Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?

Richard Briffault
Columbia Law School, brfflt@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Constitutional Law Commons, and the Law and Politics Commons

Recommended Citation
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/924

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.
**Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?**

Richard Briffault†

In *Nixon v. Shrink Missouri Government PAC*, the Supreme Court emphatically reaffirmed a key element of the campaign finance doctrine first articulated in *Buckley v. Valeo* a quarter-century earlier that governments may, consistent with the First Amendment, impose limitations on the size of contributions to election campaigns. *Shrink Missouri* was significant because the Eighth Circuit decision reversed by the Supreme Court had sought to strengthen the constitutional protection provided to contributions and had invalidated limitations on donations to Missouri state candidates that were actually higher than the limits on donations to federal candidates that the Supreme Court had previously upheld in *Buckley*. Following a series of lower court decisions that had imposed a more stringent standard of judicial review of state restrictions on contributions and had invalidated some contribution caps, *Shrink Missouri* importantly confirmed both the constitutionality of contribution limitations and the Court’s continuing com-

---

† Vice Dean and Joseph P. Chamberlain Professor of Legislation, Columbia Law School.

2. 424 U.S. 1, 143 (1976) (per curiam).
   Only one member of the Eighth Circuit panel expressly concluded that the Missouri limits were too low. *Id.* at 522-23. Two members of the court, however, held that contribution limits could be sustained only if narrowly drawn to serve a compelling state interest and found that Missouri had failed to demonstrate that there was any compelling state interest served by the limits. *Id.* at 521-22.
mitment to Buckley in framing its approach to campaign finance questions.

Yet, oddly, Shrink Missouri may also perhaps be seen as the beginning of the end of the Buckley era in campaign finance doctrine. Shrink Missouri challenges Buckley in three ways. First, even in reaffirming Buckley’s holding that contributions can be subject to dollar limitations, Shrink Missouri subtly departed from Buckley’s emphasis on the speech-like nature of campaign contributions. Shrink Missouri’s easy validation of the Missouri contribution caps seems in tension with Buckley’s determination that contributions are a form of political speech. Indeed, in declining to impose a more rigorous standard of review, Shrink Missouri may have actually adopted a more liberal one.

Second, although the Shrink Missouri holding commanded a six-justice majority, the concurring and dissenting opinions revealed that, for the first time, a clear majority of the justices now disagree with critical elements of the Buckley approach to campaign finance regulation. As a result, Buckley’s current role and continued survival seem to be more an artifact of a lack of agreement within the Court on how to replace Buckley than a reflection of continued support for Buckley’s approach.

Third, for the first time, members of the Court acknowledged in their opinions the inability of the campaign finance laws produced and shaped by Buckley to effectively regulate campaign finance practices. If, as suggested by Justices Breyer, Ginsburg, and Kennedy, the Court were to begin to take into account “the post-Buckley experience,” then surely Buckley would have to be substantially modified, if not replaced, since there can be little disagreement with Justice Kennedy’s conclusion that “Buckley has not worked.”

It is not surprising that Buckley’s future is in doubt. Although it has definitively shaped the constitutional jurisprudence of campaign finance for twenty-five years, Buckley v. Valeo has also been “one of the most vilified Supreme Court decisions of the post-World War II era,” and there have long been at least some members of the Court who disagree with Buckley’s approach. Buckley relies on a series of dichotomous dis-

6. 528 U.S. at 405 (Breyer, J., joined by Ginsburg, J., concurring).
7. Id. at 408 (Kennedy, J., dissenting).
9. The Buckley decision commanded a 6-2 majority, although four mem-
tinctions—between “equality” and “corruption”; between “con-
tributions” and “expenditures”; and between election-related
and non-election-related speech—that have proven increasingly
difficult to sustain in theory or in practice. Critically important
contemporary campaign finance practices, such as party soft
money and so-called issue advocacy advertising, have grown up
outside the formal campaign finance system reviewed and sus-
tained in Buckley, due in part to some of the distinctions Buck-
ley itself drew. Buckley has strongly shaped the law of cam-
paign finance but that law is both internally inconsistent and
increasingly irrelevant to the real world of campaign finance.

Part I of this Essay will examine the principal elements of
the Buckley doctrine and consider how Buckley has increasingly
failed to provide an adequate conceptual framework for dealing
with campaign finance law. Part II will then turn to the
Shrink Missouri decision and suggest how in the course of reaf-
firming a basic element of Buckley, the Court may have begun
to undermine Buckley as well. Finally, Part III will give brief
consideration to the elements of a potential post-Buckley era.

Given the sharp division within the Court over how to replace
Buckley, any thoughts on campaign finance doctrine in the
post-Buckley era are bound to be highly speculative. Indeed,
the division within the Court could keep Buckley in place for
years to come. New appointments to the Court, or changes in
the stated approaches of some of the current Justices, will be
necessary in order for a new doctrine to emerge.

I would like to suggest, however, greater attention to one
concern that prior to Shrink Missouri had played a minimal
role in judicial consideration of campaign finance doctrine, and
that is electoral competitiveness. Fair and vigorous competi-
tion among candidates and parties is critical for the legitimacy
of our elections and of the government those elections produce.
Campaign finance law, in turn, can have a direct effect on the
competitiveness of elections. In constructing a new campaign
finance doctrine—or in revamping current doctrine—the Court
should give greater weight to the effect of campaign finance

bers of the Court dissented from portions of the per curiam opinion. In the
Court’s last campaign finance case before Shrink Missouri, Colorado Republi-
can Federal Campaign Commission v. FEC, 518 U.S. 604 (1996), three mem-
bers of the Court rejected Buckley’s basic approach, with Justice Thomas call-
ing for greater protection of campaign finance activities than Buckley provides,
see id. at 635-44, and Justices Stevens and Ginsburg urging more regulation
than Buckley would allow, see id. at 648-50.
rules on electoral competition. This could result in both closer scrutiny of some limitations now easily upheld, and greater willingness to accept limitations currently prohibited. Competitiveness is certainly not the only value to be considered in campaign finance doctrine, and the legislative branch is likely to have a far greater role in promoting competitiveness than the courts. But the Court should give the effect of campaign finance rules, and of its own campaign finance doctrines, on the structure of electoral competition a much greater role in its consideration of campaign finance law if and when it begins to enter a post-Buckley era.

I. THE BUCKLEY DOCTRINE AND ITS PROBLEMS

A. THE DOCTRINE

*Buckley v. Valeo* has shaped campaign finance law around four principal propositions. First, and most fundamental, without quite concluding that “money is speech,” *Buckley* found that in our large, complex, and heterogeneous society money is often essential for the dissemination of political speech:

> The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.  

Similarly, by “enabl[ing] like-minded persons to pool their resources in furtherance of common political goals,” campaign contributions were said to embody the values of freedom of association. As a result, *Buckley* determined that campaign finance regulations—such as the reporting and disclosure of contributions and expenditures, restrictions on the sources and amounts of contributions, and limitations on campaign expenditures—would be subject to scrutiny under the First Amendment. Having situated campaign finance law squarely in the domain of the First Amendment, *Buckley* then made a series of distinctions that enabled the Court to validate some campaign finance measures while invalidating others. These are the distinctions between contributions and expenditures, between the prevention of corruption and the promotion of political equality,

---

11. *Id.* at 22; see also *id.* at 65-66.
and between so-called “express advocacy” speech and so-called “issue advocacy” speech.

1. Contributions v. Expenditures

*Buckley* drew a sharp distinction between contributions—that is, payments by an individual, organization, or political committee to another organization, to another committee, or to a candidate to be used to pay for election-related speech—and expenditures, or spending by candidates, organizations, political committees, or individuals on communications to the voters. The Court gave expenditures the greatest degree of constitutional protection because expenditures were seen as involving the direct communication of political views to the electorate. Contributions, by contrast, were treated as a lesser form of political speech because contributions do not entail an expression of political views: “A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.” 12 The expressive component of a contribution “rests solely on the undifferentiated, symbolic act of contributing.” 13 Indeed, having accepted that contributions fall within the domain of speech, *Buckley*’s rhetoric tended to minimize the speech element presented by contributions: “While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.” 14

2. The Prevention of Corruption v. The Promotion of Political Equality

Contributions and expenditures describe different types of campaign finance practices. Corruption and equality, by contrast, refer to the kinds of concerns a government may seek to address when it regulates campaign practices. *Buckley* determined that the prevention of corruption and the appearance of corruption justifies some campaign finance restrictions. The Court found that “the actuality and appearance of corruption resulting from large individual financial contributions... undermined... the integrity of our system of representative de-

---

12. *Id.* at 21.
13. *Id.*
14. *Id.*
mocracy."\textsuperscript{15} So, too, "the impact of the appearance of corruption stemming from [the] public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" was "[o]f almost equal concern" as the danger of actual corruption.\textsuperscript{16}

But \textit{Buckley} rejected the argument that campaign money could be restricted in the name of political equality, whether the equality of political influence among individuals or groups, or the equality of candidates' resources.\textsuperscript{17} As the Court "famously or notoriously"\textsuperscript{18} asserted, "[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."\textsuperscript{19}

The contribution/expenditure and the corruption/equality distinctions are closely intertwined. In \textit{Buckley} and later cases, the Court upheld contribution restrictions partly because contributions do not entail a direct communication to the voter and, thus, are a less valuable form of political speech than campaign expenditures, and partly because a contribution creates a relationship between a donor and a candidate that presents the dangers of corruption or the appearance thereof. By the same token, in \textit{Buckley} and later cases the Court invalidated expenditure restrictions because expenditures were considered to be direct communication with the voters, and thus, were the highest form of political speech and also because expenditures raise no danger of a quid pro quo between candidate and donor and thus expenditure restrictions could not be justified by the anti-corruption rationale. The principal other justification for limits on spending that the Court considered was the equalization of the influence of competing candidates or of interest groups, and \textit{Buckley} found equality a constitutionally inadequate justification for restricting campaign money.\textsuperscript{20}

\textsuperscript{15} Id. at 26-27.
\textsuperscript{16} Id. at 27.
\textsuperscript{17} Id. at 48-49, 56-57. The Court also rejected the argument that the government could restrict spending in order to limit the cost of political campaigns. Id. at 57.
\textsuperscript{19} \textit{Buckley}, 424 U.S. at 48-49.
\textsuperscript{20} The Court also briefly considered, and rejected, the argument that expenditure limitations may be imposed to reduce "the allegedly skyrocketing costs of political campaigns." Id. at 57. The Court determined that there is no legitimate governmental interest in limiting campaign spending per se. See
3. Express Advocacy v. Issue Advocacy

Because *Buckley* sustained the constitutionality of some regulation of campaign finance activity—both dollar limitations on contributions and reporting and disclosure requirements—that would surely have been invalid if applied to other political speech, the Court needed to draw a line between election-related speech, which may be so regulated, and other political speech, which may not be so regulated. *Buckley* held that campaign finance regulation could constitutionally apply only to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate." By way of example, a footnote in *Buckley* listed "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject,'" as a non-exhaustive list of examples of "express words of advocacy." Such expenditures are now known as express advocacy. Other political speech—now known as "issue advocacy"—was deemed constitutionally exempt from campaign finance regulation, including the contribution restrictions and reporting and disclosure requirements that could be constitutionally applied to election-related speech.

