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**First Amendment—Campaign Finance Reform—The Supreme Court Halts the Eighth Circuit's Invalidation of State Campaign Contribution Limits. *Nixon v. Shrink Missouri Government Political Action Committee*, 120 S. Ct. 897 (2000).**

Erin Buford Vinett

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FIRST AMENDMENT—CAMPAIGN FINANCE REFORM—THE SUPREME COURT HALTS THE EIGHTH CIRCUIT’S INVALIDATION OF STATE CAMPAIGN CONTRIBUTION LIMITS. *Nixon v. Shrink Missouri Government Political Action Committee*, 120 S. Ct. 897 (2000).

*If you don't have a million bucks, you might as well forget about running for political office these days.*<sup>1</sup>

I. INTRODUCTION

“Campaign finance reform” is a term that some American politicians trot out quite freely at the turn of the twentieth century. Beneath the highly visible political veneer of the term, however, lies a difficult legal struggle. This struggle essentially pits the integrity of the American democratic process, in which optimally all citizens know their votes and concerns are meaningful, against the free speech right of citizens to engage in that process through money donations to candidates. In *Nixon v. Shrink Missouri Government Political Action Committee*,<sup>2</sup> the United States Supreme Court addressed this struggle again, twenty-four years after its landmark decision in *Buckley v. Valeo*.<sup>3</sup> The Court in *Nixon* reaffirmed its decision in *Buckley*, re-striking the delicate balance that the *Buckley* decision created and allaying doubts, at least for now, about *Buckley*’s continuing vitality in the changing Court.<sup>4</sup>

The story that gave rise to the carefully crafted *Nixon* litigation opens this note. In this story, a would-be Missouri politician and a local political action committee planned a lawsuit in advance of a failed campaign, and then followed that suit through wins and losses to the United States Supreme Court. Next, the note looks at the history of governmental regulation of campaign financing in America, focusing on judicial review of that regulation. The note examines *Buckley* as well as the United States Court of Appeals for the Eighth Circuit’s sometimes stringent approach to campaign finance measures. The note then delves into the Court’s reasoning in the *Nixon* case, in which the Court curbed the Eighth Circuit’s tendency toward invalidating state campaign

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1. SENATE COMM. ON COMMERCE, FEDERAL ELECTION CAMPAIGN ACT OF 1971, S. REP. NO. 92-96, at 13 (1972), reprinted in 1972 U.S.C.C.A.N. 1773, 1785. The Senate report recounted this comment of an anonymous American in response to a Gallup Poll conducted in November 1970. See *id.* The Gallup Poll found that 80% of Americans favored a cap on the amount of money a candidate could spend during one election. See *id.*

2. 120 S. Ct. 897 (2000).

3. 424 U.S. 1 (1976) (per curiam).

4. See *Nixon*, 120 S. Ct. at 901.

finance reform measures. The final portion of the note briefly examines the significance of the *Nixon* decision, closing with a call to renew efforts to establish meaningful campaign contribution limits within the Eighth Circuit states and especially within Arkansas.

## II. FACTS

In the early and middle 1990s, there was a movement toward campaign finance reform in Missouri.<sup>5</sup> Some Missouri voters believed that the state's elected officials were bought and sold by generous campaign contributions, rendering citizens' votes—and concerns—worthless.<sup>6</sup> In response to this belief,<sup>7</sup> the Missouri

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5. See *Carver v. Nixon*, 882 F. Supp. 901, 905 (W.D. Mo. 1995). In 1994, a group of Missouri citizens, acting with the grassroots community group Association of Community Organizations for Reform Now (commonly called ACORN), sponsored a campaign finance reform ballot initiative known as Proposition A. See Editorial, *Four Proposals on the Missouri Ballot*, ST. LOUIS POST-DISPATCH, Oct. 20, 1994, at 6B. The measure passed with a majority of the citizens of Missouri voting in favor of it: “[A]n overwhelming 74% of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof.” *Carver v. Nixon*, 882 F. Supp. 901, 905 (W.D. Mo. 1995), quoted in *Nixon*, 120 S. Ct. at 908. However, the contribution limits established in Proposition A were invalidated by the Eighth Circuit in *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), in which the court held that the limits were too low to be constitutional in light of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

6. See, e.g., Editorial, *Money + Politics = Corruption*, ST. LOUIS POST-DISPATCH, Mar. 30, 1992, at 2B (“Money corrupts politics and politicians. . . . Missouri has a weak campaign reporting law. The state does nothing to limit campaign contributions or spending . . . .”); Anthony D. Ribaud, Editorial, *Campaign Funds Should Not Equal Speech*, ST. LOUIS POST-DISPATCH, Apr. 6, 1992, at 3B (“Many elected officials have lost the moral authority to govern because of the helplessness of the voters to compete with monied interests. . . . The current political process, which entwines monied interests with government decision-makers, is so morally bankrupt it requires regulation and restraint.”); Editorial, *Governor for Sale*, ST. LOUIS POST-DISPATCH, July 2, 1992, at 2C (“[Donations to the candidates for governor of Missouri] were made for one reason: to buy influence with the person who wins the governor’s chair in the Nov. 3 general election.”); Editorial, *On Missouri’s Agenda*, ST. LOUIS POST-DISPATCH, Jan. 3, 1993, at 2E (“Missouri is a wide-open state when it comes to campaign finance, so getting past well-heeled lobbyists with [campaign finance reform measures] will be hard. . . . The simple fact is that money distorts the political process, and big money makes for twisted laws and obligated officeholders.”); Editorial, *Campaign Reform Still Needed*, ST. LOUIS POST-DISPATCH, Sept. 19, 1993, at 2B (“Nothing else Congress does this year can do so much to rebuild public trust in government as restoring fairness to campaigns — as well as restricting the corrupting influence of money.”); Editorial, *Four Proposals on the Missouri Ballot*, ST. LOUIS POST-DISPATCH, Oct. 20, 1994, at 6B (“Proposition A [a 1994 campaign finance reform ballot initiative] would make further improvements to control influence-buying in elections that lawmakers were not willing to impose on themselves.”); Editorial, *New Politics Wins a Round*, ST. LOUIS POST-DISPATCH, Apr. 23,

legislature imposed upon candidates for political office a regulated system of financing their campaigns.<sup>8</sup> One component of Missouri's campaign finance reform statute<sup>9</sup> capped the amount of money that an individual or group contributor could give to any single candidate during one election.<sup>10</sup>

In 1997, several years after the passage of Missouri's campaign finance reform measure, a Missourian named Zev David Fredman

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1995, at 2B ("Prop[osition] A's tough [contribution] limits represen[t] a 'positive step towards the elimination of political corruption.'") (quoting *Carver v. Nixon*, 882 F. Supp. 901, 906 (W.D. Mo. 1995)); see also *infra* note 148 (discussing other indications of voter discontentment).

7. See Brief for Petitioners at 35, *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 120 S. Ct. 897 (2000) (No. 98-963). Missouri does not collect legislative history; therefore, the State of Missouri argued that the affidavit of a legislator who is familiar with a bill's passage could operate to "fil[il] the void" created by the lack of legislative history. See *id.*; but see Brief for Respondents at 37-39, *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 120 S. Ct. 897 (2000) (No. 98-963). Missouri, in defending its campaign finance statute, used the affidavit of the statute's sponsor, Senator Wayne Goode, to explain its origin and purposes. See Brief for Petitioners at 35, app. at 46-47, *Nixon* (No. 98-963). Senator Goode was co-chair of the committee that debated the bill and eventually advocated its passage to the legislature. See *id.* app. at 46-47. In his affidavit, he stated that the bill was drafted and debated with the goal of balancing the need for money to mount an effective campaign against the need to reduce corruption or the appearance of corruption in Missouri's government. See *id.* See also *infra* note 148 (discussing the validity of Missouri's evidentiary argument).

8. See MO. ANN. STAT. § 130.032 (West Supp. 2000). The measure passed with broad bipartisan support. See Brief for Petitioners at 3, *Nixon* (No. 98-963). The measure was passed in 1994, and took effect on January 1, 1995. See MO. ANN. STAT. § 130.032 (West Supp. 2000).

9. See MO. ANN. STAT. § 130.032 (West Supp. 2000). The statute also included a suggested ceiling on the total amount of money a candidate could spend on a campaign and measures to encourage a candidate to accept the ceiling, as well as a ban on any donations to state legislators during regular legislative sessions. See *Shrink Mo. Gov't Political Action Comm. v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), cert. denied, 518 U.S. 1033 (1996); *Shrink Mo. Gov't Political Action Comm. v. Maupin*, 922 F. Supp. 1413 (E.D. Mo. 1996). These measures were invalidated as an unconstitutional burden on free speech. See *Shrink Mo. Gov't Political Action Comm. v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), cert. denied, 518 U.S. 1033 (1996); *Shrink Mo. Gov't Political Action Comm. v. Maupin*, 922 F. Supp. 1413 (E.D. Mo. 1996).

