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Enforcing the Speech Limit: *Nixon v. Shrink Missouri Government PAC*

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Note

Enforcing the Speech Limit: *Nixon v. Shrink Missouri Government PAC*

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I. INTRODUCTION

"On [the] list of the ten worst decisions of this century."[1] "[A] 20th-century stepchild to *Dred Scott*."[2] "[D]elusional."[3] "[D]isastrous."[4]

There is no shortage of criticism of *Buckley v. Valeo*,[5] the Supreme Court's landmark 1976 campaign financing decision.[6] Few Court rulings are as widely reviled as *Buckley*, in which the Court interpreted the Federal Election Campaign Act ("FECA").[7] In the process, the Court fundamentally altered both the First Amendment's protection of political speech and the nation's political process.[8] Even *Buckley's* supporters admit that the opinion is flawed.[9] Yet while there is wide

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* J.D. expected January 2001.

1. Joel M. Gora, *Buckley v. Valeo: A Landmark of Political Freedom*, 33 AKRON L. REV. 7, 7 (1999).

2. Scott Turow, *The High Court's 20-Year-Old Mistake*, N.Y. TIMES, Oct. 12, 1997, § 4, at 15. The Supreme Court's infamous *Dred Scott* decision held unconstitutional a federal law prohibiting slavery in specified territories and served as a catalyst to the Civil War. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (superceded by U.S. CONST. amend. XIII).

3. Robert Samuelson, *'Reforming' Campaign Finance Restricts Speech*, CHI. TRIB., Feb. 11, 2000, §1, at 25.

4. *Time to Rethink Buckley v. Valeo*, N.Y. TIMES, Nov. 12, 1998, at A28.

5. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

6. *See id.* at 58 (holding that Congressionally-imposed expenditure ceiling was an unconstitutional restriction of First Amendment speech).

7. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-55 (1994)).

8. *See* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1056-57 (1996).

9. *See, e.g.*, Gora, *supra* note 1, at 18. Gora complains that *Buckley* has been unfairly criticized and "even demonized" by academic and political commentators, but acknowledges that the *Buckley* Court did not sufficiently examine less-restrictive alternatives to FECA's

agreement that the campaign financing system created in *Buckley* is problematic, there is little agreement on an acceptable solution.[10] Whereas free speech absolutists attack *Buckley*'s approval of contribution limits as an unconstitutional cap on the First Amendment, other reformers lament that the Court, in striking FECA's spending limits, did not go far enough to prevent the corruptive influence of money on politics. In disputing *Buckley*'s central holding that campaign contributions are constitutionally different from campaign expenditures,[11] the decision's critics have gravitated toward diametrically opposed positions: one camp argues that political contributions are speech and thus deserve the same level of constitutional protection as political expenditures, while others contend money is not speech and thus believe that campaign expenditures should be regulated in the same manner as contributions.[12]

By allowing the government to set limits on contributions to candidates, the *Buckley* Court reduced the First Amendment's protection of political speech, even as it acknowledged such speech lies at the core of the First Amendment.[13] The Court's decision divorced FECA's contribution limits from its spending caps and in the process created the widely despised and much-criticized campaign finance system in place today.[14]

Next year marks the twenty-fifth anniversary of *Buckley*, which would seem an appropriate milestone upon which to reassess the viability of *Buckley* in light of its impact on our First Amendment

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contribution limits. *See id.* at 18, 23-26.

10. *Compare* BILL F. CHAMBERLIN & CHARLENE J. BROWN, THE FIRST AMENDMENT RECONSIDERED: NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND PRESS 161 (1982) (arguing that the *Buckley* Court's invalidation of expenditure limits was "dubious and . . . not consistent with the democracy principle"), *with* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 291 (1992) (contending that the contribution limits upheld by the *Buckley* Court are "inconsistent with 'the marketplace of ideas'").

11. *See Buckley*, 424 U.S. at 19-21 (holding that restrictions on contributions constitute a "marginal" restriction on speech whereas limits on expenditures poses a "substantial" restriction).

12. *Compare, e.g.*, Samuelson *supra* note 4 ("You can have effective contribution limits or free speech – but not both."), *with* THOMAS L. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES 257 (1985) (arguing that "the use of capital should [not] determine First Amendment rights" (quoting Charles Rembar, *For Sale: Freedom of Speech*, THE ATLANTIC, Mar. 1981, at 32)).

13. *See Buckley*, 424 U.S. at 14 ("The First Amendment affords the broadest protection to such political expression . . . .").

14. *See* Jonathan Peterson, *The Times Poll: Clinton Retains High Job Rating; Gore Image Hurt*, L.A. TIMES, Sept. 12, 1997, at A1 (showing a poll indicating that 63% of respondents believed that the country's campaign finance mechanism requires either "a fundamental overhaul" or "major improvements"); *see also infra* Part II.C (discussing the *Buckley* Court's treatment of FECA's contribution and expenditure limits).

freedoms and its effects on the nation's political system.[15] The Supreme Court recently received that opportunity in *Nixon v. Shrink Missouri Government Political Action Committee* ("*Shrink PAC III*"),[16] in which the Court upheld a state law limiting contributions to candidates for state office as consistent with both *Buckley* and the First Amendment's guarantee of freedom of speech.[17] In sustaining the state law in a 6-3 decision, the Court reaffirmed *Buckley's* crucial distinction between the nature of speech generated by political donations and speech funded through direct expenditures.[18] Additionally, the Court in *Shrink PAC III* illuminated *Buckley* as a beacon to guide further state contribution limits[19] and signaled to state and local governments a high level of judicial deference in review of contribution statutes.[20]

This Note examines the *Shrink PAC III* decision and its likely impact on First Amendment protections of free speech rights, and its related effect on political process funding in a representative democracy. In addition, this Note reviews the level of protection the First Amendment has afforded political speech and gives a brief overview of the history of campaign finance legislation.[21] Further, it examines the limits imposed on political campaigns by FECA and the *Buckley* decision and the results of that structure on America's public debate and electoral campaigns.[22] This Note then discusses the Missouri contribution limits at issue in *Shrink PAC III* and reviews the lower court rulings leading to the Court's grant of certiorari.[23] This Note then examines the rationale behind the majority's opinion in *Shrink PAC III* as well as the concurring and dissenting positions.[24] This Note next analyzes the Court's decision in light of First Amendment jurisprudence and the nation's experience with campaign financing since the *Buckley* decision

15. *See Buckley*, 424 U.S. at 20-21 (delineating the constitutional distinction between contribution and expenditure speech).

16. *See* Nixon v. Shrink Mo. Gov't Political Action Comm., 120 S. Ct. 897 (2000) [hereinafter *Shrink PAC III*].

17. *See id.* at 909-10.

18. *See id.* at 903.

19. *See id.* at 901 (stating that *Buckley* is "authority for comparable state regulation").

20. *See infra* Part IV.B (discussing the lower standard of review applicable to speech restrictions resulting from contribution limits).

21. *See infra* Part II.A (discussing First Amendment protection of political speech).

22. *See infra* Part II.B-D (discussing the FECA, the *Buckley* decision, and their effect on political campaigns).

23. *See infra* Part III.A (discussing the Missouri contribution statute and the lower court decisions interpreting same).

24. *See infra* Part III.B (discussing the rationale supporting the *Shrink PAC III* majority opinion).

and further explains how the majority opinion failed to apply the rigorous analysis demanded by the gravity of the issue.[25] Finally, this Note discusses the probable deleterious effects of the *Shrink PAC III* on individual speech rights and candidate competition and describes how the decision will tend to increase the prevalent political apathy among the public.[26]

II. BACKGROUND

The Framers of the Constitution believed free speech, and particularly free political speech, to be an essential component to democratic governance. Consequently, they enshrined this ideal in the First Amendment.[27] Accordingly, for much of American history, political campaigns operated with no government oversight.[28] Although Congress acted to curb campaign finance abuses by corporate donors in the early twentieth century, contributions to federal candidates by individual citizens were left unregulated until passage of the 1974 FECA amendments.[29] The Supreme Court later upheld FECA's contribution limits as compatible with the First Amendment. FECA was touted as a means both to reduce the escalating costs of federal campaigns and to restore public confidence in the integrity of the electoral system. The ensuing decades, however, have witnessed rapidly spiraling campaign spending, increasing exploitation of loopholes by politicians seeking to evade contribution limits and dwindling public participation in the nation's political process.[30]

A. First Amendment Protection of Political Speech

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[31] Despite the seeming simplicity of this command, its meaning and application is much disputed.[32]

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25. *See infra* Part IV (discussing the limitations of the *Shrink PAC III* decision).

26. *See infra* Part V (discussing possible impact of *Shrink PAC III*).

27. *See infra* notes 31-37 and accompanying text (discussing the First Amendment protection of political speech and its interpretation by the Court).

28. *See infra* notes 42-49 and accompanying text (discussing the recent move towards government oversight of political campaigns).

29. *See infra* notes 50-65 and accompanying text (discussing FECA, the 1974 amendments, and the subsequent constitutional challenge).

30. *See infra* notes 91-119 and accompanying text (examining post-*Buckley* political campaigns).

31. U.S. CONST. amend. I.

32. *See* JOSEPH J. HEMMER, JR., THE SUPREME COURT AND THE FIRST AMENDMENT 2 (1986) (discussing disparity of views regarding scope of Free Speech Clause); *see also* WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 21 (1984) (noting the Supreme

Throughout its history, the Supreme Court has struggled to articulate a uniform, consistent approach in determining what constitutes speech and the permissible level of government restrictions allowed upon that speech.[33] While recent decades have seen the Court expand the protection conferred by the Free Speech Clause of the First Amendment to encompass a wide range of expression and conduct,[34] its major function is to safeguard political speech against legislative restraints.[35]

Uninhibited political speech was highly valued by the Framers because they believed it essential to a self-governing democracy.[36] Acknowledging this precept, the Supreme Court has traditionally accorded political speech a maximum level of judicial protection, especially when expressed in the electoral forum.[37]

Court alone has addressed the free speech clause "several hundred times").

33. *See* HEMMER, *supra* note 32, at 9 (observing that the Supreme Court's interpretation and application of free speech doctrine varies with the issue confronted, the historical backdrop and the Justices' own predispositions). Recently, the Court's free speech analysis has trended toward even less consistency than in the past, developing a plethora of individualized subcategories and in the process erasing clear guidelines as to what types of government regulation of speech is constitutionally permissible. *See* Nina Kraut, *Speech: A Freedom in Search of One Rule*, 12 T.M. COOLEY L. REV. 177, 178 (1995).

34. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (plurality opinion) (holding freedom of speech encompasses nude dancing); United States v. Eichman, 496 U.S. 310 (1990) (holding freedom of speech includes flag burning); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (holding freedom of speech protects projection of drive-in movies featuring nudity); Schacht v. United States, 398 U.S. 58 (1970) (holding freedom of speech protects wearing military uniform).

35. *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."); Sunstein, *supra* note 10, at 291.

36. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1960), *reprinted in* THE FIRST AMENDMENT: A READER 101, 103 (John H. Garvey & Frederick Schauer eds., 1992) ("The principle of the freedom of speech springs from the necessities of the program of self-government . . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."); *see also* HEMMER, *supra* note 32, at 405 (discussing Meiklejohn's belief that public expression, such as the utterance of a citizen who is intent upon self-government, enjoyed the absolute protection of the First Amendment); Pierre J. Schlag, *An Attack on Catergorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 692 (1983). But not all forms of government require broad freedom of speech to function properly. *See* THE FIRST AMENDMENT: A READER, *supra*, at 101. For some governmental models, such as monarchies, e.g., Saudi Arabia, freedom of speech is unnecessary. *See id.*

37. *See, e.g.*, Eu v. San Francicso County Democratic Cent. Comm., 489 U.S. 214, 223 (1989) ("[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.") (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

Still, the First Amendment's protection of political speech is far from absolute.[38] While the Supreme Court has upheld legislative restrictions on this fundamental form of expression, it has generally required the government to clear the hurdle of "strict scrutiny" to do so.[39] Under the strict scrutiny standard of review, a regulation which burdens fundamental speech is presumed unconstitutional, a presumption that can be overcome only if the government indicates both a sufficiently compelling interest in restricting speech and a narrowly tailored solution so that speech is not unnecessarily abridged.[40] Recent trends, however, suggest that the Court is much more willing to defer to legislative judgment in deciding what constitutes a compelling state interest and what remedy is sufficient to address that interest.[41]

For much of the nation's history, however, judicial review of campaign finance legislation was unnecessary simply because there was none to review.[42] Electoral campaigns were financed entirely by private contributions without legislative interference.[43] In the late nineteenth century the first contribution limits were enacted, but in general the laws were poorly enforced.[44] The dawn of the twentieth century, however, brought increased public concern over the "pernicious" influence of large campaign contributions, particularly by corporations.[45] In 1907, the Tillman Act prohibited corporate donations

38. *See* VAN ALSTYNE, *supra* note 32, at 23 (observing that First Amendment protection varies with type of expression and government interest in curtailing it); *see also* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 567 (1973) ("Neither the right to associate nor the right to participate in political activities is absolute . . . .").

39. A notable exception is limits on contributions and expenditures by corporations, where the Supreme Court has taken a deferential posture towards legislative restrictions. *See, e.g.*, Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 210-11 (1982) (indicating the Court's disinclination to apply strict scrutiny to FECA's ban on corporate campaign contributions to political parties).

40. *See, e.g.*, Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 641 (1996) (Thomas, J., concurring in the judgment and dissenting in part) (stating that the "well established" formula for strict scrutiny requires both a compelling governmental interest and legislative means narrowly tailored to serve that interest).

41. *See* discussion *infra* Part IV.B (discussing the lower standard of review applicable to speech restrictions resulting from contribution limits).

42. *See* Smith, *supra* note 8, at 1052 (pointing out that our nation survived for over one hundred years with no campaign finance laws).

43. *See id.* at 1053. Campaign expenditures originally consisted of not much more than pamphlet printing expenses and providing food and refreshments to voters at political rallies, a practice particularly prevalent in the South. *See id.*

44. *See id.*

45. *See* Buckley v. Valeo, 519 F.2d 821, 836 (D.C. Cir. 1975), *rev'd in part*, 424 U.S. 1 (1976).

to candidates for federal office;[46] a ban on labor union donations followed in 1941.[47] It was not until the 1970's that Congress attempted to extensively regulate both the inflow and outflow of money in political campaigns.[48] As such, the current funding system that strictly limits individual campaign contributions is a relatively recent development in the nation's history.[49]

B. Federal Election Campaign Act

The Federal Campaign Election Act of 1971 required disclosure of campaign finances by candidates and imposed spending caps in an attempt to control the rapidly spiraling cost of running for federal office.[50] The Watergate scandal, as well as reports of questionable fundraising practices during the 1972 campaign, however, induced Congress to perform a quick and comprehensive legislative overhaul of FECA.[51] In 1974, Congress passed a series of sweeping amendments to FECA that minutely regulated many aspects of the electoral funding process.[52]

Prompted by incidents of large cash donations to federal candidates during the 1972 election cycle,[53] FECA's contribution limits were

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46. *See* Tillman Act of 1907, ch. 420, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (1994)).

47. *See* Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 CATH. U. L. REV. 107, 110 (1999).

48. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-55 (1994)).

49. *See* Smith, *supra* note 8, at 1052 (pointing out that our nation survived for over one hundred years with no campaign finance laws).

50. *See* CHAMBERLIN & BROWN, *supra* note 10, at 161 (discussing congressional concerns prompting 1974 FECA amendments); *see also* Daniel M. Yarmish, *The Constitutional Basis for a Ban on Soft Money*, 67 FORDHAM L. REV. 1257, 1260 (1998) (discussing how FECA sought to restrict rising campaign costs and strengthen campaign reporting requirements through spending limits and strict public disclosure).

51. *See* Gora, *supra* note 1, at 14 (discussing how Congress was "stampeded" towards strengthening FECA's reach); *see also* Smith, *supra* note 8, at 1055 (noting that the post-Watergate Congress felt that it had to "do something").

52. Among the more significant provisions of FECA as amended were: providing for sharp limits on both contributions and expenditures by individuals and groups, stricter reporting and disclosure requirements, optional public financing of presidential elections, and the creation of the Federal Election Commission to oversee it all. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1975) (codified in scattered sections of 2, 18, 26 U.S.C.).

53. In one prominent example, the dairy industry pledged $2 million to President Nixon's 1972 reelection campaign, for the purpose of obtaining a presidential audience to discuss raising federal price supports. *See* Buckley v. Valeo, 519 F.2d 821, 839 n.36 (D.C. Cir. 1975), *rev'd in part*, 424 U.S. 1 (1976) (finding governmental restriction on campaign expenditures unconstitutional). The industry's ploy succeeded, and Nixon later reversed the decision of his

designed to avoid the occurrence or appearance of quid pro quo arrangements between contributors and candidates.[54] Individual donations to a political candidate were limited to $1000 per candidate per election, with a maximum donation limit of $25,000 in any election cycle.[55] Additionally, advocacy group and political action committee ("PAC") contributions were capped at $5000 to a single candidate.[56]

FECA's expenditure limits were more severe.[57] In primary campaigns, spending by Senate candidates could not exceed the greater of $100,000 or eight cents per state registered voter.[58] In general elections, the spending limit was the greater of $150,000 or twelve cents per registered voter.[59] As for the House of Representatives, candidates were restricted to a mere $70,000 in both the primary and general elections, a figure that led some to refer to FECA as the "Incumbent Protection Act."[60]

The financing scheme enacted in FECA, however, was never fully executed.[61] Its constitutionality was immediately challenged in the federal court for the District of Columbia by a variety of politicians and political advocacy groups who claimed the law's funding and spending limits directly infringed their First Amendment rights of freedom of speech and association.[62] The district court certified the constitutional

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Secretary of Agriculture and increased the dairy price supports. *See id.*

54. *See* Buckley v. Valeo, 424 U.S. 1, 14-15 (1976); *see also* Yarmish, *supra* note 50, at 1260-62. FECA defines a contribution as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i) (1994). FECA specifically excludes the value of a campaign volunteer's time as a contribution. *See id.* § 431(8)(B)(i).

55. *See* 18 U.S.C. § 608(b)(2) (Supp. 1974) (repealed 1976). An election cycle includes both a primary and general election.

56. *See id.* A political committee is defined as "any committee, club, association, or other group of persons" receiving contributions or making expenditures in excess of $1,000 during a calendar year. 2 U.S.C. § 431(4)(A) (1994).

57. *See* Gora, *supra* note 1, at 15 (calling FECA's spending caps "unconscionably low").

58. *See* 18 U.S.C. § 608(c)(1)(C) (Supp. 1974) (repealed 1976).

59. *See id.* § 608(c)(1)(D).

60. *See* Gora, *supra* note 1, at 15, 18 (observing that FECA's spending limits were so low as to prevent effective challenges to incumbents). Gora termed the Act's expenditure limits "cynical." *See id.* at 18. The annual value of the franking privilege (free postage) for members of Congress itself exceeded $70,000 and was exempt from the spending calculations required of current officeholders. *See id.* at 15, 18. As a result, under FECA's original parameters, House incumbents were allowed to spend more on mailings to constituents than their challengers were able to spend on their entire campaigns. *See id.* at 18.

61. *See* Moramarco, *supra* note 47, at 111.

62. *See* Buckley v. Valeo, 387 F. Supp. 135, 137 (D. D.C. 1975), *certified to en banc court*, 519 F.2d 821 (D.C. Cir. 1975) (per curiam) (en banc), *aff'd*, 424 U.S. 1 (1976) (per curiam). Listed on the original suit filed in the U.S. District Court for the District of Columbia were incumbent New York Senator James Buckley, the New York Civil Liberties Union, the

issues to the appellate level, where the District of Columbia Circuit Court of Appeals upheld FECA's key provisions limiting both political contributions and expenditures.[63] The plaintiffs' appeal to the Supreme Court followed, asserting that the Court of Appeals' analysis of FECA did not include the type of strict judicial scrutiny mandated by First Amendment precedent.[64]

C. The Buckley Compromise

Recognizing FECA's importance on the upcoming 1976 election, the Supreme Court agreed to hear *Buckley* on an expedited basis, issuing its lengthy opinion just three months after argument.[65] In its analysis of the funding framework constructed in FECA, the Court began by acknowledging that the challenged provisions restricted core First Amendment speech.[66] It noted that the First Amendment is broadest in its protection of political expression and recognized that money is an unavoidable and indispensable method of disseminating political information in a modern society.[67] Therefore, any restriction on the use of money by political campaigns necessarily entails a corresponding restriction on political speech.[68]

The Court, however, observed that the First Amendment's protection of political activities is not absolute.[69] Rather, governmental restrictions on political speech may be constitutionally valid, but the Court stated that such laws must undergo "the closest scrutiny" to survive challenge.[70]

By applying strict scrutiny to FECA's provisions, the Court concluded that FECA's limitations on expenditures were an

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Libertarian Party, the Mississippi Republican Party, and the Committee for a Constitutional Presidency - McCarthy '76, among others. *See* Buckley v. Valeo, 424 U.S. 1, 7-8 (1976). The named defendants included Secretary of the Senate Francis Valeo, as well as the U.S. Attorney General, the U.S. Comptroller General and the FEC. *See Buckley*, 387 F. Supp. at 137.

63. *See generally* Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975) (per curiam) (en banc).

64. *See Buckley*, 424 U.S. at 11.

65. *See* Alan B. Morrison, *What If... Buckley Were Overturned?*, 16 CONST. COMMENT. 347, 349 (1999).

66. *See Buckley*, 424 U.S. at 14 (stating that "[t]he Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities").

67. *See id.* at 19 (observing that "[v]irtually every means of communicating ideas in today's mass society requires the expenditure of money").

68. *See id.*

69. *See id.* at 25; *see also* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 567 (1973) (holding that danger to government neutrality posed by federal employees engaging in partisan political conduct was sufficient justification to restrict employees' right of association).

70. *See Buckley*, 424 U.S. at 25 (quoting NAACP v. Alabama, 357 U.S. 449, 460-61 (1958)).

unconstitutional restriction of political speech.[71] According to the Court, FECA's spending limits failed to survive strict scrutiny because restrictions on expenditures during political campaigns would necessarily reduce the size and scope of the nation's political debate.[72] Therefore, candidates' expenditures could not be limited without placing a corresponding limitation on their quantity of speech, resulting in an unconstitutional burden on political discourse.[73]

In contrast, the *Buckley* Court upheld FECA's limits on contributions by individuals and groups to candidates running for federal office.[74] The Court found the contribution limits constitutional because they both served a compelling governmental interest and were narrowly tailored to suit that interest.[75]

To justify the different levels of First Amendment protection accorded candidate expenditures and contributions, the Court distinguished the mode of expression funded by each.[76] The Court observed that the use of contributions to fund political speech involves speech by proxy, which occurs when a candidate speaks for a contributor.[77] According to the Court, limiting the donations that fund speech by proxy entails "only a marginal restriction" on a contributor's freedom of speech and is, therefore, constitutionally permissible.[78]

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71. *See id.* at 47-48 ("[T]he independent expenditure ceiling . . . fails to serve any substantial governmental interest [but] heavily burdens core First Amendment expression."). The *Buckley* Court stated that spending limits impose "substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19.

72. *See id.* (stating that spending restrictions on candidates would limit "the number of issues discussed, the depth of their exploration, and the size of the audience reached").

73. *See id.*

74. *See id.* at 20-21.

75. *See id.* at 29. Noting evidence of the recent campaign funding scandals tainting the 1972 election, the *Buckley* Court held that the government's interest in preventing corruption, whether real or perceived, was sufficiently compelling to curb large campaign contributions. *See id.* at 26-27. Moreover, the Court found that FECA's donative limits are narrow enough so as not to unduly burden a contributor's free speech rights. *See id.* at 28-29.