*Buckley*'s three dichotomies have structured campaign finance law and doctrine to this day. The Court has repeatedly reiterated its commitment to the contribution/expenditure distinction, and to the unique role of the prevention of corruption and the appearance of corruption in justifying limits on campaign money. Indeed, the outcomes of the Court's two most recent campaign finance cases—*Colorado Republican Federal Campaign Committee v. FEC* and *Nixon v. Shrink Missouri Government PAC*—turned entirely on the intertwined contribution/expenditure and corruption/equality distinctions. Because the limit on party spending challenged in *Colorado Republican* was seen as involving an expenditure and not a contribution restriction it was presumptively invalid. Conversely, the contribution limits challenged in *Shrink Missouri* were treated as presumptively valid because of the lesser constitutional protection afforded contributions and the presumption that contributions raise dangers of corruption.

---

21. *Id.* at 44, 79-80.
22. *Id.* at 44 n.52.
25. *See id.* at 391-94.
The corruption/equality distinction is also at the heart of the second Colorado Republican case, which the Court heard in February 2001. The Tenth Circuit invalidated the Federal Election Campaign Act’s limits on party expenditures which are coordinated with candidates even though, under the statute, coordinated expenditures are treated as tantamount to contributions. The Tenth Circuit reasoned that given the nature of the party-candidate relationship, parties cannot corrupt their candidates.\textsuperscript{26} As a result, limits on party coordinated spending could not be justified by Buckley’s anti-corruption rationale.\textsuperscript{27} In determining whether the federal statutory limits on a party’s coordinated expenditures with the party’s candidates are constitutional, the Supreme Court is likely to consider primarily whether such party support presents Buckley’s concerns about corruption and the appearance of corruption.\textsuperscript{28}

The Supreme Court has given relatively little attention to the express advocacy/issue advocacy dichotomy in the years since Buckley,\textsuperscript{29} but that distinction has become the focus of numerous lower court decisions concerning FEC regulations and state laws setting the boundaries of regulable campaign finance activities.\textsuperscript{30} It is likely to be the crux of any court chal-

\textsuperscript{26} FEC v. Colo. Republican Fed. Campaign Comm., 213 F.3d 1221, 1230-31 (10th Cir. 2000).

\textsuperscript{27} For a criticism of the Tenth Circuit decision, see Richard Briffault, \textit{The Political Parties and Campaign Finance Reform}, 100 COLUM. L. REV. 620, 663-66 (2000).

\textsuperscript{28} Even if a party cannot corrupt its own candidate, party contributions and coordinated expenditures may raise the specter of corruption if donors use the party as a conduit for making large donations to candidates. \textit{See id.} at 647-52; \textit{see also} Cal. Med. Ass’n v. FEC, 453 U.S. 182, 198-99, 202-04 (1981) (plurality opinion) (outlining the theory of conduit corruption).

\textsuperscript{29} The question came up in \textit{FEC v. Massachusetts Citizens for Life, Inc.}, which examined the “special edition” of an anti-abortion group’s newsletter that listed state and federal candidates contesting an upcoming primary, identified the candidates’ positions on three litmus test issues, provided photographs of those with one hundred percent favorable voting records but not of other candidates, and exhorted readers to vote for anti-abortion candidates. 479 U.S. 238, 243-44 (1986) (plurality opinion). The Court concluded that the special edition constituted express advocacy. Although the newsletter never explicitly called for votes for a particular candidate, it could not “be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates.” \textit{Id.} at 249. \textit{Massachusetts Citizens for Life} may, thus, be treated as a very modest expansion of Buckley’s definition of “express advocacy,” albeit one quite consistent with Buckley’s approach.

\textsuperscript{30} \textit{See, e.g.}, FEC v. Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997); Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991); Me. Right to Life
B. PROBLEMS WITH BUCKLEY'S DOCTRINES

Buckley's three dichotomies constitute the heart of modern campaign finance doctrine, but each dichotomy is fundamentally flawed. Each has run into considerable difficulty in practice, either because the Court's distinction requires the drawing of a line that is difficult to maintain in theory or because the distinction fails to map on to the real world of campaign practices.

Turning first to the express advocacy/issue advocacy distinction, there is increasingly little relationship between the line drawn by Buckley and the underlying need to distinguish between election-related and non-election-related speech. Some distinction between election-related spending and other political activity "is needed so long as we operate under a constitutional regime which simultaneously (i) protects political speech from government regulation; (ii) treats political spending as a form of political speech; but (iii) permits regulation of political spending that is election related."31 But Buckley's narrow "express advocacy" definition of election-related speech is woefully incapable of reaching much election-related advertising. As recent campaigns have demonstrated, it "is an open invitation for evasion."32 Advertisements that denounce a candidate's policies, voting record, or personal character can completely escape regulation simply by avoiding a direct call to vote against that candidate or for her opponent. The most common tactic in recent campaigns has been for the advertiser to include some language that directs the reader, viewer, or listener to respond to the advertisement by an act other than voting, such as calling the sponsor of the ad for more information, or calling the candidate attacked. By combining sharp criticism of a named candidate with an exhortation to make a tele-

Comm., Inc. v. FEC, 914 F. Supp. 9 (D. Me. 1996). But cf. FEC v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987) (modestly expanding Buckley's definition of express advocacy to include "limited reference to external events," particularly the timing of the advertisement, in addition to whether or not the advertisement used Buckley's "magic words"). See generally Richard Briffault, Issue Advocacy: Redrawing the Elections/Politics Line, 77 TEX. L. REV. 1751, 1756-59 (1999) (arguing that the distinction between express advocacy and issue advocacy articulated in Buckley should be reconsidered).

31. Briffault, supra note 30, at 1753.
32. Id. at 1759.
phone call, these advertisements have immunized themselves from regulation. Because issue advocacy is, as a result of *Buckley*, constitutionally exempted from reporting and disclosure requirements, the amount of money spent on such advertising cannot be precisely known, but studies suggest that it runs into the hundreds of millions of dollars.\(^{33}\)

As I have suggested, although *Buckley*'s specific express/issue advocacy distinction has failed to work in practice, some election-related/non-election-related distinction is necessary if any campaign finance regulation is to be constitutional. Moreover, it would be possible to draw such a line that both satisfies the basic First Amendment concerns of avoiding vague and overbroad regulation while capturing most speech that is truly election-related. The redefinition of express advocacy to include communications that expressly refer to a candidate and that occur within a reasonably defined period, like thirty days, before Election Day, would go far to satisfy *Buckley*'s underlying goal of creating a space for election regulation without trenching on non-election-related political speech.\(^{34}\)

The problems with the contribution/expenditure and corruption/equality distinctions run deeper. Although contributions and expenditures do constitute distinct forms of campaign money, it is not clear why they should be given such sharply different constitutional treatment. Contributions may have a higher speech value than *Buckley* acknowledged. In the absence of public funding, contributions are essential to fund candidates' speech activities. Contribution limits either curtail the expenditures of all but the wealthiest, self-funding candidates, or force them to shift their activities from actually communicating with voters to dialing for the dollars they need to fund their campaigns. For donors, a contribution is also a device for pooling support and enabling their individual views to be amplified by a candidate, thus providing more effective dissemination of those views than if the donor had spent an identical sum on expenditures to speak to the voters directly. Certainly *Buckley*'s claim that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, sym-

\(^{33}\) Id. at 1760-62.

\(^{34}\) I have offered a proposal for redefining the distinction between election-related and non-election-related political speech. See id. at 1776-98; see also Briffault, supra note 27, at 655-57.
bolic act of contributing”\textsuperscript{35} seems ludicrous: a $100,000 contribution funds a lot more speech that reflects the contributor’s views than does a $10 contribution. Moreover, even if one accepts the Court’s suggestion that contributions are only indirect speech—“speech by proxy”\textsuperscript{36}—they are a direct form of association. If political speech is infringed by expenditure limits, then freedom of association ought to be comparably infringed by contribution ceilings that limit the amount of support an individual can give to a campaign.\textsuperscript{37}

On the other hand, the Court may have overstated the speech value of expenditures. “[M]uch of the money spent in congressional campaigns is spent on items that have little to do with communicating with voters.”\textsuperscript{38} Modern campaigns involve extensive research, polling, fund-raising, and overhead. Much of the cost of recent congressional campaigns, for example, has been attributed to the fact that “most members of Congress have created their own state-of-the-art, permanent political machines that operate 365 days each year, during off-years as well as election years.”\textsuperscript{39} Yet, these non-communicative expenses are treated under \textit{Buckley} as the equivalent of money spent on direct communications with the voters. To be sure, these expenditures can be seen as money spent in preparation for direct communication with the voters, but the same can be said about contributions that enable a candidate to communicate with the voters. It is hard to see why non-communicative candidate expenditures should enjoy a more exalted constitutional status than contributions, or why contributions that perform a similar function should be given a subordinate position in the constitutional order.

