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Constitutional Law - First Amendment: Federal Campaign Finance Law Applies to State Election Contribution Limits, Allowing the Court to Apply a Special Type of First Amendment Scrutiny

Ryan Cheshire

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CONSTITUTIONAL LAW—FIRST AMENDMENT: FEDERAL CAMPAIGN FINANCE LAW APPLIES TO STATE ELECTION CONTRIBUTION LIMITS, ALLOWING THE COURT TO APPLY A SPECIAL TYPE OF FIRST AMENDMENT SCRUTINY

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000)

I. FACTS

Shrink Missouri Government PAC (Shrink), one of two respondents, is a political action committee.[1] Respondent Zev David Fredman (Fredman) was the Republican nominated candidate for the 1998 Missouri State Auditor position.[2] Shrink contributed $1,025 to Fredman's committee in 1997 and another $50 in 1998.[3] Shrink, a conservative advocacy group, donated the funds because it believed that Fredman was the only candidate who represented its political views.[4]

In 1994, the Missouri Legislature had passed a statute that restricted the permissible amount of financial contributions a person, organization, or committee could give to candidates running for state office.[5] In

1. Brief for Respondents at 4, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (No. 98-963). A political action committee (PAC) is an "organization established by businesses, labor unions, and other interest groups in the United States to channel financial contributions into political campaigns. PACs solicit contributions, pool the funds, and make donations to the campaigns of candidates for national, state, and local offices." Encarta, *Encyclopedia on the Web*, *at* http://encarta.msn.com/ (January 30, 2001).

2. Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 383 (2000); *see also* Erin Buford Vinett, Case Note, *First Amendment—Campaign Finance Reform—The Supreme Court Halts the Eighth Circuit's Invalidation of State Campaign Contribution Limits*, 23 U. ARK. LITTLE ROCK L. REV. 243, 246 n.11 (2000) (stating that Shrink suggested to Fredman that he run for the State Auditor position).

3. *Nixon*, 523 U.S. at 383.

4. Vinett, *supra* note 2, at 246 (citing to Respondents' Brief at 17, *Nixon* (No. 98-963)); *see also* Dean N. Fugate, Case Note, *Enforcing the Speech Limit:* Nixon v. Shrink Missouri Government PAC, 32 LOY. U. CHI. L. J. 205, 221 (2000).

5. *Nixon*, 528 U.S. at 382; *see also* MO. ANN. STAT. § 130.032 (West 1997 & Supp. 2001). Before the statute became effective, the voters of Missouri had passed a ballot initiative entitled Proposition A, which limited contributions to smaller amounts and also put limits on expenditures. *See* Respondents' Brief at 3, *Nixon* (No. 98-963). The Attorney General of Missouri ruled that the proposition would supercede the statute passed by the Missouri Legislature. *Id.* In 1995, the Court of Appeals for the Eighth Circuit held the expenditure limits in the initiative unconstitutional for violating the First Amendment. *Id.*; *see also* Shrink Mo. Gov't PAC v. Maupin, 71 F.3d 1422, 1429 (8th Cir. 1995). In another case, the Court of Appeals for the Eighth Circuit found the initiative's contribution limitations unconstitutional for similar First Amendment violations. *See* Carver v. Nixon, 72 F.3d 633, 645 (8th Cir. 1995) (holding that contribution limits of $100 to $300 were not sufficiently tailored to prevent corruption or the appearance of it, and finding that Missouri's statute violated the Constitution by infringing on a campaign contributor's First Amendment rights of freedom of speech and association). The court added that the 1994 statute would now go into effect. *See id.* at 642-43, 645 (holding that Missouri had "no evidence as to why the Proposition A limits of $100, $200, and $300 were selected [and] . . . no evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions"); *see also* Respondents' Brief at 3, *Nixon* (No. 98-963).

1997, the statute was amended[6] and imposed contribution limits from $250 to $1,000, depending on the specific state office and size of constituency.[7] Shrink and Fredman sought to stop enforcement of the contribution statute.[8] They claimed that the statute violated their First and Fourteenth Amendment rights.[9] Specifically, they claimed that the statute violated the rights of freedom of speech, freedom of association, and equal protection.[10] Shrink stated that without the limitation of the 1997 amended statute it would have contributed more to Fredman's campaign.[11] Fredman believed that he could have campaigned more effectively if he had received larger contributions than the statute allowed.[12]

The district court, on a motion for summary judgment, sustained the statute.[13] The Court of Appeals for the Eighth Circuit reversed.[14] It applied a strict scrutiny test, which meant that in order for a state to pass a contribution limitation, the state must prove that it has both a "compelling interest" and that the means are "narrowly tailored" to the goal desired.[15] That court stated that it did not find Missouri's proposed interest in avoiding corruption, or the appearance of it, sufficient.[16] It stated that even though the Supreme Court in *Buckley v. Valeo*[17] found corruption in 1972, Missouri had the obligation to show that the same problems currently existed in Missouri.[18]

The court then examined the second prong of the strict scrutiny test: whether the contribution limits were sufficiently tailored to curtail

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6. *See* MO. ANN. STAT. § 130.032(1) (West 1997 & Supp. 2001).

7. *Nixon*, 528 U.S. at 382. The statute read: "to elect an individual to the office of governor, lieutenant governor, . . . state auditor or attorney general, the amount of contributions made by or accepted from any person other than the candidate in any one election shall not exceed one thousand dollars." *See id.* (examining MO. ANN. STAT. § 130.032(1)). When this case was filed, contribution limits ranged from $275 to $1,075. *See id.* at 383 (stating that limits ranged from $275 for contributions to candidates for state representatives or for any office with a constituency fewer than 100,000 to $1,075 to candidates for statewide office including state auditor and for any office where the population was greater than 250,000 people).

8. *Id.* at 383.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Shrink Mo. Gov't PAC v. Adams, 5 F. Supp. 2d 734, 741-42 (E.D. Mo. 1998) (holding that there was enough support for the idea that generous contributions raised suspicions of influence and undermined citizens' confidence in the integrity of the government, and that the limitation amount was not unconstitutional under the federal standard even when failing to take inflation into account).

14. Shrink Mo. Gov't PAC v. Adams, 161 F.3d 519, 520 (8th Cir. 1998).

15. *Id.* at 521.

16. *Id.* at 522.

17. 424 U.S. 1 (1976).

18. *See Shrink*, 161 F. 3d at 521-22 (stating that the only evidence of corruption was an affidavit by a state legislator).

corruption or the appearance of it.[19] It found that the limits were constitutionally fatal because when compared to the limits in *Buckley* they were simply "too low to allow meaningful participation in protected political speech and association."[20] Given that many states limit campaign contributions,[21] the Supreme Court of the United States granted certiorari[22] in order to analyze the Eighth Circuit's decision to apply the federal standard to the state level.[23] The Supreme Court *held* that the statute did not violate the First and Fourteenth Amendments.[24]

II. LEGAL BACKGROUND

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble."[25] In 1971, Congress passed an "intricate statutory scheme"[26] known as the Federal Election Campaign Act (FECA).[27] The Court has had difficulty deciding how to analyze campaign finance laws because while some justices find that speech, association, and equal protection are the primary constitutional interests associated with such laws, others find that the laws have implicated only property interests.[28]

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19. *Id.* at 522.

20. *Id.* at 523 (quoting Day v. Halahan, 34 F.3d 1356, 1366 (8th Cir. 1994)).

21. *See generally* EDWARD D. FEIGENBAUM & JAMES A. PALMER, FEDERAL ELECTION COMMISSION, CAMPAIGN FINANCE LAW 98 (1998).

22. Nixon v. Shrink Mo. Gov't PAC, 525 U.S. 1121, 1121 (1999).

23. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 337, 385 (2000).

24. *Id.* at 396-97.

25. U.S. CONST. amend. I.

26. Buckley v. Valeo, 424 U.S. 1, 12-13 (1976).

27. *Id.* at 13. The 1971 Act was amended in 1974. *Id.* at 6.

28. *See id.* at 58-59 (holding that the FECA's expenditure restriction is unconstitutional on First Amendment freedom of speech grounds). Justice White, dissenting, compared the expenditure restriction to property-oriented restrictions such as compulsory bargaining, taxation, antitrust laws, and general price controls. *Id.* at 262-63.

A. *BUCKLEY V. VALEO*

The core case from a progeny of cases, which developed the test that regulates the FECA as well as most campaign finance reform that implicates the First Amendment, is *Buckley v. Valeo*.[29] *Buckley* dealt with four broad issues raised by the FECA: individual contribution and expenditure limitations,[30] public disclosure laws of certain contributions, public funding for presidential campaigns, and the establishment of the Federal Election Commission (FEC).[31] The issues relevant to this legal analysis deal primarily with the first section of that opinion,[32] particularly with the analysis of the individual contributions[33] and expenditure restrictions.[34]

The Court found that these restrictions "operate in an area of the most fundamental First Amendment activities [because they affect the]

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29. 424 U.S. 1 (1976).

30. 18 U.S.C. § 608(b)(1), (3) (Supp. IV 1974). This is a provision of the Federal Election Campaign Act of 1971, 86 Stat. 3 as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263 (limiting contributions by individuals to any single candidate for federal office to $1,000 per election).

31. *Buckley*, 424 U.S. at 7.

32. *Id.*

33. *Id.* at 145-46 (citing the FECA at 2 U.S.C. § 431(e) (Supp. IV 1974)).

> [A] "contribution" (1) means a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of—(A) influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party; or (B) influencing the result of an election held for the expression of a preference for the nomination of persons for election to the office of President of the United States; (2) means a contract, promise, or agreement, expressed or implied, whether or not legally enforceable, to make a contribution for such purposes; (3) means funds received by a political committee which are transferred to such committee from another political committee or other source; (4) means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose . . .

2 U.S.C. § 431(e) (Supp. IV 1974).

34. *Buckley*, 424 U.S. at 147-48 (citing the FECA at 2 U.S.C. § 431(f) (Supp. IV 1974)).