76. *See id.*

77. The Court observed that "[w]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21. The term "speech by proxy" was coined by Justice Marshall in *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 196 (1981) (plurality opinion) ("[T]he 'speech by proxy' that [a contributor] seeks to achieve through its contributions . . . is not the sort of political advocacy . . . entitled to full First Amendment protection.").

78. *See Buckley*, 424 U.S. at 20. In the Court's view, larger contributions do not appreciably increase the quantity of communication but FECA's $1000 contribution limit still allowed donors to offer their candidates "a general expression of support." *Id.* The Court further explained that while a contribution serves as symbolic support for a candidate, it "does not communicate the underlying basis for the support." *Id.*

Yet, while the Court upheld FECA's limits on contributions, it invalidated FECA's limits on independent expenditures made by citizens "relative to a clearly identified candidate."[79] Congress enacted this provision to close a loophole that would allow third parties to expend unlimited sums on behalf of a favored candidate, thereby allowing candidates and contributors to avoid FECA's individual contribution limits.[80] The provision's effect, however, would have been to essentially end the use of paid political messages by civic-minded citizens, resulting in a radical curtailment of fundamental First Amendment speech.[81] The *Buckley* plaintiffs challenged the language of this section on both overbreadth and vagueness grounds.[82]

In addressing these challenges, the Court agreed that the words "relative to," if construed to include all issue-oriented expenditures, would be unconstitutionally overbroad by infringing on the right of free expression.[83] Similarly, because FECA did not define the term "relative to," it lacked the certainty required to impose criminal penalties in "an area permeated by First Amendment interests."[84] To solve the problem, the Court distinguished between "issue advocacy" and "express advocacy" when interpreting FECA's language.[85] Under this construction, only expenditures that fund communications expressly recommending the election or defeat of a specific candidate can be constitutionally limited.[86] Communications that avoid such express language, however, are defined as "issue advocacy" and are not subject to the Act's $1000 expenditure limit.[87] This distinction effectively

79. *Id.*

80. *See* Gora, *supra* note 1, at 15.

81. *See id.* ("[T]he loophole being closed was essentially the First Amendment itself . . . .").

82. *See Buckley*, 424 U.S. at 40-41.

83. *See id.* at 43-44. The Court rejected the overbreadth claim as applied to contribution limits, although it acknowledged that most contributions are not made for an illicit purpose. *See id.* at 28-30. Instead, it noted the difficulty in "isolat[ing] suspect contributions" and stated that FECA's limits were "focuse[d] . . . on the . . . narrow aspect of political association where the actuality and potential for corruption have been identified . . . ." *Id.* at 28-29.

84. *See id.* at 41-44.

85. *See id.* at 42-44. The *Buckley* Court created the expression "express advocacy" as a constitutional term of art. *See* Moramarco, *supra* note 47, at 110-15 (discussing distinction between express and issue advocacy).

86. *See Buckley*, 424 U.S. at 43-44.

87. *See id.* at 46-47. This section of the *Buckley* opinion gave rise to the so-called "magic words" test, whereby the Court stated the expenditure limit of 18 U.S.C. § 608(e)(1) would apply only to communications containing words such as "vote for," "elect," "support," "defeat," "vote against," etc. *See id.* at 44 n.52; *see also* Moramarco, *supra* note 47, at 113. However, a decade after the *Buckley* decision, the Court determined that an advertisement may be construed as express advocacy even without specific "magic words" urging election or defeat of a specific candidate. *See* Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238,

criminalizes the use of certain words in paid political advocacy.[88]

Thus the *Buckley* Court bifurcated FECA's monetary limitations, upholding FECA's contribution limits while striking its spending limits.[89] Similarly, the Court divided FECA's independent expenditure limit, permitting unlimited amounts to be spent on issue advocacy but allowing Congress to regulate the amount a private citizen can spend in coordination with a candidate.[90]

D. Post-Buckley Political Campaigns: Soft Money, Issue Ads, and Local Regulation

Since the *Buckley* decision in 1976, the federal campaign contribution limits have remained unchanged.[91] Meanwhile, periodic calls for altering the way federal elections are financed have yet to produce any substantive legislative result.[92] Many of these proposals would place additional monetary restrictions on political advocacy and campaigns, typically imposing spending limits on candidates or more restrictive contribution limits on donors.[93] But, other reformers argue that such methods suppress a large amount of essential political speech, thereby violating the First Amendment.[94]

The campaign finance environment has not remained static in the years since *Buckley*. Rather, two trends have emerged in the ensuing

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249-50 (1986) (holding that an advertisement that directs readers to vote for a particular class of candidate, e.g. pro-life, also constitutes express advocacy).

88. *See* Moramarco, *supra* note 47, at 107-08.

89. *See supra* notes 71-81 and accompanying text (discussing the Court's review of FECA's monetary limitations).

90. *See supra* notes 82-88 and accompanying text (analyzing the Court's distinction between types of advocacy).

91. *See* 2 U.S.C § 441a(a) (1994).

92. *See* Sen. Russell D. Feingold, *Representative Democracy versus Corporate Democracy: How Soft Money Erodes the Principle of "One Person, One Vote,"* 35 HARV. J. ON LEGIS. 377, 386 (1998); *see also* Kevin Deeley, *Campaign Finance Reform*, 36 HARV. J. ON LEGIS. 547, 547 (1999) (discussing Congress' failure to enact other reform proposals). Sen. Feingold (D-WI) was a co-sponsor of the most recent attempt at campaign finance reform on Capitol Hill. The McCain-Feingold Bill (co-sponsored by John McCain (R-AZ)) would have prohibited "soft money" contributions from corporations, unions, and wealthy individuals to political parties. The bill was defeated in the Senate in February 1999, despite claiming majority support among senators, because McCain-Feingold supporters could not muster the 60 votes necessary to overcome a threatened Republican filibuster. *See* Yarmish, *supra* note 50, at 1269, 1269 n.131. For a discussion of soft money in the political process, see *infra* notes 97-107 and accompanying text.

93. *See* Smith, *supra* note 8, at 1055 (noting that most reform proposals consist of either limits on contributions, limits on total expenditures, public financing in lieu of private contributions, or some combination of all three).

94. *See, e.g.*, Gora, *supra* note 1, at 8; Smith, *supra* note 8, at 1080.

decades: increasingly elaborate, even brazen, attempts by politicians and political parties to exploit the loopholes in *Buckley* and its progeny;[95] and a proliferation of state and municipal contribution laws modeled after *Buckley*.[96]

The most significant development in campaign financing in the last decade has been the rapid rise of so-called "soft money" contributions to political parties.[97] Such contributions are exempt from FECA limits as long as they are used for a nonfederal election-related purpose[98] and not used to directly influence the outcome of a particular federal election.[99] Soft money contributions allow corporations, labor unions and wealthy individuals otherwise subject to FECA's contribution limits to give unlimited sums to political parties.[100] As such, political parties have found an increasing number of methods to raise and spend soft money.[101]

Buoyed by permissive Federal Election Commission regulations[102] and a Supreme Court decision forbidding limits on soft money expenditures,[103] soft money is used extensively to fund political

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95. *See* Moramarco, *supra* note 47, at 121 (discussing the increase of sham "issue advocacy" that consist of thinly veiled attempts to influence the outcome of elections); *see also* Yarmish, *supra* note 50, at 1257-58 (discussing soft money donations to the Democratic Party by Chinese nationals).

96. *See* Deeley, *supra* note 92, at 548 (discussing increasing number of states enacting campaign laws limiting contributions to candidates). Legislation capping campaign contributions "has been enacted in several states by popular vote." *Id.*

97. The term "soft money" describes "'the unlimited funds raised by party committees that cannot be used for the express purpose of influencing Federal elections, but may be used for a wide array of activities that can indirectly benefit Federal candidates.'" Yarmish, *supra* note 50, at 1259 (quoting *Investigation of Illegal or Improper Activities in Connection with the 1996 Federal Election Campaign - Part VIII: Hearings Before the Senate Comm. on Government Affairs*, 105th Cong. 128 (1997) (statement of Anthony Conado, Professor of Government, Colby College)).

98. Examples of nonfederal election-related purposes originally included traditional "party-building activities" such as state voter registration and "get-out-the-vote" drives, as well as administrative overhead. *See id.* at 1266-68.

99. *See id.* at 1266. Soft money was not a direct result of the *Buckley* opinion, but rather from Federal Election Commission regulations adopted in 1978. *See id.* The FEC was responding to the political parties' complaints regarding the post-*Buckley* lack of funding for "party-building activities" that were ostensibly not directly related to the election of specific candidates. *See id.* at 1266-67.

100. *See id.* at 1268. In contrast, "hard money" contributions, those given directly to candidates, are considered as directly influencing federal elections and thus subject to FECA's contribution limits. *See id.* at 1266.

101. *See, e.g.*, Moramarco, *supra* note 47, at 109.

102. *See* Yarmish, *supra* note 50, at 1266-68 (describing liberalization of FEC policy regarding permissible uses of soft money); *see also supra* notes 98-101 and accompanying text (discussing benefits and use of soft money).

103. *See* Colorado Republican Fed. Campaign Comm'n v. Federal Election Comm'n, 518

advertisements that technically qualify as party-building activities, but are actually little more than thinly-veiled candidate endorsements or attacks.[104] Although soft money, and the communications funded by it, cannot be used to directly influence electoral outcomes, in practice they form a potent vehicle by which corporations and candidates can evade FECA's contribution and independent expenditure limits.[105] Accordingly, soft money donations to political parties have skyrocketed sixfold in the last eight years,[106] as the two major political parties have increasingly taken advantage of this campaign financing loophole.[107]

While soft money donations and the use of sham issue ads are on the rise, citizen interest in the political process appears to be waning.[108] Voter turnout in the 1998 general election was just 36 percent, the lowest figure since the wartime 1942 election.[109] Further, the decline in voting rates is mirrored by the declining membership of the two major political parties. In some states, the number of registered independents exceeds the membership in either the Republican and Democratic parties.[110]

There are other signs that FECA, or the version of it created in *Buckley*, is not reducing the influence of money in politics or bolstering

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U.S. 604, 608 (1996) (holding that expenditures by a political party made independently of a particular candidate cannot be limited under *Buckley*).

104. *See* Moramarco, *supra* note 47, at 109 (arguing that the "clear intent" of FECA is subverted by issue advocacy funded by soft money).

105. *See* Feingold, *supra* note 92, at 380 (discussing how soft money was used to fund extensive amounts of television advertising during the 1996 election).

106. Soft money donations to the two major political parties totaled $86 million in the 1991-92 election cycle. *See* Mike Dorning, *Campaign Reform Dead Again; GOP Senators Defeat Bid to Ban 'Soft Money' Donations*, CHI. TRIB., Oct. 20, 1999, at A1. Four years later, during the 1995-96 election cycle, this amount had tripled, to $262 million. *See id.* Current estimates regarding the 1999-2000 cycle predict soft money contributions exceeding $525 million. *See* John M. Broder, *McCain and Bradley Collect Big Money, But It Isn't Soft*, N.Y. TIMES, Dec. 16, 1999, at A22. Among the largest corporate contributors of soft money are Citigroup (banking and insurance), BellSouth (telecommunications), Microsoft (computer software), AT&T (telecommunications) and Goldman Sachs (banking). *See id.*

107. *See* Yarmish, *supra* note 50, at 1259; *see also* Feingold, *supra* note 92, at 380-81 (listing examples of significant sums of soft money raised by the Democratic and Republican parties).

108. *See* Smith, *supra* note 8, at 1057.

109. *See* The Appleseed Center for Electoral Reform and the Harvard Research Bureau, *A Model Act for the Democratization of Ballot Access*, 36 HARV. J. ON LEGIS. 451, 451 (1999) [hereinafter Appleseed].