The contribution/expenditure distinction has also proven difficult to apply in practice. Independent expenditures—that is, expenditures incurred by a group formally independent of a candidate but that expressly support the candidate or oppose her opponent—are expenditures in form but present the same

\textsuperscript{35} 424 U.S. at 21.


\textsuperscript{38} ROBERT K. GOIDEL ET AL., \textit{MONEY MATTERS: CONSEQUENCES OF CAMPAIGN FINANCE REFORM IN U.S. HOUSE ELECTIONS} 64 (1999).

\textsuperscript{39} \textit{Id.} (quoting DWIGHT MORRIS & Murielle E. GAMACHE, \textit{GOLD-PLATED POLITICS: THE 1992 CONGRESSIONAL RACES} 10 (1994)).
danger as that raised by contributions: to the extent that the
candidate is aware of the independent expenditure and grateful
for it, the expenditure can be the basis of a corrupting quid pro
quo, just like a contribution.\textsuperscript{40} Although the Court has repeat-
edly presumed that the absence of formal coordination between
the candidate and the independent spender eliminates the cor-
ruption danger, there is ample evidence of independent spend-
ners consciously, albeit informally, tying their campaign-related
activities to the themes and strategies of the candidates they
support.\textsuperscript{41} “There are all manner of ways in which people run-
ning ‘independent’ campaigns can run them in tandem with the
candidates, and there are all manner of ways in which—
without the candidate or his top aides necessarily getting in-
volved—the independent committees and the campaigns can,
and do, collude.”\textsuperscript{42}

Current judicial standards for distinguishing “independ-
ent” expenditures from contributions fail to recognize the tacit
connections that can link nominally independent speakers,
candidates, and political parties. The leading lower court deci-
sion attempting to probe the contours of “independence” deter-
minded that frequent contacts between an “independent” organi-
ization and a candidate, including discussion of the candidate’s
campaign strategies—such as the determination of which is-
ssues to highlight and how to do so—are not sufficient to convert
“independent” spending into a campaign contribution. Only
when the candidate’s campaign requests or suggests the “in-
dependent spending” or exercises control over it, or “where there
has been substantial discussion or negotiation between the
campaign and the spender” such that the two become “partners
or joint venturers in the expressive expenditure,” does an ex-
penditure cease to be independent.\textsuperscript{43} Plainly, this provides “in-

\textsuperscript{40} \textit{Buckley} determined that in the absence of formal “prearrangement
and coordination,” independent expenditures may not be treated as contribu-

\textsuperscript{41} \textit{E.g., ELIZABETH DREW, POLITICS AND MONEY} 136-41 (1983).

\textsuperscript{42} \textit{Id.} at 136; \textit{see also ELIZABETH DREW, WHATEVER IT TAKES: THE REAL
STRUGGLE FOR POLITICAL POWER IN AMERICA} 42 (1997) (describing independ-
ent expenditures by the National Rifle Association in support of Republican
candidates and in opposition to Democrats: “[G]iven the interlocking relation-
ships and the communications among like-minded groups [the NRA and Re-
publican committees], there is reason to question how independent such ‘inde-
pendent expenditures’ are.”).

dependent" spenders with ample opportunities to create a relationship with a candidate comparable to that resulting from a direct contribution.\textsuperscript{44} The distinction between the prevention of corruption and the appearance of corruption and the promotion of political equality has also proven difficult to sustain. The Court has never actually defined what it means by "corruption or the appearance of corruption." Corruption is sometimes equated with "improper influence" or "undue influence" over officeholders—without any analysis of the distinction between proper and improper influences. \textit{Buckley} focused on the notion of the quid pro quo,\textsuperscript{45} and the Court elaborated that point a decade later in \textit{FEC v. National Conservative Political Action Committee} when it explained that "[t]he hallmark of corruption is the financial quid pro quo: dollars for political favors."\textsuperscript{46} But even \textit{Buckley} declined to limit corruption to straightforward donor-candidate deals, which may already be criminalized by anti-bribery laws. Indeed, \textit{Buckley} held that Congress could use contribution restrictions to curtail the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.\textsuperscript{47} In dicta in other cases, the Court suggested that "corruption" may be read broadly to include the spending of large sums of money that have an "undue influence on the outcome" of an election and thereby undermine "the confidence of the people in the democratic process and the integrity of government."\textsuperscript{48}

Of course, if corruption includes the influence that large sums of money can have on the outcome of an election or "voter confidence in government,"\textsuperscript{49} then large, unequal expenditures

\textsuperscript{44} A second difficulty for the contribution/expenditure distinction has been the treatment of the personal money that a candidate or members of the candidate's family contributes to the candidate's campaign. In form, these are contributions. \textit{Buckley}, however, treated such funds as expenditures for First Amendment purposes and invalidated federal statutory efforts to limit the ability of the candidate and family members to contribute to the candidate's campaign. \textit{Buckley}, 424 U.S. at 51-54. Justice Marshall, who joined all other aspects of \textit{Buckley}, dissented from this point. \textit{Id.} at 286-87.

\textsuperscript{45} 424 U.S. at 26.


\textsuperscript{47} 424 U.S. at 28.


\textsuperscript{49} \textit{Citizens Against Rent Control}, 454 U.S. at 302 (Blackmun, J., and
can be as corrupting as contributions. Indeed, to the extent that corruption includes the "undue influence" of money over electoral outcomes, then the notion of corruption includes a significant component that reflects a concern about political inequality—the factor Buckley otherwise expressly rejected as a constitutional basis for constraining campaign finance activity.

The Court's decisions after Buckley reflect the intermittent tendency of "corruption" to morph into "inequality." In a series of cases involving the constitutionality of the especially restrictive campaign finance limitations placed on corporations the Court has repeatedly blurred the corruption/inequality distinction, treating inequality of influence as a form of corruption. In FEC v. National Right to Work Committee, the Court upheld the constitutionality of limits on the ability of a corporation to solicit funds for its political action committee by citing the legitimacy of the public concern "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions."50 In FEC v. Massachusetts Citizens for Life, Inc.,51 the Court made it clear that its concern about "the corrosive influence of concentrated corporate wealth"52 was focused not on the possibility of corporate quid pro quos with candidates and officeholders but on corporate spending aimed at the public. The Court explained that the problem with corporate spending was not corporate wealth per se but the lack of any connection between corporate resources and the extent of public support for the corporation's ideas:

Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.53

O'Connor, J., concurring).

52. Id. at 257.
53. Id. at 258.
In *Austin v. Michigan State Chamber of Commerce*, the Court for the first—and so far only—time upheld an expenditure restriction by rejecting a constitutional challenge to a Michigan law barring corporations from engaging in independent spending. As in *NRWC* and *MCFL*, the Court held that a government could act to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin* emphasized that Michigan's legitimate concern that independent "expenditures reflect actual public support for the political ideas espoused by corporations" was a concern about corruption and the appearance of corruption, not about political equality. Yet, surely this "corruption" has nothing to do with the relationship between donors and officials and everything to do with the translation of economic inequalities into unequal participation in election campaigns—and that, of course, is the core of the political inequality concern.

To be sure *NRWC*, *MCFL*, and *Austin* were "corporations" cases. The Court repeatedly emphasized that "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments." The Court relied on this "unique state-conferred corporate structure" to justify greater government regulation of corporate election-related activities. But the Court's effort to limit its concern about the corrupting effect of spending not tied to public support for the ideas of the spender to spending by corporations is unpersuasive. In *First National Bank of Boston v. Bellotti*, its first case dealing with corporate political spending, the Court emphasized that the touchstone for analysis was "[t]he inherent worth of the speech in terms of its capacity for informing the public... not... the identity of its source, whether corporation, association, union, or individual." The corporate status of the speaker, then, ought to be irrelevant to an assessment of

55. Id. at 660.
56. Id.
57. Id. at 658-59.
59. Id. at 777.
whether speech is corrupting. Indeed, it is hard to see why state-granted advantages make corporate speech more corrupting. It could be that such state-granted advantages make it easier for corporations to amass wealth—although other business associations and individuals also benefit from government actions, while many corporations fail despite these advantages—but it is the conversion of wealth amassed in the marketplace to political purposes that creates the corruption problem, not the role of the state in arguably helping them to accumulate that wealth.

NRWC, MCFL, and especially Austin have eroded the conceptual underpinnings of the corruption/equality distinction. If, as the Court has suggested in these cases, heavy spending unrelated to the extent of support for the spender's ideas constitutes corruption, it is also a form of political inequality. Indeed, some members of the current Court have expressly endorsed the promotion of political equality as a justification for campaign finance regulation. In Colorado Republican Justice Stevens, joined by Justice Ginsburg, concluded that “the Government has an important interest in leveling the electoral playing field.” In so doing, they indicated a willingness to sustain some expenditure limitations as well as contribution limitations.\(^{60}\)

Conversely, one other member of the Colorado Republican Court expressed a very different doubt about the anti-corruption rationale and the continuing viability of the contribution/expenditure distinction. Justice Thomas stated that he would place contributions and expenditures on the same—and very high—constitutional plane.\(^{61}\) In his view, contribution limits placed an unjustified burden on campaign speech. The goal of preventing corruption could justify anti-bribery rules and disclosure requirements, but not contribution limits.

Colorado Republican—the Court's last campaign finance case prior to Shrink Missouri—was not the first case in which several members of the Court expressed doubts about Buckley's basic distinctions. Indeed, there have always been some dissents from Buckley's basic dichotomies, but at no time between Buckley and Colorado Republican did more than three sitting justices reject the Buckley framework.\(^{62}\) Buckley remained

\(^{60}\) 518 U.S. at 649 (Stevens, J., dissenting).

