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NOTES


I. Introduction

Americans contribute hundreds of millions of dollars every year to support and oppose candidates for public office, and to advocate or fight against issues close to their hearts. Contributors speak their minds through donations to candidate campaign organizations, political parties, and issue advocacy groups. Each election cycle, candidates raise and spend more and more money. Congressional candidates raised an astounding $4 billion over the last ten years. The Democratic Congressional Campaign Committee raised $25 million in soft money between January 1, 1999, and March 31, 2000 — four times the $6 million the committee raised in the same amount of time in 1997 and 1998. Political action committees raised a whopping $430.6 million between January 1, 1999, and June 30, 2000 — up 20% over the same eighteen-month period during the 1997-98 election cycle.

Despite the significant citizen participation demonstrated by these contributions, not everyone believes the raising of large sums of money is conducive to a well-run democracy. In fact, many campaign finance reformers bemoan political contributions as potentially corrupting influences on candidates and elections.


2. "Soft money" refers to contributions to political parties from corporations, unions, special interest groups, and individuals. These funds can be used for basic campaign activities and party building. The contributions are called soft money because they are not federally regulated like funds contributed directly to federal candidates, yet they are often used to purchase issue-related advertisements that serve to assist or deter particular candidates.

One political watchdog group lobbying for campaign finance reform defines soft money as huge contributions to political parties which are laundered into specific federal campaigns. See COMMON CAUSE, CAMPAIGN FINANCE REFORM CITIZEN ACTION KIT 4 (2001) (on file with author).

3. See Jonathan D. Silant, FEC to Enforce Limits on Party Spending, Associated Press Newswires, June 23, 2000, available in Westlaw, AllNews Plus Database. During the same time frame, the National Republican Congressional Committee raised $27 million, up from $14 million two years earlier. See id.


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Reform crusaders at the state level have been creative in designing their restrictions on contributions, imposing various forms of contribution limits intended to address what they consider unique concerns.\(^6\)

On the other hand, free speech advocates "view candidates raising large amounts of money as a healthy and essential part of the democratic process."\(^7\) In their minds, a contributor's donation to a candidate enhances the candidate's ability to communicate his message, adding to political debate and fostering the "free discussion of governmental affairs."\(^8\) Even the Supreme Court has recognized that virtually all means of communication require money, from expensive mass media campaigns to the simple distribution of pamphlets.\(^9\)

While recent campaign finance reform efforts at the federal level have been unsuccessful,\(^10\) a majority of states have enacted laws limiting contributions to candidates for state offices.\(^11\) Some states have tightened their campaign contribution restrictions by lowering the maximum allowable contribution,\(^12\) while other states are weighing their options before legislating restrictions.\(^13\)

Even in the midst of the reform environment, an Oklahoma Ethics Commission task force has recommended *higher* limits on contributions to candidates for

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6. Brief of Amici Curiae States of Ohio et al. at 4-6, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (No. 98-963). In reality, the concerns addressed in the brief are not as unique as the states' chosen restrictions on campaign contributions, which include blanket dollar-amount restrictions on individual contributions to candidates, regardless of the office sought; varying limits based on the office sought; limits tied to election cycles or calendar years; restrictions on contributions from government employees; bans on anonymous campaign contributions; and restrictions on contributions from corporations, unions, PACs, and national political parties. *See id. at 5; see also Jacqueline Soteropoulos, Campaign Finance Law Being Tested, TAMPA TRIB., Oct. 4, 1999, at 1.*

7. *See Richey, supra note 5, at 1; see also Chris Casteel, Law Expert Wants to Ban Finance Limits, DAILY OKLAHOMAN, Oct. 25, 1999, at 1* (quoting Cleta Mitchell, a former Oklahoma legislator and candidate finance expert, as saying, "I think they should get rid of all the regulations.").


12. *Soteropoulos, supra note 6, at 1* (reporting that Florida lowered maximum contributions to $500).

statewide offices from political parties.\textsuperscript{14} The Ethics Commission, however, is not considering increased limits on contributions from individuals.\textsuperscript{15} Oklahoma law currently restricts individual and family contributions to $5000 per campaign for candidates for state offices and offices in large municipalities.\textsuperscript{16} Candidates for other local offices may receive a maximum of $1000 from an individual or his own family.\textsuperscript{17} Oklahoma flatly prohibits corporate contributions benefiting political candidates.\textsuperscript{18}

Oklahoma's neighbor, the State of Missouri, has spent the last few years defending its campaign contribution limits in court.\textsuperscript{19} The U.S. Supreme Court recently upheld Missouri's restrictions on campaign contributions in \textit{Nixon v. Shrink Missouri Government PAC.}\textsuperscript{20} A candidate for statewide office and one of his contributors challenged the limits as violative of their First Amendment political speech and association rights.\textsuperscript{21} In reviewing Missouri's contribution limits, the Court relied on the often criticized case of \textit{Buckley v. Valeo},\textsuperscript{22} which came to the Court in the wake of Watergate. The \textit{Buckley} Court reviewed federal legislation aimed at redesigning the campaign finance system,\textsuperscript{23} and its decision has remained the touchstone of campaign finance reform case law.\textsuperscript{24}

When it made its decision in the mid-seventies, the \textit{Buckley} Court could not have been sure how its ruling would affect our democracy. Now, twenty-five years later, we witness its consequences, and reformers continue working to plug campaign finance law loopholes with even more First Amendment restrictions. Unfortunately, the \textit{Shrink} Court did not give these consequences an appropriate review and allowed Missouri to restrict contributors' and candidates' rights in violation of First Amendment principles.\textsuperscript{25}

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\textsuperscript{14} Chuck Ervin, \textit{Panel Backs Raising Donation Limit}, TULSA WORLD, Aug. 12, 2000, at A11. The task force recommended a $50,000 maximum party contribution for gubernatorial candidates and a $25,000 limit for other statewide office candidates. \textit{Id.} The maximum individual contribution for both sets of candidates is currently $5000. \textit{Id.}

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} 21 OKLA. STAT. § 187.1 (Supp. 2000). A candidate for a municipal or county office in a municipality or county with a population over 250,000 people may accept up to $5000 from a person or family. \textit{Id.}

\textsuperscript{17} \textit{Id.} The statute actually uses the words "person" and "family." \textit{Id.} The statutory definition of person includes an individual, corporation, association, proprietorship, firm, partnership, organization, committee, and club. \textit{Id.} § 187. "Family" means an individual, his or her spouse, if any, and all children under the age of eighteen years residing in the same household." \textit{Id.}

\textsuperscript{18} 21 OKLA. STAT. § 187.2.


\textsuperscript{20} 528 U.S. 377 (2000). PAC is the acronym for political action committee.