110. *See* Mark Z. Barabak, *N.H. Primary is Independents' Day*, L.A. TIMES, Jan. 30, 2000, at A1. In the politically important state of New Hampshire, almost 40% of registered voters are independents, more than either major political party. *See id.* Among younger voters in America, the lack of party affiliation is even greater, with some national studies placing the ratio of independents at 60% among the generation born between 1961 and 1981. *See* Dennis McLellan, *New Kids in the Bloc*, L.A. TIMES, Sep. 30, 1998, at E6.

public confidence in the political process.[111] Campaign spending by candidates for Congress jumped 347 percent from 1977 to 1992.[112] The number of PACs increased sevenfold between 1974 and 1995, while PAC contributions to congressional candidates rose ninefold.[113] Meanwhile, public faith in the integrity of the electoral process has plummeted in the last 30 years.[114] Further, incumbency rates in Congress peaked at record highs in the 1984 and 1988 elections, prior to a slight reduction in recent years.[115]

While FECA has failed in its goal of reducing the cost of mounting a federal electoral campaign and has not increased public confidence in the political system,[116] the issue remains whether FECA's contribution limits have reduced corruption, which was the primary rationale behind its enactment.[117] As the Supreme Court acknowledged in *Buckley*, the amount of corruption in government is unknowable.[118] Yet this uncertainty in the correlation between campaign contributions and the level of government corruption has not prevented states and municipal governments from attempting to curtail contributions to local political candidates.[119]

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111. *See* Smith, *supra* note 8, at 1050.

112. *See id.*

113. *See id.* Political action committees (PACs) donated $20.5 million to federal candidates in 1976. *See id.* By 1994, federal PAC contributions had increased to $189 million. *See id.*

114. *See id.* at 1057. Smith observes that the "perceived crisis of confidence" in government has grown since enactment of FECA's contribution limits, although FECA was intended to have the opposite impact. *See id.* While not discounting other factors that may explain the public's reaction, Smith suggests that the remedy may be worse than the disease. *See id.* Moreover, there are indications that campaign finance laws, such as FECA and its state progeny, are responsible for weakening the role of political parties, despite the essential and beneficial role such parties play in the nation's political process and democracy in general. *See* James Bopp Jr., *All Contribution Limits Are Not Created Equal: New Hope in the Political Speech Wars*, 49 CATH. U. L. REV. 11, 22-23 (1999).

115. *See* Smith, *supra* note 8, at 1051.

116. *See id.*

117. *See* Buckley v. Valeo, 424 U.S. 1, 25-26 (1976).

118. *See id.* at 27 (acknowledging that "the scope of such pernicious practices can never be reliably ascertained . . . .").

119. *See* Bopp, *supra* note 114, at 23 (discussing trend toward additional regulation despite evidence that campaign-finance restrictions harm democracy); *see also* Crystal Carreon & Phil Willon, *Anaheim May Ease Campaign Limits*, L.A. TIMES, Apr. 7, 1999, at B1 (discussing California cities' contribution limits); *Yes on Boulder's 2D*, DENV. POST, Oct. 25, 1999, at B10 (editorial endorsing adoption of $100 contribution limit for Boulder, Colorado).

III. DISCUSSION

Like many states, Missouri enacted its own version of campaign finance restrictions patterned after *Buckley*.[120] In July 1994, the state legislature passed a law imposing limits on contributions to candidates for state office ranging from $250 to $1000, depending on the size of the office.[121] The law was due to take effect on January 1, 1995.[122] In November 1994, however, Missouri voters approved Proposition A,[123] a ballot initiative that provided for even lower contribution limits and became law immediately.[124]

A. Lower Court Decisions

After a district court upheld the Missouri ballot initiative as consistent with *Buckley*,[125] the Court of Appeals for the Eighth Circuit reversed.[126] Applying the strict scrutiny standard referred to by the Court in *Buckley*, the Eighth Circuit invalidated Proposition A's contribution limits as unconstitutionally abridging freedom of speech.[127] The court found that Proposition A's contribution limits were not narrowly tailored to serve the state's interest of limiting the corruptive influence of large campaign contributions.[128] The Eighth Circuit's

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120. *See* MO. ANN. STAT. § 130.032 (West 1997 & Supp. 2000).

121. *See id.*

122. *See* Shrink Mo. Gov't Political Action Comm. v. Adams, 161 F.3d 519, 520 (8th Cir. 1998) [hereinafter *Shrink PAC II*], *rev'd*, 120 S. Ct. 897 (2000).

123. *See* MO. ANN. STAT. § 130.100 (West 1997 & Supp. 2000) (repealed by S.B. No. 16, § A, limits governed by § 130.032).

124. *See* Carver v. Nixon, 72 F.3d 633, 634 (8th Cir. 1995). Proposition A provided:

> There shall be the following limitations on campaign contributions:
>
> (1) No person or committee shall make a contribution to any one candidate or candidate committee with an aggregate value in excess of:
>
> (a) $100 per election cycle per candidate in districts with fewer than 100,000 residents[.]
>
> (2) [sic] $200 per election cycle per candidate, other than statewide candidates, in districts of 100,000 or more residents. For purposes of this section "statewide candidates" refers to those candidates seeking election to the office of Governor, Lieutenant Governor, Attorney General, Auditor, Treasurer and Secretary of State.
>
> (3) [sic] $300 per election cycle per statewide candidate.

Id. at 634 n.1. At the time of passage, Proposition A's contribution limits were the lowest in the nation. *See id.* at 644.

125. *See* Carver v. Nixon, 882 F. Supp. 901, 905 (W.D. Mo. 1995) (holding that "stairstepping" of contribution limits in the ballot initiative indicated it was narrowly tailored), *rev'd*, 72 F.3d 633 (8th Cir. 1995).

126. *See Carver*, 72 F.3d at 645.

127. *See id.*

128. *See id.* The Eight Circuit found that the contribution limits in Proposition A were "too low to allow meaningful participation in protected political speech . . . ." *See id.* at 641 (quoting

invalidation of Proposition A effectively resurrected the limits contained in the 1994 legislative statute, which had been rendered dormant by the passage of the ballot initiative.[129]

In 1998, Zev David Fredman, an outsider candidate,[130] campaigned for the Republican nomination for the office of state auditor.[131] The 1994 Missouri law limited contributions to candidates for that position to $1000, but because the statutory limits are indexed to the Consumer Price Index, the contribution limit had increased to $1075.[132] A conservative advocacy group, Shrink Missouri Government Political Action Committee ("Shrink PAC"), donated $1025 to Fredman's campaign in 1997 and gave another $50 in 1998, thereby reaching the maximum legal contribution limit.[133] Subsequently, Fredman was defeated in the Republican primary election.[134]

Both Fredman and Shrink PAC filed suit in federal district court, alleging that the Missouri contribution limits infringed on their First Amendment freedoms of speech and association.[135] On cross motions for summary judgment, the district court upheld the state law as constitutional under *Buckley*.[136]

Day v. Holahan, 34 F.3d 1356, 1365 (8th Cir. 1994)). Further, the court noted that because the limits were imposed via ballot initiative, they need not be accorded the same deference as those imposed by legislative action. *See id.* at 645. This was not the first time the Eighth Circuit had invalidated a state contribution limit as unconstitutionally low. *See* Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), *cert. denied* 513 U.S. 1127 (1995). In *Day v. Holahan*, the Eighth Circuit invalidated a Minnesota statute that limited contributions to political committees to $100. *See id.* at 1366.

129. *See Shrink PAC II*, 161 F.3d at 520. The Missouri statute provides in pertinent part:

> [T]he amount of contributions made by or accepted from any person other than the candidate in any one election shall not exceed the following:
>
> (1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, one thousand dollars;
>
> (2) To elect an individual to the office of state senator, five hundred dollars;
>
> (3) To elect an individual to the office of state representative, two hundred fifty dollars.

MO. ANN. STAT. § 130.032.1(1)-(3) (West 1997 & Supp. 2000).

130. Fredman, age 36, was a first-time candidate with no previous political experience or party support. During his campaign, Fredman, a certified public accountant, worked as chief financial officer for Fredman Brothers Furniture Company. *See* Jo Mannies, *Appeals Court was Big Plus for GOP Challenger in Race for Auditor*, ST. LOUIS POST-DISPATCH, July 26, 1998, at B5.

131. *See Shrink PAC III*, 120 S. Ct. 897, 902 (2000).

132. *See* Shrink Mo. Gov't Political Action Comm. v. Adams, 5 F. Supp. 2d 734, 737 (E.D. Mo. 1998) [hereinafter *Shrink PAC I*], *rev'd*, 161 F.3d 519 (8th Cir. 1998), *rev'd*, 120 S. Ct. 897 (2000).

133. *See Shrink Pac II*, 161 F.3d at 520.

134. *See Shrink Pac I*, 5 F. Supp. 2d at 737.

135. *See id.*

136. *See id.* at 742. In its analysis, the district court examined both the sufficiency of the

On appeal, the Eighth Circuit reversed.[137] Noting that the contribution limits regulated First Amendment rights, the appellate court relied on *Buckley* in applying a strict scrutiny standard of review, the same standard it had used to strike down Proposition A three years earlier.[138] To satisfy strict scrutiny, Missouri was required to show that it had both a compelling interest in imposing contribution limits and that the limits were narrowly tailored to serve that interest.[139]

The Eighth Circuit held that Missouri did not indicate a compelling interest in support of its law.[140] The state argued that its compelling interest was the prevention of corruption, or the perception thereof, that accompanied large campaign contributions to candidates running for elective office.[141] The court, however, faulted the state for failing to introduce empirical evidence indicating a connection between large campaign contributions and any actual or apparent corruption.[142] The court emphasized that Missouri had failed to show that any large monetary donations were even made to candidates before passage of the state statute limiting them.[143] As such, the court invalidated the contribution limits as a matter of law.[144]

Moreover, Judge Bowman, writing the second part of the *Shrink PAC II* opinion without a majority, opined that even if evidence of a compelling interest were forthcoming, the state had failed to show that

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state's interest and the narrowness of its solution, the $1000 contribution limit. *See id.* at 737-42. The court found the state's interest in preventing corruption compelling even without empirical evidence supporting the state's contention that apparent or actual corruption is a problem in Missouri, stating that "[t]he Court does not believe that polling the citizenry is required in order to demonstrate that the integrity of a state's election process in facing a perceived threat." *Id.* at 738. As to the issue of whether the state's chosen limits were overly restrictive, the Court took notice that the median household income in Missouri in 1995 was just over $31,000. *See id.* at 742. It therefore concluded that the average Missourian would consider a $1,000 contribution as "large." *See id.*

137. *See Shrink PAC II*, 161 F.3d at 523.

138. *See id.* at 521; *see also* Carver v. Nixon, 72 F.3d 633, 637 (8th Cir. 1995) (invalidating voter-approved ballot initiative providing for contribution limits of between $100 to $300 as overly restrictive of freedom of speech).

139. *See Shrink PAC II*, 161 F.3d at 521.

140. *See id.* at 522.

141. *See id.* at 521.

142. *See id.* at 522.

143. *See id.* The state did introduce an affidavit of a state senator who at the time co-chaired the state's campaign finance reform committee, in which the senator claimed that it was his and his colleagues' belief that large contributions had the "real potential to buy votes" and "have the appearance of buying votes." *See id.* Noting that the senator's committee had designed the legislation at issue and thus had a vested interest in seeing it sustained, Chief Judge Bowman dismissed these statements as "conclusory and self-serving." *See id.*

144. *See id.*

the statutory limits were narrowly tailored to that interest.[145] Using FECA's $1000 limit as a benchmark, Judge Bowman noted that the state's contribution limits, adjusted for inflation, severely curtailed political speech by preventing candidates "from amassing the resources necessary for effective advocacy."[146]

B. Shrink PAC III

The Supreme Court granted certiorari for *Shrink PAC III* to reconcile the Eighth Circuit's decision in *Shrink PAC II* with its own precedent, recognizing the issue's importance to the many states that had enacted campaign finance legislation based on the *Buckley* opinion.[147] In a 6-3 vote,[148] the Court overruled the Eighth Circuit, upholding the Missouri contribution limits and reaffirming *Buckley*.[149] As a result, state and local governments can continue to confidently model their own campaign finance laws after *Buckley*, regardless of inflationary erosion of the dollar.[150] In reiterating the constitutional distinction between expenditures and contributions in the realm of political speech, the Court again relied on the speech by proxy rationale that undergirded *Buckley*.[151]

Two dissenting opinions, however, strongly disagreed with the majority holding and called for the overruling of *Buckley*.[152] Justice Kennedy accused the majority of ignoring the unfortunate consequences of *Buckley* on political discourse,[153] while Justice Thomas, joined by

145. *See id.*

146. *See id.* at 522-23 (quoting Buckley v. Valeo, 424 U.S. 1, 21 (1976)). The court noted that $1075 was the equivalent of $378 in 1976 dollars. *See id.* at 523 n. 4. The *Buckley* Court held that contribution limits may be unconstitutional if set at levels that prevented candidate speech from being heard. *See* Buckley v. Valeo, 424 U.S. 1, 21 (1976).