\(^{61}\) Id. at 640 (Thomas, J., concurring in the judgment and dissenting in part).

\(^{62}\) In Buckley, Justice White would have upheld both contribution and
well-established and was repeatedly invoked in deciding campaign finance cases. *Shrink Missouri* continued this reliance on *Buckley*. Moreover, the combination of *Shrink Missouri* and *Colorado Republican*—which invalidated federal statutory limits on political party independent expenditures—strongly reaffirm the contribution/expenditure distinction so central to *Buckley*. Yet, as I will indicate in the next Part, the long-term effect of *Shrink Missouri* may have been to undermine that distinction. Moreover, in *Shrink Missouri* a record six Justices indicated opposition to the *Buckley* framework for resolving campaign finance cases.

II. *SHRINK MISSOURI* AND ITS IMPLICATIONS FOR *BUCKLEY V. VALEO*

A. THE ISSUE

*Shrink Missouri* considered the standard of judicial review applicable to a contribution limitation. *Buckley* had been maddeningly imprecise on this question. Although *Buckley* repeatedly grouped contribution and expenditure limitations together in determining that both restrictions “operate in an area of the most fundamental First Amendment activities”63 and that both “contribution and expenditure limitations also impinge on protected associational freedoms,”64 the Court also found that restrictions on contributions place less of a burden on political expression than do restrictions on expenditures.65 Still, the Court insisted that it was applying a “rigorous standard of re-

---

63. 424 U.S. at 14.
64. Id. at 22.
65. See id. at 20-23.
view” to the federal contribution restrictions at issue in Buckley, and required that they be justified by “weighty interests.”

Buckley agreed that the prevention of corruption and the appearance of corruption constituted such weighty interests, but the Court spent less time on the issues that became central to Shrink Missouri: how serious a corruption danger do contributions present? How narrowly must a contribution restriction be tailored to the anti-corruption interest in order to be constitutional? Ordinarily, the Court requires that restrictions that burden speech must be narrowly tailored to advance important interests. Buckley, however, spent relatively little time on the fit between the anti-corruption goal and the contribution restrictions under attack.

Perhaps because the case came down so soon after the Watergate scandal and the well-documented campaign finance abuses that notoriously marked the 1972 presidential election, the Buckley Court spent little time discussing what Congress had to prove to demonstrate that contributions present a serious corruption danger. The Court simply alluded to “the deeply disturbing examples surfacing after the 1972 election” to suggest that large contributions posed a real danger of quid pro quo corruption. The Court gave even less attention to the question of whether the specific contribution limitations at issue—the limit of $1000 per candidate per election on individual donations, the aggregate cap of $25000 on total individual contributions in a calendar year, and the $5000 limit on donations by political committees per candidate per election—were necessary to prevent corruption. Perhaps because donations in excess of $1000 were relatively uncommon at the time Buckley was decided, the Court declined to consider whether the specific contribution limits were narrowly tailored to advance the weighty goal of preventing corruption. Instead, the Court indicated it would give considerable deference to Congress’s judgment concerning the propriety of particular contribution limitations. Quoting the opinion of the Court of Appeals in an earlier stage of the Buckley litigation, the Supreme Court concluded, “If it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe,

66. Id. at 29.
67. Id. at 26-27 & n.28.
68. The Court noted that in the 1974 congressional elections—that is, the elections immediately preceding the Buckley decision—94.9% of the funds raised by all candidates for Congress came from contributions of $1000 or less. See id. at 21-22 n.23; id. at 26 n.27.
a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.' ... Such distinctions in degree become significant only when they can be said to amount to differences in kind."  

The Eighth Circuit, in the *Shrink Missouri* decision that was reviewed by the Supreme Court, as well as in several earlier decisions dealing with contribution limitations, sought to impose a heavier burden of proof on governments seeking to restrict contributions. Taking seriously the notion that contributions are core political speech protected by the First Amendment, the Eighth Circuit applied the techniques of judicial review normally applicable in First Amendment cases. Not only would a regulation have to be justified by a weighty interest, but the regulation would have to be "narrowly drawn" to serve that interest. Without questioning that the prevention of corruption or the appearance of corruption are compelling government interests, the court required that the state demonstrate that the contribution limits in question were strictly necessary to prevent corruption. The Eighth Circuit found that Missouri's proof fell short. First, the court indicated that the state could not rely on general assumptions about a linkage between contributions and corruption. *Buckley*'s determination that Watergate demonstrated a federal corruption problem which justified caps on contributions in federal election campaigns would not suffice:

[We are unwilling to extrapolate from those examples that in Missouri at this time there is corruption or a perception of corruption.... We will not infer that state candidates for public office are corrupt or that they appear corrupt from the problems that resulted from undeniably large contributions made to federal campaigns over twenty-five years ago.]

The state would have to prove contributions created a corruption problem in Missouri, and the state's evidence on that point was held to be inadequate. The court found that the principal evidence relied upon by the state was an affidavit submitted by the state senator who had co-chaired the Missouri Interim Joint Committee on Campaign Finance Reform. The senator attested that contributions above the statutory limits present a

---

69. *Id.* at 30 (citation omitted).
70. See Russell v. Burris, 146 F.3d 563 (8th Cir. 1998); Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995); Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994).
72. *See id.*
73. *Id.* at 522.
"real potential to buy votes" and "have the appearance of buying votes." The court dismissed the affidavit as "conclusory and self-serving," and insufficient to prove the existence of a "real problem with corruption or a perception thereof as a direct result of large campaign contributions." One member of the Eighth Circuit panel would have gone even further. Chief Judge Bowman found that even if Missouri had proven a corruption problem, the specific limits the State had adopted were so low "that they [ran] afoul of the Constitution by unnecessarily restricting protected First Amendment freedoms." The Missouri limits were $1075 for candidates for statewide office, $525 for candidates for state senator, and $275 for candidates for state representative. Buckley had upheld limits of $1000 per candidate in 1976. As a result of inflation, the $1075 limit for Missouri statewide offices was worth just $378 in 1976 dollars. The other limits were, of course, far below that in 1976 dollars. With Missouri's limits roughly one-third or less than those sustained in Buckley, Chief Judge Bowman determined that this amounted to "differences in kind" and not mere "distinctions in degree" from the limits Buckley found to be constitutional. In his view, these limits imposed an excessive burden on the First Amendment interests of donors, and, thus, were not narrowly tailored to prevent corruption and the appearance of corruption. Given that the federal contribution limits sustained in Buckley have not been modified since their enactment nearly three decades ago—and, indeed, are actually lower than the Missouri statewide limits at issue in Shrink Missouri—Judge Bowman's opinion sharply, albeit silently, called into question the continuing constitutionality of the federal limits on donations in presidential and congressional elections that Buckley upheld a quarter-century ago.

B. THE OPINION OF THE COURT

Justice Souter's opinion for a six-Justice majority emphatically rejected the Eighth Circuit's efforts to require more

74. Id. (citation omitted).
75. Id.
76. Id.
77. Id. at 520.
78. Id. at 523 n.4.
79. Id. at 523 (quoting Buckley, 424 U.S. at 30).
80. See id.
81. The opinion of the Court was joined by Chief Justice Rehnquist and
stringent judicial review of contribution limits and to increase the burden of proof on a state seeking to justify contribution limits. The Court confirmed Buckley's implication that the First Amendment provides much less protection for contributions than for expenditures.\textsuperscript{82} The Court also applied a relatively expansive interpretation to "corruption," clarified the relatively minimal burden on the state to prove corruption, and significantly minimized the donor's constitutionally protected interest in making contributions.

\textit{Shrink Missouri} subtly expanded the notion of corruption, going beyond the prevention of quid pro quos to include "the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery.\textsuperscript{83} Although \textit{Shrink Missouri} did not use the language of inequality, it joined \textit{Austin} in viewing "corruption" as a matter of the systemic influence of money on the political process, rather than as simply the direct purchase of political favors.

\textit{Shrink Missouri} also clarified, and lowered, the amount of proof necessary to demonstrate that a contribution restriction is justified by the anti-corruption goal. "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{84} Citing \textit{Buckley} and \textit{Buckley}'s discussion of Watergate era abuses, the Court concluded that "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible."\textsuperscript{85} If not quite finding that large donations by their nature create a danger of corruption and the appearance thereof, \textit{Shrink Missouri} came awfully close: "[T]here 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."\textsuperscript{86} The state senator's affidavit so easily dismissed by the

\textsuperscript{82} \textit{See id.} at 386-88.
\textsuperscript{83} \textit{Id.} at 389 (quoting \textit{Buckley}, 424 U.S. at 28).
\textsuperscript{84} \textit{Id.} at 391.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.} at 395.
Eighth Circuit, supplemented by a smattering of Missouri news articles and editorials concerning large contributions and links to government actions, sufficed to demonstrate the possibility of corruption. Voter approval, by a wide margin, of a ballot proposition imposing tight contribution limits “attested to the perception” of corruption. Indeed, the Court suggested that the plaintiffs had failed to make “any showing of their own to cast doubt on the apparent implications of Buckley’s evidence and the record here.” Reversing the usual allocation of burdens in First Amendment cases, the Court implied that the challengers to a contribution restriction have a burden of showing that the contributions in question do not present a danger of corruption, rather than requiring the state to show that the contributions present such a danger.

*Shrink Missouri* also minimized the First Amendment implications of contribution restrictions. The Court expressed little concern about the burden contribution limitations place on the rights of donors and would-be donors. Even a contribution limit “involving ‘significant interference’ with associational rights could survive,” if justified by the goal of preventing corruption and the appearance of corruption. The Court gave greater attention, in theory, to the burden contribution limits impose on candidates by making it more difficult for them to finance their campaigns. Even then, the Court emphasized this was an interest of candidates in general, and not of any particular candidate. One of the plaintiffs in *Shrink Missouri*, a candidate for the Republican nomination for state auditor, claimed that he had been severely burdened by the state’s contribution cap because it interfered with the ability of a principal supporter—the other plaintiff, the *Shrink Missouri Government PAC*—from donating to him. But the Court determined that even if the state law did interfere with the plaintiff’s ability to raise funds from one or a small number of potential large donors “a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under Buckley.”