\textsuperscript{21} \textit{Id.} at 382.

\textsuperscript{22} 424 U.S. 1 (1976).

\textsuperscript{23} See \textit{id.} at 6, 7.

\textsuperscript{24} Research revealed more than 2000 decisions citing \textit{Buckley}.

\textsuperscript{25} The First Amendment is meant to vigorously protect free speech. "[I]t is the supreme election
Part II of this note reviews the *Buckley* Court's decision regarding political contribution and expenditure limitations. Part III provides a statement of the *Shrink* case and an in-depth discussion of the Court's decision. Part IV considers the consequences our representative democracy has endured as a result of *Buckley*'s campaign contribution limits. Part V argues that Missouri's contribution restrictions should have been subjected to *real* strict scrutiny, and that they should have been found unconstitutional for the absence of evidence of harm and for being arbitrarily and overly restrictive. Part VI concludes the note.

II. Background: *Buckley v. Valeo*

A. The Constitution Allows Restrictions on Contributions to Candidates, but Not on Expenditures

In 1976, the U.S. Supreme Court reviewed "the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress." The Federal Election Campaign Act's (the Act) provisions included limits on individual and political committee contributions to candidates, and limits on campaign and independent expenditures. The plaintiffs argued that the Act's limitations placed grossly unconstitutional restraints on political speech and association, areas the Court had recognized as the most deserving of First Amendment protection. Nevertheless, the *Buckley* Court upheld contribution limits in the Act (including a $1000 per election limit on law of the land, and stands as the preeminent safeguard of our republican democracy." James Bopp, Jr., *All Contribution Limits Are Not Created Equal: New Hope in the Political Speech Wars*, 49 CATH. U. L. REV. 11, 13 (1999). As repeatedly stated by the Supreme Court, the First Amendment's primary purpose is to protect political speech, *Shrink*, 528 U.S. at 409 (Thomas, J., dissenting), because political speech is more than self-expression; it is the essence of self-government," Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). "The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy — the political campaign." Brown v. Hartlage, 456 U.S. 45, 53 (1982). In fact, "the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley*, 424 U.S. at 15. Not only is discussion of ideas important, but the debate on the qualifications of candidates is also integral to the operation of our government. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995). As the Supreme Court proclaimed, "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley*, 424 U.S. at 14-15.

26. *Id. at 7.*

27. *Id. at 13* (prohibiting individuals from contributing more than $1000 to any single candidate for an election campaign and more than a total of $25,000 in a single year).

28. *Id. at 35* (prohibiting political committees from contributing more than $5000 to any candidate with respect to any election for federal office).

29. *Id. at 39-59.*

30. Plaintiffs included a presidential candidate, a United States Senator who was also a candidate for re-election, a potential contributor, political parties, and private political organizations. *Id. at 7-8.*

31. *Id. at 15.*

32. *Id. at 14, 15.* "[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . of course includ[ing] discussion of candidates . . . ." *Id. at 14.*

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individual contributions to candidates), while striking down expenditure limits in the Act.33

The Court considered the limits on individual contributions as merely "marginal restriction[s]."34

The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.35

The Court also found it important that the "transformation of contributions into political debate involves speech by someone other than the contributor."36 Further, the Court reasoned that contribution limits restricted only one means of associating with a candidate, and left contributors the opportunity to support candidates through other associations.37 Therefore, candidates and the associations that supported them could still "aggregate large sums of money to promote effective advocacy."38 In addition to contributing money, candidate advocates could also provide substantial support by volunteering their services.39

B. Contribution Limits Prevent Corruption and the Appearance of Corruption

The basic constitutional freedom of association has close ties to the freedom of speech.40 Because these rights lie at the foundation of our free society, infringement upon them is subject to the "closest scrutiny."41 Nevertheless, the Buckley Court found that the Act's contribution limits were justified under the "rigorous standard of review established by [its] prior decisions."42

Under this strict standard of review, the government had to first demonstrate a "sufficiently important interest" to justify limiting the freedoms of speech and association.43 The Court found that Congress's primary interest was to prevent corruption and the appearance of corruption resulting from "large contributions."44 The Court spoke of actual corruption in terms of large contributions given in exchange for political quid pro quo.45 The Court considered the impact of

33. Id. at 58-59.
34. Id. at 20.
35. Id. at 21. The Court further explained, "A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." Id.
36. Id.
37. Id. at 22.
38. Id.
39. Id. at 28.
40. Id. at 25.
41. Id.
42. Id. at 29.
43. Id. at 25.
44. Id. at 26.
45. Id. Quid pro quo is Latin for "something for something." BLACK'S LAW DICTIONARY 1261 (7th

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perceived corruption to be nearly as dangerous as actual corruption," reasoning that "Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." In analyzing the sufficiency of Congress's interest, the Buckley Court accepted the lower court's discussion of evidence regarding "the deeply disturbing examples" of corruption that surfaced after the 1972 election. According to the Court, these examples demonstrated that the problem was not illusory.

In the second step of its review, the Court determined whether the limitation on contributions had been "closely drawn to avoid unnecessary abridgment of associational freedoms." The Court rejected appellants' argument that bribery laws, in combination with narrowly drawn disclosure requirements, would provide a less restrictive means of addressing Congress's interests. The Court approved the additional restriction of contribution limits because corruption and the appearance of corruption are "inherent in a system permitting unlimited financial contributions."

The Court found that the Act's $1000 contribution limitation dealt precisely with the problem of large contributions. The Court found it significant that the limits did not materially undermine "the potential for robust and effective discussion of candidates and campaign issues" by individuals, associations, the press, candidates, or political parties. The Court refused to invalidate the $1000 restriction as unrealistically low to effectuate corruption or its appearance. Nor would the Court take a scalpel to Congress's determination of an appropriate limit. Instead, the Court found that distinctions in the degree of limitation are significant only when they "amount to differences in kind."

The Act's contribution limits overcame other challenges as well. The Court did not find the limitations unconstitutionally broad, reasoning that most large contributors do not seek to corrupt a candidate. Nor did the Court accept the

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ed. 1999). It is a thing that is exchanged for another thing of more or less equal value, a substitute. Id. Examples of political quid pro quos in exchange for contributions are political appointments and favorable legislative action.