147. *See Shrink PAC III*, 120 S. Ct 897, 903 (2000).

148. Comprising the majority were Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer. *See id.* at 901. Justice Breyer wrote a concurrence that was joined by Justice Ginsburg. *See id.* at 910-14 (Breyer, J., concurring). Justice Stevens also filed a concurring opinion. *See id.* at 910 (Stevens, J., concurring). The three-justice minority consisted of Justice Kennedy, who filed a dissenting opinion, and Justice Thomas, who wrote a dissenting opinion that was joined by Justice Scalia. *See id.* at 914-16 (Kennedy, J., dissenting), 916-27 (Thomas, J., dissenting).

149. *See id.* at 910.

150. *See id.* at 901.

151. *See id.* at 903-04; *see also supra* Part II.C (discussing the constitutional distinction between campaign expenditures and contributions drawn by the *Buckley* Court).

152. *See Shrink Pac III*, 120 S. Ct. at 914-16 (Kennedy, J., dissenting), 916-27 (Thomas, J., dissenting).

153. *See id.* at 914 (Kennedy, J., dissenting).

Justice Scalia, attacked both the reasoning and use of precedent in the majority opinion.[154]

1. Majority Opinion

The majority opinion, written by Justice Souter, addressed two issues: whether *Buckley* provided authority for state limits on contributions to candidates, and whether the $1000 limit approved in *Buckley* had eroded to an unconstitutionally low level.[155] The Court acknowledged the ambiguity regarding the standard of review employed by the *Buckley* Court in its analysis of FECA's contribution limits, but declined to further clarify the standard in the current matter.[156] Instead, the majority in *Shrink PAC III* simply parroted *Buckley's* classification of contributions as indirect speech and thus concluded it deserved less First Amendment protection than expenditures.[157] The majority quoted at length the *Buckley* passage setting forth the rationale:

> [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. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.[158]

As to the justification necessary to impose such a restriction, the Court reiterated the rationale advanced in *Buckley* regarding the government's legitimate interest in preventing corruption.[159] Beyond

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154. *See id.* at 916 (Thomas, J., dissenting).

155. *See id.* at 901.

156. *See id.* at 903 (quoting Buckley v. Valeo, 424 U.S. 1, 16 (1976)). The majority did not elucidate the applicable standard of scrutiny for examining contribution limits, stating that "[p]recision about the relative rigor of the standard to review contribution limits was not a pretense of the Buckley per curiam opinion." *Id.*

157. *See id.* (quoting *Buckley*, 424 U.S. at 19-21).

158. *Id.* at 903-04 (quoting *Buckley*, 424 U.S. at 20-21).

159. *See id.* at 906 (citing *Buckley*, 424 U.S. at 26-27).

outright quid pro quo bribery, it noted that both the integrity of a representative democracy and the public confidence necessary for its operation is threatened by actual or perceived corruption.[160] The majority found that this threat extends to large political contributions that could lead to candidates who are more easily swayed by their benefactors and not sufficiently responsive to their constituents.[161]

Fredman and Shrink PAC objected to the lack of empirical evidence upholding the state's legitimate interest.[162] Refusing to strike the statute for lack of evidentiary support, the Court alluded to the incidents of financing irregularities that occurred during the 1972 campaign as indicating that the connection between corruption and campaign contributions is more than theoretical.[163] The majority also referred to an affidavit by a state senator[164] and newspaper reports of large contributions among state officials to determine that the State had met its burden.[165] Additionally, the approval of Proposition A, the Missouri ballot initiative that set contribution limits lower than the state statute, was also relevant.[166] The majority viewed that referendum as indicative of a widespread public perception that political contributions lead to corruption.[167]

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160. *See id.* at 905-06 (citing *Buckley*, 424 U.S. at 27).

161. *See id.* at 906 ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.").

162. *See id.*

163. *See id.* (observing that "the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem [of corruption] is not an illusory one") (quoting *Buckley*, 424 U.S. at 27). Interestingly, in the opinion below, the Eighth Circuit reached the opposite conclusion: "[W]e are unwilling to extrapolate from [*Buckley's*] examples that in Missouri at this time there is corruption or a perception of corruption from 'large' campaign contributions, without some evidence that such problems really exist." *Shrink PAC II*, 161 F.3d 519, 522 (8th Cir. 1998), *rev'd*, 120 S. Ct. 897 (2000).

164. *See Shrink PAC III*, 120 S. Ct. at 907; *see also supra* note 138 and accompanying text (applying a strict scrutiny standard of review, the Eighth Circuit noted contribution limits regulated First Amendment rights).

165. *See Shrink PAC III*, 120 S. Ct. at 907. The district court cited a report that a Republican candidate for State Auditor in 1994 received $40,000 from a state brewery and $20,000 from a bank. *See Shrink PAC I*, 5 F. Supp. 2d 734, 738 n.6 (E.D. Mo. 1998), *rev'd*, 161 F.3d 519 (8th Cir. 1998), *rev'd*, 120 S. Ct. 897 (2000).

166. *See Shrink PAC III*, 120 S. Ct. at 908; *see also supra* notes 137-46 and accompanying text (discussing Eighth Circuit's invalidation of Proposition A's contribution limits).

167. *See Shrink PAC III*, 120 S. Ct. at 908. The Court stated that "although majority votes do not, as such, defeat First Amendment protections, the statewide vote on Proposition A certainly attests to the perception [that] the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof." *Id.* (internal quotations omitted).

The Court rejected the petitioners' argument that other Supreme Court rulings since *Buckley*, notably *Colorado Republican Federal Campaign Commission vs. Federal Election Commission*,[168] require the government to prove that the alleged harm from candidate contributions is based in fact and not mere conjecture.[169] The Court explained that *Colorado Republican* did not raise the evidentiary bar for states attempting to justify contribution limits and therefore excused Missouri from any requirement to produce empirical evidence in support of its contribution statute.[170] The Court reasoned that, in light of the incidents of financing irregularities cited in *Buckley*, Missouri's sparse evidentiary showing was adequate to justify its contribution statute.[171]

The Court indicated, however, that had the petitioners presented more evidence contradicting the anecdotal examples of corruption in *Buckley* and *Shrink PAC I,* Missouri's burden of proof may have been higher.[172] The Court discounted the petitioners' academic studies indicating that large campaign contributions do not alter politicians' positions or votes and concluded that large political contributions still pose a significant risk of corruption.[173]

The Court also disagreed with petitioners' contention that the Missouri contribution law was not narrowly tailored to serve the state's interest in preventing corruption.[174] While candidate Fredman argued that the state limits had prevented him from raising the funds necessary to wage an effective campaign for State Auditor, the Court stated that the inability of any single candidate to garner sufficient political

168. Colorado Republican Fed. Campaign Comm'n v. Federal Election Comm'n, 518 U.S. 604 (1996).

169. *See Shrink PAC III*, 120 S. Ct. at 906-07.

170. *See id.* at 907. Although the Court in *Colorado Republican* charged the federal government with failing to show that the risk of corruption was real, the Court distinguished that case on the basis that it dealt with limitations on independent expenditures, which are not directly related to the government's interest in preventing corruption as are limitations on contributions. *See id.* The majority indicated that the petitioners had misread *Colorado Republican* to require a higher burden of proof than was accepted in *Buckley*, stating instead that both cases stood for the proposition that expenditures enjoy a higher level of constitutional protection and thus a higher evidentiary standard is required to sustain spending limits. *See id.* ("*Colorado Republican* . . . goes hand in hand with *Buckley*, not toe to toe.").

171. *See id.* at 906.

172. *See id.* at 908; *see also* Buckley v. Valeo, 424 U.S. 1, 20 (1975); *Shrink PAC I*, 5 F. Supp. 2d 735, 738 n.6 (E.D. Mo. 1998), *rev'd*, 161 F.3d 519 (8th Cir. 1998), *rev'd*, 120 S. Ct. 897 (2000).

173. *See Shrink PAC III*, 120 S. Ct. at 908 (noting both the conflicting conclusions among the reports and the lack of any indication that the studies had assuaged public suspicions regarding the corruptive influence of political donations).

174. *See id.* at 908.

donations under the state contribution statute did not render the law constitutionally defective.[175] Observing that the contribution law seemed to have little effect on the ability of candidates considered as a whole to finance political campaigns, the majority referred to the district court's finding that the Missouri statute still allowed politicians to raise adequate funding for elective campaigns.[176] Therefore, the Court concluded that because the law had not reduced the overall availability of such funds, it did not overly restrict the speech of all candidates.[177]

Furthermore, the Court also rejected petitioners' claim that Missouri's contribution limits were set unconstitutionally low.[178] Noting that since 1976 inflation has eroded the value of the dollar by almost two-thirds, the petitioners argued that the state's limits[179] differed dramatically from the federal limits approved in *Buckley*.[180] The majority rebutted this argument by observing that the constitutionality of contribution limits are not tied to a specific dollar amount.[181]

Instead, the Court stated that the test to determine the constitutionality of a particular contribution limit is its effect on political advocacy by both candidates and contributors.[182] The Court

175. *See id.* at 909 (stating that "a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*").

176. *See id.* (*quoting Shrink PAC I*, 5 F. Supp. 2d at 741) (noting that the Missouri law did not prevent other candidates from "[amassing] impressive campaign war chests"). The district court found that after the state limits took effect, there was little, if any, effect on the ability of candidates to raise the funds necessary to wage a political campaign. *See Shrink PAC I*, 5 F. Supp. 2d at 740. Additionally, the district court found that in the 1994 pre-limit state elections, almost 98 percent of political contributions to candidates for State Auditor were under $2000. *See id.* at 741.

177. *See Shrink PAC III*, 120 S. Ct. at 909.

178. *See id.*

179. Missouri's contribution limits range from $250 to $1000. *See generally* MO. REV. STAT. § 130.032 (West 1997 & Supp. 2000).

180. *See id.* The *Buckley* Court suggested that some contribution limits may be unconstitutionally low if they constitute a difference in kind from FECA's limits rather than merely a difference in form. *See* Buckley v. Valeo, 424 U.S. 1, 30 (1976).

181. *See Shrink PAC III*, 120 S. Ct. at 909 ("[T]he dictates of the First Amendment are not mere functions of the Consumer Price Index." (quoting *Shrink PAC II*, 161 F.3d 519, 525 (1998) (Gibson, J., dissenting))). The majority's disinclination to judge the sufficiency of the limits chosen by the legislature mirrored the approach of the *Buckley* Court, which stated that "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *See Buckley*, 424 U.S. at 30 (quoting Buckley v. Valeo, 519 F.2d 821, 842 (D.C. Cir. 1976)).