> [An] "expenditure" (1) means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for the purpose of—(A) influencing the nomination for election, or the election, of any person to Federal office, or to the office of presidential and vice presidential elector; or (B) influencing the results of a primary election held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States; (2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; (3) means the transfer of funds by a political committee to another political committee . . .

2 U.S.C. § 431(f) (Supp. IV 1974); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 381-82 (2000) (stating that an issue in *Nixon* was whether *Buckley's* contribution guidelines applied to state candidates).

[d]iscussion of public issues and debate on the qualifications of candidates [which] are integral to the operation of the system of government established by our Constitution."[35] To determine whether the expenditure and contribution limitations of the FECA violated the First Amendment, the Court first decided which test to apply.[36]

The Court began by finding that the *United States v. O'Brien*[37] test,[38] known as "intermediate scrutiny," was not an appropriate test[39] because the contribution and expenditure limitations in the FECA were not the same as the limitation on conduct that was upheld in *O'Brien*.[40] There was a distinction between the scrutiny in *O'Brien* and *Buckley* because spending money is not the same type of conduct as destroying a draft card.[41] The Court explained that some communication derived from money involves only speech, some involves only conduct, and some involves both.[42] The Court added that the Constitution applies most to conduct of campaigns for political office.[43] Rather than applying the *O'Brien* test or "time, place, and manner regulations," the Court in *Buckley* looked to develop a new test.[44] It began this process by examining exactly how contributions and expenditures restrict speech.[45]

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35. *Buckley*, 424 U.S. at 14.

36. *Id.* at 16.

37. 391 U.S. 367 (1968).

38. *O'Brien*, 391 U.S. at 377. The test is:

> a government regulation is sufficiently justified if it . . . furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on [the] alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

39. *See Buckley*, 424 U.S. at 16. The lower Court of Appeals for the District of Columbia applied *O'Brien* scrutiny because it found that contribution and expenditure restrictions were not infringements on speech but rather regulated non-speech conduct. *Id.* The court found that the restrictions had only an incidental effect on speech and that the law did not restrict speech any more than was necessary. *Id.*

40. *Id.* The Court also expressly stated that the similar standard of review applied to "time, place, and manner restrictions" did not apply. *Id.* at 18 (stating that there is an important difference between picketing and a newspaper column because picketing was conduct intertwined with both association as well as expression, but the newspaper was pure expression involving pure speech without conduct). The Court stated the principal difference between "time, place, and manner restrictions" and the law in *Buckley* was that this law imposed "direct quantity restrictions of political communication and association." *Id.*; *see also* Cox v. Louisiana, 379 U.S. 536, 558 (1965) ("It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that . . . discretion is exercised with uniformity . . . free from . . . discrimination . . . and . . . consistent.").

41. *Buckley*, 424 U.S. at 16.

42. *Id.*

43. *Id.* at 14-15.

44. *Id.* at 14-22. The Court needed a new test because rational basis, intermediate, and traditional strict scrutiny did not fit the unique infringement on speech that contribution and expenditure restrictions triggered. *Id.*

45. *Id.* at 19.

First, the Court distinguished expenditures in a campaign from contributions to a campaign.[46] It found that a limitation on how much a person or group could spend on measures to communicate a message directly decreased the "quantity of expression."[47] It stated that this was because communication in today's world required spending money.[48] On the other hand, it stated that limiting contributions does not substantially impair the expression of political speech.[49] The Court found that reducing the amount of money a group or person can contribute does not directly reduce communication because the contribution is "symbolic expression" that does not prevent the person or group from promoting candidates or issues.[50]

The Court also stated that there was an important difference between contribution and expenditure restrictions when analyzing them under the freedom of association guarantees.[51] It found that contribution restraints were less of a burden on this freedom than restrictions on expenditures.[52] It reasoned that while expenditure limitations would impede an association's ability to extend its message, a contribution restriction does not, to the same degree, deter speech.[53] A contribution restriction does not deter speech because it does not prevent the contributor from becoming a member of any association or helping a candidate personally.[54] The Court, before proceeding into further examination of contribution and expenditure limitations, concluded that while both limitations involved First Amendment interests, expenditure restrictions were more severe.[55]

Next, the Court developed a special First Amendment test for contribution limits.[56] It stated that even though limits on the right to associate will be analyzed under the strictest scrutiny,[57] the right to associate is not absolute.[58] This special test stated "[e]ven a 'significant interference with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and

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46. *Id.* at 19-20.
47. *Id.* at 19.
48. *Id.*
49. *Id.* at 21.
50. *Id.* at 21-22.
51. *Id.* at 22.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 23.
56. *Id.* at 25.
57. *Id.* (citing NAACP v. Alabama, 357 U.S. 449, 460-61 (1958)).
58. *Id.* (citing CSC v. Letter Carriers 413 U.S. 548, 567 (1973)).

employs means closely drawn to avoid unnecessary abridgement of associational freedoms."[59]

The Court took the above stated test and first examined the three proposed interests offered by the government to determine if those interests were sufficient.[60] The main purpose of the FECA, the government argued, was the "prevention of corruption," whether real or imagined.[61] The two secondary interests proposed were: (1) to equalize the citizen's ability to affect the outcome of the election[62] and (2) to stop the expanding amount of money being spent in the elections and therefore open access to elections to more candidates with less money.[63]

The Court stated that the two ancillary interests need not be examined because the proposed main interest was sufficient in itself.[64] The Court found this interest sufficiently important because the problem of corruption, whether real or perceived, was not "illusory."[65] Also, the danger of "quid pro quo arrangements" as well as the danger to "fair and effective government" was enough to qualify it as a sufficiently important interest.[66]

The Court then examined Appellants'[67] argument that both bribery laws and disclosure laws were less restrictive means of discouraging these "quid pro quo arrangements."[68] In rejecting this argument, the Court stated that bribery laws only focused on the "blatant and specific" examples of those arrangements and that Congress should be given leeway to deal with the reality or appearance of corruption.[69] The Court found that the FECA's contribution restrictions did not "to any material degree" discourage communication of candidates or issues.[70]

The Court then looked at the issue of whether the provisions challenged in the FECA utilized means closely drawn to the FECA's objectives.[71] It acknowledged that when a donor made a large donation that did not mean the donor intended to influence the candidate;

59. *Id.*
60. *Id.* at 25-26.
61. *Id.*
62. *Id.* This was done by limiting the effect the wealthy could have in the election process. *Id.*
63. *Id.*
64. *Id.* at 26.
65. *Id.* at 27.
66. *Id.* (quoting CSC v. Letter Carriers, 413 U.S. 548, 565 (1973)).
67. The Appellants were a diverse group of individuals and organizations; they included a candidate for the U.S. Presidency, a U.S. Senator who was seeking re-election, a potential contributor, the Committee for a Constitutional Presidency, the New York Conservative Party and the New York Civil Liberties Union, the Mississippi Republican Party, the Libertarian Party, the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc. *Id.* at 7-8.
68. *Id.* at 27.
69. *Id.* at 27-28.
70. *Id.* at 29.
71. *Id.*

however, it was difficult to isolate "suspect contributions."[72] Therefore Congress was justified in its conclusion that the link from contributions to direct action was complex if not, in many instances, impossible to prove.[73] It also found that a $1,000 restriction was not unreasonably low because Congress did not have to fine tune the amount.[74]

The Court also examined the expenditure constraints that the FECA imposed.[75] The Court found that neither the main interest offered by the government, curtailing corruption or the appearance of it, nor the secondary interest, "equalizing" the influence of individuals and groups, was sufficient and struck down the expenditure limitations.[76] The interests were insufficient to justify the expenditure restriction because the restriction "preclude[d] most associations from effectively amplifying the voice of their adherents" and at the same time interfered with their freedom of association, thus creating a more significant restraint than contribution limitations.[77]

Chief Justice Burger, who concurred in part and dissented in part, stated that he would strike down the contribution limitations for the same reason that the majority struck down the expenditure restrictions.[78] He argued that the contribution limitations were too restrictive.[79] He suggested that both contribution and expenditure limitations would, in certain circumstances, restrict the same political activity.[80]

Justice White, in a separate concurrence, asserted that what the FECA restricted was not speech, but rather money.[81] Like Chief Justice Burger, he found the majority's reasoning "strange" when it distinguished contribution restrictions from expenditure restrictions.[82] He stated:

> Let us suppose that each of two brothers spends $1 million on TV spot announcements that he has individually prepared and in which he appears, urging the election of the same named candidate in identical words. One brother has sought and obtained the approval of the candidate; the other has not.

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72. *Id.* at 29-30.

73. *Id.*

74. *Id.* at 30. The Court noted the lower court's comment that "a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* (citing Buckley v. Valeo, 519 F.2d 821, 842 (D.C. Cir. 1975). The Supreme Court went on to state "[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.*

75. *Id.* at 39.

76. *Id.* at 49-51. The Court's decision was based on the same reasoning it used to distinguish expenditures and contributions. *Id.* at 19-23.

77. *Id.* at 22-23 (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958)).

78. *Id.* at 235 (Burger, C.J., concurring in part and dissenting in part).

79. *Id.*

80. *Id.* at 243.

81. *Id.* at 259-60 (White, J., concurring in part and dissenting in part).

82. *Id.* at 261.

> The former may validly be prosecuted under [section] 608(e); under the Court's view, the latter may not, even though the candidate could scarcely help knowing and appreciating the expensive favor.[83]

Justice White stated that he did not perceive any distinction between the two, at least for "constitutional purposes."[84] He would have found that, like contribution limitations, expenditure limitations were also constitutional.[85]

B. DEVELOPMENTS FOLLOWING *BUCKLEY*

Since the *Buckley* decision, the Court has explicitly reiterated and clarified that different standards govern contributions and expenditures by holding that "restrictions on contributions require less compelling justification than restrictions on independent spending."[86] The Court has extensively examined the application of the different standards in cases since the ruling in *Buckley*.[87]

1. *Federal Election Commission v. National Conservative Political Action Committee*

In *Federal Election Commission v. National Conservative Political Action Committee*,[88] the Supreme Court for the first time took up the issue of whether 26 U.S.C. § 9012(f),[89] which limited expenditures by PACs, was constitutional.[90] National Conservative Political Action

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83. *Id.*

84. *Id.* Justice White stated that it did not make sense to limit the amounts an individual may give to a candidate but not limit the amount that candidate can spend. *Id.* The candidate will recognize the money spent on his behalf whether he knows of how it was spent or not. *Id.*

85. *Id.* at 266.

86. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387 (2000).

87. *See infra* Parts II.B.1-4.

88. 470 U.S. 480 (1985).

89. *Fed. Election Comm'n*, 470 U.S. at 491 (citing Presidential Election Campaign Fund Act, Pub. L. No. 92-178, 85 Stat. 563 (1971) (codified as amended 26 U.S.C. §§ 9001-9013 (1974)). This section was part of the FUND Act that, like the FECA, regulated presidential campaigns. *Id.* "The Presidential Election Campaign Fund Act (Fund Act), 26 U.S.C. § 9001 *et seq.*, offers the Presidential candidates of major political parties the option of receiving public financing for their general election campaigns." *Id.* at 482. Section 9012(f) stated:

> [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

Id. at 491.

90. *Id.* at 491-92.

Committee (NCPAC) was a political committee that solicited funds for former President Reagan's 1984 presidential reelection.[91]

The Court found that PACs were entitled to just as much First Amendment protection as individuals.[92] The Court employed *Buckley* in support of this premise.[93] It made the analogy that a PAC is to a supporter of a candidate as an amplifier is to a speaker in a public hall.[94] The point being that pooling of financial resources increased speech the same way an amplifier extended the message of a public speaker.[95]

The Court then examined the purpose behind § 9012(f), which was to curtail potential corruption, and found that the fact that PACs typically spend more money than individuals did not consequently mean that their potential for corruption was greater.[96] The Court stated that "hypothetically," even if PACs were *linked* to corruption, § 9012(f) was still overbroad because it would restrict large scale PACs' contributions the same as contributions from smaller casual dialogue groups.[97] Thus, the Court held that § 9012(f) was unconstitutionally overbroad and therefore violated the First Amendment.[98]

In his dissent, Justice White again criticized *Buckley*.[99] He stated that he thought *Buckley* was wrongly decided because limitations on both contributions and expenditures were supported by a valid governmental interest.[100] He argued that, "[t]he First Amendment protects the right to speak, not the right to spend."[101] He asserted that giving money to an organization was not identical to speech.[102] This, Justice White found, was because there is an important difference between spending your own money on a candidate and giving your money to someone else to spend on like political views.[103]

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91. *Id.* at 490-91.
92. *Id.* at 496.
93. *Id.* at 493 (citing Buckley v. Valeo, 424 U.S. 1, 14 (1976)).
94. *Id.*
95. *Id.*
96. *Id.* at 497-98 (stating that the Court was never informed of what the "corruption" consisted of).
97. *Id.* at 498.
98. *Id.* at 501.
99. *Id.* at 507 (White, J., dissenting).
100. *Id.* (stating again that the interest mentioned was real or apparent corruption). Justice White would have found that § 9012(f) resembled the contribution statute challenged in *Buckley*, and therefore he would have upheld it. *Id.* at 508.
101. *Id.* (stating also that he could not "accept the identification of speech with its antecedents" because such a method could "be used to find a First Amendment right to a job or to a minimum wage to 'produce' the money to 'produce' the speech").
102. *Id.* at 513.
103. *Id.*

He agreed with the majority that expenditures in this case did "produce" speech but that they did only that, "produce" it.[104] This was different from actually being speech.[105] Justice White stated that he also followed the majority's view in that it was difficult to differentiate between "1,000 $25 contributions and . . . 100,000 $25 contributions," but that this was the reason § 9012(f) was not overbroad.[106]

2. *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,[107] the Court held that an expenditure must constitute "express advocacy" to be scrutinized under § 441b of FECA.[108] The Court examined the issue of whether a corporation's publication and distribution of a newsletter, urging readers to vote pro-life in an election, was "express advocacy" and thus violated § 441b of the FECA.[109] This section prohibited direct expenditure of corporate funds in connection with election to public office.[110] The Court also questioned the constitutionality of § 441b as applied to Massachusetts Citizens for Life (MCFL).[111]

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104. *Id.* at 508.
105. *Id.*
106. *Id.* at 516 n.11.
107. 479 U.S. 238 (1986).
108. *Fed. Election Comm'n*, 479 U.S. at 249. 2 U.S.C. § 441b(2) states in part:

> [T]he term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include
>
> (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;
> (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and
> (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

Federal Election Campaigns Disclosure of Federal Campaign Funds, Pub. L. No. 92-225, 90 Stat. 490 (codified as amended at 2 U.S.C. § 441b(2) (1980)).
109. *Fed. Election Comm'n*, 479 U.S. at 249.
110. *Id.*
111. *Id.*

The Court found that the "Special Edition" publication by MCFL did "expressly advocate" and thus violated § 441b.[112] Then the Court analyzed whether the statute was constitutional as applied to MCFL.[113] The Court asserted that when a statute inhibits speech it must be justified by a "compelling state interest."[114] It asserted that the proposed interest, a broad rule preventing all corporations from corruption or the appearance of it, was not enough.[115] Therefore, the Court held that the section violated the First Amendment in this case because Congress lacked a compelling justification for it.[116]

3. *Colorado Republican Federal Campaign Committee v. Federal Election Commission*

In *Colorado Republican Federal Campaign Committee v. Federal Election Commission (Colorado I)*,[117] the Court for the first time reviewed expenditure restrictions against parties.[118] The Court faced the question of whether 2 U.S.C. § 441a(d)(3), a provision of the FECA passed in 1971 and amended in 1974, which limited expenditures by PACs, was constitutional as applied to the case.[119]

Colorado Republican Federal Campaign Committee (CRFCC) bought radio advertisements attacking a congressman.[120] The Federal Election Commission (FEC) brought a complaint against CRFCC for violating § 441a(d)(3).[121] The Court stated that the interest put forth in

112. *Id.* at 251.

113. *Id.* The Court found that the Massachusetts Citizens for Life's (MCFL) "Special Edition" publication fell within the Congressional intent of § 441b for three reasons. *Id.* at 243. The first was based on the legislative history and purpose of the provision. *Id.* at 246-47. The second was based on its examination of the language of the statute. *Id.* at 248-50. The third reason involved the way the edition was put together. *Id.* at 250-51. This separated it from a "regular newsletter," which would be exempt. *Id.* at 245-50.

114. *Id.* at 256.

115. *Id.* at 263 (stating the wish for a "bright-line" rule was not enough). The Court explained that MCFL was not a "profit-making enterprise" trying to seek an unfair advantage in the "political arena," but rather, a political organization that just happened to be incorporated. *Id.* at 258-59. In other words, the Court stated § 441b would not be constitutional if applied to a corporation that: (1) was begun to promote a political ideology; (2) "has no shareholders or other persons [with claims to] assets or earnings"; and (3) "was not established by a business corporation or a labor union." *Id.* at 263-64.

116. *Id.*

117. 518 U.S. 604 (1996).

118. *Colorado I*, 518 U.S. at 628.

119. *Id.* at 608. The provision prohibited both "persons" and any "multi[-]candidate political committee" from directly or indirectly making contributions of various limits. *Id.* at 610; *see also* 2 U.S.C. § 441a(a)(1)-(3) (1994).

120. *Colorado I*, 518 U.S. at 612.

121. *Id.* (stating that the FEC agreed with the Democratic Party "that the purchase of radio time was an 'expenditure in connection with the general election campaign of a candidate for Federal office' [that] exceeded the Party expenditure . . . limits" (quoting 2 U.S.C. § 441a(d)(3) (1994))).

favor of the regulation, to prevent corruption or the appearance of it, was not constitutionally sufficient.[122] It was an insufficient interest because there was no "coordination between the candidate and the source of the expenditure."[123] It stated that the interest would be similarly insufficient if Congress' intent was to prevent what it thought was uneconomical and unnecessary campaign spending.[124]

The Court then distinguished what it saw as an independent expenditure from a coordinated one.[125] The Court stated the FEC's determination of whether an expenditure was independent or coordinated would not be a definitive label for "constitutional purposes."[126] It found no evidence of knowledge of the expenditure by the candidate and therefore found that it was indeed an independent expenditure.[127] The Court therefore held that the First Amendment prohibited the expenditure restraint.[128]

In the one concurrence and the two dissents there were continued criticisms of *Buckley*.[129] Justice Kennedy, in his concurrence, criticized both *Buckley*'s and the majority's different treatment of contributions and expenditures, finding that whether a party was spending money in "cooperation, consultation, or concert with" a candidate or not did not matter because the effect was the same—a restriction of speech.[130] He argued that a "[p]arty spending 'in cooperation, consultation, or concert with' a candidate . . . is indistinguishable in substance from expenditures by the candidate or his campaign committee."[131]

Justice Thomas found that the contribution versus expenditure distinction developed in *Buckley* should be overruled.[132] He stated that there was only one difference between a contribution and an expenditure: a contribution will pass through an intermediary whereas an expen-

122. *Id.* at 617.

123. *Id.*

124. *Id.* at 618.

125. *Id.* at 621. The Court found that there was an important distinction between the two types of expenditures with the basic difference being whether the person doing the spending had informed the candidate or not. *Id.*

126. *Id.* at 622 (stating that "the government 'cannot foreclose the exercise of constitutional rights by mere labels'" (quoting NAACP v. Button, 371 U.S. 415, 429 (1963))).

127. *Id.* at 623-24. Because the lower court did not examine the case in light of it being an independent expenditure, the Court remanded the case for further proceedings. *Id.* at 625.

128. *Id.* The Court stated "[T]he First Amendment prohibits the application of this provision to the kind of expenditure at issue here—an expenditure that the political party has made independently, without coordination with any canditate." *Id.* at 608.

129. *Id.* at 627-50.

130. *Id.* at 629-30 (quoting Buckley v. Valeo, 424 U.S.1, 21 (1976)) (Kennedy, J., concurring in part and dissenting in part).

131. *Id.* at 630.