10. See MO. ANN. STAT. § 130.032.1 (West Supp. 2000). This statute placed per-election limits (with primaries and general elections counted as separate elections) on contributions for any individual or group donor. The limits were: \$250 for candidates for the office of state representative or any other state office with an electorate of fewer than 100,000; \$500 for candidates for the office of state senator or any other state office with an electorate of 100,000 or more but fewer than 250,000; and \$1,000 to candidates for statewide office (including governor, lieutenant governor, secretary of state, state treasurer, state auditor, and attorney general), or any other state office with an electorate of 250,000 or more. See *id.*

decided to run for state auditor.<sup>11</sup> Fredman saw a rare opportunity to gain this statewide office in the November 1998 elections, because the incumbent Missouri state auditor decided not to seek another term of office.<sup>12</sup> In the wake of the incumbent's announcement, he prepared to mount a campaign.<sup>13</sup>

Fredman faced several hurdles to gaining office. He had minimal name recognition, having never run for office before.<sup>14</sup> He did not have a large network of campaign contributors.<sup>15</sup> He did not have the support of the Missouri Republican Party establishment.<sup>16</sup> Additionally, Missouri's campaign finance law prevented Fredman from receiving more than \$1,075 from any one contributor.<sup>17</sup> This contribution cap meant that Fredman had to rely on an array of smaller contributors rather than just a generous few.<sup>18</sup>

Fredman believed that he had just such a potential generous donor in Shrink Missouri Government Political Action Committee ("Shrink PAC").<sup>19</sup> Indeed, Shrink PAC donated \$1,075 to Fredman's campaign.<sup>20</sup> Shrink PAC, in turn, asserted that Fredman was the only candidate in the race for auditor who supported the committee's political views.<sup>21</sup> Fredman contended that without the ability to legally accept large

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11. See Brief for Respondents app. at 12, *Nixon* (No. 98-963). According to a Shrink Missouri Government Political Action Committee ("Shrink PAC") affidavit, Shrink PAC approached Fredman with the idea that he run for the office of state auditor. See *id.* app. at 38, 42. Before Fredman filed for candidacy, members of Shrink PAC and Fredman discussed the potential of their filing a lawsuit challenging Missouri's campaign finance scheme on First Amendment grounds. See *id.* app. at 38, 43.

12. See Brief for Respondents app. at 12, *Nixon* (No. 98-963).

13. See *id.*

14. See *id.* at 6.

15. See *id.*

16. See *id.* app. at 44. The Missouri Republican Party appeared to endorse a different candidate, Charles Pierce, for the position of state auditor. See *id.* app. at 12-13, 43-44.

17. See MO. ANN. STAT. § 130.032.1 (West Supp. 2000). The statute originally imposed a limit of \$1,000 on contributions to candidates running for statewide offices, including state auditor. See *id.* Subsequent amendment of the statute in 1997 mandated that the limits be adjusted for inflation as measured by the Consumer Price Index, which placed the limit on Fredman's receipts at \$1,075 per donor, rather than \$1,000. See MO. ANN. STAT. § 130.032.2 (West Supp. 2000).

18. See Brief for Respondents app. at 59, *Nixon* (No. 98-963).

19. See *id.* at 4-5.

20. See *Shrink Mo. Gov't Political Action Comm. v. Adams*, 5 F. Supp. 2d 734, 737 (E.D. Mo. 1998).

21. See Brief for Respondents app. at 17, *Nixon* (No. 98-963).

donations from a few contributors, he was effectively foreclosed from any meaningful chance at a successful campaign for state auditor.<sup>22</sup>

For these reasons, Fredman and Shrink PAC filed a federal lawsuit seeking to invalidate Missouri's contribution limits as an unconstitutional burden on political speech.<sup>23</sup> They initially sought an injunction preventing the Missouri Attorney General from enforcing the contribution limits.<sup>24</sup> After the district court denied the injunction, the plaintiffs ("Fredman and Shrink PAC") and defendant ("Missouri") filed cross motions for summary judgment in the district court.<sup>25</sup> The court granted Missouri's motion, holding that Missouri's campaign finance reform statute did not impermissibly harm Fredman and Shrink PAC's First Amendment interests under the Supreme Court's ruling in *Buckley v. Valeo*.<sup>26</sup>

The United States Court of Appeals for the Eighth Circuit reversed the district court's denial of the requested injunction, granting the injunction that Fredman and Shrink PAC had initially sought.<sup>27</sup> This injunction, issued twelve days before the Republican primary, gave Fredman a short time to garner the large contributions he sought.<sup>28</sup> Fredman was unsuccessful in the primary, receiving only 19.49% of the votes cast.<sup>29</sup>

Fredman was more successful in the Eighth Circuit than he was in the Republican primary. In a decision on the merits of Fredman's case, a divided panel reversed the district court's grant of summary judgment.<sup>30</sup> The Eighth Circuit held that when *Buckley's* approved contribution limits were interpreted in light of inflation, the Missouri limits amounted to only \$378 compared to *Buckley's* limit of \$1,000.<sup>31</sup> The Eighth Circuit held Missouri's contribution caps to be impermissi-

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22. See *Adams*, 5 F. Supp. 2d at 737.

23. See *id.* at 736-37.

24. See *id.* at 735.

25. See *id.* at 742.

26. See *id.* at 741-42; see also *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

27. See *Shrink Mo. Gov't Political Action Comm. v. Adams*, 151 F.3d 763 (8th Cir. 1998).

28. See Brief for Respondents at 8-9, *Nixon* (No. 98-963).

29. See *id.* at 10.

30. See *Shrink Mo. Gov't Political Action Comm. v. Adams*, 161 F.3d 519 (8th Cir. 1998), *rev'd*, 120 S. Ct. 897 (2000).

31. See *id.* at 523 n.4; see also *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). The Eighth Circuit panel was divided, with Judge Ross concurring and Judge Gibson dissenting from Chief Judge Bowman's opinion.

ble under the First Amendment.<sup>32</sup> The Supreme Court granted certiorari to decide the matter.<sup>33</sup>

### III. BACKGROUND

America has only recently had a regulated system of campaign financing. Not until the 1970s did Congress first attempt broad regulation of the federal campaign financing system with the passage of the Federal Election Campaign Act ("FECA").<sup>34</sup> A bipartisan coalition of politicians, a potential contributor, political parties, and non-profit organizations filed a federal lawsuit which challenged the wide-ranging statute.<sup>35</sup> In *Buckley v. Valeo*,<sup>36</sup> the Court upheld some provisions of the statute while striking down others.<sup>37</sup> Since this landmark decision, courts have decided two distinct strands of campaign finance cases—contribution cases and expenditure cases—based on the Supreme Court's decision in *Buckley*.<sup>38</sup> This section will discuss the state of campaign finance law before *Buckley*, as well as *Buckley* and its progeny. This section does not discuss every campaign finance case subsequent to *Buckley*; however, it discusses at length the Eighth Circuit's approach to campaign finance measures.

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32. See *Adams*, 161 F.3d at 523.

33. See *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 119 S. Ct. 901 (1999); see also *infra* Part IV.

34. Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455 (1994)).

35. See *Buckley*, 424 U.S. at 7-8; see also DAVID B. MAGLEBY & CANDICE J. NELSON, *THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 15* (1990). The plaintiffs included New York Senator James Buckley, presidential candidate Eugene McCarthy, major Democratic contributor Stewart Mott, the Republican Parties of Mississippi and New York, the New York Civil Liberties Union, the Conservative Victory Fund, Human Events, Inc., the Libertarian Party, and the American Conservative Union. See *Buckley*, 424 U.S. at 7-8.

36. 424 U.S. 1 (1976) (per curiam).

37. See *id.*

38. Compare, e.g., *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), with *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 120 S. Ct. 897 (2000), and *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998). For information on the contribution/expenditure distinction, see *infra* notes 63-65 and accompanying text.

### A. Campaign Finance Regulation Before *Buckley*

Prior to Congress's passage of the 1971 FECA,<sup>39</sup> campaign financing was generally unregulated.<sup>40</sup> During the aftermath of the Civil War, Congress passed a measure that outlawed illegal voting, coercion, manipulation of voter registration, and other election corruption.<sup>41</sup> It was not until 1907, however, that Congress passed legislation that dealt with corruption stemming from the financing of campaigns.<sup>42</sup> That year, Congress passed the Tillman Act, which prohibited campaign contributions from banks and corporations.<sup>43</sup> In 1925, the Corrupt Practices Act was enacted.<sup>44</sup> This statute required disclosure of campaign contributions and expenditures made in the course of a campaign.<sup>45</sup> The Corrupt

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39. 2 U.S.C. §§ 431-456 (1994).

40. See generally MAGLEBY & NELSON, *supra* note 35, at 13-14; ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND THE COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 24-26 (1988); FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 1-28 (1992).

41. See Enforcement Act, 16 Stat. 44 (1870); see also SENATE COMM. ON COMMERCE, FEDERAL ELECTION CAMPAIGN ACT OF 1971, S. REP. NO. 92-229, at 20 (1971), reprinted in 1972 U.S.C.C.A.N. 1773, 1840. This statute, known as the Enforcement Act, was passed just two months after ratification of the Fifteenth Amendment. See STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 443 (Bernard Schwartz ed., 1970). The Supreme Court described the broad Enforcement Act as Congress's response to the "swift and violent" reaction of white southerners to African-Americans' new political power in the late 1860s. See *id.* (quoting *United States v. Price*, 383 U.S. 787, 803-04 (1966)).

42. See SENATE COMM. ON COMMERCE, FEDERAL ELECTION CAMPAIGN ACT OF 1971, S. REP. NO. 92-229, at 20 (1971), reprinted in 1972 U.S.C.C.A.N. 1773, 1840.

43. See Tillman Act, 34 Stat. 814 (1907); see also SENATE COMM. ON COMMERCE, FEDERAL ELECTION CAMPAIGN ACT OF 1971, S. REP. NO. 92-229, at 21 (1971), reprinted in 1972 U.S.C.C.A.N. 1773, 1841.