The only First Amendment question the Court found presented by the contribution limits was whether such limits interfered generally within the ability of candidates to raise the

---

87. *Id.* at 393-94.
88. *Id.* at 394.
89. *Id.* at 387 (quoting *Buckley*, 424 U.S. at 25) (citations omitted).
90. *Id.* at 396.
funds necessary to finance effective political campaigns. There, too, the Court suggested that only an extreme restriction was unconstitutional: "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."91 The Missouri restrictions did not come close to flunking such a minimal constitutional standard. Noting that the overwhelming majority of campaign contributions to candidates in the election before the limits had been adopted were in amounts of $2000 or less, and that the district court had found that since the limits were adopted, candidates had still been able to finance effective campaigns, the Court concluded that the limits did not unduly burden candidates' interests.92

C. THE SEPARATE OPINIONS

Shrink Missouri also elicited four separate opinions, signed by a total of six Justices. Each of these opinions demonstrated considerable hostility to the *Buckley* approach to campaign finance questions.

1. Justices Thomas and Scalia

Justice Thomas, reiterating the position he had taken in *Colorado Republican*, dissented. This time joined by Justice Scalia, Justice Thomas indicated that he would provide contributions with the same strong protection accorded to expenditures. In his view, contribution caps "should be met with the utmost skepticism and should receive the strictest scrutiny."93 Without directly questioning the validity of the anti-corruption rationale for campaign finance regulation, he condemned the majority for "separat[ing] 'corruption' from its *quid pro quo* roots and giv[ing] it a new, far-reaching (and speech-suppressing) definition,"94 and for "weaken[ing] the requisite precision in tailoring"95 necessary to justify contribution restrictions under the anti-corruption rationale. For Justices Thomas and Scalia, contribution restrictions are an excessively burdensome means of preventing corruption and the appear-

---

91. *Id.* at 397.
92. *Id.* at 395-96 & n.9.
93. *Id.* at 412 (Thomas, J., dissenting).
94. *Id.* at 423 (Thomas, J., dissenting).
95. *Id.* at 424 (Thomas, J., dissenting).
ance of corruption, given that less restrictive means, such as anti-bribery laws and disclosure requirements, are available.\textsuperscript{96}

2. Justice Stevens

While Justices Thomas and Scalia sought to increase, not relax, judicial scrutiny of contribution restrictions, Justice Stevens sought to take campaign finance practices entirely out from under First Amendment review. Having joined in the majority opinion, Justice Stevens also issued a brief concurrence that rejected \textit{Buckley}'s most fundamental premise. Justice Stevens declared that "[m]oney is property; it is not speech."\textsuperscript{97} Although the right to use one's money to fund political campaigns, like other uses of property, "merits significant constitutional protection," Justice Stevens implied that these are not the same protections that are triggered when campaign money is considered to be speech.\textsuperscript{98} Although he did not take a position on the constitutionality of specific campaign restrictions, such as expenditure limitations, the plain implication is that he would accept significant restrictions on campaign expenditures—restrictions that currently would be held unconstitutional.

3. Justice Kennedy

The Thomas and Stevens dissents from \textit{Buckley} were presaged by those justices' separate opinions in \textit{Colorado Republican}, although Justice Scalia's joining Justice Thomas was a new development, and Justice Stevens's hostility to \textit{Buckley} has become more marked. The more significant developments in \textit{Colorado Republican} were the separate opinions of Justices Kennedy and Breyer. Like Justices Thomas and Scalia, Justice Kennedy dissented from the Court's validation of Missouri's contribution limits. Justice Kennedy was sharply critical of the Court's relative deferential standard of review, finding it "unacceptable for a case announcing a rule that suppresses one of our most essential and prevalent forms of political speech."\textsuperscript{99} He condemned "\textit{Buckley}'s wooden formula"\textsuperscript{100} distinguishing contributions from expenditures, voiced sympathy for Justice

\textsuperscript{96} \textit{Id.} at 428 (Thomas, J., dissenting).
\textsuperscript{97} \textit{Id.} at 398 (Stevens, J., concurring).
\textsuperscript{98} \textit{Id.} at 398-99 (Stevens, J., concurring).
\textsuperscript{99} \textit{Id.} at 405 (Kennedy, J., dissenting).
\textsuperscript{100} \textit{Id.} at 407 (Kennedy, J., dissenting).
Thomas's concern about the First Amendment values affected by contribution restrictions, and expressly called for the overruling of *Buckley* and "the halfway house we created in *Buckley.*"101

But, unlike Justice Thomas, Justice Kennedy's criticism turned as much, if not more, on *Buckley's* failure to work in practice rather than its departure from First Amendment theory. Justice Kennedy focused on how candidates, parties, and supporters have evaded contribution restrictions through the development and exploitation of soft money and issue advocacy:

The plain fact is that the compromise the Court invented in *Buckley* set the stage for a new kind of speech to enter the political system. It is covert speech. The Court has forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits.102

In Justice Kennedy's view, the combination of unlimited spending, limits on hard money contributions, and unlimited soft money and issue advocacy is both a result of *Buckley,* and "creates dangers greater than" the unregulated system it replaced. It forces campaign participants to disguise the purposes of their speech. It blurs accountability in a manner "confusing, if not dispiriting, to the voter." Indeed, "[t]he very disaffection or distrust that the Court cites as the justification for limits on direct contributions has now spread to the entire political discourse."104

In rejecting *Buckley,* Justice Kennedy gave conflicting signals about his own views concerning the proper future direction of campaign finance law. To a considerable degree he expressed sympathy with Justice Thomas's "insightful and careful discussion" of the constitutional status of contributions, and acknowledged Justice Thomas's "reasoning and my own seem to point to the conclusion that the legislature can do little by way of imposing limits on political speech."105 Indeed, Justice Kennedy joined Justices Thomas and Scalia in dissenting from the Court's validation of the Missouri contribution limits. But Justice Kennedy's concerns focused at least as much on the workability of the contribution/expenditure distinction and its unintended effect of fueling the explosion of issue advocacy and

---

101. Id. at 409-10 (Kennedy, J., dissenting).
102. Id. at 406 (Kennedy, J., dissenting).
103. Id. at 407 (Kennedy, J., dissenting).
104. Id. at 408 (Kennedy, J., dissenting).
105. Id. at 409 (Kennedy, J., dissenting).
soft money as on the tension between contribution limits and the First Amendment per se. Thus, Justice Kennedy stated "[f]or now ... I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions."106 In other words, although sympathetic to the notion of providing heightened protection for contributions, Justice Kennedy expressed a willingness to provide reduced protection for expenditures so long as the resulting system avoided the "existing distortion of speech caused by the halfway house we created in Buckley."107 Either way, in Shrink Missouri, Justice Kennedy joined the growing number of justices opposed to Buckley.

4. Justices Breyer and Ginsburg

Justice Ginsburg, who had signed Justice Stevens's dissent in Colorado Republican, parted company with him in Shrink Missouri. Perhaps she thought that in taking campaign finance regulation entirely out of the scope of the First Amendment Justice Stevens had gone too far in repudiating Buckley. Instead, Justice Ginsburg, who joined in the opinion of the Court, also joined Justice Breyer's concurring opinion. In his only previous campaign finance opinion—the plurality opinion announcing the judgment of the Court in Colorado Republican—Justice Breyer had adhered closely to the contribution/expenditure distinction, and to Buckley's determination that only the prevention of corruption and the appearance of corruption could justify restrictions on campaign money.108 In Shrink Missouri, however, Justice Breyer, joined by Justice Ginsburg, broke with Buckley on these points, by indicating that there were legitimate government goals in campaign finance regulation other than the prevention of corruption and that he would be willing to sustain some restrictions on expenditures that could not be defined in narrow anti-corruption terms.

While continuing to find, unlike Justice Stevens, that contribution restrictions raise First Amendment concerns, Justices Breyer and Ginsburg emphasized that such restrictions can "protect the integrity of the electoral process, ... democratize the influence that money itself may bring to bear upon the elec-

106. Id. (Kennedy, J., dissenting).
107. Id. at 410 (Kennedy, J., dissenting).
toral process,” and promote a “fairer electoral debate.” Having framed the issue of campaign finance regulation in terms of democratization, electoral integrity and electoral fairness, they also sharply criticized Buckley’s oft-cited statement that “the 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,” noting that “[t]he Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many.” Justices Breyer and Ginsburg called for “making less absolute the contribution/expenditure line” and expressly indicated a willingness to support limitations on “independently wealthy candidates, whose expenditures might be considered contributions to their own campaigns.”

More generally, Justices Breyer and Ginsburg indicated that given that “constitutionally protected interests lie on both sides of the legal equation,” and given the legislature’s “significantly greater institutional expertise . . . in the field of election regulation,” they would be willing to give greater deference “to empirical legislative judgments” as well as to the legislature’s “political judgment” including the constitutionally controversial judgment—rejected by Buckley—that “unlimited spending threatens the integrity of the electoral process.” They cautioned, however, that deference must end for measures that increase “the reputation-related or media-related advantages of incumbency and thereby insulate[] legislators from effective electoral challenge.”