182. *See Shrink PAC III*, 120 S. Ct. at 909 (stating that the test of constitutionality of contribution limits is "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless").

concluded that the relevant question in any contribution limitation challenge is not the relative value of the dollar, but the limit's effect in reducing the entire amount of money contributed to all candidates in a campaign.[183] Under this standard, the Court declared that the Missouri limits did not impose an unconstitutional restriction of the free speech rights of candidates or their contributors.[184]

2. Concurring Opinions

a. Justice Stevens' Concurrence

Justices Stevens and Breyer each filed concurring opinions in *Shrink PAC III*.[185] The Stevens concurrence justified the Court's treatment of contributions as constitutionally different from expenditures by observing that the use of money to fund speech by others is a property right rather than a fully protected speech right.[186] As such, contributions used to promote ideas are not entitled to the same protection as the ideas themselves.[187] Justice Stevens concluded that speech by proxy funded by political donations deserves "significant constitutional protection" but is not entitled to the same level of deference afforded to individual speech.[188]

b. Justice Breyer's Concurrence

Justice Breyer, in a concurrence joined by Justice Ginsburg, defended the standard of review utilized by the majority in sustaining the Missouri statute.[189] Responding to the dissenters' complaints that the majority abandoned the strict scrutiny standard traditionally employed to review government restrictions on freedom of speech, Justice Breyer advised against oversimplifying the complex constitutional issue posed by contribution limits.[190] In Justice Breyer's view, the legitimate interests involved on both sides of the contribution limit debate caution against the strong presumption of unconstitutionality placed on statutes

183. *See id.*

184. *See id.* at 910.

185. *See id.* (Stevens, J., concurring), 910-14 (Breyer, J., concurring).

186. *See id.* at 910 (Stevens, J., concurring).

187. *See id.* (Stevens, J., concurring).

188. *See id.* (Stevens, J., concurring).

189. *See id.* at 911 (Breyer, J., concurring).

190. *See id.* (Breyer, J., concurring) (arguing that "mechanical application of the tests associated with 'strict scrutiny' . . . will properly resolve the difficult constitutional problem that campaign finance statutes pose"); *see also* THE FIRST AMENDMENT: A READER, *supra* note 36, at 181 (arguing that "balancing is and must be the Court's methodology in all First Amendment cases").

by the strict scrutiny test.[191] Instead, Justice Breyer argued that courts should approach statutory contribution limits by balancing the individual contributor's right to free political speech and the state's competing interest in preventing corruption and maintaining public confidence in the political system.[192]

Justice Breyer concluded that the state's solution was not a disproportionate burden on free speech. Although the state's limits may have crippled Zev David Fredman's election chances, the law was not unconstitutionally restrictive.[193]

3. The Dissenting Opinions

The *Shrink PAC III* decision contained two dissenting opinions written by Justices Kennedy and Thomas. Each Justice strongly objected to the majority's decision and urged that *Buckley* be overturned. The opinions differed, however, in their analysis of *Buckley's* flaws and their proposed solutions.[194]

a. Justice Kennedy's Dissent

In his dissent, Justice Kennedy accused the majority of shirking its duty to acknowledge both the negative consequences of *Buckley* and the Court's subsequent decisions regarding the electoral process and political speech.[195] He further criticized the Court for abruptly dismissing the petitioners' challenge to the state's law merely because of the claim's factual similarity to *Buckley*.[196]

Justice Kennedy believed the *Buckley* decision distorted First Amendment speech rights by driving political speech "underground."[197] He observed that the *Buckley* Court's endorsement of contribution limits

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191. *See Shrink PAC III*, 120 S. Ct. at 910 (Breyer, J., concurring).

192. *See id.* at 912 (Breyer, J., concurring) ("[W]here a law significantly implicates competing constitutionally protected interests in complex ways[,] the Court has closely scrutinized the statute's impact on those interests but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests."); *see also* THE FIRST AMENDMENT: A READER, *supra* note 36, at 181 ("[F]ree speech doctrine is always the result of a complex balancing process."). *But see* Sunstein, *supra* note 10, at 259-60 ("[A]ny restrictions on speech, once permitted, have a sinister and inevitable tendency to expand . . . . As far as possible, 'balancing' ought to play no role in free speech law.").

193. *See Shrink PAC III*, 120 S. Ct. at 910 (Breyer, J., concurring).

194. *See id.* at 914-16 (Kennedy, J., dissenting), 916-27 (Thomas, J., dissenting).

195. *See id.* at 914 (Kennedy, J., dissenting).

196. *See id.* (Kennedy, J., dissenting).

197. *See id.* (Kennedy, J., dissenting) ("[A]s contributors and candidates devise ever more elaborate methods of avoiding contribution limits . . . .[t]he preferred method has been to conceal the real purpose of the speech.").

to individual candidates and its rejection of limits on donations gave rise to the funding of issue advocacy by unrestricted "soft money" contributions.[198] By contrast, "hard money" contributions donated to fund direct candidate speech are capped and subjected to strict disclosure laws.[199] Therefore, Justice Kennedy concluded that *Buckley* created a system where clandestine speech is encouraged while candid speech is penalized.[200] In Justice Kennedy's view, such a result cannot be compatible with the free speech guarantee of the First Amendment.[201]

Furthermore, Justice Kennedy also warned that *Buckley's* harmful effects on political speech are compounded by the self-insulating nature of the opinion.[202] Moreover, Justice Kennedy argued that the current financing system undermined voter confidence in the integrity of the electoral process.[203] Preservation of the public's faith in politics was one of the primary reasons cited by the *Buckley* Court in upholding FECA's contribution limits.[204] To bolster the integrity of political funding, Justice Kennedy advocated the use of the Internet's instantaneous communication capabilities to create a more immediate and less restrictive method by which to monitor political contributions, giving voters direct access to the information necessary to determine when a candidate has been compromised or "bought."[205]

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198. *See id.* (Kennedy, J., dissenting). Justice Kennedy lamented that the nation's campaign finance framework is the result of Supreme Court decisions rather than pure legislative action: "The current system would be unfortunate, and suspect under the First Amendment, had it evolved from a deliberate choice; but its unhappy origins are in our earlier decree in *Buckley*, which . . . created a misshapen system." *Id.* at 914-15 (Kennedy, J., dissenting).

199. *See id.* at 914 (Kennedy, J., dissenting).

200. *See id.* (Kennedy, J., dissenting).

201. *See id.* (Kennedy, J., dissenting) (stating that the majority opinion "mocks the First Amendment").

202. *See id.* at 915 (Kennedy, J., dissenting) (observing that "outsider" candidates such as Fredman "cannot challenge the status quo unless he first gives into it.").

203. *See id.* (Kennedy, J., dissenting). Justice Kennedy went on to state that the "[r]ulings of this Court must never be viewed with more caution than when they provide immunity from their own correction in the political process and in the forum of unrestrained speech." *Id.* (Kennedy, J., dissenting).

204. *See id.* (Kennedy, J., dissenting). Voter participation rates in recent elections have dipped to historical lows. *See supra* notes 108-09 and accompanying text (explaining that voter turnout in the 1998 election was the lowest figure since 1942).

205. *See id.* (Kennedy, J., dissenting) (noting that "[a]mong the facts the Court declines to take into account is the emergence of cyberspace communication by which political contributions can be reported almost simultaneously with payment."). The *Buckley* Court stated that "disclosure requirements - certainly in most applications - appear to be the least restrictive means of curbing the evils of . . . corruption." *See* Buckley v. Valeo, 424 U.S. 1, 68 (1976). But the Court went on to state that:

> Congress was surely entitled to conclude that disclosure was only a partial measure,

Although Justice Kennedy would overrule *Buckley*, he stopped short of declaring all statutory contribution limits as per se unconstitutional.[206] Instead, Justice Kennedy left open the possibility that some future legislative schemes limiting political contributions might survive the strict scrutiny demanded by the First Amendment.[207]

b. Justice Thomas' Dissent

In his dissenting opinion, Justice Thomas, joined by Justice Scalia, argued that the Missouri statute was an impermissible abridgment of contributors' and candidates' speech and recommended that *Buckley* be overruled.[208] Justice Thomas accused the majority of abandoning the principles underlying the First Amendment's free speech guarantee and failing to apply the strict scrutiny demanded by precedent.[209]

Noting that robust and open political debate is the primary purpose behind the First Amendment's free speech guarantee,[210] Justice Thomas stated that campaign contributions produce "essential political speech."[211] Thus, contribution limits are a "direct and substantial" restriction on the political speech rights of both contributors and candidates.[212] Accordingly, any restriction placing such substantial burdens on speech protected at the core of the First Amendment necessitates a presumption of unconstitutionality and should receive the strictest scrutiny.[213]

However, Justice Thomas claimed the majority applied a lesser, unidentified standard of review to uphold the Missouri law. In Justice Thomas' view, the standard employed by the majority relied on a "faulty distinction," namely the speech by proxy rationale advanced in *Buckley* that created a constitutional difference between speech funded

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> and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

Id. at 28.

206. *See Shrink PAC III*, 120 S. Ct. at 916 (Kennedy, J., dissenting) ("[Although] [t]here are serious constitutional questions to be confronted in enacting any such scheme . . . I would not foreclose it at the outset.").

207. *See id.* (Kennedy, J., dissenting).

208. *See id.* (Thomas, J., dissenting).

209. *See id.* at 917 (Thomas, J., dissenting).

210. *See id.* at 916 (Thomas, J., dissenting) ("I begin with a proposition that ought to be unassailable: [p]olitical speech is the primary object of First Amendment protection.").

211. *See id.* at 917 (Thomas, J., dissenting).

212. *See id.* (Thomas, J., dissenting).

213. *See id.* (Thomas, J., dissenting).

by contributions and speech funded by direct expenditure.[214] Justice Thomas contended that this speech by proxy distinction fails because nearly all political messages require dissemination through a third party, regardless of how funded.[215] Therefore, Justice Thomas concluded there was no constitutional basis for treating contributions as fundamentally different from expenditures and, thus, no reason to deny contribution speech full First Amendment protection.[216]

After assailing the speech by proxy rationale, Justice Thomas focused on contribution statutes' deleterious effect on the speech rights of both contributors and candidates.[217] Justice Thomas maintained that the First Amendment does not allow the government to judge the means used by citizens to express their political viewpoints, nor the amount of money they choose to spend doing so.[218] Instead, Justice Thomas contended that in amplifying a candidate's message, contributors are simply recognizing that political campaigns are a convenient and effective means of expressing the contributor's political ideas.[219]

By ignoring the unique position of candidate organizations in the political process as vehicles for citizen debate, Justice Thomas argued the majority's ruling denied contributors the freedom to choose the

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214. *See id.* at 218 (Thomas, J., dissenting); *see also* Buckley v. Valeo, 424 U.S. 1, 20-21 (1976). The *Buckley* Court held that while expenditure limits have a "substantial" effect on the quantity of political speech whereas limits on contributions result in only a "marginal" restraint on speech, in part because "the transformation of contributions into political debate involves someone other than the contributor." *See Buckley*, 424 U.S. at 21.

215. *See Shrink PAC III*, 120 S. Ct. at 918 (Thomas, J., dissenting). Justice Thomas observed that "there is usually some go-between that facilitates the dissemination of the spender's message—for instance, an advertising agency or a television station. The only possible difference is that contributions involve an extra step in the proxy chain." *Id.* (Thomas, J., dissenting) (quoting Colorado Republican Fed. Campaign Comm'n v. Federal Election Comm'n, 518 U.S. 604, 638-39 (1996) (Thomas, J., concurring in the judgment and dissenting in part)). Additionally, Justice Thomas contended that after *Buckley*, the Court rejected the argument that speech by proxy diminishes contributors speech rights in *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985). *See id.* (Thomas, J., dissenting).

216. *See id.* (Thomas, J., dissenting).

217. *See id.* at 919-10 (Thomas, J., dissenting).

218. *See id.* (Thomas, J., dissenting).