132. *Id.* at 636 (citing Chief Justice Burger's proposition in *Buckley v. Valeo*, 424 U.S.1, 241 (1976) that "contributions and expenditures are two sides of the same First Amendment coin") (Thomas, J., concurring in part and dissenting in part).

diture might not.[133] To give an example, Justice Thomas stated "[a] campaign poster that reads simply 'We support candidate Smith' does not seem to me any less deserving of constitutional protection than one that reads 'We support candidate Smith because we like his position on agriculture subsidies.'"[134] He asserted that when an individual gives money to an organization, that individual strengthens that organization's ability to communicate a message.[135] This, Justice Thomas argued, allowed for "free discussion of governmental affairs."[136] He argued that this single distinction "lacks constitutional significance."[137]

Justice Stevens dissented and stated that there were three reasons, similar to those given throughout the *Buckley* decision, why all money should be treated like contributions.[138] The first was that there was a "special interdependency" between candidates and parties that opened itself up to the possible danger of improper influence.[139] The second reason was that the restrictions in the FECA supplement each other, that is, the parts, when put together, serve a larger purpose.[140] The third reason, first discussed by Justice White,[141] was that money is not always the same as speech.[142] Justice Stevens also asserted that Congress has more "wisdom and experience" to deal with the campaign finance issue.[143]

4. *Federal Election Commission v. Colorado Republican Federal Campaign Committee*

On June 25, 2001, the United States Supreme Court handed down *Federal Election Commission v. Colorado Republican Federal Campaign Committee* (*Colorado II*).[144] *Colorado I* dealt with whether FECA's spending restrictions "were unconstitutional as applied to Colorado's Republican Party's independent expenditures in connection with a senatorial campaign."[145] *Colorado II* was a facial challenge to

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133. *Id.* at 638 (stating also that "[a] contribution is simply an indirect expenditure; though contributions and expenditures may thus differ in form, they do not differ in substance").
134. *Id.* at 639-40.
135. *Id.* at 636.
136. *Id.* (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).
137. *Id.*
138. *Id.* at 648 (Stevens, J., dissenting).
139. *Id.* at 648-49.
140. *Id.* at 649.
141. *See* Buckley v. Valeo, 424 U.S. 1, 263 (1976) (noting that "money is not always equivalent to or used for speech") (White, J., concurring in part and dissenting in part).
142. Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n (*Colorado I*), 518 U.S. 604, 649 (1996).
143. *Id.* at 650.
144. 121 S. Ct. 2351 (2001).
145. *Colorado II*, 121 S. Ct. at 2356; *see also supra* Part II.B.3.

the limits on parties' "coordinated expenditures."[146] The issue in *Colorado II* was "whether the First Amendment allows coordinated election expenditures by parties to be treated functionally as contributions, the way coordinated expenditures by other entities are treated."[147] The party argued that because its speech was political its spending, whether coordinated or not, should be free from the FECA's restrictions.[148] The party believed that its character, that of being a party, should create a stricter scrutiny of any efforts to regulate it, thus treating it differently from individuals or PACs.[149] However, the Government argued that:

> [i]f coordinated spending were unlimited, circumvention would increase: because coordinated spending is as effective as direct contributions in supporting a candidate, an increased opportunity for coordinated spending would aggravate the use of a party to funnel money to a candidate from individuals and nonparty groups, who would thus bypass the contribution limits that *Buckley* upheld.[150]

The Court found that the party was not in an unique position.[151] The Court found that the party should be treated the same as individuals and PACs and that the appropriate scrutiny was whether the restriction was closely drawn to a sufficiently important government interest.[152] The Court found that the government's purpose in preventing abuses from unlimited coordinated spending was sufficient.[153] The Court also found that the restriction was closely drawn.[154] The Court rejected the arguments that there are better safeguards, such as the earmarking rule,[155] and the arguments that limitations on contributions to parties would be less restrictive than limits on coordinated expenditures.[156] In distinguishing *Colorado I*, the Court stated "the choice here [*Colorado II*] is not, as in *Buckley* and *Colorado I*, between a limit on pure contributions and pure expenditures. The choice is between limiting contributions and limiting expenditures whose special value as expenditures is

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146. *Colorado II*, 121 S. Ct. at 2356.
147. *Id.* at 2360.
148. *Id.* at 2360-61.
149. *Id.* at 2361.
150. *Id.* at 2361-62.
151. *Id.* at 2366.
152. *Id.* (citing Nixon v. Shrink Mo. Government PAC, 528 U.S. 377, 387-88 (2000)).
153. *Id.* at 2367.
154. *Id.* at 2369-71.
155. *Id.* at 2369-70. "[T]he earmarking rule of § 441a(a)(8) . . . provides that contributions that 'are in any way earmarked or otherwise directed through an intermediary or conduit to [a] candidate' are treated as contributions to the candidate." *Id.* at 2369.
156. *Id.* at 2370-71.

also the source of their power to corrupt."[157] The Court rejected the party's facial challenge and reversed the Tenth Circuit.[158]

5. *United States v. National Treasury Employees Union*

United States v. National Treasury Employees Union[159] is important in understanding the *Nixon* decision[160] because the Court thoroughly examined and analyzed the interest of curtailing corruption or the appearance of it.[161] In *National Treasury*, the Court dealt with whether the Ethics Reform Act of 1989, particularly § 501(b), violated the First Amendment by making it illegal for government employees to accept money in exchange for articles or speeches, even when the articles or speeches were not connected to their job.[162]

The Court stated that the standard was that "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation.'"[163] After acknowledging that the regulation was viewpoint neutral and that it inflicted a considerable burden on expression, the Court then applied this test to § 501(b).[164] It stated that since the preponderance of speech at issue did not involve government work-related topics and also occurred outside the place of work, § 501(b) failed the test.[165] Even though administrative efficiency was an important governmental interest, it was not sufficient.[166] The Court stated:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." . . . It must demonstrate that the recited

157. *Id.* at 2371.

158. *Id.*

159. 513 U.S. 454 (1995). It should be noted that this case was not directly related to the FECA. *See Nat'l Treasury*, 513 U.S. at 458-59 (1995) (stating that the provision being challenged was found in the Ethics Reform Act of 1989 which states that "[a]n individual may not receive any honorarium while that individual is a [m]ember, officer or employee").

160. *See generally* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

161. *See Nat'l Treasury*, 513 U.S. at 457-59.

162. *Id.*

163. *Id.* at 468 (quoting Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, 391 U.S. 563, 568 (1968)).

164. *Id.* at 468.

165. *Id.* at 470.

166. *Id.* at 473-74.

> harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[167]

The court concluded that the possible yield from the ban was insufficient and that § 501(b) was also "crudely crafted."[168]

6. *Conclusion of Case Law Since* Buckley

The current test for analyzing campaign finance regulation is that "[e]ven a 'significant interference with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."[169] Even though both contribution and expenditure limitations affect First Amendment interests, expenditure restrictions are treated more severely.[170] The interest in preventing corruption, whether real or perceived, is considered by the Court to be a "sufficiently important interest" for restricting contributions but not for restricting expenditures.[171] However, *National Treasury* established that recited harms must be real and not "merely conjectural."[172]

III. ANALYSIS

In *Nixon,* the Supreme Court of the United States decided the following two issues: (1) whether *Buckley* was applicable to state contribution limits to state political candidates and (2) whether the monetary limits set forth in *Buckley* are still applicable today.[173] In a plurality opinion written by Justice Souter and joined by Chief Justice Rehnquist and Justice O'Conner, the Court found: (1) that the *Buckley* test did apply to state contribution limits but (2) that the amount was not limited

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167. *Id.* at 475 (quoting Turner Broad. Sys. v. FCC, 512 U.S. 622, 664 (1994)). The Court also looked to previous statements from Justice Brandeis such as:

> [a] "reasonable" burden on expression requires a justification far stronger than mere speculation about serious harms. "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced."

Id. (quoting Whitney v. California, 274 U.S. 357, 376 (1927)).

168. *Id.* at 477.

169. Buckley v. Valeo, 424 U.S. 1, 25 (1976) (quoting Cousins v. Wigoda, 419 U.S. 477, 488 (1975)).

170. *Id.* at 23.

171. *Id.* at 26.

172. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 475 (1995).

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

by *Buckley*, and therefore the Court upheld Missouri's contribution limits.[174]

Justice Stevens concurred only as to the judgment.[175] Justice Breyer, joined by Justice Ginsburg, concurred in the judgment.[176] Justice Kennedy dissented.[177] Justice Thomas and Justice Scalia also dissented.[178]

A. PLURALITY OPINION

The Court first examined the issue of whether Missouri's statutory contribution limitations that applied to political action committees should be analyzed under the *Buckley* standard.[179] It found that *Buckley* applied.[180] The Court explained that contribution restrictions infringed on First Amendment freedoms of speech and association as well as Equal Protection guarantees of the Fourteenth Amendment[181] Since the First and Fourteenth Amendments were implicated, federal constitutional law applied; therefore, *Buckley* was ruling precedent.[182]

The standard that the Court created in *Buckley* was was neither that of *O'Brien* nor the "time, place, and manner" type.[183] The Court asserted once again that there was a difference between how contributions were treated versus expenditures.[184] It stated that while this distinction may not have been made clear in *Buckley*, it had explicitly recognized this distinction in subsequent case law.[185] Therefore, contribution limits would be sustained if the "[g]overnment demonstrated that

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174. *Id.* at 397-98.

175. *Id.* at 398 (Stevens, J., concurring). He found that the First Amendment was not applicable to this case because money is not speech and the rights in question were only property interests. *Id.*

176. *Id.* at 399 (Breyer, J., concurring). He would have found: (1) that the Court should balance the constitutional interest of the First Amendment speech and the constitutional interest of equalizing citizens' voices instead of trying to apply a rigid test (that is, strict scrutiny), and (2) that the Court may need to reexamine the distinctions between contribution restrictions and expenditure restrictions. *Id.* at 400-04.

177. *Id.* at 405 (Kennedy, J., dissenting). He found: (1) that the reason for treating contributions and expenditures differently was flawed, and he would strike both down, (2) that *Buckley* should be overruled, and (3) that the Court should have applied more "serious scrutiny" because of the seriousness of the First Amendment infringement at stake. *Id.* at 405-10.