Justices Breyer and Ginsburg stopped short of calling for the overruling of Buckley, suggesting that Buckley might leave the legislative branches with the discretion to adopt appropriate campaign finance reforms and that “it might prove possible to reinterpret aspects of Buckley in light of the post-Buckley experience stressed by Justice Kennedy.” But, like Justice

109. 528 U.S. at 401-02.
110. 424 U.S. at 48-49.
111. 528 U.S. at 401.
112. Id. at 405.
113. Id. at 400.
114. Id. at 402.
115. Id.
116. Id. at 403-04.
117. Id. at 404.
118. Id. at 405.
Kennedy, they concluded that if Buckley could not be so reinterpreted, then "the Constitution would require us to reconsider Buckley."\textsuperscript{119}

D. IMPLICATIONS

Shrink Missouri has three principal implications: (i) it tacitly modifies Buckley; (ii) it registers the opposition of a majority of the members of the Court to Buckley, and (iii) it indicates a new concern with the real world consequences of campaign finance doctrine in determining the elements of that doctrine:

1. The Modification of Buckley

To the extent that the Court continues to treat Buckley as governing doctrine in campaign finance cases, it has subtly changed some elements of the Buckley doctrine. In clarifying the standard of review applicable to contribution limitations, the Court virtually dispensed with the concern that contribution limits burden the speech or associational rights of donors, virtually presumed that large contributions create a corruption and appearance of corruption problem, and imposed a very low burden of proof for demonstrating a corruption danger. After Shrink Missouri, it is difficult to see how, from the donors' perspective, contributions are protected by the First Amendment at all. The only constitutional interest the Court found seriously implicated by contribution restrictions was the ability of candidates and political committees to obtain the funds necessary to mount effective election campaigns, and there, too, the Court emphasized that this was an interest not of every individual candidate or committee, but of candidates and committees in general. An individual candidate, who is particularly dependent on a few wealthy donors, might be burdened, but that would not constitute an unconstitutional "suppress[ion of] political advocacy."\textsuperscript{120}

Shrink Missouri, thus, takes Buckley's two-tier treatment of contributions and expenditures and virtually reads contributions out of the domain of the First Amendment altogether. Contribution restrictions create a First Amendment problem only when they threaten the ability of many candidates and political groups to make campaign expenditures. In the guise of restating Buckley, then, Shrink Missouri appears to have nar-

\begin{footnotesize}
\textsuperscript{119} Id. \\
\textsuperscript{120} Id. at 396.
\end{footnotesize}
rowed Buckley, turning it into a doctrine entirely for expenditures, not for campaign finances generally.

Moreover, Shrink Missouri appears to have continued the Court’s nuanced revision of the meaning of “corruption.” As in Austin, the Court is focused not simply on corruption as quid pro quo arrangements between donors and candidates but also on the pervasive influence of campaign money on the political process. Although the Court did not extend the broad infusion of political inequality concerns into the meaning of corruption that has marked the Court’s corporation cases, the Court emphasized that as a concept “corruption” includes not just specific deals but the “broader threat” of politicians excessively attentive to large donors.

Further, the Court confirmed that relatively little would be needed to prove that contributions presented a serious danger of corruption, thereby justifying contribution limits. The record cited by the Court was thin but adequate. The Court’s emphasis on the appropriateness of legislative action to deal with the appearance of corruption as well as corruption itself may also operate to make it easier to adopt contribution limits since it is likely to be easier to prove the appearance of corruption than actual corruption. Indeed, the Court found that an important bit of proof supporting the presence of the perception of corruption was the strong popular vote for a ballot proposition imposing contribution limits. This comes close to suggesting that the very adoption of contribution limits evidences the concern about corruption that validates such limits.

2. The Division Within the Court

Perhaps more striking than the Court’s treatment of contributions was the rejection of critical elements of Buckley by a majority of the justices. Four justices—Justices Kennedy, Scalia, Thomas, and Stevens—expressly called either for overruling of Buckley entirely or for overruling key elements of the decision. Two more justices—Justices Breyer and Ginsburg—expressed the hope that Buckley could be salvaged through significant reinterpretation, including the modification of one key Buckley component, the contribution/expenditure distinction. And even they called for a reconsideration of Buckley in the event that Buckley could not be so reinterpreted. Only Justices Souter and O’Connor and Chief Justice Rehnquist raised no questions about the continuing status of Buckley.
To be sure, Buckley's critics were deeply divided over what direction the Court should take in the campaign finance area. Buckley may be seen as a hybrid or compromise approach to campaign finance, permitting disclosure requirements and contribution restrictions but barring expenditure limitations, and justifying government regulation in terms of the prevention of corruption but not the promotion of political equality.\(^\text{121}\) Although six members of the Court now reject this compromise, there is no clear majority for either a more regulatory or a less regulatory approach. Two members of the Court have plainly concluded that the Constitution requires deregulation. Justices Thomas and Scalia found that contributions are as valuable a form of speech as expenditures, and that the government's interest in preventing corruption is not enough to justify contribution limits. They would eliminate all campaign finance restrictions except reporting and disclosure requirements.

By contrast, three members of the Court have concluded that the Constitution permits more restrictions on campaign finances, including the imposition of some expenditure limits. Whether by adding the promotion of political equality to the list of important governmental goals, by expanding the notion of corruption to include the undue influence of big money more generally, or, as in Justice Stevens's case, by reading campaign finances out of the First Amendment altogether, they would approve far more regulation of campaign expenditures than the Constitution is now read to allow.

Finally, Justice Kennedy apparently incorporates the divisions within the Court into his own opinion. He would scrap the contribution/expenditure distinction, but is uncertain which way the Constitution ought to be read. Although suggesting a greater sympathy for the Thomas and Scalia deregulatory approach, he would also permit Congress and state legislatures to experiment with some expenditure restrictions.

For the moment, Buckley survives because of the division within the Court over how to replace it. Given the depth of that division, this could be a long "moment." There is no majority for an alternative to Buckley, and there may not be such a majority for years to come. Still, the extent of the opposition to

\(^{121}\) To be more precise, Buckley rejected the use of campaign expenditure limitations to promote political equality. See 424 U.S. at 39-59. By contrast, the Court had little difficulty approving Congress's decision to promote political equality by providing public funds to presidential candidates. See id. at 85-108.
Buckley within the Court is impressive—and unprecedented in the twenty-five-year life of the doctrine. It may prove difficult for the Court to fashion a coherent body of campaign finance case law when a majority of the Court is strongly opposed to its governing doctrine.

3. Concern with Real World Context

Justice Kennedy, and to a lesser extent Justice Breyer, expressed considerable interest in shaping campaign finance law not simply around First Amendment theory but also in light of the real world consequences of the Court's decisions. For Justice Kennedy a critical element in his rejection of Missouri's contribution limits is his conclusion that the contribution limits previously affirmed in Buckley simply had the consequence of stimulating newer and more pernicious campaign finance practices. Similarly, his determination that Buckley ought to be overruled seems to be based less on his sense that contributions are a form of core political speech and more on his firm conclusion that "Buckley has not worked."122

This concern with consequences could have significant, albeit uncertain, implications for the future of campaign finance law. On the one hand, there is one school of thought that suggests that campaign finance reform is bound to fail. Money plays such a critical role in politics that no matter what restrictions are adopted, candidates, parties, and potential contributors and supporters will find ways of evading the rules and bringing money back in.123 Certainly over the last twenty-five years, politicians and organizations seeking to influence the electoral process have repeatedly demonstrated their ability to frustrate legislative efforts to restrict the flow of campaign dollars. Moreover, like soft money and so-called issue advocacy, these new practices may actually be worse than the practices formally restricted. A concern with consequences could very well counsel the adoption of a deregulatory approach.

On the other hand, a concern with the real world context in which campaign finance doctrines play out could also result in more effective laws. The current express advocacy/issue advocacy distinction is based on a highly unrealistic notion of how

122. 528 U.S. at 408.
123. See generally Samuel Issacharoff & Pamela S. Karlan, The Hydraulics of Campaign Finance Reform, 77 TEX. L. REV. 1705 (1999) (analyzing campaign finance reform by tracing how political money works its way through the political system).
politicians and interest groups communicate with the public when they are interested in affecting elections. A judicial approach informed by the nature of contemporary political campaigns could result in the validation of the application of campaign finance rules to electioneering ads that currently have been able to escape regulation through the guise of express advocacy. So, too, greater judicial attention to the ways in which campaigns actually operate could result in doctrines concerning independent expenditures and the distinction between independent and coordinated expenditures that take into account the tacit forms of collaboration that render many nominally independent expenditures less than truly independent.

III. TOWARD A NEW CAMPAIGN FINANCE DOCTRINE

The divisions within the Court may continue to prop up Buckley as governing doctrine for years to come. That division makes it difficult to tell which way the Court will go. Much will depend on whether any current member of the Court changes his or her mind, as well as potential future resignations and appointments. It is, thus, necessarily speculative to talk about a post-Buckley era, let alone the elements of judicial doctrine if and when Buckley is substantially modified or overruled. Still, given the current discontent within the Court over Buckley, it may be useful to think about some of Buckley’s shortcomings.

Buckley rightly reminded us that campaign finance involves speech and associational activities protected by the First Amendment. But campaign finance implicates more than just the First Amendment. Campaign finances are part of our system of elections. Elections are our central form of collective political decisionmaking and, thus, they are our most important mechanism for securing democratically accountable government. Moreover, we have a distinctive jurisprudence of elections that attempts to combine and balance strong protection for the individual rights of political participation with the collective societal interest in organizing the process of collective self-governance. As the Supreme Court has repeatedly recognized, the electoral process “is necessarily structured to maintain the integrity of the democratic system.”124 Governmental regulation is not antithetical to freedom of political expression and association. Rather, “reasonable regulations of parties,

elections, and ballots"125 are necessary to make an election work as a mechanism for aggregating diverse preferences into results that reflect majority sentiment, command public support, and produce an effective, accountable government.

Freedom of speech and association are critical to this process. The very legitimacy of our system of elections requires that candidates, political parties, and others with an interest in the election be able to participate in the process and make their cases to the voters. A free election assumes that candidates are free not simply to place their names on the ballot but to contest the election vigorously. A vigorous contest includes the freedom to communicate with the voters to persuade them to cast their ballots for particular candidates. Moreover, election campaigns require campaign spending. Money per se is not speech, but in our large and heterogeneous society it takes a considerable amount of money for anyone interested in an election to communicate with the voters. Campaign finances are a critical part of a campaign, and campaign finance doctrine must take into account the effects of campaign finance laws on the ability of candidates, parties, and other interested actors to participate in the electoral process.