219. *See id.* at 920 (Thomas, J., dissenting). Justice Thomas mentioned that political candidates have a "strong self-interest" in using campaign contributions in the most efficient means possible. *See id.* (Thomas, J., dissenting). Such self-interest, Justice Thomas reasoned, meant that "individual citizens understandably realize that they may add more to political discourse by giving rather than spending, if the donee is able to put the funds to more productive use than can the individual." *See id.* (Thomas, J., dissenting) (quoting Colorado Republican Fed. Campaign Comm'n v. Federal Election Comm'n, 518 U.S. 604, 636 (1996) (Thomas, J., concurring in the judgment and dissenting in part)).

mode of expressing their political ideas.[220] As a result, the Court's decision allows the government to "second guess" the political decisions of citizens, forcing donors to employ less effective means of speech that prevents some contributors from speaking at all.[221] Therefore, Justice Thomas concluded that contribution limits impose a substantial restriction on political speech and violate the First Amendment rights of contributors.[222]

After analyzing the effects of contribution statutes on the free speech of donors, Justice Thomas focused on their effect on rights on the candidates.[223] Like the Court in *Buckley*, the majority in *Shrink PAC III* allowed that contribution limits may constitute an infringement on the free speech rights of individual candidates.[224] However, both opinions found that the total effect of contribution limits on all candidates was negligible, judging by the total amount given to fund political campaigns.[225]

Justice Thomas attacked this cumulative method of evaluating the effect of contribution limits on the speech of candidates as "flawed and unsupported," claiming that the First Amendment guarantees freedom of speech to the individual.[226] According to Justice Thomas, regardless of the law's effect on candidates as a whole, the suppression of individual political speech through contribution limits effectively dooms some, if not most, minor candidates to political invisibility.[227] The

220. *See id.* (Thomas, J., dissenting) (claiming that contribution limits "depriv[e] donors of their right to speak through the candidate").

221. *See id.* (Thomas, J., dissenting). Justice Thomas argued that contribution limits served to limit voter participation in the political process because forcing contributors to expend their time, effort, and money disseminating political messages independently "may make the difference between participating and not participating in some public debate." *Id.* (Thomas, J., dissenting) (quoting City of Ladue v. Gilleo, 512 U.S. 43, 57 (1994)).

222. *See id.* at 917 (Thomas, J., dissenting); *see also* Buckley v. Valeo, 424 U.S. 1, 19-20 (1976) (holding that expenditure limits imposed "substantial" restriction on speech while contribution limits entail only a "marginal" restraint).

223. *See Shrink PAC III*, 120 S. Ct. at 921 (Thomas, J., dissenting).

224. *See id.* at 909; *see also Buckley*, 424 U.S. at 33 (stating that "[contribution limits] may have a significant effect on particular challengers or incumbents").

225. *See Shrink PAC III*, 120 S. Ct. at 908; *see also Buckley*, 424 U.S. at 21. The district court in *Shrink PAC I* cited figures indicating that overall contributions in Missouri had remained relatively unchanged between the 1992 election, before state limits took effect, and the 1996 election. *See Shrink PAC I*, 5 F. Supp. 2d 734, 740-41 (E.D. Mo. 1998), *rev'd*, 161 F.3d 519 (8th Cir. 1998), *rev'd*, 120 S. Ct. 897 (2000).

226. *See Shrink PAC III*, 120 S. Ct. at 921-22 (Thomas, J., dissenting) ("[T]he right to free speech is a right held by each American, not by Americans en masse.").

227. *See id.* at 922 (Thomas, J., dissenting) (noting the "clear and detrimental effect" of contribution limits on candidates lacking "the advantages of incumbency, name recognition, or substantial personal wealth").

result is reduced political competition and less vigorous public debate.[228]

After castigating what he termed the "analytic fallacies" in *Buckley*, Justice Thomas warned that by failing to apply strict scrutiny to the Missouri statute, the Court further eroded the already precarious constitutional safeguards accorded political donations by the *Buckley* opinion.[229] Justice Thomas accused the majority of applying a *sui generis* standard of review to the Missouri contribution limits.[230] In Justice Thomas' view, the majority's standard provided less constitutional protection for political speech than *Buckley* because it expanded the compelling-interest justifications available to legislatures seeking to limit political contributions.[231]

Additionally, Justice Thomas warned that the majority's approach loosened the requisite "narrow-tailoring" of speech-limiting laws by sustaining a law containing broader restrictions than those upheld in *Buckley*.[232] Rejecting the Missouri statute as "massively over inclusive," Justice Thomas criticized the majority for neglecting to address the law's other provisions that provide for lower contribution limits,[233] equivalent limits for both individuals and political

228. *See id.* (Thomas, J., dissenting).

229. *See id.* at 916 (Thomas, J., dissenting) (accusing the majority of "weaken[ing] the already enfeebled constitutional protection that *Buckley* afforded campaign contributions").

230. *See id.* at 922 (Thomas, J., dissenting). Justice Thomas observed that while the *Buckley* Court purported to apply a test of "closest scrutiny" to FECA's contribution limits, it neglected to do so in fact. *See id.* (Thomas, J., dissenting). He further noted that the majority opinion in *Shrink PAC III* addressed the appropriate standard of review by referring only to "*Buckley*'s standard of scrutiny," which he labeled a *sui generis* test that resulted in an "ad hoc balancing away of First Amendment rights." *Id.* (Thomas, J., dissenting). *Sui generis* is defined as "[o]f its own kind or class." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990). For a detailed discussion of the Supreme Court's trend toward *sui generis* analysis in free speech cases, see Kraut, *supra* note 33, at 177.

231. *See Shrink PAC III*, 120 S. Ct. at 923 (Thomas, J., dissenting). Observing that *Buckley* held only the prevention of quid pro quo corruption as a sufficiently compelling interest for government limits on contributions, Justice Thomas argued that the majority's ruling redefined corruption to include the broader concern of "politicians too compliant with the wishes of large contributors." *Id.* at 924 (Thomas, J., dissenting). Justice Thomas worried that this language allows "vague and unenumerated harms to suffice as a compelling reason for the government to smother political speech." *Id.* (Thomas, J., dissenting).

232. *See id.* at 924 (Thomas, J., dissenting); *see also* 2 U.S.C. § 608(b) (West 1996 & Supp. 2000) (limiting individual contributions to $1000 per political candidate). In disagreeing with the majority's view that the Missouri limits were narrowly tailored to serve the state's interest, Justice Thomas disputed the Court's view that the state caps bore "a striking . . . resemblance to the limitations sustained in *Buckley*," noting that inflation since the *Buckley* decision in 1976 rendered the state's limits more restrictive in scope than those previously approved by the Court. *Shrink PAC III*, 120 S. Ct. at 924 (Thomas, J., dissenting).

233. *See* MO. REV. STAT. § 130.032.1(4) (West 1998) (limiting to $250 contributions to

committees,[234] and vary contribution ceilings according to the population of state districts.[235] Justice Thomas declared these measures "crudely tailored" and unrelated to the state's interest in preventing corruption.[236]

Moreover, while conceding that Missouri's interest in preventing corruption was compelling despite its lack of empirical evidence, Justice Thomas claimed that less restrictive legislative means are available to avert corruption, including anti-bribery laws and full disclosure requirements.[237] Justice Thomas observed that where "traditional legal methods" exist, the Supreme Court has ruled against laws that suppress protected speech under the guise of crime prevention.[238] Given the availability of such methods to Missouri and all legislatures, Justice Thomas contended that government cannot pass the equivalent of a statutory sledgehammer that crushes a large amount of legitimate speech while also stamping out the possibility of corruptive contributions.[239] As such, Justice Thomas concluded that the state law at issue and contribution limits in general are an unconstitutional abridgment of political speech.[240]

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candidates for state representative).

234. *See id.* § 130.032.3 (imposing identical contribution limits on both political committees and individuals).

235. *See Shrink PAC III*, 120 S. Ct. at 924-25 (Thomas, J., dissenting). *Compare* MO. REV. STAT. § 130.032.1(4) (limiting to $250 contributions to candidates from electoral districts with populations of less than 100,000), *with* § 130.032.1(5) (limiting to $500 contributions to candidates from electoral districts with populations of between 100,000 and 250,000).

236. *See Shrink PAC III*, 120 S. Ct. at 924-25 (Thomas, J., dissenting) ("I cannot fathom how a $251 contribution could pose a substantial risk of 'secur[ing] a political quid pro quo.' Thus, contribution caps set at such levels could never be 'closely drawn.'" (citation omitted)).

237. *See id.* at 926 (Thomas, J., dissenting). Missouri's contribution statute includes disclosure requirements for candidates receiving contributions. *See* MO. REV. STAT. § 130.041 (West 1998). Justice Thomas found that the only argument in favor of limiting contributions is that such limits may be more effective in preventing corruption than other means available. *See Shrink PAC III*, 120 S. Ct. at 926 (Thomas, J., dissenting). However, he concluded that even if contribution limits are more effective than other means, that does not justify silencing the speech of contributors "without regard to whether the donors pose any real corruption risk." *Id.* (Thomas, J., dissenting).

238. *See Shrink PAC III*, 120 S. Ct. at 926-27 (Thomas, J., dissenting); *see also* Martin v. City of Struthers, 319 U.S. 141, 146-49 (1943) (invalidating anti-burglary law that prohibited door-to-door distribution of political handbills); Riley v. National Fed'n of the Blind, Inc. 487 U.S. 781, 790 (1988) (invalidating regulation of fundraiser fees on grounds that state had already enacted general antifraud law).

239. *See Shrink PAC III*, 120 S. Ct. at 927 (Thomas, J., dissenting) ("States are free to enact laws that directly punish those engaged in corruption and require the disclosure of large contributions, but they are not free to enact generalized laws that suppress a tremendous amount of protected speech along with the targeted corruption.").

240. *See id.* (Thomas, J., dissenting).

IV. ANALYSIS

The Court in *Shrink PAC III* reversed the Eighth Circuit and upheld the Missouri contribution statute as constitutional, even though the state's limitation amounts are far below those approved in *Buckley*.[241] The majority viewed the same concerns that led Congress to impose contribution limits in 1974 as still valid to support state contribution statutes and further indicated that such laws need not mirror the relative purchasing power of the limits approved in *Buckley*.[242]

A. Contributions and Expenditures: A Distinction Without a Difference

Unfortunately, the Court did not accept the judicial responsibility inherent in the arena of government-imposed restrictions on political speech.[243] Instead, the Court unquestionably adopted the defining rationale of *Buckley* without pausing to assess its continued viability in light of the nation's political experience during the last 25 years.[244] In so doing, the majority opinion vastly understated the speech-suppressing effects of contribution limits and the damage these laws wreak on the country's political debate.[245]

The majority performed a disservice to the freedom of speech and the democracy that depends on it by simply regurgitating *Buckley*'s speech by proxy distinction without further analysis.[246] Rather than mount its own defense of *Buckley*'s treatment of contribution speech as second-class political speech, the majority merely block-quoted an entire paragraph from that decision and thus sidestepped any serious reconsideration of the issue.[247] Considering the importance of the speech by proxy rationale in determining the constitutionality of contribution limits, the majority's paltry discussion was an abdication of its judicial responsibility to arbitrate the tension between government restrictions and personal freedoms.[248]

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241. *See id.* at 910.

242. *See id.* at 908 (stating that "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").

243. *See* Buckley v. Valeo, 424 U.S. 1, 16 (1976) (stating that the First Amendment requires "exacting scrutiny.").

244. *See supra* Part II.D (discussing recent campaign financing developments).

245. *See, e.g*, Smith, *supra* note 8, at 1072 (arguing that campaign finance reform leads to "undemocratic" consequences); Bopp, *supra* note 114, at 22 (noting that ideals that underlie campaign finance reform proposals often go unfulfilled in practice).

246. *See Shrink PAC III*, 120 S. Ct at 922 (Thomas, J., dissenting) (accusing the majority opinion of "blindly adopt[ing]" *Buckley*'s speech by proxy rationale).

247. *See id.* at 903-04.

248. Justice Kennedy categorized the majority's attitude toward the issue presented as

As Justice Thomas' dissent forcefully argues, the speech by proxy distinction is illogical in theory and untenable in practice.[249] This is because most political messages depend upon mass media, and whether funded by contributions or independent expenditures, the use of media involves dissemination by third parties.[250] The bulk of modern political advocacy is in the form of paid political advertisements,[251] requiring a candidate to employ writers, editors, and other production personnel to assist in transforming a political idea into political speech. Thus, there is no viable constitutional distinction between contribution speech and independent expenditure speech because both methods of communication depend on a proxy for dissemination.[252] The majority fails to acknowledge the twin nature of contributions and expenditures in the political arena and therefore repeats *Buckley*'s error in granting contribution speech less than full First Amendment protection.