178. *Id.* at 410 (Thomas, J., dissenting). He would: (1) use strict scrutiny, (2) find that Missouri failed both parts of this test because it did not have a sufficient interest and there were less restrictive alternatives, (3) find that the rational supporting the contribution/expenditure distinction was not reasonable, and (4) ultimately, overrule *Buckley*. *Id.* at 410-30.

179. *Id.* at 381-82.

180. *Id.* at 397 (stating that there was "no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern").

181. *Id.* at 385.

182. *Id.* at 387-88.

183. *Id.* at 386.

184. *Id.* at 386-87.

185. *Id.* at 387. *See generally* Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604 (1996).

contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'"[186] After clarifying the test for contribution restrictions, the Court then applied the test to examine the constitutionality of Missouri's statute.[187]

The Court first looked to the interest Missouri gave for establishing the statute.[188] It stated that Missouri's interest was similar to Congress' in *Buckley*.[189] That interest was to prevent corruption and the appearance of it from campaign contributions.[190] This was found to be a sufficient interest that the Court stated posed "no serious question."[191] The Court analyzed what the proof requirement was to pass this interest portion of the test.[192] It stated that the amount of evidence necessary to justify the interest would "vary up or down" depending on the "plausibility of the justification raised."[193]

It then reconciled the problem that *National Treasury*[194] presented.[195] *National Treasury* held that when the government restricts speech, the harms that it proposes to treat must be "real, not merely conjectural."[196] The problem in *Nixon* was that one of the interests proposed by Missouri was the "appearance of corruption."[197] The Court faced the problem of "mere conjecture" versus "the appearance of corruption."[198]

The Court asserted that there might be a need for evidence of actual corruption if Fredman and Shrink could cast doubt on the validity of the evidence admitted.[199] Fredman and Shrink, however, could only point to studies that demonstrated contributions did not lead directly to changes in the candidate's voting.[200] The Court found that there were other

186. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387-88 (citing Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

187. *Id.* at 390-97.

188. *Id.* at 390.

189. *Id.*

190. *Id.*

191. *Id.* ("Democracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.'" (quoting United States v. Miss. Valley Generating Co., 364 U.S. 520, 562 (1961))).

192. *Id.* at 391.

193. *Id.* For example, the Court stated that *Buckley* was scrutinized in the context of the disturbing problems with the 1972 election. *Id.*

194. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 475 (1995).

195. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 392 (2000).

196. *Nat'l Treasury*, 513 U.S. at 475 (quoting Turner Broad. Sys. v. FCC, 512 U.S. 622, 664 (1994)).

197. *Nixon*, 528 U.S. at 392.

198. *Id.*

199. *Id.* at 394.

200. *See id.* (stating that this was insufficient and finding that other studies pointed the opposite way).

studies that contradicted this.[201] It stated that in evaluating the clash of information, there was only modest evidence to doubt that contributions were actually corrupting our political system and very little evidence to question suspicion of corruption among voters.[202] The Court examined an assortment of Missouri's evidence and evidence cited by the district court's findings.[203] This included: Proposition A,[204] an affidavit from a state senator,[205] and various newspaper accounts and reports.[206] The Court found that this evidence was sufficient to demonstrate that the same congressional concerns that existed in *Buckley* were present in the passage of Missouri's law.[207]

The Court then examined the second issue of whether *Buckley* specified a permissible amount that contributions could be limited.[208] It stated that Missouri would have to have a sufficiently tailored statute to serve a legitimate interest in order for the statute to be constitutional.[209] It paralleled this case to that of *Buckley*, finding that there was no proof that the contribution limitations in Missouri's law would have a negative effect on the funding of a campaign or a political association.[210] The Court repeated the district court finding that since the statute at issue had become law, candidates for office were still able to receive enough

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201. *Id.*

202. *Id.* at 394-95.

203. *Id.* at 393-95.

204. *Id.* at 393-94 (quoting Carver v. Nixon, 882 F. Supp. 901, 905 (W.D. Mo. 1995), *rev'd*, 72 F.3d 633 (8th Cir. 1995), "[T]he statewide vote on Proposition A certainly attested to the perception relied upon here: 'an overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof.'"). But the Court also made clear that majority votes (referring to the proposition) do not defeat First Amendment protections. *Id.* at 394.

205. *See id.* at 393 (stating that the Court examined an affidavit from State Senator Wayne Goode, who was the co-chair for the Joint Committee for Campaign Finance Reform, which stated, "large contributions have 'the real potential to buy votes'").

206. *Id.* The Court looked to the district court findings of newspaper accounts that showed that big contributions supported inferences of improprieties. *Id.* One report noted that the state's treasurer made a decision to use a specific bank for most of Missouri's banking practices after that bank gave $20,000 to the treasurer's campaign. *Id.*

207. *Id.* at 395-96. The Court noted that the Eighth Circuit itself, while invalidating limits on Proposition A, identified clear improprieties between campaign contributions and Missouri officials. *See* Carver v. Nixon, 72 F.3d 633, 642 (8th Cir. 1995). Also in *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 393-94 (2000), the Court stated

> the Eighth Circuit . . . identified a $420,000 contribution to candidates in northern Missouri from a political action committee linked to an investment bank, and three scandals, including one in which a state representative "was accused of sponsoring legislation in exchange for kickbacks," and another in which Missouri's former attorney general pleaded guilty to charges of conspiracy to misuse of state property.

Id. (quoting Carver v. Nixon, 72 F.3d 633, 642 n.10 (8th Cir. 1995)).

208. *Nixon*, 528 U.S. at 395.

209. *Id.*

210. *Id.* at 395-96.

money to run effective campaigns.[211] The Court noted that even before the statute took effect, 97.62% of all contributors to the state auditor's campaign gave $2,000 or less.[212]

The Court clarified that *Buckley* never set a constitutionally permissible minimum contribution amount that could be restricted.[213] Rather, the Court explained, the test was, "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."[214] Therefore Missouri's statute was entirely constitutional.[215] The Court stated that there was no qualm about *Buckley's* appropriateness to govern this case.[216]

B. JUSTICE STEVENS' CONCURRENCE

Justice Stevens concurred in the judgment but argued that this case should not fall under First Amendment analysis because "[m]oney is property; it is not speech."[217] He would decide this case by using a property-based analysis.[218] Explaining his reasoning, Justice Stevens asserted, "[s]peech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail. . . . Money . . . has the power to pay . . . laborers to perform the same tasks."[219] He stated that it was wrong to assume that the First Amendment protected the use of money to accomplish goals in the same way it protected the use of ideas to complete those results.[220]

Justice Stevens stated that while the Constitution protected this property interest, a governmental regulation such as the one at issue should be viewed as a deprivation of liberty or property.[221] He argued that to rely on the First Amendment to invalidate campaign finance

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211. *Id.* at 396; *see also* Shrink Mo. Gov't PAC v. Adams, 5 F. Supp. 2d 734, 741 (E.D. Mo. 1998) (stating that candidates would still be able to put together impressive amounts of money for their campaigns).

212. *See Nixon*, 528 U.S. at 396 (explaining that Fredman only identified one contributor that would have given him more than the $1,075 capped by the statute).

213. *Id.*

214. *Id.* at 397 (stating that the cases after *Buckley* should not be viewed as a "narrow question about the power of the dollar").

215. *Id.* at 397-98. This was constitutional even though the $1,000 contribution in *Buckley* was worth far more in value today than the $1,075 limit sought by Missouri because of inflation. *Id.* at 396. In other words, the actual limited contribution amount is much more severe than the one allowed in *Buckley*. *Id.* at 396-97.

216. *Id.* at 397-98.

217. *Id.* at 398 (Stevens, J., concurring).

218. *Id.* at 399.

219. *Id.* at 398.

220. *Id.*

221. *Id.* at 398-99 (citing Moore v. East Cleveland, 431 U.S. 494, 513 (1977)).

regulations, such as in the case at hand, was inaccurate.[222] Justice Stevens asserted that this case, like that of *Moore v. East Cleveland*,[223] involved property rights that were "not entitled to the same protection as the right to say what one pleases."[224] Justice Stevens saw *Moore* as a case analogous to the one at hand as an application of a misguided analysis.[225]

C. JUSTICE BREYER'S CONCURRENCE

Justice Breyer, joined by Justice Ginsburg, wrote separately to address the question of what the appropriate standard of test should be.[226] He agreed that the majority was correct in the outcome.[227] He argued that this case was one "where constitutionally protected interests lie on both sides of the legal equation."[228] Justice Breyer asserted that just because the words "strict scrutiny" are brought up in the application of a test that does not mean the law at issue is presumptively unconstitutional.[229] He agreed with Justice Stevens that money was not speech,[230] but he disagreed on the applicable test because "money enables speech."[231] Because he found that money enabled speech, the First Amendment was of direct concern.[232] Justice Breyer asserted that the "Constitution 'demands' that each citizen have 'an equally effective voice.'"[233] Contribution restrictions allow for a more just process because they equalize the voice of an individual so that money does not play the decisive factor.[234] He recognized that *Buckley* used language

222. *See id.* at 399 (stating that it would be, "the functional equivalent of the Court's candid reliance on the doctrine of substantive due process as articulated in the two prevailing opinions in *Moore v. East Cleveland*").

223. 431 U.S. 494 (1977).

224. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 399 (2000).

225. *See Moore*, 431 U.S. at 496-97. Inez Moore was convicted of violating a housing ordinance that limited occupancy of her unit to family. *Id.* The ordinance recognized only certain related individuals as family. *Id.* The Court held that the ordinance violated the substantive due process doctrine of the Fourteenth Amendment because it made it a crime for Moore to live with her son and grandsons. *Id.* at 506. Justice Stevens asserted that "[t]elling a grandmother that she may not use her property to provide shelter to a grandchild—or to hire mercenaries to work in that grandchild's campaign for public office," brings up vital constitutional concerns that are unconnected to the First Amendment. *See Nixon*, 528 U.S. at 399.

226. *Nixon*, 528 U.S. at 399-400 (Breyer, J., concurring).

227. *Id.* at 400.