44. See Corrupt Practices Act, 44 Stat. 15 (1925); see also SENATE COMM. ON COMMERCE, FEDERAL ELECTION CAMPAIGN ACT OF 1971, S. REP. NO. 92-229, at 21 (1971), reprinted in 1972 U.S.C.C.A.N. 1773, 1841; MAGLEBY & NELSON, *supra* note 35, at 13 (1990).

45. See SENATE COMM. ON RULES & ADMIN., FEDERAL ELECTION CAMPAIGN ACT OF 1971, S. REP. NO. 92-229, at 21 (1971), reprinted in 1972 U.S.C.C.A.N. 1773, 1841. The Corrupt Practices Act was an ineffective deterrent to corruption, however, because it was riddled with exceptions that exempted most contributions and expenditures from its disclosure requirements. See MAGLEBY & NELSON, *supra* note 35, at 13 (1990).



Practices Act withstood judicial scrutiny<sup>46</sup> and was the central federal law regulating campaigns until the passage of the FECA.<sup>47</sup>

The 1971 FECA was the first federal law that attempted comprehensive regulation of federal campaign financing.<sup>48</sup> The measure as passed in 1971 focused primarily on thorough disclosure as a deterrent to questionable campaign financing practices.<sup>49</sup> However, the Watergate scandal that ended President Richard Nixon's administration revealed impropriety in the financing of his 1972 bid for re-election.<sup>50</sup> These revelations prompted Congress to amend the FECA in 1974.<sup>51</sup>

The 1974 amendments shifted the focus of the FECA from disclosure to limitation. Among other things, the 1974 FECA limited campaign contributions, contributions to political committees, and

46. *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934). The Court stated, in upholding the Corrupt Practices Act,

To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.

*Id.* at 545.

47. See SENATE COMM. ON RULES & ADMIN., FEDERAL ELECTION CAMPAIGN ACT OF 1971, S. REP. NO. 92-229, at 21 (1971), reprinted in 1972 U.S.C.C.A.N. 1773, 1841.

48. See generally MAGLEBY & NELSON, *supra* note 35, at 13-14; MUTCH, *supra* note 40, at 24-26; FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 1-28 (1992).

49. See SENATE COMM. ON RULES & ADMIN., FEDERAL ELECTION CAMPAIGN ACT OF 1974, S. REP. NO. 93-689, at 2 (1973), reprinted in 1974 U.S.C.C.A.N. 5587, 5588 ("The Act of 1971 was predicated on the principle of public disclosure, that timely and complete disclosure . . . would result in the exercise of prudence by candidates and their committees and that excessive expenditures would incur the displeasure of the electorate who would or could demonstrate indignation at the polls.").

50. See FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 36-37 (1987); Marlene Arnold Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323, 323 (1977); David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 REV. LITIG. 85, 91 (1999) (citing HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, & POLITICAL REFORM 32-38 (1992)).

51. See SENATE COMM. ON RULES & ADMIN., FEDERAL ELECTION CAMPAIGN ACT OF 1974, S. REP. NO. 93-689, at 2 (1973), reprinted in 1974 U.S.C.C.A.N. 5587, 5588. The Senate Report stated:

It was unfortunate that the [1971 FECA] did not become effective until April 7, 1972, because the scramble to raise political funds prior to that date, and thus to avoid the disclosure provisions of the law, resulted in broad and grave dissatisfaction with the Act and led to a demand for new and more comprehensive controls.

*Id.*

independent expenditures in support of a candidate.<sup>52</sup> A constitutional challenge to this unprecedented regulation of elections was quick to follow.<sup>53</sup> A coalition of politicians and their supporters mounted a challenge to the various provisions of the FECA.<sup>54</sup> Led by New York Senator James Buckley, the opponents of the FECA filed suit in the United States District Court for the District of Columbia.<sup>55</sup>

B. *Buckley v. Valeo*: The Supreme Court Draws a Line Between Contributions and Expenditures

Senator Buckley's vigorous efforts to overturn the FECA led his case to the United States Supreme Court. In *Buckley v. Valeo*,<sup>56</sup> the Court examined many of the provisions of the FECA.<sup>57</sup> This note will discuss only the portion of the *Buckley* opinion which upheld campaign contribution limits and distinguished contribution limits from limits on independent expenditures—the portion of the opinion which drew the line that has divided the caselaw since *Buckley*.

The *Buckley* Court, in drawing this line, noted that two of the provisions of the FECA dealt to some extent with protected political speech: first, political contributions which an individual makes directly to a candidate or that candidate's campaign organization;<sup>58</sup> and second, expenditures that an individual makes in support of a candidate, but

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52. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified at 2 U.S.C. §§ 431-456 (1994)). The FECA also provided for matching funds for candidates who were willing to accept an overall expenditure ceiling and other measures that are beyond the scope of this note. See *id.*

53. See 2 U.S.C. §§ 431-456 (1994); *Buckley v. Valeo*, 387 F. Supp. 135 (D.D.C. 1975). The bill was signed into law October 15, 1974, and the United States District Court for the District of Columbia made its initial ruling on January 24, 1975. See 2 U.S.C. §§ 431-456 (1994); *Buckley v. Valeo*, 387 F. Supp. 135 (D.D.C. 1975). Senator Buckley proposed an amendment to the 1974 bill amending the FECA which provided for an expedited judicial review of the statute. See *Buckley*, 387 F. Supp. at 139-40. Senator Buckley's amendment was passed as part of the 1974 FECA with only minor modifications. See *id.* Commenting on his amendment to the FECA, Senator Buckley stated: "[I]t is in the interest of everyone to have the question [of the FECA's constitutionality] determined by the Supreme Court at the earliest possible time." *Id.* at 139.

54. See *Buckley*, 424 U.S. at 7-8.

55. See *Buckley v. Valeo*, 387 F. Supp. 135 (D.D.C. 1975).

56. 424 U.S. 1 (1976) (per curiam).

57. See *id.* at 8-10. The lengthy opinion dealt with the key provisions of the 1974 FECA, including tax code issues, expenditure ceilings, enforcement provisions, and several other issues. See *id.*

58. See *id.* at 19-38 (discussing the various forms of campaign contributions and upholding the portions of the FECA that limit such contributions).

independently of the candidate or that candidate's campaign organization.<sup>59</sup> The Court also noted the government's legitimate interest in protecting the integrity of the democratic process from corruption, and that corruption and perceptions of corruption are implicated to some extent in political donations and expenditures.<sup>60</sup> With these two general principles as guidance, the Court drew a fundamental distinction between contributions and expenditures.<sup>61</sup>

The Court examined both contribution limits and expenditure limits with regard to the government's interest in preventing corruption.<sup>62</sup> The Court noted that where an individual contributes money directly to a campaign, there is a greater chance of a political quid pro quo from the candidate to the donor.<sup>63</sup> When an individual spends money independently of the candidate, however, there is not so great a danger of corruption because the expenditure is not coordinated with the candidate's campaign organization.<sup>64</sup> The Court noted that such expenditures,

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59. See *id.* at 19-20, 39-60 (discussing the various forms of independent expenditures and invalidating portions of the FECA that limit such expenditures).

60. See *Buckley*, 424 U.S. at 25-29.

61. See *id.* at 35, 51.

62. See *id.* at 25-27, 44-47.

63. See *id.* at 45-46. The Court singled out the greatest danger of corruption or the perception thereof: when an individual makes a contribution directly to a candidate or that candidate's campaign organization. See *id.* The Supreme Court has characterized this direct flow of money to a candidate as a "single narrow exception to the rule that limits on political activity were contrary to the First Amendment." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97 (1981), quoted in *Russell v. Burris*, 146 F.3d 563, 568 (8th Cir. 1998). In *Citizens Against Rent Control*, the Court struck down a campaign finance measure that limited contributions to political committees that supported ballot initiatives. See *Citizens Against Rent Control*, 454 U.S. at 300. The Court noted that there was clearly no danger of an improper quid pro quo from a ballot initiative, and therefore the government had an insufficient interest in limiting such contributions. See *id.* at 297-99; see also *Harwin v. Goleta Water Dist.*, 953 F.2d 488 (9th Cir. 1991) (invalidating a limit on contributions to a candidate for a local water district in light of no evidence of any possibility of a quid pro quo from the candidate due to a recusal provision in the campaign finance ordinance); *Pacific Gas & Elec. Co. v. City of Berkeley*, 131 Cal. Rptr. 350 (Cal. Ct. App. 1976) (invalidating a provision similar to that in *Citizens Against Rent Control* which applied to unions' and corporations' contributions to committees supporting ballot initiatives).