B. A Deferential Standard of Review

The Court in *Shrink PAC III* not only casually reaffirmed *Buckley*'s untenable contribution/expenditure distinction, but it lowered the standard of review applicable to speech restrictions imposed by contribution limits. The majority opinion acknowledged that contributions are an important source of political speech which, in turn, should have triggered a strict scrutiny standard of review or standard approaching it.[253] Yet where the *Buckley* Court at least paid lip service to the strict scrutiny demanded by the First Amendment, the *Shrink PAC III* majority did not bother to identify the level of scrutiny it applied to Missouri's contribution statute. This ambiguity regarding the appropriate standard of review exemplifies the Court's trend toward individualized, *sui generis* review of free speech issues.[254]

Far from the balancing approach urged by Justice Breyer,[255] the Court's approach to analyzing state contribution limits more closely

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"indifferent." *See id.* at 914 (Kennedy, J., dissenting).

249. *See id.* at 918-21 (Thomas, J., dissenting).

250. *See* Buckley v. Valeo, 424 U.S. 1, 19 (1976) ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money.").

251. *See* Moramarco, *supra* note 47, at 109 n.10.

252. *See Shrink PAC III*, 120 S. Ct. at 918 (Thomas, J., dissenting) (noting that "[e]ven in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message").

253. *See id.* at 917 (Thomas, J., dissenting) (noting that the *Buckley* Court claimed to employ a strict scrutiny approach toward contribution limits but failed to do so in fact).

254. *See* Kraut, *supra* note 33, at 195-96 (arguing that free speech rights deserve more consistent protection than provided by recent Supreme Court precedents).

255. *See Shrink PAC III*, 120 S. Ct. at 912 (Breyer, J., concurring).

resembles a rational-basis test, adopting a deferential posture to Missouri's assertion of the law's necessity and function.[256] Rather than requiring Missouri to introduce concrete evidence that corruption due to political contributions was more than a problem in theory, the Court simply recognized the reasonableness of the state's belief that large contributions may lead to corruption or the appearance of corruption.[257]

Ironically, the majority opinion stated that Missouri's evidentiary burden may have increased had petitioners introduced more evidence of their own to counteract examples of corruption cited in *Buckley* and *Shrink PAC I*.[258] This assertion runs counter to precedent that places the burden of justification upon the government seeking to restrict freedom of speech and not upon the individual seeking to protect his First Amendment rights.[259] Moreover, the Court's decision effectively ends the states' evidentiary burden of proving a compelling interest behind contribution restrictions as state legislatures need now rely only on the accounts of corruption contained in *Buckley*.[260] Consequently, the Court established *Buckley* as evidentiary, as well as constitutional, precedent for other state contribution laws, enshrining the electoral misdeeds of the 1972 campaign as lasting proof of a compelling state interest.

Unfortunately, the Court did not attempt an inquiry into whether the Missouri statute was narrowly tailored to suit its avowed purpose, so as to ensure that the law addressed only the corruptive influence of large contributions while leaving political speech as unburdened as

256. Under a rational basis standard of review, a law need only have rational relation to a legitimate state interest and must minimally advance that interest; no judicial consideration of less restrictive means is pursued. *See* R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden*, 28 U. RICH. L. REV. 1279, 1283 (1994).

257. *See Shrink PAC III*, 120 S. Ct. at 906 ("*Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.").

258. *See id.* at 908.

259. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43 (1994) (holding that the government did not provide sufficient justification for removing war protest sign); United States v. Grace, 461 U.S. 171, 183 (1983); Wooley v. Maynard, 430 U.S. 705, 716-17 (1977); *see also* Smith, *supra* note 8, at 1057 (arguing that campaign finance reformers should bear burden of justifying restrictions on free speech rights).

260. *See Shrink PAC III*, 120 S. Ct. at 907. The Court held that although Missouri did not introduce evidence to support its contention that corruption was a legitimate concern in state government, newspaper reports of large contributions to the campaigns of certain state officials and the passage of Proposition A was "enough to show that the substantiation of the congressional concerns reflected in *Buckley* has its counterpart supporting the Missouri law." *Id.* Moreover, the Court stated that Fredman and Shrink Missouri Government PAC had failed to overcome "the apparent implications of *Buckley's* evidence." *Id.* at 908.

possible.[261] The Court declined to examine the specific limitation amounts chosen by the Missouri legislature to determine whether higher, less speech-restrictive limits would be as effective in preventing the appearance or reality of corruption.[262] Such a deferential stance towards legislative solutions that infringe on "an area of the most fundamental First Amendment activities" does not approach the "rigorous scrutiny" mandated by *Buckley*.[263] As a result, state legislatures may freely regulate campaign contributions at the most advantageous level for the political establishment, with little or no justification, regardless of the effects on protected speech or candidate competition.[264] Consequently, the Court's decision will mute public dialogue and reduce electoral choice.[265]

V. IMPACT

The Court's decision in *Shrink PAC III* will have a lasting and detrimental effect on political speech and electoral competition in America. In sanctioning highly restrictive contribution limits like those imposed under the Missouri statute, the Court set the stage for a proliferation of more speech-suppressing legislation that will serve to entrench establishment candidates and increase the power of the elite at the expense of "ordinary" citizens.[266]

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261. The Court also did not discuss Justice Kennedy's suggestion to make use of the Internet's disclosure of contributions as a less restrictive, and more efficient, means of policing corruption. *See id.* at 915 (Kennedy, J., dissenting). The Internet's instant reporting and all-hours access capabilities would seem ideal for this function. Perhaps not surprisingly, politicians are already employing the Internet to solicit campaign contributions. *See* Joe Salkowski, *Fund-raising on Net Levels Playing Field for McCain*, CHI. TRIB., Feb. 14, 2000, § 4, at 8 (discussing Senator's McCain's use of the internet for fundraising).

262. *See Shrink PAC III*, 120 S. Ct. at 909.

263. Buckley v. Valeo, 424 U.S. 1, 14 (1976).

264. *See, e.g.*, Smith, *supra* note 8, at 1072 (arguing that lower contribution limits make challenging incumbents more difficult); Gora, *supra* note 1, at 26-27 (arguing that contribution limits primarily benefit incumbents and the wealthy).

265. *See* Smith, *supra* note 8, at 1072; Bopp, *supra* note 114, at 22. The majority dismissed the state law's effect on Fredman's campaign as "a showing of one affected individual." *Shrink PAC III*, 120 S. Ct. at 909. However, the majority did not pause to consider the effect of Fredman's inability to air his views on the content of the campaign in general. *See, e.g.*, Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 692 n.14 (1998) (Stevens, J., dissenting) ("[P]olitical figures outside the two major parties have been fertile sources of new ideas and new programs.").

266. Although campaign finance reform, and contribution limits in particular, are billed as a means to equalize the effects of wealth on the political process, some argue that a system of small contributions tends to marginalize the collective voices of the many while enabling the wealthy and influential to remain so. *See* Smith, *supra* note 8, at 1072-81.

Beyond the immediate impact on the free speech rights of candidates and their contributors, the Court's decision rewards and encourages the political establishment to solidify their dominance over our country's political debate and the electoral process. Granting state legislatures the power to set contribution limits provides the incumbents with another tool to limit political competition, thereby insulating themselves from challenge and steering electoral outcomes to their advantage.[267]

The two major political parties already determine the rules for candidates to gain ballot access. In many states, this fact has led to nearly insurmountable barriers to third-party or "outsider" candidates.[268] Additionally, the Supreme Court recently ruled that public television broadcasters need not include third-party candidates in televised debates, further limiting the public's exposure to alternative political views.[269] These factors, together with the Court's ruling in *Shrink PAC III*, will give the major parties the power to both control the level of funding available to candidates outside the political mainstream and to limit voter choice through ballot restrictions. Moreover, because minor and independent candidates are not guaranteed access to televised public debates, their public visibility may recede even further.[270] Thus,

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267. *See id.* at 1072 (observing that contribution limits increase the difficulty for challengers to wage an effective campaign against an incumbent); *see also* Deeley, *supra* note 92, at 552 (stating that "[i]ncumbent legislators have strong incentives . . . to pass legislation that will further advantage incumbents").

268. *See* Appleseed, *supra* note 109, at 453 (discussing the highly restrictive ballot access laws of many states). Indeed, many states' ballot laws are so onerous that even major party challengers have trouble meeting the access requirements. One recent example is Republican presidential candidate John McCain, who despite a national profile and a 17-year Senate career was not assured a spot on the March 7, 2000 New York primary ballot until after his victory in the February 12, 2000 New Hampshire primary. A federal district court struck down New York's byzantine ballot law, finding that it placed an "undue burden" on voters' First Amendment rights. *See Judge Korman's Election Order,* N.Y. TIMES, Feb. 5, 2000, at A14.

269. *See* Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998). In *Forbes*, the Court held that a publicly-owned television station could exclude third-party candidates as long as the exclusion was "reasonable" and not "based on the speaker's viewpoint." *Id.* at 682.

270. *See* Janet H. Brown, *15% Poll Rating Reasonable: Debates must focus on viable candidates to serve their mission of informing public*, KNIGHT RIDDER/TRIBUNE NEWS SERVICE, Aug. 11, 2000, *available in* LEXIS, News Library, Knight Ridder/Tribune News Service File. The Commission on Presidential Debates, a private, nonprofit organization, has sponsored debates among presidential and vice-presidential candidates since 1987 and sets the criteria for candidate participation in a debate. *See id.* In determining if a candidate qualifies for a debate, the Commission considers three factors: 1) whether a candidate is constitutionally eligible for election; 2) whether the candidate has sufficient state ballot access to be mathematically eligible for election; and 3) whether the candidate has a fifteen percent approval rating as determined by the average of five national opinion polls. *See id.* It is this last criterion that tends to ensure that, with infrequent exceptions, access to the forum of presidential debates is restricted to the candidates of the two major parties. *See id.*

the major political parties will increasingly control the terms of public debate, to the detriment of our country's democratic process.[271]

Ironically, this trend towards consolidation of political power in the two major parties runs counter to the increasing political independence among the public.[272] While such voter disaffection would seem to indicate a desire for alternatives to the major parties, *Shrink PAC III* leads to less vigorous political debate, fewer candidate choices, and a solidification of major party dominance of the electorate. Given that third parties historically have been the impetus for many progressive political ideas that were later adopted by the mainstream,[273] the Court's reaffirmation that contribution speech is undeserving of full First Amendment protection lands a heavy blow to the type of grassroots activity that has historically powered this nation's political process.[274]

VI. CONCLUSION

In upholding Missouri's campaign contribution limits, the Supreme Court in *Shrink PAC III* reiterated the viability of the constitutional distinction articulated in *Buckley*, which divided contributions and expenditures into separate constitutional categories for purposes of First Amendment analysis. Moreover, the Court sanctioned the use of the *Buckley* opinion as evidentiary proof by governments seeking to enforce contribution statutes, excusing the need to produce current empirical evidence that corruption due to political contributions is more than a theoretical threat. As a result, the Court's decision has reduced the level of judicial scrutiny applicable to legislative restrictions on First Amendment freedoms. In the process, the Court has restricted contributors' freedom of speech, reduced candidate competition, and generally stunted the health of the nation's political debate.

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271. Ironically, the *Buckley* Court itself noted that "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." Buckley v. Valeo, 424 U.S. 1, 14-15 (1976). Unfortunately, the Court's decision in *Shrink PAC III* will likely work to reduce voter choice by narrowing candidate options.

272. *See* Appleseed, *supra* note 109, at 454 (noting that a record number of voters in 1998 did not declare themselves members of either major political party).

273. *See id.* at 455 (crediting third parties with the enactment of child-labor laws, the eight-hour workday, female suffrage, farmer assistance programs, and the graduated income tax).

274. *See* Smith, *supra* note 8, at 1082-84 (arguing that regulating campaign funding tends to "professionalize" politics to the detriment of the average citizen).