46. Id. at 27.
47. Id.
48. Id. at 27. Here, the Court was referencing activities taking place during the Watergate era, which Part V.B of this note discusses.
49. Id.
50. Id. at 25.
51. Id. at 28.
52. Id.
53. Id.
54. Id. at 29.
55. Id. at 30.
56. Id.
57. Id.
58. Id. at 29.
proposition that the limits invidiously discriminated in favor of incumbents, and against challengers and minor-party candidates.\textsuperscript{9}

\textbf{C. Expenditure Restrictions Burden First Amendment Expression}

On the other hand, the Court found that "[a] restriction on the amount of money a person or group can spend on political communication . . . reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."\textsuperscript{60} Such expenditure limitations, in contrast with contribution limitations, are direct and "substantial rather than merely theoretical restraints on the quantity and diversity of political speech."\textsuperscript{61}

The Court found that the independent expenditure ceiling heavily burdened core First Amendment expression without serving any substantial government interest.\textsuperscript{62} The Court observed:

[I]ndependent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as quid pro quo for improper commitments for the candidate.\textsuperscript{63}

Candidates spending their personal funds to advocate their elections to office could not be restricted because the concern about undue influence from outside interests would not exist.\textsuperscript{64} Additionally, the Court flatly rejected the government's interest in equalizing the varied voices of candidates' political speech in order to equalize influence over electoral outcomes.\textsuperscript{65} According to the Court, the framers designed the First Amendment to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"; therefore, it is improper to calibrate the strength of its protection according to a candidate's financial status.\textsuperscript{66}

\begin{footnotesize}
\begin{itemize}
\item 59. \textit{Id.} at 30-35.
\item 60. \textit{Id.} at 19 (emphasis added).
\item 61. \textit{Id.} at 19, 59.
\item 62. \textit{Id.} at 47-48.
\item 63. \textit{Id.} at 47.
\item 64. \textit{Id.} at 54.
\item 65. \textit{Id.} at 48-49. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." \textit{Id.}
\item 66. \textit{Id.} at 49. The Court found that the voting rights cases did not support abridging the rights of some to enhance the relative voice of others. \textit{Id.} at 49 n.55 (citing Harper \textit{v.} Va. Bd. of Elections, 383 U.S. 663 (1966); Lubin \textit{v.} Panish, 415 U.S. 709 (1974); Bullock \textit{v.} Carter, 405 U.S. 134 (1972); and Phoenix \textit{v.} Kolodziejski, 399 U.S. 204 (1970)). "Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues." \textit{Id.}
\end{itemize}
\end{footnotesize}
The Court also found that candidates often raise various amounts of money based on the size and intensity of their support. The fact that one candidate spends more money than his opponent does not, on its face, raise an inference of impropriety. In fact, equalizing candidate expenditures could penalize a neophyte candidate with low name recognition and minimal public awareness of his political convictions at the outset of the campaign. Furthermore, the Court rejected the apparent intended interest of easing the escalating costs of political campaigns.

III. Statement of the Case: Nixon v. Shrink Missouri Government PAC

A. The Missouri Statute

In Nixon v. Shrink Missouri Government PAC, the U.S. Supreme Court upheld a Missouri statute that limits contributions to candidates for state office. The legislature originally enacted the statute in 1994, but the statute was superseded by a ballot initiative that restricted contributions to as low as $100. The Eighth Circuit Court of Appeals held that the limits in the Missouri initiative were unconstitutionally low, reasoning that the State did not provide evidence to justify the limits or demonstrate that the limits were narrowly tailored to prevent real corruption or the appearance of corruption. Thus, the legislature's previously superseded statute took effect, limiting contributions to candidates for various state offices to amounts ranging from $250 to $1000.

The statute provides for inflationary adjustments, which at the time that Shrink Missouri Government PAC and Zev David Fredman, a candidate for the Republican nomination for State Auditor, sought to enjoin the statute, allowed for a maximum contribution of $1075 to a candidate for statewide office. Shrink PAC had already given two contributions totaling $1075 to Fredman's campaign in 1997 and 1998. The PAC claimed it would contribute more if it did not have to comply with the limits. Fredman claimed the $1075 limit prevented him from running an effective campaign. Shrink PAC and Fredman both believed that the statute violated their constitutional rights of free speech and free association. They also argued that Missouri's contribution limits should have been based on the $1000 limit.
set in *Buckley* in 1976 and adjusted for inflation.\textsuperscript{81} Concerned that suspicions of corruption might diminish confidence in the integrity of government, the district court sustained the statute; however, the Eighth Circuit enjoined enforcement and reversed the lower court.\textsuperscript{82} The court of appeals found that Missouri, in support of its interest in abridging First Amendment freedoms, did not present sufficient evidence to show that corruption or the appearance of corruption was a problem in the state.\textsuperscript{83} In addition, the court found that the specific limit amounts were overly restrictive.\textsuperscript{84}

**B. Court Holds That Buckley Allows States to Restrict Contributions**

The U.S. Supreme Court held that the *Buckley* decision fully applied to the Missouri statute and that the state's contribution limits need not be tied to the dollar limits accepted in *Buckley*.\textsuperscript{85} While recognizing that *Buckley* did not set a precise standard of scrutiny, the Court reiterated *Buckley*'s general discussion of "the exacting scrutiny required by the First Amendment."\textsuperscript{86} However, the Court also acknowledged that decisions after *Buckley* made it clear that contribution limits would be more readily accepted than spending limits.\textsuperscript{87} In the end, the *Shrink* Court declared that a contribution limit involving "significant interference" with associational rights could survive if the government demonstrated that the regulation was "closely drawn" to meet a "sufficiently important interest."\textsuperscript{88}

Using language from *Buckley*, the *Shrink* Court found that limiting a contributor's "symbolic act" of giving money places only a marginal restraint on political communication.\textsuperscript{89} Political association and communication remain "significantly unimpaired" by contribution limits because a contributor remains "free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates."\textsuperscript{90} The *Shrink* Court also made it clear that, in addition to preventing actual corruption, preventing the appearance of corruption also serves as a sufficiently important state interest.\textsuperscript{91}

\textsuperscript{81} Shrink Mo. Gov't PAC v. Adams, 5 F. Supp. 2d 734, 740 (E.D. Mo. 1998). When adjusted for inflation according to the Consumer Price Index, Missouri's $1075 limit in 1998 was the equivalent of only $378 in 1976. *Id.*

\textsuperscript{82} Shrink, 528 U.S. at 383.

\textsuperscript{83} *Id.* at 384.

\textsuperscript{84} Shrink Mo. Gov't PAC v. Adams, 161 F.3d 519, 523 (8th Cir. 1998).

\textsuperscript{85} Shrink, 528 U.S. at 382.

\textsuperscript{86} *Id.* at 386.

\textsuperscript{87} *Id.* at 387. "[R]estrictions on contributions require less compelling justification than restrictions on independent spending." *Id.* (quoting Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259-60 (1986)).

\textsuperscript{88} *Id.*

\textsuperscript{89} *Id.* at 386.