228. *Id.*

229. *See id.* (finding that it was not possible that "mechanical application of the tests associated with 'strict scrutiny'—the tests of 'compelling interests' and 'least restrictive means'—will properly resolve the difficult constitutional problem that campaign finance statutes pose").

230. *Id.*

231. *See id.* (stating that it helped with communicating a political point and drawing votes of equally minded voters, therefore affecting both freedoms of speech and association).

232. *Id.* at 401.

233. *Id.*

234. *Id.* at 401-02.

that could have been interpreted to mean that there was a presumption to find certain contribution laws unconstitutional.[235]

Justice Breyer argued that, in reality, when the Court has dealt with contribution and expenditure restrictions, it has not used a simple test but rather "balanced" First Amendment interests against the need for a free, democratic process.[236] He asserted "[t]he Constitution[[237]] often permits restrictions on the speech of some in order to prevent a few from drowning out the many."[238] In practice, this means finding whether a statute disproportionately burdens one interest over the other.[239]

Justice Breyer would find that this was exactly the sort of balancing that has been done with various other "competing constitutional interests" such as privacy,[240] First Amendment interests of listeners or viewers,[241] and First Amendment interests involved in the broadcast media.[242] He asserted that the reason the Missouri statute was valid was because it treated these Constitutional interests equally.[243]

Justice Breyer stated that while he did not believe the Missouri statutory limit was too low,[244] he acknowledged that the monetary limit did raise this question.[245] He asserted that when dealing with campaign finance reform, the Court would be better suited to leave the issue to the political judgment of the legislature because it was more knowledgeable about the problem.[246] He agreed with Justice Kennedy's suggestion,[247] that if the Court would not allow Congress to come up with its own

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235. *Id.* Justice Breyer reiterated that *Buckley* explicitly rejected the proposition that it was acceptable to limit the speech of some to enlarge the voice of others. *See* Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

236. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402-03 (2000).

237. *See id.* at 402 (stating that the Constitution restricts speech, as in Article 1, § 6 which limits the amount of time members of Congress can debate so that everyone has "an equal opportunity to express his or her views"). The concurrence also provided the example of limited ballot access. *Id.*

238. *Id.*

239. *Id.* at 402.

240. *See id.* at 403 (citing Frisby v. Schultz, 487 U.S. 474, 485-88 (1988), "balancing [the] rights of privacy and expression").

241. *See id.* (citing Turner Broad. Sys. v. FCC, 520 U.S. 180, 192-94, (1997), "recognizing the speech interests of both viewers and cable operators").

242. *See id.* (citing CBS v. Democratic Nat'l Comm., 412 U.S. 94, 102-03 (1973), finding that this "is a task of great delicacy and difficulty").

243. *Id.* at 403-04. Justice Breyer also asserted that this way of balancing interests was similar to how other countries deal with the problem. *Id.* at 403 (citing to Bowman v. United Kingdom (1998) 26 Eur. H. R. Rep. 1; *Libman v. Quebec* (A.G.) (1997), 151 D.L.R. (4th) 385 (S.C.C.)). Both *Bowman* and *Libman* demanded proportionality in the campaign finance context. *Id.*

244. MO. REV. STAT. § 130.032(1) & (2) (2001) (showing that the statutory limit was $1,075 or $378 if figured in 1976 dollars).

245. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 404 (2000) (stating that any contribution limit law would narrow the field of challengers to "some degree").

246. *Id.* at 403-04.

247. *Id.* at 404-05.

solutions to campaign finance, it might be time to take another look at *Buckley*.[248]

D. JUSTICE KENNEDY'S DISSENT

Justice Kennedy dissented and would rely on the traditional First Amendment analysis of strict scrutiny.[249] He found the Court's approach "unacceptable for a case announcing a rule that suppresses one of our most essential and prevalent forms of political speech."[250] He argued that it was time to face the problems associated with the *Buckley* decision.[251] He would have relied on the traditional First Amendment standards.[252]

Justice Kennedy argued that the analysis begun in *Buckley* "set the stage for a new kind of speech [covert speech] to enter the political system."[253] He specifically described the Court's creation of "covert speech" as having "forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits, limits which take no account of rising campaign costs."[254] The term "covert speech" is used to describe the creative efforts put into concealing the real purpose of speech.[255] The main type of covert speech is "soft money,"[256] which is

248. *Id.* Justice Kennedy found that it might be time to extinguish the distinction between how contributions and expenditures are treated. *Id.* at 409 (Kennedy, J., dissenting). He agreed with Justice Thomas' assertion that the reasoning in different treatment is based on a "faulty distinction." *See id.* at 413 (Thomas, J., dissenting).

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

250. *Id.* at 405.

251. *Id.* at 406. Justice Kennedy stated:

> The justifications for the case system and *stare decisis* must rest upon the Court's capacity, and responsibility, to acknowledge its missteps . . . to face up to adverse, unintended consequences flowing from our own prior decisions. . . . I submit the Court does not accept this. . . . [I]t perpetuates and compounds a serious distortion of the First Amendment resulting from our own intervention in *Buckley*.

Id.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *See* Jenny Murphy, *Should Soft Money Be Banned?* SpeakOut.com Staff Writer, *at* http://www.speakout.com/Issues/Briefs/1096/ (Feb. 3, 2000). Soft money is:

> Funds donated by corporations, unions and individuals to political parties. . . . This money is intended to be used for general party building activities such as voter registration drives. Since soft money is not used to support individual candidates, it is not regulated under federal campaign laws, and there are no limits placed on the amounts that can be contributed.
>
> However, soft money has been used to pay for political ads that indirectly support particular candidates by endorsing their views. Since these ads often feature a candidate's name and image, the true intent of ads has been questioned.

Id.

money used in unlimited amounts,[257] often to "fund so-called issue advocacy advertisements."[258]

Justice Kennedy argued that the Court made a mistake in *Buckley* by holding that expenditures would not survive strict scrutiny while contribution limitations would.[259] He asserted that this would create an inadequate system, which would blur what speech is.[260] Justice Kennedy pointed out that in the current system "[s]oft money must be raised to attack the problem of soft money" because you will still, in practical terms, need money which will be given via soft money to get elected in order to fight the problem.[261]

He explained that Mr. Fredman was an "outsider," not an incumbent and that the Court's *Nixon* decision told Mr. Fredman that he may not challenge the current system unless he gave into it first.[262] This was because the incumbent would still be allowed to receive soft money.[263] The current system also "create[d] dangers" by requiring contributors of soft money and those that receive it to conceal their real purpose, and also by having an "indirect system of accountability that is confusing, if not dispiriting, to the voter."[264] He found that these dangers were of greater concern than the ones they replaced.[265]

Justice Kennedy would find that the law would not pass "any serious standard of First Amendment review" because apparent corruption would not survive strict scrutiny.[266] Justice Kennedy concluded by stating that he would first overrule *Buckley* and then allow Congress, by interpreting the First Amendment itself, to attempt to handle the problem of campaign financing.[267]

E. JUSTICE THOMAS' DISSENT

Justice Thomas, joined by Justice Scalia, dissented by first arguing that the plurality employed a *sui generis* test,[268] to balance away First

257. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 406 (2000) (citing Colo. Republican Fed. Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 616 (1996), stating that soft money is unrestricted as to the amount a contributor may give).

258. *Id.* (stating that "issue advocacy" is advancing or assaulting a candidate's position on an issue without specifically asking that they be defeated or elected).

259. *Id.* at 407.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 408.

265. *Id.*

266. *Id.*

267. *Id.* at 409-10.

268. BLACK'S LAW DICTIONARY 1448 (7th ed. 1999) (defining *sui generis* as "[o]f its own kind or class; unique or peculiar"). Justice Thomas asserted that this test was peculiar as compared to other

Amendment freedoms.[269] He asserted that the Court erred with every step of its analysis because it applied the *Buckley* test.[270] He argued that the appropriate test was strict scrutiny.[271] Strict scrutiny was needed because "[p]olitical speech is the primary object of First Amendment protection."[272] He asserted that Missouri would fail both the compelling interest portion as well as the narrowly tailored requirement.[273]

He argued that the "Founders"[274] wanted to protect individual political speech especially during campaigns for office.[275] He found that the Court in this decision abandoned these principles.[276] Justice Thomas asserted that the plurality, by applying less than strict scrutiny, purposefully harmed political speech instead of protecting it.[277]

Justice Thomas then asserted that *Buckley*'s test had been undermined over the years.[278] Justice Thomas disagreed with *Buckley*'s[279] assertion that contributing to a candidate for office is dissimilar from that candidate directly expending money.[280] He argued that the Court, in *Federal Election Commission v. National Conservative Political Action Committee*,[281] discarded "the argument that a contribution does not represent the constitutionally protected speech of a contributor."[282]

Justice Thomas saw no distinction between contributions and expenditures because contributors give money when they think speech by a group will be superior to their own speech.[283] Justice Thomas argued that it was perfectly reasonable for "individuals to speak through contributions rather than through independent expenditures."[284] He

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First Amendment constitutional tests. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 418 (2000) (Thomas, J., dissenting).

269. *Nixon*, 528 U.S. at 410.

270. *Id.* at 412.

271. *Id.*

272. *Id.* at 410-11 (making numerous remarks indicating why he believed this function was so important).

273. *Id.* at 411-12.

274. *Id.* at 411. In reference to "Founders," Justice Thomas quoted James Madison who stated "The value and efficacy of [the right to elect the members of government] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." *Id.* (quoting Madison, *Report on the Resolutions* (1799), *in* 6 WRITINGS OF JAMES MADISON 397 (G. Hunt ed. 1906) (alteration in original)).

275. *Id.*

276. *Id.*

277. *Id.* at 412.

278. *Id.*

279. *See* Buckley v. Valeo, 424 U.S. 1, 21 (1976) (stating the premise 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").

280. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 413 (2000).

281. 470 U.S. 480 (1985).

282. *Nixon*, 528 U.S. at 414.