64. See *Buckley*, 424 U.S. at 45-46. The Court stated that independent expenditures do "not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Buckley*, 424 U.S. at 46. However, since the *Buckley* decision, independent expenditures have increased and now play a much larger role in campaign financing. See *Schultz*, *supra* note 50, at 113 (arguing that by compiling a sufficient evidentiary record of corruption or the appearance thereof, a limit on independent expenditures can be sustained given the increase in independent expenditures and their utility to candidates).

when made independently of the campaign structure, may either hurt or help the candidate.<sup>65</sup>

Likewise, the Court examined the differences in the speech rights affected by the FECA's contribution limits and expenditure limits.<sup>66</sup> The Court emphasized that when an individual contributes to a candidate, the contributor expresses only general support for the candidate<sup>67</sup>—the contributor does not decide how or on which issue the contribution is spent, and it is up to the campaign organization to speak through the contribution.<sup>68</sup> On the other hand, when the individual independently spends his or her money in support of a candidate, the individual decides the content of the message in support, and the individual decides what issues are important.<sup>69</sup> Therefore, the Court concluded that the FECA's contribution limits were a lighter burden on the individual's speech rights than were FECA's expenditure limits.<sup>70</sup>

As a result of these distinctions, the Court upheld the FECA's limit on individual contributions directly to either a candidate or a candidate's campaign organization.<sup>71</sup> However, the Court invalidated those portions

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65. See *Buckley*, 424 U.S. at 47. This argument has been recently resurrected by Texas Governor George W. Bush's campaign organization in his 2000 bid for the presidency. See *Wyly Profile* (National Public Radio, March 9, 2000), archived in National Public Radio, All Things Considered Archives (visited March 15, 2000) <<http://search.npr.org/cf/cmn/cmnpd01fm.cfm?PrgDate=3%2F9%2F2000&PrgID=2>>. During the presidential primary campaign, Texas billionaire Sam Wyly made a large independent expenditure on television advertisements that ran in the key battleground states of Ohio, California, and New York. See *id.* The ads touted the Texas governor's environmental record. See *id.* They also criticized the environmental record of Bush's then-rival for the Republican presidential nomination, Senator John McCain. See *id.* Responding to questions about the ads, Bush spokesperson Karen Hughes stated: "I think the ads probably hurt us, because they brought attention on our opponent's issue of campaign finance reform, and they were widely condemned by newspapers across America." *Id.*

66. See *Buckley*, 424 U.S. at 19-20.

67. See *id.* at 21.

68. See *id.*

69. See *id.* at 46-51. The Court emphasized that the FECA's expenditure provisions would make it a federal crime to take out a one-quarter page advertisement in a major metropolitan newspaper in support of an identified candidate. See *id.* at 40. Likewise, the Senate Report on the FECA described a scenario in which an individual could purchase billboards in support of a candidate. See *id.* at 46 n.53 (citing SENATE COMM. ON RULES & ADMIN., FEDERAL ELECTION CAMPAIGN ACT OF 1974, S. REP. NO. 93-689, at 18 (1973), reprinted in 1974 U.S.C.C.A.N. 5587, 5604). However, if the billboards clearly identified a particular candidate, then the individual could spend no more than \$1,000 on the billboards, or else the individual would be violating the FECA. See *id.* at 47 n.53.

70. See *Buckley*, 424 U.S. at 21, 29-30, 47-48.

71. See *id.* at 35.

of the FECA that limited an individual's ability to make expenditures independently of a candidate or a candidate's campaign organization.<sup>72</sup> This distinction has been further developed by the Court in subsequent cases.<sup>73</sup> The issues in these cases fall into two different categories, depending on whether they deal with a contribution limit or an independent expenditure limit. The next section traces these two strands of caselaw.

### C. Judicial Review of Campaign Financing Regulation After *Buckley*

The Supreme Court's contribution/expenditure distinction has been the ordering principle in campaign finance cases since *Buckley*. With few exceptions, the cases that involved expenditure limits have been decided in favor of the challenger plaintiff.<sup>74</sup> The cases that involved contribution limits have been decided in favor of the government defendant more often than have the expenditure cases.<sup>75</sup> This section will examine the expenditure cases first, and the contribution cases second.

#### 1. *Expenditure Cases: Free Speech Principles Override Concerns About the Democratic Process*

When considering expenditure limits, courts have almost uniformly held that the limits violate the First Amendment as interpreted by *Buckley*. The types of entities allowed to make independent expenditures have broadened considerably since *Buckley*. In *Federal Election Commission v. National Conservative Political Action Committee*,<sup>76</sup> the

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72. See *Buckley*, 424 U.S. at 51. See also Schultz, *supra* note 50, at 117 n.172 (citing PHILIP M. STERN, STILL THE BEST CONGRESS MONEY CAN BUY 197 (1992) (identifying independent expenditures as one of the various loopholes in the FECA that the *Buckley* ruling created)).

73. See, e.g., *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 120 S. Ct. 897 (2000); *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998).

74. See *Colorado Republican*, 518 U.S. at 618.

75. Compare, e.g., *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985), and *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996), with *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 120 S. Ct. 897 (2000). See also *Colorado Republican*, 518 U.S. at 609-10 (noting the divergent rulings on the two issues).

76. 470 U.S. 480 (1985).

Supreme Court decided that political committees may make independent expenditures in support of a candidate.<sup>77</sup> Likewise, in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,<sup>78</sup> the Court held that state political parties may make expenditures that are not coordinated with a candidate's campaign structure.<sup>79</sup> *Colorado Republican* did not address whether national political parties may make such independent expenditures.<sup>80</sup>

Since *Buckley*, courts have been generally reluctant to allow even an incidental infringement on an entity's ability to make an independent expenditure in support of a candidate. In *Day v. Holahan*,<sup>81</sup> the Eighth Circuit invalidated provisions of Minnesota's campaign finance law that provided for public matching funds for candidates against whom independent expenditures were made.<sup>82</sup> The Eighth Circuit held that such matching funds would be a disincentive to independent expenditures because the expenditure would put public money in the coffers of a favored candidate's opponent.<sup>83</sup> *Day* illustrates that even an incidental limitation on expenditures violates the First Amendment under the principles established in *Buckley*.<sup>84</sup>

The notable exception to the courts' almost universal invalidation of measures that limit independent expenditures is *Austin v. Michigan Chamber of Commerce*.<sup>85</sup> In *Austin*, the Supreme Court found that the Michigan government had a compelling interest in limiting the expenditures of corporations in that state.<sup>86</sup> The state's interest in *Austin* was based on its unique corporate structuring that allowed massive wealth buildup by corporations.<sup>87</sup> Absent some sort of uniquely

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77. See *id.* at 498-500.

78. 518 U.S. 604 (1996).

79. See *id.*

80. See *Colorado Republican*, 518 U.S. at 611-12. See also Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323, 1330 & n.53 (1998) (noting that whether the Republican National Committee or the Democratic National Committee can legally make independent expenditures in support of a candidate is an important and as yet unanswered question).

81. 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995).

82. See *Day*, 34 F.3d at 1358.

83. See *id.* at 1359-60.

84. See *id.* at 1360. For other examples of cases invalidating direct or incidental expenditure limits, see *Kruse v. Cincinnati*, 142 F.3d 907 (6th Cir. 1998), and *Republican Party of Minnesota v. Pauly*, 63 F. Supp. 2d 1008 (D. Minn. 1999).

85. 494 U.S. 652 (1990). See also Schultz, *supra* note 50, at 101.

86. See *Austin*, 494 U.S. at 660.

87. See *id.* In an earlier case, the Court noted likewise that "the special characteristics of the corporate structure require particularly careful regulation." *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 209-10

compelling interest as was present in *Austin*, however, it seems clear that independent expenditures are highly protected by the First Amendment as interpreted by *Buckley*.

## 2. *Contribution Cases: Concerns About the Democratic Process Override Free Speech Principles*

In contrast to the courts' treatment of measures limiting independent expenditures, the courts have been less quick to invalidate measures limiting contribution limits. In a decision five years after *Buckley*, the Supreme Court upheld a limit on contributions imposed by the FECA.<sup>88</sup> In *California Medical Ass'n v. Federal Election Commission*,<sup>89</sup> the plaintiff argued that, because its money was first donated to a political action committee and *then* to a candidate, its money was spent as an expenditure and not a contribution.<sup>90</sup> However, the Court rejected the argument, noting that the individual members of the plaintiff organization were free under *Buckley* to make their own independent expenditures.<sup>91</sup> In *California Medical*, the Court demonstrated a willingness to look below the surface of an argument it characterized as superficially appealing in order to uphold limits on contributions to a candidate.<sup>92</sup>

The various United States Courts of Appeals have come to differing results in their treatment of contribution limits. The Sixth Circuit recently upheld a Kentucky statute that prohibited gubernatorial candidates from accepting contributions in the twenty-eight days preceding an election.<sup>93</sup> In *Gable v. Patton*,<sup>94</sup> the court recognized that the Kentucky government had an interest in preventing corruption that was analogous to the government's interest in *Buckley*.<sup>95</sup> However, the Sixth Circuit expressed reservation about whether the First Amendment interests implicated were likewise analogous, because the statute prohibited candidates from *accepting* contributions rather than prohibiting individuals from *making* contributions.<sup>96</sup> The court extended the

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(1982).

88. See *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 193-99

(1981).

89. 453 U.S. 182 (1981).

90. See *id.* at 195.

91. See *id.*

92. See *id.*

93. See *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999).

94. 142 F.3d 940 (6th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999).