\textsuperscript{90} *Id.* at 387.

\textsuperscript{91} *Id.* at 390 ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.").
Shrink PAC and Fredman did not challenge the legitimacy of Missouri's interest in eradicating the appearance of corruption.\textsuperscript{92} However, they did charge that the State lacked the necessary evidence to "demonstrate that the recited harms [were] real, not merely conjectural."\textsuperscript{93} The \textit{Shrink} Court rejected the respondents' call for more sufficient evidence, distinguishing a case cited by respondents requiring significant evidence of corruption.\textsuperscript{94} The Court held, "We have never accepted mere conjecture as adequate to carry a First Amendment burden . . . . In any event, this case does not present a close call requiring further definition of whatever the State's evidentiary obligation may be."\textsuperscript{95}

Based on nearly twenty-five years of inflation, the respondents urged the Court to consider Missouri's contribution limits as different in kind from the limits in \textit{Buckley}.\textsuperscript{96} The \textit{Shrink} Court found that Missouri's limits were adequately tailored to serve the State's purposes. The limits did not have any dramatically adverse effect on the funding of political campaigns because candidates for state offices had been able to "amass impressive campaign war chests" in order to "run effective campaigns."\textsuperscript{97} According to the Court, Missouri's restrictions were not so outrageous that they silenced candidates or caused political association to become inconsequential.\textsuperscript{98}

Justice Stevens, in his concurring opinion, had one point to make: "Money is property; it is not speech."\textsuperscript{99} As property, political contributions are entitled to constitutional protections, but not as much protection as the right to speak one's mind.\textsuperscript{100} Justice Breyer's concurrence\textsuperscript{101} stated that contributions deserve First Amendment protection because they enable speech.\textsuperscript{102} He asserted that the \textit{Buckley} Court actually applied a balancing test that would weigh the constitutionally protected interests of free speech and association against the constitutionally protected interest of upholding the integrity of the electoral process.\textsuperscript{103} Justice Breyer found that the presumption against constitutionality that comes with strict

\textsuperscript{92} Id.
\textsuperscript{94} Id. The Court distinguished \textit{Colorado Republican Federal Campaign Committee v. Federal Election Commission}, 518 U.S. 604 (1996), by noting that it dealt with independent expenditures by political parties, not contributions to candidate campaigns. Id. Without coordination between a candidate and a contributor, there is less concern about corruption. Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 396.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 397.
\textsuperscript{99} Id. at 398.
\textsuperscript{100} Id.
\textsuperscript{101} Justice Ginsburg joined Justice Breyer's concurring opinion. Id.
\textsuperscript{102} Id. at 400.
\textsuperscript{103} Id. at 400-03.
scrutiny is misapplied when such important interests are at odds.\textsuperscript{104} In the end, however, his balancing scales tipped in deference to the Missouri legislature.\textsuperscript{105}

Justice Kennedy's dissent spoke of the Court's "duty to face up to adverse, unintended consequences flowing" from Buckley.\textsuperscript{106} Justice Thomas, joined by Justice Scalia, called for Buckley to be overruled.\textsuperscript{107} He claimed that the Court's ruling abandoned the principle that political speech is the primary object of First Amendment protection.\textsuperscript{108}

\textit{IV. The First Amendment's Passionate Protection of Political Speech and Association Required the Court to Consider the Consequences of Contribution Limits}

The Buckley Court expended considerable effort addressing the strength of the First Amendment's historical protection of political speech and association.\textsuperscript{109} Unfortunately, the Buckley Court then proceeded to minimize those freedoms by pronouncing that they are not disabled by contribution limits.\textsuperscript{110} The Shrink Court, in contrast, gave these constitutional guarantees little ink and instead went right to work explaining why contribution limits negligibly impair political communication and association.\textsuperscript{111}

The Shrink Court abandoned the First Amendment's "foundational principles"\textsuperscript{112} and avoided discussion of the deficiencies in its Buckley decision. Given the First Amendment's inherent importance to the functioning of our democracy, the Shrink Court should have placed the consequences of Buckley's contribution limits under thorough review\textsuperscript{113} and recognized the real restrictions these limits place on First Amendment freedoms. Among these consequences are five areas that Professor Bradley A. Smith\textsuperscript{114} has identified as "undemocratic."\textsuperscript{115}

First, contribution limits favor incumbents by making it difficult for challengers to compete on the same level.\textsuperscript{116} Incumbents have valuable name recognition, established campaign organizations, extensive supporter lists, and relationships with the media.\textsuperscript{117} An unknown challenger begins his campaign without these advantages and is further shackled by the inability to raise significant amounts of money

\textsuperscript{104} Id. at 401-02.
\textsuperscript{105} Id. at 402-03.
\textsuperscript{106} Id. at 406.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 408.
\textsuperscript{110} Id. at 20-37.
\textsuperscript{111} Shrink, 528 U.S. at 385-87.
\textsuperscript{112} Id. at 411 (Thomas, J., dissenting).
\textsuperscript{114} Assistant Professor, Capital University Law School.
\textsuperscript{116} Id. at 1072.
\textsuperscript{117} Id. at 1072-74.
from a small number of dedicated supporters. In Shrink, one respondent, Fredman, was a first-time candidate for statewide office who did not have a network of political contacts or an established base of contributors. He had to manage his business while running for office and was unable, under the $1075 limits, to raise the seed money needed to run an effective campaign.

One unsuccessful congressional candidate, Dr. Demaris Miller, testified at a Senate hearing about the roadblocks she faced in her campaign against an entrenched incumbent. Dr. Miller ran against an incumbent who was often interviewed by the local press and who appeared regularly on a popular CNBC talk show. Dr. Miller, in contrast, rarely received equal-time interviews with the local media and never secured an interview with the talk show. While her opponent enjoyed an official, taxpayer-funded web site, Dr. Miller's campaign had to raise money to pay for an informational web site. She dedicated nearly one-third of her total expenditures to winning her primary, which meant she had about $310,000 to work with during the general election. Her incumbent opponent ran unopposed for his party's nomination and spent $534,660 to win the general election. The incumbent raised much of this amount in previous election cycles.

Another example of the financial advantages enjoyed by incumbents is that of members of the U.S. House of Representatives seeking re-election and receiving several times the contributions raised by their opponents. More than 90% of those well-funded incumbents regularly defeat their opponents. Researchers have found that an incumbent's advantages have a powerful impact on state elections as well. In state races, challengers often spend 25% or less of their incumbent opponent's totals. And similar to federal races, the candidate who spends the most money almost always wins.