283. *Id.*

284. *Id.* at 415. In *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 636 (1996), individual citizens understandably realize that they "may add more to political

stated that this was the reason that contributions should not be treated differently from expenditures, and the "First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."[285]

Justice Thomas found that not only did *Buckley* degrade the speech interests of contributors, but that it also did the same to the candidates.[286] The Court stated in *Buckley*[287] that contribution restrictions do restrict speech by association of the candidates.[288] Justice Thomas asserted that the First Amendment was intended to put restrictions on the government and to allow the individual to choose how to speak.[289] Justice Thomas argued that the Court, in applying the *Buckley* standard and upholding Missouri's statute, had harmed Mr. Fredman, who was not an incumbent and did not have a lot of money, because the Missouri law limited him from spreading his message.[290] Justice Thomas argued that while the Court professed to use a test of the "closest scrutiny" in *Buckley*, it actually used "something less—much less—than strict scrutiny."[291]

Justice Thomas asserted that the Court in *Buckley* stated that only actual corruption or the appearance of it would suffice as a "compelling" interest.[292] Under a strict scrutiny analysis, however, this would fail the first part of the test because the interest was not a "compelling" one, and therefore the Missouri law would be unconstitutional.[293]

Not only did the Court fail in its analysis of *Buckley*, Justice Thomas contended, but the Court also extended that holding.[294] The "extension," Justice Thomas found, was that in *Buckley* and opinions since,[295] the word "corruption" was used in a narrow *quid pro quo* sense meaning "perversion or destruction of integrity in the discharge of public duties by bribery or favour."[296] In *National Conservative Political Action Committee*, Justice Thomas argued that the meaning of corruption was extended, giving "it a new, far-reaching (and speech-suppressing)

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discourse by giving rather than spending, if the donee is able to put the funds to more productive use than can the individual."

285. *Nixon*, 528 U.S. at 418 (quoting Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 790-91 (1988)).

286. *Id.*

287. Buckley v. Valeo, 424 U.S. 1, 33-34 (1976).

288. *Nixon*, 528 U.S. at 418.

289. *Id.* (discussing Cohen v. California, 403 U.S. 15, 24 (1971)).

290. *Id.* at 420.

291. *Id.* at 421.

292. *Id.* at 422 (citing *Buckley*, 424 U.S. at 25-26).

293. *Id.* at 426.

294. *Id.* at 424-25.

295. *See* Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497-98 (1985) (finding that since the *Buckley* decision, the Court has interpreted "corruption," to have a narrow meaning).

296. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 422 (2000) (citing 3 OXFORD ENGLISH DICTIONARY 974 (2d ed. 1989)).

definition."[297] Justice Thomas stated that the governmental interest accepted in *Buckley*[298] was part of the problem.[299] He contended that the plurality never stated what corruption stood for.[300] The plurality "permits vague and unenumerated harms to suffice as a compelling reason for the government to smother political speech."[301] He asserted that this was because "we are never told with assurance" exactly what corruption consists of in *National Conservative Political Action Committee*.[302]

Justice Thomas argued that the plurality also lessened the requirement of tailoring.[303] Justice Thomas contended that the Court allowed much greater restrictive contribution limitations, varying from $250 to $1,000.[304] The difference between *Buckley*'s and Missouri's caps, he asserted, was more pronounced if one accounted for inflation.[305] The Court failed to pay attention to the significantly lower amounts allowed in this case.[306] He contended that the Court failed to explain why political action committees should be treated like individuals.[307] He argued that it also "fail[ed] to explain why caps that vary with the size of political districts [were] tailored to corruption."[308]

Justice Thomas questioned whether the plurality would find that a $251 contribution could cause corruption.[309] He pointed to the plurality's own evidence that "97.62 percent of all contributors to candidates for state auditor made contributions of $2,000 or less."[310] He wrote:

> If the [plurality's] assumption is incorrect—i.e., if Missouri's contribution limits actually do significantly reduce campaign

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297. *Id.* at 423.

298. *Id.* at 422-23 (stating that merely the appearance of corruption was sufficient).

299. *Id.*

300. *Id.* at 423.

301. *Id.* at 424.

302. *Id.* (citing Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497-98 (1985).

303. *Id.*

304. *Id.* at 425 (finding that these figures were priced in terms of 1995 dollars).

305. *Id.* (stating that if one used the Consumer Price Index, "a dollar today purchases about a third of what it did in 1976").

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* (concluding also that, "contribution caps set at such levels could never be 'closely drawn'"); *see also* BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM (2001) for a general discussion on certain myths associated with campaign finance reform. The author notes that one

> might also compare political spending to amounts spent by Americans on various other products. For example, Americans spent two to three times as much money each year on the purchase of potato chips. Proctor and Gamble and Phillip Morris Company, the nation's two largest advertisers, spend roughly the same amount on advertising as is spent by all political candidates and parties.

Id. at 42.

310. Nixonv. Shrink Mo. Gov't PAC, 528 U.S. 377, 426 (2000).

> speech—then the [plurality's] calm assurance that political speech remains unaffected collapses. If the [plurality's] assumption is correct—i.e., if large contributions provide very little assistance to a candidate seeking to get out his message (and thus will not be missed when capped)—then the [plurality's] reasoning still falters. For if large contributions offer as little help to a candidate as the Court maintains, then the Court fails to explain why a candidate would engage in "corruption" for such a meager benefit. The [plurality's] statistical claim directly undercuts its constitutional defense that large contributions pose a substantial risk of corruption.[311]

Justice Thomas asserted that the second part of a strict scrutiny analysis required that contribution limits be narrowly tailored to serve a compelling governmental interest.[312] He argued that Missouri's statutory contribution limits were not narrowly tailored to the harm.[313] He found that bribery and disclosure laws were more appropriate and less restrictive methods to deal with the harm.[314] Justice Thomas contended that since the law was not sufficiently tailored, the First Amendment would not allow it.[315] He stated that, in general, "[s]tates 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."[316]

To summarize, Justice Thomas found that strict scrutiny should be applied rather than the standard from *Buckley* and that *Buckley* should be overruled.[317] He also found that the Missouri statute would fail both parts of this test.[318] He found that the prevention of corruption, as defined by the majority, was not a compelling interest and that the statute was not tailored narrowly enough to pass strict scrutiny.[319] He asserted that this was because there are less restrictive means to prevent corruption, specifically bribery and disclosure laws.[320]

311. *Id.*
312. *Id.* at 427.
313. *See id.* at 428 (stating that they were "crudely tailored" and "massively overinclusive").
314. *Id.* at 428-29.
315. *Id.* at 430.
316. *Id.*
317. *Id.*
318. *Id.* at 426, 428.
319. *Id.*
320. *Id.* at 428-29.

F. SUMMARY OF THE COURT'S HOLDING IN *NIXON*

In conclusion, the Supreme Court in *Nixon* held that the test established in *Buckley* was not that of traditional strict scrutiny as applied by the Eighth Circuit.[321] Rather, the contribution regulation would survive if it were "'closely drawn' to match a 'sufficiently important interest,' though the dollar amount of the limit need not be 'fine tuned.'"[322] The Court found that Missouri had shown through sufficient evidence that such an interest, "deterring corruption or the appearance of it," existed.[323] Missouri's statutory contribution limitations were sufficiently tailored because there was no specified constitutional minimum amount which any state legislature could not go under.[324] Rather, the second part of this test was whether the contribution limitation would "render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."[325]

IV. IMPACT

The Supreme Court of the United States upheld Missouri's statute that limited the amount an individual or political action committee could make as a contribution.[326] In doing so, the Supreme Court upheld the *Buckley* precedent.[327] But the Court in its entirety was split, not only on the holding, but also on the analysis.[328] For the first time since *Buckley*, three Justices have acknowledged that they might be willing to reconsider the distinction between the treatment of contributions and expenditures,[329] while three Justices have indicated their desire to completely overrule it.[330]

This is a significant event because both proponents and opponents of the *Buckley* decision believe that the reasoning behind the different

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321. *Id.* at 387-88.
322. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 30 (1976)).
323. *Id.* at 384.
324. *Id.* at 397.
325. *Id.*
326. *Id.* at 395-97.
327. *Id.* at 397.
328. *Id.* at 380.
329. *Id.* at 404-05. Justice Ginsburg and Justice Breyer stated, "it might prove possible to reinterpret aspects of *Buckley* . . . stressed by Justice Kennedy . . . making less absolute the contribution/expenditure line." *Id.* at 405. Since Justice Stevens would include contributions as a property interest, it is possible that he is also a proponent of ridding the system of the contribution/expenditure line. *See* Marcia Coyle, *High Court Campaign Finance Ruling Clears a Path: Pending Challenges to State Limits May Help Refine 1976 'Buckley' Decision*, NAT'L L.J., Feb. 7, 2000, at A7.
330. *See id.* at 409-10. (Kennedy, J., dissenting) (stating Justice Kennedy's belief that *Buckley* should be overruled so that legislatures can enact their own campaign finance reforms based on their First Amendment interpretations); *see also id.* at 410 (Thomas, J., dissenting, joined by Scalia, J.) (asserting that *Buckley* should be overruled).

treatment of the two is both flawed and the largest problem with *Buckley*.[331] This decision also is significant because it suggests Congress should try to resolve the issue.[332] Congress has taken some steps to try and solve what the majority of the Court perceives to be a problem.[333]

The decision is not, however, significant in terms of direct impact on North Dakota law.[334] North Dakota allows for unlimited contributions from both individuals and political committees to candidates.[335] North Dakota also does not limit the amount a candidate can use toward expenditures.[336] While North Dakota has no limitations on individual contributions,[337] thirty-six states, including neighboring states, do.[338]

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331. *See* Jeffrey Rosen, *Talk is Cheap*, NEW REPUBLIC, Feb. 14, 2000, at 20. Rosen wrote:

> Supporters and opponents of campaign finance reform agree on little except this: the compromise that the Supreme Court imposed on the nation 24 years ago in *Buckley v. Valeo* has collapsed. . . . The theory was that giving money to a candidate is not really a form of expression, while spending money to win an election is. . . . The Court . . . suggested that expenditures are less corrupting than contributions, because candidates can't corrupt themselves.
>
> This logic didn't make a lot of sense in 1976, and it makes even less today.

Id.

332. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 409 (2000) (stating that *Buckley* should be overruled and then the Court should "free Congress or state legislatures to attempt some new reform").

333. *See* Campaign Finance Revision, Hearings on S. 26/S. 1593 Before the Senate Rules Committee on Campaign Finance Reform, 106th Cong. (2000) (statement on April 5, 2000 of Christopher Shays, representative and Co-sponsor of the Shays-Meehan Bipartisan Campaign Finance Reform Act, H.R. 417). Some of these steps include: H.R. 417, the Shays-Meehan Bipartisan Campaign Finance Reform Act, which purports to ban soft money, closes the issue of ad loophole, gives the FEC the power it needs to enforce the legislation, and creates a bipartisan commission to recommend further improvements. *Id.* Another step is S. 26/S. 1593, the companion bill in the Senate, entitled the McCain-Feingold Bipartisan Campaign Reform Act which purports to completely eliminate

> political party soft money, including money funneled through state parties for use in federal elections; increases the aggregate hard dollar contribution limit from $25,000 to $30,000; and codifies the Beck decision to require labor organizations to annually notify employees who pay agency fees of their eligibility to object to the use of their funds for political activities.

Id.

334. *See* EDWARD D. FEIGENBAUM & JAMES A. PALMER, FEDERAL ELECTION COMMISSION, CAMPAIGN FINANCE LAW 2000, at ND-1 to ND-7 (2000) (illustrating that North Dakota has neither contribution limits nor expenditure restrictions).

335. *Id.*

336. *Id.*

337. *See* N.D. CENT. CODE § 16.1-08.1-03.3 (1997 & Supp. 1999) (requiring contribution restrictions for corporations, cooperative corporations, limited liability companies, and associations, but not for political committees).

338. *See generally* FEIGENBAUM & PALMER, *supra* note 334 (illustrating that, along with the District of Colombia, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri (current case), Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming all have limitations for individual contributions). North Dakota, Alabama, Colorado, Illinois, Indiana, Iowa, Mississippi, Nebraska, New Mexico, Oregon, Pennsylvania, Texas, Utah, and Virginia do not have restrictions on contribution limits by individuals (not including judicial campaigns). *Id.* at Chart 2-A & 2-B.

The *Nixon* decision is significant because, while the Court upheld Missouri's state contribution limits, it did not define what would be the lowest amount of contribution restriction permissible under the Constitution.[339] Still at issue, or at least unclear, is what will suffice for evidence to justify a state's interest in preventing corruption or the appearance of it.[340] Along those lines, is the issue of what the Court in the future will interpret "corruption" to mean.[341]

Since *Nixon*, lower courts in the federal judiciary have examined some of the same issues.[342] For instance, the Eighth Circuit recently held that sections 130.032.4 and 130.032.7 of the *Missouri Revised Statutes* were unconstitutional.[343] These sections limited the amount of money and in-kind contributions that parties could give to a candidate.[344] The court found that they were unconstitutional because they restricted expenditures by political parties.[345]

In *Daggett v. Commission on Governmental Ethics & Election Practices*,[346] the First Circuit Court of Appeals upheld both contribution limits to congressional members in Maine and a matching fund system corresponding to expenditures made by candidates.[347] The First Circuit Court of Appeals began analyzing the contribution limitation, in accordance with *Nixon*'s holding, by examining whether there were sufficient evidentiary justifications to support Maine's contention of the threat of corruption or the appearance of it.[348] The court found that state representative testimony, along with a significant amount of press clippings, surveys, and a referendum were sufficient to meet the evidentiary obligation set forth in *Nixon*.[349] The court then looked to whether the Maine Act was overbroad by limiting contributions to $250 and $500.[350] It found that Maine's limits, though smaller than those held

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339. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 397 (2000) (stating that the test 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," and the Court did not propose an exact amount).

340. *See supra* notes 294-316 and accompanying text.

341. *Id.*

342. *See infra* notes 343-70 and accompanying text.

343. Mo. Republican Party v. Lamb, 227 F.3d 1070, 1073-74 (8th Cir. 2000). *But see* North Carolina Right to Life, Inc. v. Leake, 108 F.Supp.2d 498, 518 (E.D. N.C. 2000). In *Leake*, the District Court for the Eastern District of North Carolina held that North Carolina's limits on contributions to political committees were sufficiently tailored and therefore constitutional. *Id.*

344. *Mo. Republican Party*, 227 F.3d at 1073-74.

345. *Id.*

346. 205 F.3d 445 (1st Cir. 2000).

347. *Daggett*, 205 F.3d at 472 (holding constitutional the Maine Clean Election Act).

348. *Id.* at 455.

349. *Id.* at 456-57.

350. *Id.* at 458.

constitutionally permissible in *Nixon*, were not so different in kind as to make them unconstitutional.[351]

In *Vermont Right to Life Committee v. Sorrell*,[352] the Court of Appeals for the Second Circuit held unconstitutional three provisions of the 1997 Vermont Campaign Finance Reform Act that required disclosure of payment for all political advertisements and a similar reporting requirement.[353] Section 2882 required disclosure of "'[a]ll political advertisements' which section 2881 define[d] as 'communications . . . which expressly or implicitly advocate the success or defeat of a candidate.'"[354] The court found that the term "implicitly" extended the reach of the disclosure requirement to advocacy speech associated with public issues.[355] The court stated that usage of the word "implicitly" did not set forth what is permissible and what is impermissible speech under the act.[356] Therefore, the court found that the sections violated the First Amendment and were unconstitutional.[357]

In *Landell v. Sorrell*,[358] the United States District Court for the District of Vermont, in determining the constitutionality of the 1997 Vermont Campaign Finance Reform Act, held that a $2,000 limitation on contributions to political parties was constitutional but that a limit on contributions from political parties to candidates was unconstitutionally low.[359] The court followed a similar analysis to *Nixon* in distinguishing expenditures from contributions for constitutional purposes.[360]

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351. *Id.* at 458-59. The court also discussed the fact that campaigns in Maine are less expensive than similar campaigns in other states. *Id.* at 459. The court deemed this an important factor in determining a permissible contribution amount to limit. *Id.*

352. 221 F.3d 376 (2d Cir. 2000).

353. *Vt. Right to Life Comm.*, 221 F.3d at 392.

354. *Id.* at 387.

355. *See id.* (finding, therefore, that it violated the rule created in *Buckley* and *Nixon*).

356. *Id.* (citing Buckley v. Valeo 424, U.S. 1,41 (1976)). The court clarified by stating

> A person seeking to communicate his or her point of view on a public issue—to engage in classic issue advocacy—cannot know in advance whether the State will read the communication to be an implicit endorsement of a candidate who, to a greater or lessor extent, agrees with or supports actions that conform to the speaker's view and will therefore be subject to penalty under the statute.

Id.

357. *Id.* at 392.

358. 118 F. Supp. 2d 459 (D. Vt. 2000).

359. *Landell*, 118 F. Supp. 2d at 493.

> The challenged statutes limit[ed] contributions to candidates for Vermont office in a two-year election cycle to $200 for state representative, $300 for state senator, and $400 for governor, lieutenant governor, secretary of state, state treasurer, state auditor, and state attorney general. Contributions from a single source, political party, or political committee to political committees or political parties [were] limited to $2000. VT. STAT. ANN. tit. 17, § 2805(a) and (b).

Id. at 462.

360. *Id.* at 477-78. The court, when discussing the differences between justifications for expenditure and contributions restraints, interestingly discussed the fact that *Buckley* never directly

The court stated that because parties play such an important role in our system, contribution limitations from them to candidates "deserve especially careful attention."[361] The district court found that although *Nixon* does not directly answer the question of whether contribution limitations on political parties are to be guided by the same standards associated with contributions limitations on individuals, *Nixon* does answer the question indirectly.[362] The court found the answer by examining *Nixon's* discussion of how the constitutionality of a contribution limit is focused on the

> type of financial support being given to the candidate, not the identity of the contributor: "Restrictions on contributions require less compelling justification than restrictions on independent spending." . . . Because [Shrink] expressly approved Missouri's claimed interests in limiting individual contributions, it follows that the state's corresponding limits on political parties must also be upheld as long as the same rationale applies and they meet the criteria set out in [Shrink].[363]

The court then stated the test, holding that "[l]imits on contributions from parties to candidates—like from individuals to parties—cannot be so radical in effect as to render political association between parties and candidates ineffective."[364] It then examined the 1997 contribution limits of $400, $300, and $200 on parties and found those amounts stringent considering Vermont's small political scale.[365] The court stated that parties speak differently than individuals.[366] It held that the contribution limits would "reduce the voice of political parties to an undesirable, and constitutionally impermissible, whisper."[367] It found those limits were too low to be constitutionally permissible.[368]

The court also held that the Vermont Campaign Finance Reform Act of 1997, that limited contributions from individuals to candidates, was constitutional.[369] However, the court found the act's expenditure limits unconstitutional.[370]

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held that corruption or the appearance of it, were the only acceptable compelling governmental interests. *Id.* at 477 (citing Buckley v. Valeo 424 U.S. 1, 25-26 (1976)). The court found, therefore, that *Buckley* did not end the possibility for new compelling governmental interests. *Id.* at 477-78.

361. *Id.* at 486.
362. *Id.* at 487.
363. *Id.* (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387 (2000)).
364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.* at 493.
370. *Id.*

V. CONCLUSION

The division of the Court in *Nixon*, both on the standards used and on the result, demonstrates why the issue of campaign finance reform will likely continue to be a battle in the judiciary. While the issue has gained attention at the national level with proposed McCain-Feingold and Shays-Meehan campaign finance reform bills, the issue is arguably more divisive at the individual state level which will further test the constitutional boundaries of free speech and financial involvement in elections.[371] As campaign finance reform continues to be an important societal and legislative concern, a great deal of judicial examination is likely to continue.

Ryan Cheshire[*]

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371. *See Demanding a Vote on Reform*, N.Y. TIMES, July 17, 2001, at 18 *and* Jim Drinkard, *McCain Confident Bill will be Back Before House*, USA TODAY, July 16, 2001, at A6 (discussing the status of the major campaign finance reform bills).

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