95. See *Gable*, 142 F.3d at 950-51.

96. See *id.*

Supreme Court's ruling in *Buckley* to allow such limitations on a candidate's ability to accept contributions.<sup>97</sup>

The Fourth Circuit has recently emphasized the tailoring requirement imposed by *Buckley*. In *North Carolina Right to Life, Inc. v. Bartlett*,<sup>98</sup> the Fourth Circuit upheld a North Carolina statute that prohibited lobbyists and political committees from contributing to state legislators during the regular legislative sessions.<sup>99</sup> The court, however, struck down a broader provision of the statute that barred contributions from corporations altogether because it was not closely drawn.<sup>100</sup> The Fourth Circuit noted that the North Carolina statute failed to distinguish between different types of corporations with differing abilities to amass "war chests," such as for-profit versus non-profit corporations.<sup>101</sup>

The Eighth Circuit has been notably quick to invalidate contribution limits. In a trilogy of cases in the 1990s, the Eighth Circuit invalidated contribution limitation measures. First, in *Day v. Holahan*,<sup>102</sup> the Eighth Circuit invalidated a Minnesota campaign finance provision that limited contributions to political committees to \$100.<sup>103</sup> Viewing the limits in light of inflation, the court found that the limits were so low that they were not narrowly tailored to serve the Minnesota government's interest of fighting corruption.<sup>104</sup>

In *Carver v. Nixon*,<sup>105</sup> the Eighth Circuit interpreted *Buckley* as mandating strict scrutiny in judicial assessments of contribution limits.<sup>106</sup> Proceeding on that assumption, the court invalidated a 1994 Missouri ballot initiative that limited contributions to a candidate for statewide office to \$300.<sup>107</sup> As in *Day*, the court noted that the Missouri measure placed limits on contributions at a considerably lower level than did the FECA.<sup>108</sup> Thus, the court ruled that the Missouri measure was not narrowly tailored to serve the Missouri government's interest.<sup>109</sup>

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97. See *id.*

98. 168 F.3d 705 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1156 (2000).

99. See *Bartlett*, 168 F.3d at 714-18.

100. See *id.* at 714.

101. See *id.* at 713-14.

102. 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995).

103. See *Day*, 34 F.3d at 1365.

104. See *id.*

105. 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996).

106. See *Carver*, 72 F.3d at 637.

107. See *id.* at 644.

108. See *id.* at 642 & n.8.

109. See *id.* at 642-44.



Finally, in *Russell v. Burris*,<sup>110</sup> the court reviewed an Arkansas voter initiative that capped campaign contributions for candidates for statewide office at \$300.<sup>111</sup> Explicitly adopting the *Carver* standard of strict scrutiny,<sup>112</sup> the court invalidated the contribution limits both as not fulfilling a compelling state interest and as not narrowly tailored.<sup>113</sup> The court reviewed the evidence presented to the trial court and found no compelling state interest in limiting corruption in Arkansas politics.<sup>114</sup> As in *Day*, the *Russell* court noted that inflation widened the gap between the contribution dollar amounts of the FECA and the Arkansas voter initiative and that the Arkansas contributions were thus not narrowly tailored.<sup>115</sup>

*Shrink Missouri Government Political Action Committee v. Adams*<sup>116</sup> is the Eighth Circuit's most recent application of the principles it announced in *Carver*, *Day*, and *Russell*.<sup>117</sup> Just as in those three cases, the Eighth Circuit in *Adams* invalidated the Missouri contribution limits at stake.<sup>118</sup> Unlike its refusal to review *Carver*, *Day*, and *Russell*, however, the United States Supreme Court granted certiorari in *Nixon*.<sup>119</sup> The Supreme Court reversed the Eighth Circuit's decision and rejected the line of reasoning that the Eighth Circuit had built in *Carver*, *Day*, and *Russell*.<sup>120</sup>

#### IV. REASONING OF THE COURT

##### A. Majority Opinion: The Court Upholds Missouri's Contribution Limits

In *Nixon v. Shrink Missouri Government Political Action Committee*,<sup>121</sup> the Supreme Court clarified the power of states to limit contributions to

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110. 146 F.3d 563 (8th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998).

111. *See Russell*, 146 F.3d at 565.

112. *See id.* at 567.

113. *See id.* at 571.

114. *See id.* at 569-70.

115. *See id.* at 570-71.

116. 116 F.3d 519 (8th Cir. 1998).

117. *See Shrink Mo. Gov't Political Action Comm. v. Adams*, 161 F.3d 519 (8th Cir. 1998).

118. *See id.*

119. *See Nixon v. Shrink Mo. Gov't Political Action Comm.*, 119 S. Ct. 901 (1999).

120. *See Nixon v. Shrink Mo. Gov't Political Action Comm.*, 120 S. Ct. 897, 910 (2000).

121. 120 S. Ct. 897 (2000) (Souter, J., wrote the opinion for the majority of the Court, in which Rehnquist, C.J., Stevens, O'Connor, Ginsburg, and Breyer, JJ., joined).

candidates for state political offices.<sup>122</sup> The Court held that, as to the dollar amount of the limitation, state measures need not track exactly the federal measures upheld in *Buckley v. Valeo*.<sup>123</sup>

In *Nixon*, Fredman and Shrink PAC raised both First Amendment and Fourteenth Amendment challenges to Missouri's campaign finance statute.<sup>124</sup> In assessing those challenges, the Supreme Court in *Nixon* examined three principal issues. First, the Court rejected the use of rigid standards of judicial scrutiny when reviewing campaign finance laws that limit contributions to a candidate.<sup>125</sup> Second, the Court examined Fredman's and Shrink PAC's claim that Missouri must show concrete or empirical evidence of corruption or the appearance thereof in order to save the statute.<sup>126</sup> Third, the Court examined Fredman's and Shrink PAC's claim that the Missouri contribution limits, because of inflationary devaluation of the dollar, could not survive judicial scrutiny under *Buckley*.<sup>127</sup>

1. *The Standard of Judicial Scrutiny to be Applied to Contribution Limits: Whether the Government Can Show a "Sufficiently Important Interest"*

In addressing the standard of scrutiny appropriate for contribution limits, the Court first looked to *Buckley*.<sup>128</sup> The Court noted that *Buckley* rejected the intermediate scrutiny standards established in *United States v. O'Brien*<sup>129</sup> and in the time, place, and manner cases.<sup>130</sup> The Court then

122. See *id.* at 901.

123. See *id.*; see also *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

124. See *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 120 S. Ct. 897, 902 (2000). The respondents' complaint states these two general grounds for challenging the statute. See Brief for Respondents app. at 5, *Nixon* (No. 98-963). The Court assumed that the challenges are "those of free speech, association, and equal protection, although the complaint did not so state." *Nixon*, 120 S. Ct. at 902. The Court's discussion of the equal protection claim was relegated to a footnote. See *id.* at 905 n.4. However, Justice Thomas's dissenting opinion discusses equal protection principles at some length. See *id.* at 922 (Thomas, J., dissenting).

125. See *Nixon*, 120 S. Ct. at 903-05.

126. See *id.* at 905-08.

127. See *id.* at 908-10.

128. See *id.* at 903. The Eighth Circuit stated emphatically that the *Buckley* Court had established a standard of strict scrutiny. See *Shrink Mo. Gov't Political Action Comm. v. Adams*, 161 F.3d 519, 521 (8th Cir. 1998), *rev'd*, 120 S. Ct. 897 (2000). The Supreme Court stated, however, that "[p]recision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley per curiam* opinion." *Nixon*, 120 S. Ct. at 903.

129. 391 U.S. 367 (1968).

130. See *Nixon*, 120 S. Ct. at 903; *Buckley v. Valeo*, 424 U.S. 1, 15-18 (1976) (per

mentioned that the speech at issue in *Buckley* was political speech that required the most urgent protection under the First Amendment.<sup>131</sup>

The *Nixon* Court, however, emphasized that *Buckley* drew a line between caps on contributions to a candidate and independent expenditures made in support of a candidate.<sup>132</sup> The *Buckley* Court said that caps on campaign contributions bear more heavily on associational rights than on speech rights, while caps on independent expenditures bear heavily on speech rights.<sup>133</sup> Thus, the *Nixon* Court stated that caps on contribution limits required a "less compelling justification" than did caps on independent expenditures.<sup>134</sup>

To the extent that *Nixon* dwelled on the appropriate standards, the *Nixon* Court followed the *Buckley* Court's decision: When governmental regulation "significant[ly] interfere[s]" with associational rights, the proper standard of scrutiny requires the government to show a "sufficiently important interest" in the regulation.<sup>135</sup> Any governmental regulation of this right of association, the *Buckley* Court held, must be "closely drawn" to fit the contours of the governmental interest, but did

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curiam); see also *United States v. O'Brien*, 391 U.S. 367 (1968) (requiring intermediate scrutiny of governmental regulation of conduct that communicates); *Adderley v. Florida*, 385 U.S. 39 (1966) (requiring intermediate scrutiny of governmental regulation of the time, place, and manner in which speech is allowed). Under either test, the federal contribution limits at issue in *Buckley* would have failed. See *Buckley*, 424 U.S. at 17-18. First, according to *O'Brien*, a factor to be considered is whether the government has an interest in regulating the conduct that is unrelated to the suppression of expression. See *O'Brien*, 391 U.S. at 376-77; see also *Buckley*, 424 U.S. at 15-18. In matters of campaign finance regulation, the government's interest is squarely focused on preventing expression because of the negative effects of that expression. See *Buckley*, 424 U.S. at 17. Second, with regard to the time, place, and manner cases, the *Buckley* Court distinguished them by noting that caps on campaign contributions have the patent effect of limiting the quantity of speech, rather than merely the time, place, and manner of the speech. See *id.* at 18; see also *Cox v. Louisiana*, 379 U.S. 536, 554-58 (1965); *Adderley*, 385 U.S. at 47-48.

131. See *Nixon*, 120 S. Ct. at 903; *Buckley*, 424 U.S. at 14-15.

132. See *Nixon*, 120 S. Ct. at 904.

133. See *id.* at 904. Since *Buckley*, the Court has clarified the distinction between the standards to be applied to abridgment of associational rights as opposed to abridgment of speech rights in the context of independent expenditures. See *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986). The *Nixon* Court also addressed the relationship of a speech versus an associational challenge to contribution caps: "[A] contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well . . . ." *Nixon*, 120 S. Ct. at 904.