118. Id. at 1072-73.
119. Respondents' Brief at 6, Shrink (No. 98-963).
120. Id. Like a plant seed is necessary to begin the production of a plant, seed money is the campaign financing necessary to fuel initial campaign activities. Candidates expect seed money to help produce a base of supporters who will contribute the additional funds necessary to run a successful campaign.
122. Id. at 32.
123. Id.
124. Id. at 33.
125. Id. at 34. Dr. Miller's total expenditures, including in-kind contributions, were $456,695. Id.
126. Id. at 33-34.
130. Id. at 101.
even raise a threshold amount of money — or seed money — it is "virtually impossible for them to compete, let alone win."\textsuperscript{131}

The second undemocratic consequence of contribution limits is that they increase the incentives for contributors to seek influence over an official's legislative votes, while they decrease accountability.\textsuperscript{132} Once a campaign donor has given the maximum amount to his preferred candidate, he will often give additional money to issue-oriented organizations that contribute to candidates in an effort to gain support for the organizations' legislative interests.\textsuperscript{133} Thus, contribution limits encourage candidates searching for additional financial support — because they are handicapped by contribution restrictions — to move toward those particular legislative initiatives and away from constituent opinion. Savvy candidates also know that independent expenditures by issue-oriented organizations can have significant impacts on public opinion, and ultimately on the outcome of elections.

While eager campaign donors are pigeonholed into financing legislative interests rather than contributing further toward the election of particular candidates, those same candidates are moving away from the broad interests of their constituents and toward the narrower interests of wealthy special interests. It follows then, that the representative system's democratic value diminishes as it becomes more responsive to these special interests and less responsive to constituent opinion.\textsuperscript{134} Ironically, campaign finance reformers expect additional contribution restrictions to minimize the power wielded by issue advocacy groups, which now thrive because reformers successfully enacted contribution restrictions almost thirty years ago.

Third, contribution limits favor select elites at the expense of isolating individual citizens from the political process.\textsuperscript{135} These elites obtain their political influence through various attributes, such as speaking ability, personality, good looks, organizational skills, influence over potential volunteers, celebrity, and access to or control of the popular press.\textsuperscript{136} Despite the fact that these modes of influence can be extremely powerful, they do not encounter the same restrictions as do contributions of money.\textsuperscript{137} For example, a retired public relations executive can volunteer her professional talents — worth $10,000 in the private sector — to a candidate's campaign without any restriction. However, under Missouri's contribution limitations, a contributor could not give the opposing candidate a $10,000 contribution to pay for equivalent services.\textsuperscript{138}

\textsuperscript{131} \textit{Id.} at 113. Fredman's campaign certainly was not one of the campaign war chests of which the \textit{Shrink} Court spoke.
\textsuperscript{132} \textit{Smith, supra} note 115, at 1075.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.} at 1077.
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.} at 1078.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} Professor Smith compared a twenty-five-year-old Harvard law student turning down a $15,000 summer law firm job because he wished to volunteer on a campaign and a twenty-five-year-old high school dropout who owned a successful auto body shop and wished to contribute $15,000 to the campaign. \textit{Id.} at 1079-80.
Fourth, the limits favor wealthy candidates who reach into their own pockets to fund their campaigns while their less wealthy opponents are forced to raise the money.\footnote{Id. at 1081.} This system restricts the number of viable candidates, which, in the end, limits voter choice.\footnote{Id. at 1082.} Historically, candidates with large constituencies among the working class have been funded by a small number of wealthy supporters.\footnote{Id.} By eliminating this source of vital funding, such candidates cannot compete.\footnote{Id.} This consequence, as well as the lopsided power of incumbency, results in the financially deprived candidate spending more time and energy on fundraising. This focus on fundraising takes away from time spent on the constitutionally significant acts of communicating political ideas and debating important campaign issues.

Lastly, Professor Smith found that contribution regulations favor sophisticated special interests over grassroots, citizen-oriented activity.\footnote{Id. at 1082-83.} Contribution limits, along with other campaign regulations, impose a great burden on political speakers who lack familiarity with complex laws and the astute organization necessary to comply with them.\footnote{Id.} The intricate regulations surrounding campaign finance reform have "the perverse effect of professionalizing politics and distancing the system from 'ordinary' citizens."\footnote{Id. at 1083.}

Another issue of great concern is that while the costs of campaigning have skyrocketed, the allowable individual contribution to federal candidates has not changed in twenty-five years. Television advertising, the best and favored way to quickly reach targeted audiences, can deplete campaign coffers in less time than it takes to watch a political advertisement. In 1999, reaching one thousand homes with a thirty-second spot cost more than five times as much as it did in 1975 — and households with televisions grew from 69.6 million to 99.4 million in the same time period.\footnote{Id. at 1082-83.} So, not only does it cost considerably more to reach each household, but there are thirty million more households to reach. Other ordinary campaign costs, such as polling, commercial production, and postage, have also dramatically increased.\footnote{Id. at 1083.} While the cost of campaigning for state legislative seats varies widely by state, one study revealed significant increases above the rate of inflation in several states.\footnote{Id. at 1084.}

The grueling money chase created by the \textit{Buckley} decision has compelled some elected officials to abandon their posts or refuse to seek higher office. Senator Paul Simon declined to seek re-election because he realized the effort to raise the

\begin{footnotesize}
\begin{enumerate}
\item[139.] \textit{Id.} at 1081.
\item[140.] \textit{Id.} at 1082.
\item[141.] \textit{Id.}
\item[142.] \textit{Id.}
\item[143.] \textit{Id.}
\item[144.] \textit{Id.} at 1082-83.
\item[145.] \textit{Id.} at 1083. In 1991, the \textit{Los Angeles Times} found that the second largest group of people who had violated the Act's contribution limits of $25,000 per contributor were elderly people with little understanding of campaign laws. \textit{Id.}
\item[146.] \textit{Hearing, supra} note 121, at 56 (attachment to testimony of Karen Sheridan, Executive Vice President of SMY Media).
\item[147.] \textit{Id.} at 52 (prepared testimony of Karen Sheridan, Executive Vice President of SMY Media).
\item[148.] THOMPSON \& MONCRIEF, \textit{supra} note 129, at 56.
\end{enumerate}
\end{footnotesize}
required $10 million would consume one-third of his time during the last two years of his term in the Senate.\textsuperscript{149} Senator Dennis DeConcini grew tired of constantly "grazing" for money.\textsuperscript{150} One former senator noted that in order to run a $5 million campaign, a candidate must raise $50,000 each week for two years or $16,000 each week for six years, the full length of a Senate term.\textsuperscript{151}

The Missouri statute in \textit{Shrink} went before the U.S. Supreme Court nearly two-and-a-half decades after the \textit{Buckley} decision. This significant time frame should have given laws on contribution limits an ample opportunity to begin preventing corruption and the perception of corruption in campaigns; yet, campaign finance reform aimed at alleviating that same evil was still a cornerstone issue in the 2000 presidential campaigns.\textsuperscript{152} If campaign contribution limits were achieving their goal, the current debate over the perceived need for further restrictions on political freedoms would be unnecessary.