Similarly, the legitimacy of decisionmaking by elections also turns on the ability of voters to receive the information they need in order to cast informed votes. Indeed, given that citizens as voters are making choices that bind the polity as a whole and set the course of government policy for the next political term, there is a collective interest in increasing the amount of relevant information available to the voters in the hope of improving the quality of voter decisionmaking.

Voter information is also served by the protection of campaign speech. Although the news media provide information concerning candidates and election issues, media coverage is often wanting, particularly for lower-level elections. To a significant degree, the voters depend on candidates, parties, and other election participants to provide them with the information they need in order to cast informed votes.126

126. The government can also play a role in increasing voter information by requiring candidates to disclose the identities of their donors, by sponsoring debates, by distributing voter information pamphlets, by enabling candidates to obtain access to the media at reduced cost, or by providing candidates with campaign funds.
On the other hand, freedom of speech and association are not the only fundamental values that go into the structuring of the electoral process. Two other factors ought to be considered as we structure our campaign finance system: voter equality and competitive elections.

Voter equality is a central premise of our democratic system. Over the course of our history, the electorate has been expanded to presumptively include all adult citizens. Recent developments like the one person, one vote doctrine and the vote dilution doctrine have sought to ensure not simply that each adult citizen has the right to vote but that each voter has an equally weighted vote, and, thus, an equal opportunity to affect the outcome of the election. Bush v. Gore is only the most recent, albeit perhaps most dramatic, illustration of the importance of the voter equality concern in the electoral context.

Moreover, the voter equality concern has been particularly focused on denying a special place for wealth in voting. Most states long ago scrapped wealth or tax-payment requirements for voting, and the Supreme Court has made the elimination of wealth and tax-payment tests a constitutional mandate. Wealth may not be a criterion for the right to cast a vote or be a candidate, nor may the wealth of the voter be a factor in determining how much a weight a particular vote will be given.

127. See, e.g., Reynolds v. Sims, 377 U.S. 533 (1964) (holding that debase ment or dilution of a citizen's vote in either a state or federal election is a denial of voting rights).


129. 121 S. Ct. 525 (2000) (holding that manual recounts without set standards for discerning voter intent failed to meet the minimum requirements for non-arbitrary voter treatment and therefore violated the Equal Protection Clause).


132. See, e.g., Hill v. Stone, 421 U.S. 289 (1975) (concluding that a Texas rendering requirement impermissibly disenfranchised individuals otherwise qualified to vote simply because those citizens had rendered no property for taxation).
The role of voter equality in our electoral system has implications beyond the actual casting and counting of ballots. For the election to serve as a mechanism of democratic decision-making there must be a considerable amount of pre-election-day activity before balloting can occur. Indeed, the election campaign is an integral part of the process of structured choice and democratic deliberation that constitutes an election. Voter equality concerns, thus, apply to the financing of campaigns as well as to voting.

To be sure, participation in and influence over campaigns are not the same thing as voting. It is relatively easy to measure votes and to ensure that no person casts more votes than any other. Participation and influence take many different forms, vary widely in intensity, and are difficult to measure. It is virtually impossible to quantify the impact of a particular dollar in a particular race, nor would it be possible to quantify other modes of participation and influence—the "free media" value of celebrity endorsements, the intensity of commitment of volunteers, the superior organization of a particular interest group—that can affect a campaign. It is not possible to truly equalize influence over an election. Indeed, given the values of robust and uninhibited political participation, and the extensive regulation it would take to ensure total equality, ensuring absolutely equal influence over elections may not even be desirable. Nevertheless, when extreme inequalities of wealth bear directly on campaign financing and spending, as they currently do, the norm of voter equality is undermined. Thus,

133. In the 1995-1996 election, 235,000 people, or one-tenth of one percent of the total population, provided one-third of all individual donations. See CENTER FOR RESPONSIVE POLITICS, THE BIG PICTURE: WHERE THE MONEY CAME FROM IN THE 1996 ELECTIONS, at http://www.opensecrets.org/pubs/bigpicture/overview/bpoverview.htm (last visited Apr. 11, 2001). In 1998, individuals who made donations of $500 or more accounted for 68% of all contributions to Senate candidates and 56% of all contributions to House candidates. See RESEARCH AND POLICY COMM. OF THE COMM. FOR ECONOMIC DEVELOPMENT, INVESTING IN THE PEOPLE'S BUSINESS: A BUSINESS PROPOSAL FOR CAMPAIGN FINANCE REFORM 14-15 (1999) [hereinafter CED REPORT]. Nor are large donors a politically or demographically representative sample of the general population. A recent study of large donors—defined as those who gave at least $200 to one or more congressional candidates—found the affluent, men, whites, and people engaged in high-status occupations make up a far higher proportion of the large donor group than of society as a whole. See JOHN GREEN ET AL., INDIVIDUAL CONGRESSIONAL CAMPAIGN CONTRIBUTORS: WEALTHY, CONSERVATIVE AND REFORM-MINDED, at http://www.opensecrets.org/pubs/donors/donors.htm (last visited Apr. 11, 2001). (The "reform-minded" in the title refers to the contributors' favorable views on campaign finance
one important goal of campaign finance law ought to be to reduce the tension between the goal of equal voter influence over election outcomes and the unequal influence wealthy individuals and interest groups currently.

Much has been written about voter equality and its place in the campaign finance system. As we have seen, Buckley flatly ruled out equality as a basis for limiting campaign expenditures, but later cases included some elements of the equality concern in the Court's definition of corruption. The Court has given less direct attention to the other major concern that ought to shape campaign finance law: electoral competitiveness.

Elections are about giving voters choices. A fair election allows voters to choose among a number of contenders for the same position, and also allows the candidates to compete for votes. Legal constraints that limit the amount or type of campaigning can interfere with electoral competition, but so too can resource constraints. If one candidate is well-funded, while the others are not, the voters are likely to hear far more information and arguments from the first candidate than from her opponents. This can affect the outcome of the election. Moreover, when an election is marked by grossly unequal resources or by the inability of most candidates to raise enough money to campaign effectively, a victory for the big spender may seem unfair or less than fully legitimate.

The concern about fair competition is particularly focused on the willingness and ability of challengers to take on incumbents. The opportunity to deny reelection to incumbents, and the possibility that in any given election the people may exercise their authority to vote out current officeholders, is the ultimate security of popular control over government. As Joseph Schumpeter once observed, "[E]lectorates normally do not control their political leaders in any way except by refusing to reelect them."\textsuperscript{134} The value of fair electoral competition is, therefore, especially significant when the incumbent is seeking reelection. The incumbent typically starts with many built-in advantages, ranging from the free media attention he or she has gotten during her term in office, to the opportunity to use the office to provide constituency service and bring pork barrel

---

\textsuperscript{134} JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 272 (3d ed. 1950).
expenditures back to the district, to the fact that the incumbent was popular enough to win the last election. These advantages contribute to, and are typically reinforced by, the incumbent's superior ability to raise campaign money. An important goal for a campaign finance system, thus, is to assure that challengers have sufficient funds to mount effective challenges to incumbent officeholders. This will make it more likely that incumbents will actually be challenged, and that the incumbent-challenger race will be a truly contested election.

Absolute funding parity is not essential for an election to be competitive. Political scientists have found that a challenger can do well as long as he or she has mustered a critical mass of funds even if the incumbent spends more. Nor is it necessary for challengers actually to defeat incumbents, or for there to be frequent turnovers in office. Rather, voters need to know they have a real alternative to the incumbent, and incumbents need to know there is a real possibility they may lose. This requires credible challengers, and credible challengers require adequate financing.

A central weakness of our current campaign finance system is its failure to provide challengers with adequate funding. In 1998, the average House incumbent spent $657,000 and the average House challenger spent $265,000, or just 40% of what the average incumbent spent.  

Similarly, in 1996 the average incumbent spent $750,000 and the average House challenger $279,000 for an imbalance of 2.7 to 1. More importantly, in 1998 half of all House challengers raised less than $100,000 and only one-third raised as much as $200,000. Altogether 60 percent of House incumbents either had no significant opposition or outspent their opponents by a margin of ten to one or more.

As one recent study concluded, "The majority of House challengers now raise and spend so little that they cannot wage a viable campaign.... As a result, most House elections were financially uncompetitive." Looking to all House elections, over the 1994, 1996, and 1998 congressional election cycles, "the average winner outspent the average loser by between 2.5 to 1 and 3 to 1." In 95% of House races, the biggest spender won.

---

136. Id.
137. CED REPORT, supra note 133, at 17.
138. CITY BAR REPORT, supra note 135, at 67. The figures for all winners
Financial competitiveness directly affects political competitiveness. In 1998, the House challengers who spent less than $200,000 generally received less than 40% of the two-party vote. On the other hand, the relatively small number of challengers who received as much as 40% of the major party vote were able to spend an average of $639,000 or approximately the median level of spending of all House incumbents.

A central weakness of our system is the financial inequalities among candidates, and thus, the lack of competitiveness in many of our elections, particularly those involving incumbents. An incumbent can carry forward excess funds from his or her last election and is well-positioned to collect funds while in office. The statistical likelihood that the incumbent will be re-elected increases his or her ability to collect funds from donors who want access to the winner. Incumbents receive the lion's share of donations from political action committees and large individual donors—contributors who are particularly concerned with maintaining good ties with present and prospective office-holders. Incumbents, thus, usually start out well ahead in the financial arms race. By contrast, the challenger typically starts out less well-known and with less campaign money. Saddled with the presumption of incumbent re-election, the challenger is likely to experience greater difficulty raising funds. The burdens of fundraising may not just limit challenger finances, but may also discourage many potential challengers from entering the race altogether. In addition, the difficulties of raising the funds necessary to fund a competitive race may provide a special opportunity for the wealthy self-funded candidate.