134. See *Nixon*, 120 S. Ct. at 904. The Court stated: "We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." *Id.* at 904 (quoting *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986)).

135. *Id.* at 904 (quoting *Buckley*, 424 U.S. at 25).

not have to be “fine tun[ed]” as to the dollar amount of contributions.<sup>136</sup> The *Nixon* Court did not explicitly classify this standard, but the Court contrasted it with other association cases that used strict scrutiny.<sup>137</sup>

In applying the principles established in *Buckley* to the facts of *Nixon*, the Court focused on two general issues: first, whether the state must present concrete or empirical evidence of its interest in limiting contributions; and second, whether the Missouri limits must fail under *Buckley* because they are not closely drawn in light of inflation and thus prevent candidates from mounting effective campaigns.<sup>138</sup>

## 2. Missouri Presented Concrete Evidence of Its Interest

Fredman and Shrink PAC argued that the State of Missouri did not have a “sufficiently important interest” at stake to justify the abridgment of their associational rights.<sup>139</sup> Relying on *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,<sup>140</sup> they argued that Missouri, to show its interest, was required to produce evidence that there was *actual* corruption of Missouri officials.<sup>141</sup> Likewise, Fredman and Shrink PAC argued that Missouri was required to present evidence of an *actual* perception of corruption among Missouri residents.<sup>142</sup> They asserted that Missouri had not produced any such evidence.<sup>143</sup>

In addressing this argument, the Court first noted that *Colorado Republican* was distinguishable from *Nixon* because it addressed the issue of independent expenditures by political parties.<sup>144</sup> According to the

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136. *Id.* (quoting *Buckley*, 424 U.S. at 25, 30).

137. *See id.* at 904 n.3. The *Nixon* Court compared the *Buckley* standard of scrutiny to the standards articulated in *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984), *NAACP v. Button*, 371 U.S. 415, 438 (1963), and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). *Roberts* and *Button* require a “compelling” governmental interest, rather than *Buckley*’s “sufficiently important” interest. *See Nixon*, 120 S. Ct. at 904 n.3; *Roberts*, 468 U.S. at 623; *Button*, 371 U.S. at 438. Likewise, *Patterson* required the “closest scrutiny,” which the *Buckley* standard did not require. *See Nixon*, 120 S. Ct. at 904 n.3; *Patterson*, 357 U.S. at 460-61. Also, the Court in *Buckley* labeled the standard a “rigorous standard of review” but did not explicitly classify that standard as strict scrutiny. *See Buckley*, 424 U.S. at 29.

138. *See Nixon*, 120 S. Ct. at 905, 908.

139. *See* Brief for Respondents at 18-19, *Nixon* (No. 98-963).

140. 518 U.S. 604 (1996) (requiring concrete empirical evidence of corruption in order to consider an expenditure limitation).

141. *See Nixon*, 120 S. Ct. at 907; *see also* Brief for Respondents at 18, *Nixon* (No. 98-963).

142. *See* Brief for Respondents at 25-26, *Nixon* (No. 98-963).

143. *See id.* at 33.

144. *See Nixon*, 120 S. Ct. at 907; *see also* *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604 (1996). In *Colorado Republican*, the

Court, independent expenditures, because they bear more heavily on speech rights than on associational rights, are governed by far more rigorous First Amendment standards under *Buckley*.<sup>145</sup> Therefore, the government's burden of proving its interest in limiting expenditures was a heavier one.<sup>146</sup> The *Nixon* Court refused to apply the same burden to the present case, which involved the less protected campaign contribution caps.<sup>147</sup>

The Court nevertheless addressed Fredman's and Shrink PAC's claim on its merits and found that Missouri *had* presented evidence of an actual perception of corruption.<sup>148</sup> The Court next noted that

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plurality opinion found that the government had not shown a risk of corruption sufficient to justify its limit on expenditures. *See Colorado Republican*, 518 U.S. at 616-18. However, the opinion also expressly distinguished limits on expenditures from limits on contributions. *See id.* at 615. Under the *Buckley* expenditure/contribution dichotomy, the reasoning that applies to expenditure limits does not apply to contribution caps. *See id.* at 615; *Buckley*, 424 U.S. at 19-21. *See also supra* Part III(B).

145. *See Nixon*, 120 S. Ct. at 907; *Buckley*, 424 U.S. at 22, 28-29.

146. *See Nixon*, 120 S. Ct. at 907.

147. *See id.* ("*Colorado Republican* thus goes hand in hand with *Buckley*, not toe to toe.")

148. *See id.* at 907-08. The Court noted that Proposition A, the 1994 campaign finance reform ballot initiative, passed with 74% of Missouri citizens approving of the measure. *See id.* at 908. The Court also noted that the district court cited several newspaper accounts of a perception of corruption. *See id.* at 907; *see also Shrink Mo. Gov't Political Action Comm. v. Adams*, 5 F. Supp. 2d 734, 738 n.6 (E.D. Mo. 1998). Finally, the Court noted that Missouri offered the affidavit of state Senator Wayne Goode who attested to a perception of corruption in Missouri politics. *See Nixon*, 120 S. Ct. at 907. Due to these factual allegations, the Court stated that "this case does not present a close call." *Id.* at 907.

However, the Court did not address the issue that one of Missouri's three pieces of evidence of corruption was flawed. According to precedent, the Senator's affidavit should have been given little weight. *See Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577, 582 & n.3 (1982). In *Bread*, the Court was presented with a situation remarkably analogous to the one in *Nixon*. The plaintiffs in *Bread* sought to challenge a provision of the FECA through a judicial review amendment to the FECA sponsored by Senator James Buckley. *See id.* at 579. The amendment was ambiguous as to whether the plaintiffs were included as permissible parties to bring suit under the statute; therefore, the plaintiffs secured an affidavit from Senator Buckley stating that the amendment was intended to include the plaintiffs. *See id.* Faced with this situation in *Bread*, the Court stated: "We cannot give probative weight to these affidavits, however, because '[s]uch statements represent only the personal views of th[is] legislato[r], since the statements were made after passage of the Act.'" *Id.* (quoting *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 132 (1974)); *see also* NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §§ 48:16-:17 (6th rev. ed. 2000) (collecting cases in which federal and state courts have refused to give probative weight to the testimony of legislators; declaring courts' policy rationale to be the avoidance of passing on the credibility of legislators). The *Nixon* Court did not state why it considered Senator Goode's affidavit to be probative of the legislative intent of the Missouri legislature. *See Nixon v. Shrink Mo. Gov't Political Action Comm.*, 120 S.

Fredman and Shrink PAC had offered no specific evidence to cast doubt on that offered by Missouri.<sup>149</sup> The Court stated that if Fredman and Shrink PAC had offered evidence to the contrary, then Missouri might have had to make a correspondingly more extensive evidentiary offering.<sup>150</sup> The Court deferred the question of the requirement of empirical evidence until a future case presents a scenario where the government has not offered any such evidence.<sup>151</sup>

3. *The Missouri Limits Do Not Prevent a Candidate from Mounting an Effective Campaign*

Fredman and Shrink PAC also argued that Missouri's campaign contribution limits should be invalidated because they were not closely drawn and were thus fundamentally different from those scrutinized in *Buckley*.<sup>152</sup> First, they made the general assertion that the Missouri limits were so low that they prevented candidates from mounting effective campaigns.<sup>153</sup> Second, they made the more specific argument that the Missouri limits, when adjusted for inflation, were fundamentally different from *Buckley*'s and should be invalidated.<sup>154</sup>

The Court dismissed the first, more general argument right away.<sup>155</sup> The Court cited *Buckley*'s concern that contribution limits might, if too low, prevent a candidate from mounting an effective campaign.<sup>156</sup>

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Ct. 897 (2000).

149. See *Nixon*, 120 S. Ct. at 908. The Court placed importance on the fact that Fredman and Shrink PAC offered only scholarly works that generally opposed campaign finance reform. See *id.* Noting that Missouri had offered similar scholarly works with opposite theses, the Court stated:

Given the conflict among these publications, and the absence of any reason to think that public perception has been influenced by the studies cited by respondents, there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.

*Id.*

150. See *id.*

151. See *id.*

152. See Brief for Respondents at 46-47, *Nixon* (No. 98-963). While this argument was not the principal argument made by Fredman and Shrink PAC, the Court addressed it at some length, possibly because it was the primary basis upon which the Eighth Circuit decided in Fredman's favor. See *id.*; see also *Shrink Mo. Gov't Political Action Comm. v. Adams*, 161 F.3d 519, 522-23 (8th Cir. 1998).

153. See *Nixon*, 120 S. Ct. at 908-09.

154. See *id.* at 909.

155. See *id.* at 908-09.

156. See *id.*; see also *Buckley*, 424 U.S. at 21 ("Given the important role of contributions in financing political campaigns, contribution restrictions could have a

However, the Court rejected this argument by referring to statistics provided by Missouri.<sup>157</sup> These statistics showed that an overwhelming number of campaign contributions made to candidates for state auditor before Missouri's campaign finance statute took effect were small donations relative to the current contribution caps.<sup>158</sup> Thus, the Court did not engage in speculation that but for the Missouri statute, Fredman's campaign would have been inundated with large donations.<sup>159</sup> The Court likewise diminished the importance of Fredman's loss in the 1998 race for state auditor.<sup>160</sup> The Court declined to infer from his loss that the entire Missouri system was one of suppressed expression and advocacy.<sup>161</sup> In sum, the Court held that Missouri's contribution limits did not prevent candidates from mounting effective campaigns.<sup>162</sup>

The Court held similarly with respect to Fredman's and Shrink PAC's inflation argument.<sup>163</sup> Fredman and Shrink PAC asserted that, when *Buckley*'s approved contribution limits were adjusted for inflation, the Missouri limits amounted to only \$378 compared to *Buckley*'s limit of \$1,000.<sup>164</sup> This difference in the dollar amount, they argued, made the Missouri limits fundamentally different from those at issue in *Buckley*.<sup>165</sup> In rejecting this argument, the Court stated that *Buckley* did not establish a hard limit on contributions beyond which a state could not go.<sup>166</sup> Instead, the *Nixon* Court held that *Buckley* only required that

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severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.”).