The ineffectiveness of contribution limits combined with the unintended consequences they have spawned should have caused the Court to take a fresh look at the profound effect these limits have on First Amendment freedoms. When legislation strikes in the sensitive area of First Amendment freedom and the passing of time demonstrates that the legislation has not realized its intended goal, the Court should reassess its initial decision and supporting reasoning.\textsuperscript{153} \textit{Shrink} provided an appropriate opportunity for the Court to recognize that contribution limits trample the First Amendment and to eliminate the restrictions altogether.

V. Analysis

A. Real Strict Scrutiny Should Have Been Applied

\textit{Buckley}'s standard of review for contribution limits has been subjected to numerous interpretations. Writers have characterized it as strict scrutiny,\textsuperscript{154} less-than-strict scrutiny,\textsuperscript{155} heightened intermediate scrutiny,\textsuperscript{156} and amorphous.\textsuperscript{157} The \textit{Shrink} Court began its discussion of the standard of review for contribution

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150. \textit{Id.}

151. \textit{Id.} at 19 (prepared testimony of Dan Coats).


limits by acquiescing that the Buckley decision did not set a precise standard of review.\textsuperscript{158} In narrowing the possibilities, the Court recalled the standards of review rejected in Buckley.\textsuperscript{159} It then stated that associational rights should receive more protection than speech rights.\textsuperscript{160} Justices Breyer, Ginsburg, Thomas, and Scalia called it a balancing test.\textsuperscript{161} In the end, the Shrink Court applied what it called "Buckley's standard of scrutiny,"\textsuperscript{162} which was scrutiny labeled as exacting, but which was "something . . . much less" upon application.\textsuperscript{163}

In light of the widespread confusion in such a sensitive area of freedom, the Shrink Court should have clarified the application of a strict scrutiny standard of review for restrictions on contributions. While the Court proclaimed that contribution limitations bear more heavily on the associational right than on the freedom to speak, commentators have made strong arguments for equal treatment of the protected freedoms.\textsuperscript{164} The Shrink opinion did include a footnote that directed comparison of Buckley's standard of scrutiny with the standards applied in other First Amendment opinions.\textsuperscript{165} Those standards required the "closest scrutiny" and a "compelling state interest" that could not be achieved through less restrictive means in order to curtail the freedom to associate.\textsuperscript{166} When viewed as a whole, the Shrink Court's various statements regarding the standard of review signal the Court's belief that these political freedoms deserved strict scrutiny. The Court, however, just did not seem to actually apply strict scrutiny.

According to the Shrink Court, the contribution limits could only survive if Missouri demonstrated that the limits were closely drawn to match a sufficiently important interest. While the prevention of actual corruption seems like a "constitutionally sufficient justification"\textsuperscript{167} on the surface, further inquiry brings the justification into question. Buckley originally spoke of actual corruption in terms of "large contributions . . . given to secure political quid pro quo."\textsuperscript{168} This definition

\textsuperscript{158} Shrink, 528 U.S. at 386.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 387.
\textsuperscript{161} Id. at 402-03, 410.
\textsuperscript{162} Id. at 387.
\textsuperscript{163} Id. at 421 (Thomas, J., dissenting).
\textsuperscript{164} Marshall, supra note 113, at 350-52. Professor Marshall named four reasons the Court drew an incoherent distinction between contributions and expenditures. First, the Court's distinction was inconsistent with its own characterization of "contributions and expenditures as core First Amendment protection." Id. at 350. Second, Buckley ignored the constitutional equivalencies of the two freedoms: "both express political messages; contributions are essentially a form of indirect expenditures"; and contributions are acts of political association, just like expenditures are political expression. Id. at 350-51. Third, the Court's conclusion that corruption or its appearance is more likely to exist with direct donations than from large sums spent on the candidate's behalf is "tenuous at best." Id. at 351. Fourth, the reality of campaigns is that the unlimited ability to spend drives the need for contributions. Id. If expenditures are protected because money is indispensable to the communication of political ideas, then the same should apply to contributions, the supply side of expenditures. Id.
\textsuperscript{165} Shrink, 528 U.S. at 387 n.3.
\textsuperscript{166} Id.
\textsuperscript{167} Id. at 388.
\textsuperscript{168} Id.
would require large contributions in exchange for "coercive influence on candidates' positions and . . . actions."09 Put another way, "Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusion of money into their campaigns."70 But then the Buckley Court supplemented its definition of corruption with more ambiguous terms such as "improper influence"71 and "opportunities for abuse."72 The Shrink Court used these additional terms to secure a broader meaning of corruption: the "power of money 'to influence government action' in ways less 'blatant and specific' than bribery."73 As Justice Thomas pointed out, the Court improperly expanded the meaning of corruption to include "politicians too compliant with the wishes of large contributors."74

The Court's characterization of actual corruption — something less than the exchange of money for coercive influence on votes or advocacy of political positions — really reflects the Court's concern over how responsive an elected official should be to each constituent.75 The feared harm is more than the bartering of public office. It is a concern about politicians straying from the acceptable boundaries of democratic representation.76 The influence or power created from so-called corrupting contributions could be the innocent ability to obtain an appointment with an official or to secure the official's presence at a community event. The contribution of money to a candidate because he promises to work toward the passage of certain legislation is simply supporting the candidate that the contributor believes will best represent her. Campaign contributions do not equal guaranteed legislative results in exchange for money.77 The attention a candidate gives a contributor is the same kind of disproportionate attention given to interest groups with large memberships or active grassroots organizations, even religious groups. The power, or corrupting influence as some would believe, of these organizations could simply be the ability to mobilize their members for political purposes.78

The Court's view of what activities qualify as corruption strikes at the heart of conflicting philosophies of democratic representation. The civic republican would consider responsiveness to constituent preferences a delinquency of the representative's obligation to use his wise, independent thought regarding the best interest of the public.79 On the other hand, the populist would expect her

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171. Buckley, 424 U.S. at 27.
172. Id.
173. Shrink, 528 U.S. at 389.
174. Id. at 424.
176. Id. at 679.
177. Id.
178. Id. at 680.
179. Id at 681.
representative to act as a dutiful transmitter of "polling data into policy." Neither of these views, when put into action, is contrary to the law. Therefore, neither should be vilified as democracy-destroying corruption for the purpose of absconding First Amendment rights.