The promotion of electoral competitiveness is primarily an issue for the political process rather than the courts. The primary means of promoting more competitive elections through the campaign finance system would be through the provision of public funding to candidates or parties, and that is clearly a matter for the legislature, not the judiciary. So, too, competitiveness is affected by a host of other factors—partisan gerrymandering, ballot access rules, the choice of winner-take-all single-member districts versus more proportional systems of include successful open-seat candidates and the rare successful challengers, as well as winning incumbents. See id.

139. See CED REPORT, supra note 133, at 17-18.
140. See id.
141. See CITY BAR REPORT, supra note 135, at 68-71.
representation—that are entirely beyond the campaign finance system. Yet, greater attention to the competitiveness implications of judicial review of campaign finance restrictions could be significant, and could have complex and cross-cutting consequences.

On the one hand, it could lead the courts to engage in somewhat more rigorous oversight of contribution restrictions. Although contribution restrictions promote the value of voter equality, they can affect competitiveness by making it more difficult for candidates to raise money. Contribution restrictions do not cap the aggregate amount of money a candidate may raise but they require the candidate to raise the same sum of money from many more donors. This can require much more time and effort, making fundraising a far more costly process. More burdensome fundraising can discourage some candidates, reduce the funds effectively available to other candidates, and skew the campaign process by inducing candidates to spend more time wooing potential contributors than considering policy issues or meeting with voters. These burdens do not apply to all candidates evenly. Incumbents and candidates who are personally wealthy do not have to worry nearly as much about fundraising as do challengers and candidates who are less financially well-endowed. The fundraising system, thus, tends to reinforce the advantages of incumbency and contributes to the growing role of self-financed campaigns. The burdens of fundraising also play a part in the growing influence of campaign finance intermediaries, who collect contributions from their associates, supporters, or members, bundle them together, and pass them on to candidates.

The Shrink Missouri Court implicitly acknowledged the burden contribution limits could potentially place on competitiveness. The principle concern of Justice Souter's majority opinion with the Missouri contribution limits was whether they interfered with the ability of candidates to run effective campaigns. Justice Breyer's concurrence more expressly indicated a concern with competitiveness. He stated that although he and Justice Ginsburg would ordinarily defer to legislative judgments in the campaign finance area "we should not defer in respect to whether its solution, by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates

142. See 528 U.S. at 395-96.
legislators from effective electoral challenge."143 Indeed, although the majority purported to scrutinize the effect of the contribution limits on the ability of candidates to campaign, it could be argued that they were too deferential to the legislature. The majority relied heavily on the fact that before the enactment of the contribution restrictions at issue "97.62% of all contributors to candidates for state auditor"—the post sought by plaintiff Fredman—"made contributions of $2000 or less,"144 but that tells us nothing about the percentage of candidates' funds attributable to large donors. It could very well be that although small donors made most of the contributions, a significant fraction of donations came from large donors. It also tells us nothing about the particular sources of funding for challengers. It could be that challengers are particularly dependent on a small number of relatively large donations from close backers in order to launch their campaigns. Such donations could function as "seed money" enabling a campaign to get off the ground and then attract the initial support necessary to pull in large numbers of small donors later.

This is not to say that the Missouri limits did impose a special burden on challengers or on competitiveness generally, but only to point out that the Court's finding that the vast majority of donors were unaffected by the limits tells us nothing about whether candidate competitiveness was affected, or whether the burdens of fundraising and the effect of those burdens in discouraging competitors were increased.145 The Court would be well-advised to take more directly into account Justice Breyer's injunction to consider contribution limits' potential capacity to insulate incumbents from effective electoral challenges.146

143. See id. at 404.
144. Id. at 396.
145. The majority did report that the District Court had found that in the period since the Missouri limits became effective "candidates for state elected office [have been] quite able to raise funds sufficient to run effective campaigns," but that does not address whether the ability of candidates in the same races to compete with each other has been affected by the restrictions. Id. (internal quotations and citation omitted). It could be that the incumbents continue to be well-funded while challengers' ability to raise funds was impaired.
146. Justice Breyer, of course, agreed with the majority that due in part to "the record of adequate candidate financing post-reform," the contribution limits at issue did not burden competition. Id. at 404. Moreover, as he points out, the Missouri limits are indexed for inflation, a factor that tends to reduce the anti-competitive effect of such limits. By contrast, the limits in the Federal
If concern about electoral competitiveness suggests somewhat closer scrutiny of contribution limits than the Court adopted in *Shrink Missouri*, attention to competitiveness might also lead to acceptance of some expenditure limitations. Contribution limits arguably burden competition because, if set too low, they can make it difficult for challengers to fund a competitive race. On the other hand, unlimited expenditures, by enabling incumbents and personally wealthy candidates to spend all the money they can raise, may also burden competition by driving up the spending level and thus increasing the amount of money necessary to fund a competitive race. The ability of an incumbent or wealthy candidate to drastically outspend competitors may discourage those competitors from entering the fray at all.

To be sure, low spending limits are also anti-competitive. One of the few facts we have about the effects of money on campaigns, is that being able to achieve a critical level of spending is essential for a challenger to be competitive.\(^1\)\(^4\)\(^7\)\(^4\)\(^7\) A low spending limit would make it impossible for a challenger to get her name and message out to the public. But there is evidence that moderate spending limits, along the lines of median candidate spending levels in recent races, would have little effect on challenger spending, and would impose a greater limitation on incumbent spending.\(^1\)\(^4\)\(^8\) Reasonable spending limits, thus, could reassure challengers that the funds they are able to raise will enable them to finance a race that is comparable to that of the incumbent. So, too, such limits could cap the built-in advantages of the personally wealthy candidates. With the knowledge that they would not be dramatically outspent by incumbents or personally wealthy candidates, many more potential candidates might be encouraged to enter races.

Expenditure limitations could also reduce the burdens and distractions of fundraising. Instead of devoting critical campaign time and effort to raising funds, candidates could spend more time on debates, campaigning, and meeting with the vot-

---

1. Election Campaign Act are not indexed and consequently are exactly what they were when enacted twenty-seven years ago despite the effects of inflation and the dramatic increases in campaign costs. *See* City Bar Report, *supra* note 135, at 119. The Senate has just voted to raise those limits, and, more importantly, to index them for future inflation.

2. *See generally, e.g.*, Gary C. Jacobson, *Money in Congressional Elections* (1980) (arguing that although campaign spending matters for every candidate, it matters most to candidates who are not incumbents).

ers. This could improve the quality of campaigns, increase voter information, and, ultimately, enhance citizen participation and election day turnout.149

Greater judicial attention to competitiveness as a constitutional concern in campaign finance regulation, thus, could increase judicial willingness to validate reasonable spending limits, that is, limits pegged to the costs of mounting effective campaigns. As with contribution limits, courts should not give excessive deference to legislative judgments concerning the level at which the expenditure limit is set. Even more than contribution limits, expenditure limits have the capacity to be incumbent-protective and anti-competitive. But, courts should be willing to accept that some expenditure limits may be a reasonable and appropriate means of advancing the important constitutional interest in competitive elections.

To be sure, the best way to promote competitive elections would be through the legislative provision of public funds for candidates or parties.150 Competitiveness suffers primarily because most candidates have too little money, not because some candidates have too much. The infusion of more money to help the poorly-funded candidates, especially challengers, can do far more to advance competitiveness than can the imposition of limits on contributions or expenditures. Moreover, contribution and expenditure limits ought to be far more constitutionally acceptable when part of a regime in which candidates may also receive public funding at levels adequate to effectively finance their campaigns. Public funding with expenditure limits would be more desirable than expenditure limits—even reasonable expenditure limits—without public funding.151 Still, even in the absence of public funding, a greater attention to competitiveness concerns could provide the support necessary to sustain reasonable spending limits—provided those limits are tested to determine that they are actually reasonable in light of election campaign costs.

149. See id. at 85-142 (contending that direct contact by candidates and parties with voters is far more effective in informing voters and increasing turnout than money spent on mass media advertisements).


151. See GOIDEL ET AL., supra note 38, at 74-80.
CONCLUSION

This is a time of considerable ferment in campaign finance law. After years of debate, Congress appears to be on the verge of adopting new limitations on soft money and issue advocacy. A growing number of state and local governments have been experimenting with public funding.\textsuperscript{152} A serious constitutional challenge has been mounted to the longstanding federal statutory limits on political party spending in support of party candidates.\textsuperscript{153} As a matter of constitutional doctrine, Shrink Missouri reveals an unprecedented degree of disaffection within the Supreme Court with the Court's foundational campaign finance case, Buckley v. Valeo. The divisions within the Court over how to replace Buckley may mean that Buckley will continue to govern campaign finance doctrine for years to come. Still, the majority's implicit modification of Buckley's treatment of contribution limits, the dissents' sharp repudiation of the contribution/expenditure distinction, and the especially thoughtful separate opinions of Justices Breyer and Kennedy suggest that the Court may be on the verge of a serious reconsideration of campaign finance doctrine.

Should that reconsideration occur, I would hope that it would entail not simply attention to the First Amendment values of freedom of speech and association but a broader concern for democratic elections. First Amendment rights are critical to democratic self-governance but so, too, are the other values that have marked our jurisprudence of elections, particularly voter equality and electoral competitiveness. The inclusion of concern for these values is likely to result in judicial acceptance of more campaign finance regulation than has been the case during the Buckley regime, and ought to result in giving the political branches a greater role in determining campaign finance law. But, as my discussion of electoral competitiveness may suggest, it should certainly not result in the abdication of a judicial role.

\textsuperscript{152} See Briffault, \textit{supra} note 150, at 567.

\textsuperscript{153} See, e.g., FEC v. Colo. Republican Fed. Campaign Comm., 213 F.3d 1221 (10th Cir. 2000) (holding that the party expenditure provision of the Federal Election Campaign Act violated the political parties' First Amendment rights), \textit{cert. granted}, 121 S. Ct. 296 (2000) (\textit{Colorado Republican II}).