157. See *Nixon*, 120 S. Ct. at 909. Missouri appended fourteen pages of statistical data to its brief to the Supreme Court. See Brief for Petitioners app. at 23-37, *Nixon* (No. 98-963).

158. See *Nixon*, 120 S. Ct. at 909. In 1994, before Missouri's contribution caps went into effect, 97.62% of contributors to candidates for state auditor gave \$2,000 or less. See *id.* Based on this data and others provided by Missouri, the district court noted that “candidates for political office in the state are still able to amass impressive campaign war chests.” *Shrink Mo. Gov't Political Action Comm. v. Adams*, 5 F. Supp. 2d 734, 741 (E.D. Mo. 1998), quoted in *Nixon*, 120 S. Ct. at 909.

159. See *Nixon*, 120 S. Ct. at 909.

160. See *id.*

161. See *id.*

162. See *id.* at 908-09.

163. See *id.* at 909.

164. See Brief for Respondents at 46, *Nixon* (No. 98-963); see also *Shrink Mo. Gov't Political Action Comm. v. Adams*, 161 F.3d 519, 523 & n.4 (8th Cir. 1998). Fredman and Shrink PAC based their calculations on the Consumer Price Index. See *Adams*, 161 F.3d at 523 n.4.

165. See Brief for Respondents at 46, *Nixon* (No. 98-963); see also *Nixon*, 120 S. Ct. at 909.

166. See *Nixon*, 120 S. Ct. at 909 (“[T]his assumption [that *Buckley* set constitutional minimums on campaign contributions] is a fundamental misunderstanding of what we held.”).

a court ask whether or not the limits prevent a candidate from mounting an effective campaign.<sup>167</sup> The Court referred again to the statistical evidence offered by the state of Missouri to show that candidates in Missouri are capable of mounting effective campaigns despite the limits on contributions.<sup>168</sup>

In concluding the opinion, the Court responded generally to the dissenting Justices' arguments. Justices Scalia, Kennedy, and Thomas would have overruled *Buckley* and removed any limitations on contributions to candidates.<sup>169</sup> The Court responded by noting that Fredman and Shrink PAC did not request that *Buckley* be overturned, and thus the Court was constrained from doing so.<sup>170</sup>

#### B. Concurring Opinions: Reservations About *Buckley*'s Expenditure/Contribution Dichotomy

Justice Stevens concurred in the result of the majority's reasoning in *Nixon* but wholly disagreed with the majority's reasoning.<sup>171</sup> Justice Stevens' concurrence made but one underlying point: the entire *Buckley* framework of analysis should be discarded.<sup>172</sup> He based his concurrence on the premise that campaign contributions are not speech at all, but rather are property.<sup>173</sup> Thus, under Justice Stevens' premise, the issue of campaign finance should be analyzed under relevant principles of substantive due process as they apply to constitutional protections of property.<sup>174</sup> An analysis of campaign finance under these substantive

167. *See id.*

168. *See id.*; *see also supra* note 158.

169. *See Nixon*, 120 S. Ct. at 910, 916. Justice Kennedy remained somewhat open to limitations on contributions and expenditures, and would have overruled *Buckley* in order to give legislative bodies full discretion to rework the entire campaign finance system. *See id.* at 916 (Kennedy, J., dissenting). Justices Thomas and Scalia would have overruled *Buckley* based on the proposition that the First Amendment allows no limitation on contributions or expenditures. *See id.* at 916 (Thomas, J., dissenting).

170. *See id.* at 909.

171. *See Nixon*, 120 S. Ct. at 910 (Stevens, J., concurring).

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

173. *See id.* (Stevens, J., concurring). Justice Stevens juxtaposed the powers of speech and money:

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

*Id.* (Stevens, J., concurring).

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



due process principles, Stevens implied, would give the Court much greater latitude in limiting contributions and expenditures.<sup>175</sup>

Justice Breyer also wrote a concurring opinion which Justice Ginsburg joined.<sup>176</sup> This concurrence functioned primarily to justify *Buckley's* distinction between expenditures and contributions.<sup>177</sup> Justice Breyer initially rebuked the principal dissent for failing to recognize that there are compelling arguments on both sides of the issue of campaign finance.<sup>178</sup> Next, Justice Breyer rejected Justice Stevens's argument by reaffirming the fundamental premise of *Buckley*: that campaign contributions enable protected political speech and are not mere money.<sup>179</sup>

The balance of Justice Breyer's concurrence explored the reasons why using strict scrutiny is improper when reviewing campaign finance measures.<sup>180</sup> First, the strong presumption against constitutionality that accompanies strict scrutiny is improper, he stated, because of the serious constitutional interests on both sides of the issue.<sup>181</sup> Justice Breyer wrote that the interests of the government in preserving the integrity of the American electoral process, if realized by campaign finance measures, would work toward increasing speech rather than stifling it.<sup>182</sup>

Second, Justice Breyer's concurrence rejected strict scrutiny because in matters of campaign finance, deference to the political branches of government was proper.<sup>183</sup> He emphasized that those branches of government had institutional expertise in matters of

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175. See *id.* (Stevens, J., concurring) (“[P]roperty rights . . . are not entitled to the same protection as the right to say what one pleases.”).

176. See *id.* at 910-14 (Breyer, J., concurring).

177. See *Nixon*, 120 S. Ct. at 911 (Breyer, J., concurring). This opinion showed the most ardent support of all the opinions for continuing the *Buckley* regime of limiting contributions while allowing unlimited expenditures. See *id.* (Breyer, J., concurring).

However, even this opinion acknowledged *Buckley's* potential flaws and called for limited reform of the current regime. See *id.* at 913-14 (Breyer, J., concurring).

178. See *id.* at 911 (Breyer, J., concurring). Justice Breyer noted that campaign finance is a “difficult constitutional problem,” and implied that any blindly facile reasoning by its proponents or opponents does the issue a disservice. See *id.* (Breyer, J., concurring).

179. See *id.* (Breyer, J., concurring).

180. See *id.* at 911-14 (Breyer, J., concurring).

181. See *id.* at 911-12 (Breyer, J., concurring).

182. See *id.* at 911 (Breyer, J., concurring). Justice Breyer implied that the First Amendment presupposes a vibrant, communicative, and voting public. See *id.* (Breyer, J., concurring). He stated that insofar as this is not the case in America today, campaign finance measures seek to fulfill a fundamental First Amendment goal: to revitalize our democracy and increase the *overall* volume of ideas being expressed in the context of American electoral politics. See *id.* (Breyer, J., concurring).

183. See *Nixon*, 120 S. Ct. at 912 (Breyer, J., concurring).

campaign finance.<sup>184</sup> Therefore, Justice Breyer urged that a strong presumption against the constitutionality of their enactments was improper.<sup>185</sup>

In concluding, Justice Breyer's concurrence dealt with the possibility of flaws in the system established by *Buckley*.<sup>186</sup> He questioned whether *Buckley* provides enough flexibility to allow for changes in the way campaigns are financed.<sup>187</sup> Breyer explicitly stated that *Buckley* left open to legislative bodies the option to regulate soft money, reduced-price media time, and public financing of campaigns.<sup>188</sup> However, agreeing with Justice Kennedy, Justice Breyer remained open to overturning *Buckley* if it unduly limits changes to campaign finance systems.<sup>189</sup>

### C. Dissenting Opinions: Outright Disagreement with *Buckley*

Kennedy's dissent initially emphasized the failures of *Buckley* and criticized the majority for failing to recognize that twenty-four years after the *Buckley* decision, the regime it established no longer works.<sup>190</sup> Justice Kennedy stated that *Nixon* presented a situation in which deference to precedent should not necessarily govern the Court's decision-making.<sup>191</sup> Kennedy concluded with the seemingly contradictory statement that he was both in substantial agreement with the principal dissent, and also open to a system of campaign finance in which both contributions and expenditures are limited.<sup>192</sup> This contradiction, though, made Justice Kennedy's point clear: regardless of the direction in which campaign finance policy moves in the future, it must move away from the flawed regime established by *Buckley*.<sup>193</sup>

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184. *See id.* at 912-13 (Breyer, J., concurring).

185. *See id.* at 912 (Breyer, J., concurring).

186. *See id.* at 913 (Breyer, J., concurring).

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

188. *See id.* (Breyer, J., concurring). This dicta is timely considering the campaign finance bills that have lingered in the halls of Congress for the last several congressional terms. *See, e.g.*, McCain-Feingold Campaign Finance Reform Bill, S. 26, 106th Cong., 1st Sess. (1999); Shays-Meehan Bipartisan Campaign Finance Reform Act, H.R. 417, 106th Cong., 1st Sess. (1999); *see also* Joseph Lieberman, *Campaign Finance*, 49 CATH. U. L. REV. 5, 6 (1999).

189. *See Nixon*, 120 S. Ct. at 913-14 (Breyer, J., concurring).