Included with the accepted interest of preventing actual corruption is the prevention of the "appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." Not only is the Court's broad brand of actual corruption unacceptable, but the government's interest in preventing the appearance of corruption is a much too ambiguous justification upon which to allow restriction of political speech and association. The reality of evil corruption is too far removed from the Court's "appearance of corruption" scenario to justify restriction of a citizen's First Amendment rights. The government bases its interest on nothing more than highly subjective appearances and perceived opportunities that do not accurately represent the objectives of most contributors' participation in the political process.

The Court concluded that "[d]emocracy 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." The very nature of suspicion is nebulous, oftentimes gauged only by a gut feeling. Suspicion has been defined as a "mental uneasiness" or an "imagination of something wrong without proof, or on slight evidence." By approving suspicion as a sufficient governmental interest, the Court declared that whimsical imagination is enough to restrict the most protected area of First Amendment freedom.

Appearances and impressions are highly subjective because they are based on individual assessments of information. A state's people may suspect corruption because they have heard of its existence in the past, possibly in the distant past. Actual corruption may not have taken place for years, yet politicians trying to move their approval ratings up the scale can, with the assistance of the sensationalizing media, induce the citizenry to believe corruption lurks throughout the political system. In addition, a state's voters may suspect their officials of corruptive activities because corruption has been reported to take place in other states. Polls reveal a common public perception that large corporate contributions in a given state corrupt candidates, when, in reality, the state's laws completely prohibit corporate contributions.

Modern American political campaigns are an exercise in creating appearances. The American polity expects to be spun by slick candidates and entertained with political dog-and-pony shows. Candidates kiss their spouses in front of millions of

180. Id.
182. Id. at 390 (quoting United States v. Miss. Valley Generating Co., 364 U.S. 520, 562 (1961)).
183. WEBSTER'S COLLEGIATE DICTIONARY 1189 (9th ed. 1985).
people and serve meals in senior citizen centers to shape their public images. They stage photo opportunities with children in disadvantaged neighborhoods and run television ads with subliminal messages. Candidates stretch the truth to make their opponents appear self-serving or even evil on one issue, then smile and commend each other on the next issue. The practice is so accepted that political pundits spend entire television shows and write lengthy editorials on the normacy of truth stretching in political campaigns.

The Shrink Court's unbridled expansion of the meaning of actual corruption, and to an even greater extent, its continued endorsement of the appearance of corruption as a constitutionally sufficient justification, are substantial reasons for one to question the preciseness of the Court's scrutiny of campaign contribution limits. The Court's sui generis "Buckley's standard of scrutiny" allowed the muffling cries of Missouri's citizens and legislators to penetrate the constitutional shield surrounding political speech. Real strict scrutiny would not allow the abridgement of First Amendment freedoms simply because a politician may be responsive to a constituent who happens to be a campaign donor participating in a democratic system that requires significant financial contributions. Nor would real strict scrutiny permit the waning faith of fickle citizens to trample the First Amendment on the grounds that those citizens believe, with little proof, that corruption may exist. The Court should not have permitted Missouri to limit contributions without first subjecting those restrictions to a strict standard of review — a standard under which the limits should fail.

B. Proof of Harm Should Be Necessary

Despite the implausible inadequacy of the corruption and the appearance of corruption interest adopted by the Court, the respondents did not challenge it. However, the respondents did challenge Missouri's assertion that actual corruption was taking place in the state, or, at least, that corruption was perceived by the state's citizens to exist. The Eighth Circuit's opinion adopted language from the Supreme Court's decision in United States v. National Treasury Employees Union: "When the Government defends a regulation on speech . . . it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, . . . and that the regulation will in fact

185. Ed Bark, Gore Wins Laughs on Letterman Show, DALLAS MORNING NEWS, Sept. 15, 2000, at 35A. During Al Gore's appearance on The Late Show, David Letterman told the Vice President that his prolonged kiss of Tipper Gore at the Democratic convention showed America that "I've got a wife that I'm still crazy about. I'm not gonna be chasin' interns." Id.
186. Frank Bruni, Bush Says Rats Reference in Ad Was Unintentional, N. Y. TIMES, Sept. 13, 2000, at A19 (reporting George W. Bush's defense of a television ad attacking Al Gore's plans for health care, which included an almost undetectable flashing image of the word "rats").
188. Shrink, 528 U.S. at 390.
alleviate these harms in a direct and material way.\textsuperscript{190} The Eighth Circuit was "unwilling to extrapolate" from the federal campaign finance problems cited in \textit{Buckley} that Missouri suffered from corruption or a perception of corruption due to large contributions to state candidates.\textsuperscript{191}

Missouri offered the affidavit of a state senator who had cochaired the Interim Joint Committee on Campaign Finance Reform when the contribution limits were enacted.\textsuperscript{192} This senator did not provide any evidence that candidates had received large campaign contributions before Missouri's limits went into effect. Consequently, there could be no evidence of resulting corruption or its appearance.\textsuperscript{193} "The senator stated that he and his colleagues believed there was the 'real potential to buy votes' if the limits were not enacted, and that contributions greater than the limits 'have the appearance of buying votes.'"\textsuperscript{194} The court of appeals could not decipher whether the senator's statements were his own perceptions or the public perception, and determined that the affidavit was conclusory and self-serving.\textsuperscript{195}

Nevertheless, the Supreme Court did not find the statute void for lack of evidence.\textsuperscript{196} The Court stated that the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."\textsuperscript{197} In \textit{Buckley}, the Court found that actual corruption or the perception of corruption were plausible consequences of large contributions, but did not outline the minimal evidentiary requirements for proving corruption.\textsuperscript{198} The \textit{Shrink} Court did not accept the respondents' argument that \textit{Buckley} had been supplemented by \textit{National Treasury or Colorado Republican Federal Campaign Commission v. Federal Election Commission}\textsuperscript{199} to require the State to "demonstrate that the recited harms are real, not merely conjectural."\textsuperscript{200} The Court found the fact that the \textit{Colorado Republican} decision concerned independent expenditure caps significant because the lack of coordination with the candidate eliminated the assumption of potential corruption.\textsuperscript{201}

The \textit{Shrink} Court looked to the evidence cited by the lower courts as well as evidence introduced into the record by respondents.\textsuperscript{202} Unlike the court of appeals, the Supreme Court found that this information, along with Missouri's ballot vote on

\textsuperscript{190} Shrink Mo. Gov't PAC v. Adams, 161 F.3d 519, 522 n.3 (8th Cir. 1998) (quoting Carver v. Nixon, 72 F.3d 633, 638 (8th Cir. 1995), which invalidated Missouri's ballot initiative that approved campaign contribution limits).

\textsuperscript{191} Id. at 522.

\textsuperscript{192} Id.

\textsuperscript{193} Id.

\textsuperscript{194} Id.

\textsuperscript{195} Id.


\textsuperscript{197} Id.

\textsuperscript{198} Id.

\textsuperscript{199} 518 U.S. 604 (1996).

\textsuperscript{200} Shrink, 528 U.S. at 392 (quoting Respondents' Brief at 26).

\textsuperscript{201} Id.

\textsuperscript{202} Id.
contribution limits, was enough to warrant the Missouri legislature's concerns. In doing so, the Court accepted evidence that not only was inadequate for the purpose of restricting political speech and association rights, but that also embraced constitutionally unacceptable government interests.

The district court cited one newspaper editorial that observed a possible favoritism connection between a bank's $20,000 contribution to the State Treasurer and that bank's selection as the state's bank some time later. Unfortunately, the Shrink Court failed to acknowledge that the editorial proceeded to conclude that the bank had "won the contest fair and square." The bank had submitted the lowest bid in a process subjected to considerable review and had given the state a discount. Therefore, the editorial proffering was merely a circumstantial observation of possibility by the media, far from strong proof upon which reasonable widespread perception of corruption could be based. Another cited article simply reported contributions of $20,000 and $40,000 to a candidate for State Auditor. The article made no claim that the contributors gave the money in exchange for corrupting influence. Furthermore, while the only accepted interest for contribution limits concerns corruption, the district court's evidence regarding the media's coverage of the ballot initiative spoke to the constitutionally insufficient interests of leveling the playing field and limiting the influence of special interests. The Court recklessly proclaimed that the majority vote for the initiative "certainly attested to the perception" that the limits were necessary to combat corruption and its appearance. The cited evidence did not support Missouri's contention that its citizens were concerned about corruption, but instead clearly showed that those citizens sought to limit First Amendment rights for reasons explicitly rejected by the Court.

The Shrink Court's less-than-minimal evidentiary requirements send the states an alarming message: it doesn't matter how weak your evidence supporting the constitutionally acceptable state interest is when contribution limits become state law, as long as you offer the argument that you are concerned about corruption or its appearance when the law is challenged in court. The Buckley Court at least relied on the court of appeals' discussion of "a number of abuses uncovered after the 1972 elections" in its opinion. The nation's concerns over the integrity of the electoral system were so intense at that time that the appellate court characterized

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203. Id. at 393.
206. Id.
207. Id.
208. Adams, 5 F. Supp. 2d at 738 n.7.
210. It is well settled that "voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981).
it as a time of crisis.212 Political impropriety was rampant. Congressional findings revealed illegal corporate contributions, millions of dollars of coordinated special interest contributions to President Nixon's campaign, and millions in individual contributions to Nixon in exchange for guarantees to ambassador posts.219 In contrast, the State of Missouri offered no such revealing legislative findings. The Shrink Court should not have reversed the Eighth Circuit without real proof that the citizens of Missouri were being harmed, or were likely to be harmed, by campaign contributions beyond the state's legislated limits.

C. Missouri's Limits Are Far from Closely Drawn

As the next step of review, the Court required the regulations to be closely drawn. The Court found that Missouri's $1075 limit on campaign contributions was closely drawn to meet the sole constitutionally sufficient justification of preventing corruption and the appearance of corruption. The Court, very confident in its decision, found that the case did not even present a close call requiring further definition of Missouri's evidentiary obligation. The Court certainly did not take an exacting scalpel to the amount of the restrictions; its analysis is more appropriately characterized as a cursory examination.

According to the Court, Missouri's contribution restrictions did not have any dramatically adverse effects on the funding of campaigns because the candidates were still able to "amass impressive campaign war chests."214 Surprisingly, the district court's evidence, accepted by the Shrink Court as enough to substantiate Missouri's interest in limiting contributions, included an editorial claiming that campaign war chests tainted the democratic process.215 Another article cited by the Court correctly noted that total campaign contributions would decline once the limits went into effect.216 After the limits were imposed, total combined spending for five statewide offices was cut by more than half, falling from $21,599,000 to $9,337,000.217 Total expenditures on statewide primary elections were slashed 89%.218

In an attempt to show that contribution limits have a negligible impact on political speech and association, the petitioners also produced evidence showing that more than 97% of all contributors to 1994 candidates for Missouri's State Auditor post made contributions of $2000 or less.219 As Justice Thomas's dissent points out, this anecdotal information does not provide any assurance that resources supporting political speech in Missouri have not been reduced.220 If large

213. Id. at 839-40 nn.36-38.
214. Shrink, 528 U.S. at 396.
216. Jo Mannies, Auditor Race May Get Too Noisy to Be Ignored, ST. LOUIS POST-DISPATCH, Sept. 11, 1994, at 4B.
217. Shrink, 528 U.S. at 426 n.10 (Thomas, J., dissenting).
218. Id.
219. Id. at 396.
220. Id. at 425 (Thomas, J., dissenting).
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contributions actually provide little assistance to a candidate's efforts, then why would a candidate engage in corrupt activities in order to receive that support? And if the restrictions "do significantly reduce campaign speech — then the majority's calm assurance that political speech remains unaffected collapses." This evidence fails to demonstrate that a regime of large individual financial contributions capable of creating the appearance of corruption existed in Missouri, unless the Court considers less than 2.5% of all contributions in that race a suspect regime. Moreover, the respondents' $2000 evidentiary sample is nearly twice the amount of the $1075 limit in question — hardly providing convincing evidence of closely drawn limitations. In light of the Court's acceptance of such inane evidence that the limits were closely drawn, it appears that a state would have to virtually eliminate contributions before the Court would consider the restrictions so restraining as to force the Court to elaborate a constitutional guideline for creating acceptable limits in the future.

VI. Conclusion

While self-proclaimed campaign finance reformers may believe that too much money is spent on political campaigns and that special interest groups have too much influence on modern politics, the Supreme Court has found that the only sufficiently important interest for restricting campaign contributions is corruption or its appearance. Unfortunately, with the approval of Missouri's restrictions, it seems the Court will allow a state to affect candidates' and contributors' constitutionally protected rights of political speech and association based on insufficient reasons masked in a cloak of unsubstantiated corruption and unreasonable claims of perceived corruption. The First Amendment's premier priority is the protection of political speech and association. Public officials should consider proposed legislation affecting these freedoms with a heightened sensitivity to that constitutional priority. The temptation may be great to minimize these freedoms under the pressure of a constituency that might be unhappy with a campaign system it believes consumes too much money, but officials must first protect the critical foundation of the First Amendment. The strength of our democracy, which is gauged by our protected freedoms, depends on it.

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221. Id.

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