190. *See id.* at 914-15 (Kennedy, J., dissenting).

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

192. *See id.* at 916 (Kennedy, J., dissenting).

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

Justice Thomas wrote the most vigorous dissent, which Justice Scalia joined.<sup>194</sup> Justice Thomas advocated overruling *Buckley* and eliminating restrictions on contributions, just as *Buckley* eliminated restrictions on expenditures.<sup>195</sup> Thomas's dissent primarily urged the use of a strict standard of scrutiny when reviewing campaign finance measures that limit contributions.<sup>196</sup>

Justice Thomas opened his discussion with a reiteration of the importance of political speech under our Constitution.<sup>197</sup> The opinion cites a number of decisions in which the Court has upheld less consequential speech under the First Amendment, and therefore called into question the *Nixon* Court's reasoning in abridging speech that is at the very core of First Amendment protection.<sup>198</sup>

The next portion of the dissent was dedicated to refuting the proposition that is the basis of *Buckley*: contributions to a candidate are not themselves speech, but rather enable speech.<sup>199</sup> To this end, Justice Thomas noted that in our technological nation, speech of all sorts is disseminated effectively through the expenditure of money.<sup>200</sup> Thus, the dissent contended that the distinction between speech and money is insignificant, and such a fragile distinction should not have served as the basis for *Buckley*'s upholding of campaign contribution caps.<sup>201</sup>

Justice Thomas concluded his dissent with a scathing critique of what he saw as the majority's poorly reasoned adherence to *Buckley*.<sup>202</sup> Thomas questioned what standard of review the majority used in upholding Missouri's statute, noting that the *Nixon* standard does not fit

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194. See *Nixon*, 120 S. Ct. at 916 (Thomas, J., dissenting).

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

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

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

198. See *id.* (Thomas, J., dissenting); see also *NAACP v. Button*, 371 U.S. 415 (1963) (protecting the filing of lawsuits); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (protecting the making of defamatory statements about public officials); *Schacht v. United States*, 398 U.S. 58 (1970) (protecting the wearing of military uniforms by civilians in theatrical productions); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) (protecting the exhibition of drive-in movies with nudity); *United States v. Eichman*, 496 U.S. 310 (1990) (protecting the burning of the American flag); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion) (protecting nude dancing).

199. See *Nixon*, 120 S. Ct. at 917-27 (Thomas, J., dissenting).

200. See *id.* at 918 (Thomas, J., dissenting).

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

202. See *id.* at 922-27 (Thomas, J., dissenting). Justice Thomas stated that the majority "blindly adopt[ed] *Buckley*'s flawed reasoning without so much as pausing," and that the majority "hi[d] behind *Buckley*'s discredited reasoning," among other criticisms. *Id.* at 922-23 (Thomas, J., dissenting).

neatly within a traditional classification of strict scrutiny or intermediate scrutiny.<sup>203</sup> Finally, the dissent attacked the evidentiary basis for the majority opinion, arguing that Missouri did not carry its burden of proving an important state interest in limiting contributions.<sup>204</sup>

The opinions in *Nixon*, taken in the aggregate, reveal a Court with sharp ideological divisions. Between Justice Stevens' advocacy of abandoning a First Amendment analysis altogether and Justice Thomas' advocacy of abandoning all limits on campaign contributions, the majority of the Court managed to find an analytical center in *Buckley*'s reasoning. Although the majority's reasons for upholding *Buckley* were delicately balanced among competing interests, *Nixon* ensures that for the time being, at least, *Buckley* remains the core of campaign finance jurisprudence.

#### V. THE SIGNIFICANCE OF THE *NIXON* DECISION

Nationally, the campaign finance reform debate is focused on such acute problems as soft money, political action committees, and issue advocacy.<sup>205</sup> However, at the state level, the issues at the fore of campaign finance reform are often simpler, if no less politically charged.<sup>206</sup> For example, in *Nixon*, Missouri's contribution limits were hotly contested, while at the national level the constitutionality of contribution limits is nearly taken for granted. *Nixon* does not address the complex campaign finance issues that are debated at the national level; rather, *Nixon* speaks to efforts at the state level to impose contribution limits on candidates for state offices.

The Court's decision in *Nixon* is of immediate importance to states in the Eighth Circuit because the Court rejected the Eighth Circuit's rigid approach to analyzing contribution limits.<sup>207</sup> Generally, the Court

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203. See *id.* at 922 (Thomas, J., dissenting).

204. See *id.* at 925 (Thomas, J., dissenting).

205. For a discussion of how these issues impacted the 1996 national election, see Joseph Lieberman, *The Politics of Money and the Road to Self-Destruction*, 16 YALE L. & POL'Y REV. 425 (1998).

206. For a thorough discussion of state campaign contribution limits, see William J. Connolly, Note, *How Low Can You Go? State Campaign Contribution Limits And The First Amendment*, 76 B.U. L. REV. 483 (1996).

207. On remand from the United States Supreme Court, Judge Bowman wrote a tart concurrence that illustrates the sharp ideological divide between those favoring and opposing campaign contribution limits:

In *Shrink Missouri*, the Supreme Court has spoken in a way that subordinates core First Amendment rights of free speech and free association to the predilections of the legislature and the mood of the electorate. Given that

rejected the Eighth Circuit's use of formulaic strict scrutiny in reviewing contribution limits. Specifically, the Court took a more relaxed approach to the state's evidentiary requirements and to the state's tailoring of the limits. This section initially examines each of the Court's specific criticisms of the Eighth Circuit's reasoning in turn, then discusses the state of campaign finance reform in Arkansas, and closes with a call for re-examination of campaign finance in Arkansas.

The Court's decision in *Nixon* reveals that very little evidence is required for a state to sustain a contribution limit by showing its interest in the regulation. *Nixon* was initially decided on a motion for summary judgment, and the district court cited only three pieces of indirect evidence of a public perception of corruption in Missouri government. The Supreme Court found this scant record to be ample evidence of the state's interest. Thus, the Court implicitly acknowledged that a state need not conduct extensive empirical studies of corruption or the perception of corruption in order to prove its interest in combating such corruption. *Nixon* establishes that in cases involving contribution limits, the state's interest in preventing real or perceived corruption is nearly presumed.

Similarly, *Nixon* is also significant because the Court allowed Missouri's contribution limits a good deal of tailoring latitude. The Court rejected the Eighth Circuit's strict tailoring requirement, which went so far as to calculate contribution limits according to inflation since the 1976 *Buckley* decision. The Court clearly established that states do not have to take inflation since *Buckley* into account, and that *Buckley*'s \$1,000 contribution limit does not represent a constitutional template.

Following the *Nixon* decision, states in the Eighth Circuit may reasonably be more hopeful that contribution limits can withstand that court's scrutiny. In Arkansas, statewide candidates are currently subject to a \$1,000 limit on contributions.<sup>208</sup> Thus, Arkansas's campaign

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decision and the current political climate, we no doubt can expect further, even more draconian, efforts by government to restrict political speech. Any state armed with the power to limit what citizens may choose to contribute to candidates for political office, or what they otherwise may spend on political activity, bears close watching, and the courts must remain vigilant in performing their duty to protect the essential freedoms guaranteed by the Constitution.

Shrink Mo. Gov't Political Action Comm. v. Adams, 204 F.3d 838, 843 (8th Cir. 2000) (Bowman, J., concurring).

208. See ARK. CODE ANN. § 7-6-203 (Michie Repl. 2000). The \$1,000 limit on contributions was effective after the Eighth Circuit's decision in *Russell* which invalidated the lower limits imposed by a 1996 Arkansas ballot initiative. See *Russell*

contribution limits are nearly equivalent to the Missouri limits litigated in *Nixon*. The *Nixon* case, indirectly, shields the Arkansas limits from attacks on their constitutionality. More importantly, the *Nixon* case creates a more favorable climate for future work in campaign finance reform in Arkansas. Such future work may focus on a newly-created gray area in the law of state contribution limits: a \$1,000 limit is acceptable according to the United States Supreme Court, but a \$300 limit is too low according to the Eighth Circuit. Because *Nixon* implicitly halted the Eighth Circuit's stringent treatment of state campaign finance measures, concerned citizens in Arkansas and other states in the Eighth Circuit may now more confidently work to enact further campaign finance reform.

*Erin Buford Vinett\**

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v. *Burris*, 146 F.3d 563, 568-73 (8th Cir. 1998). Arkansas Code Annotated section 7-6-203 first provided for legislatively enacted \$1,000 limits for statewide offices, and the subsequent ballot initiative lowered the limits to \$300. After the Eighth Circuit's decision in *Russell* which invalidated the \$300 limits, it was unclear if the \$1,000 limit would again be effective, or whether there would simply be no contribution limit in Arkansas. However, on remand from the Eighth Circuit, Judge Bill Wilson of the United States District Court for the Eastern District of Arkansas reinstated the original \$1,000 limits in an unpublished judgment. See *Russell v. Burris*, No. LR-C-97-0089 (E.D. Ark. Aug. 24, 1998). Thus, the Arkansas Ethics Commission, the administrative entity charged with enforcing Arkansas's campaign laws, promulgated administrative rules limiting contributions to \$1,000 for candidates for statewide offices. See ARKANSAS ETHICS COMMISSION, RULES ON CAMPAIGN FINANCE AND DISCLOSURE § 203, at 9 (amended ed., 1999).

\* J.D. expected 2001; B.A. with distinction in history, Hendrix College, 1998. I would like to thank Professor Morell E. Mullins for his challenging guidance.

