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SHRINK MISSOURI, CAMPAIGN FINANCE, AND “THE THING THAT WOULDN’T LEAVE”

*Richard L. Hasen**

During one of the first seasons of *Saturday Night Live*, perhaps in 1976, the “Not Ready for Prime Time Players” satirized trailers for horror movies. Along with “The Island of Lost Luggage,” the skit featured a trailer for “The Thing That Wouldn’t Leave.” John Belushi played a party guest who planted himself on the living room couch after all the other guests had left. When Belushi, shoving his face full of potato chips, announced that he was going to make a long distance phone call, party hostess Jane Curtin gave a blood-curdling scream.

The year 1976 was also when the United States Supreme Court decided *Buckley v. Valeo*,¹ which, among other things, upheld limits on campaign contributions but struck down limits on campaign expenditures. The per curiam opinion was drafted hastily to be in time for the 1976 elections and featured additional separate opinions from five of the eight Justices who participated.² Members of the Court have since criticized various aspects of the opinion, including its decision to judge campaign contribution limits by a different standard than campaign expenditure limits.³ Yet despite such criticism, nearly 25 years later

* Professor and William M. Rains Fellow, Loyola Law School. B.A., 1986, University of California, Berkeley; M.A., 1988, J.D., 1991, Ph.D. (Political Science), 1992, University of California, Los Angeles. Thanks to Richard Briffault, David Burcham, Hal Krent, Chris May, Roy Schotland, and Adam Winkler for useful comments and suggestions. I presented an earlier version of this Article at the Annual Meeting of the American Political Science Association held in Washington D.C., August 31-September 4, 2000. Thanks to participants there, especially commentators Michael Fitts and Michael Malbin, for sharing their thoughts.

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

2. Chief Justice Burger and Justices White, Marshall, Blackmun, and Rehnquist wrote separate opinions. Justice Stevens did not participate in the case.

3. See, e.g., *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 518-19 (1985) (Marshall, J., dissenting); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring). Chief Justice Burger made the same point in his concurring and dissenting opinion in *Buckley* itself.

and many years after the death of John Belushi, *Buckley* truly has become "The Thing That Wouldn't Leave." *Buckley* has appeared to be an immovable object, despite numerous challenges from many directions.⁴

Perhaps change is finally coming. This past term, the Supreme Court decided *Nixon v. Shrink Missouri Gov't PAC*.⁵ *Shrink Missouri* upheld against First Amendment challenge a Missouri law limiting individual campaign contributions to statewide candidates to \$1,075. The outcome of the case is unremarkable following *Buckley*'s decision to uphold the federal contribution limit of \$1,000, but the reasoning in *Shrink Missouri* is quite significant. In four separate ways, the Court in *Shrink Missouri* lowered the constitutional bar for laws limiting campaign contributions. The Court: (1) ratcheted down the level of scrutiny applicable to contribution limit challenges; (2) expanded the definition of "corruption" and "the appearance of corruption" necessary to sustain contribution limits; (3) lowered the evidentiary burden for a government defending contribution limits; and (4) created a very difficult test for those challenging a contribution limit amount as unconstitutionally low. In combination, the opinion shows dramatic new deference toward contribution limits.

A key question remaining open after *Shrink Missouri* is the extent to which this deference signals a broader willingness of the Court to allow regulation of campaign finance. The case may be read in two ways. One reading, supported by the Court's careful limiting language, is that *Buckley* is alive and well. Under this reading, *Shrink Missouri* is simply the Court's latest pronouncement that, following *Buckley*, contribution limits generally are constitutional. *Shrink Missouri* then pairs well with the second most recent Supreme Court campaign finance case, *Colorado Republican Federal Campaign Committee v. Federal Election Commission*.⁶ In *Colorado Republican*, the Supreme Court, following *Buckley*, affirmed a political party's right to

424 U.S. at 241 ("For me contributions and expenditures are two sides of the same First Amendment coin").

4. See Richard Briffault, *Campaign Finance, The Parties, and the Court: A Comment on Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 14 Const. Comm. 91, 125-26 (1997) (suggesting that *Buckley* will remain viable precedent despite sustained challenge).

5. 120 S. Ct. 897 (2000).

6. 518 U.S. 604 (1996). For a comprehensive and thoughtful commentary on the case, see Briffault, 14 Const. Comm. at 120-26 (cited in note 4).

make unlimited independent expenditures for or against a particular candidate.

The second reading of the case is that the Court is preparing to erect in place of *Buckley* a jurisprudence more hospitable to campaign finance regulation. The majority opinion never says this explicitly, but the message comes through implicitly in the Court's discussion and is supported explicitly by the concurring opinions.

We probably will not learn whether the first or second interpretation of *Shrink Missouri* is correct until Supreme Court personnel changes. Nonetheless, even if the Court opts for the first reading in the near term, each day the *Buckley* status quo grows increasingly untenable given the explosive growth in the campaign finance loopholes of "issue advocacy" and "soft money," a point Justice Kennedy raised in his *Shrink Missouri* dissent.⁷ Loopholes have eviscerated much of *Buckley*'s force, a fact the entire Court should recognize eventually. At the same time, reformers continue to push *Buckley*-challenging campaign finance proposals through state and local legislative bodies and, more often, through the initiative process. These trends should move the Court either to adopt the second interpretation of *Shrink Missouri* or to move in the far opposite direction as urged by Justice Thomas,⁸ barring any contribution or expenditure limit, but perhaps upholding campaign finance disclosure laws.

This Article proceeds as follows. Part I sets forth the background of the *Shrink Missouri* case in light of *Buckley* and other precedent. Part II explains how the majority of the *Shrink Missouri* Court significantly lowered the bar for constitutional scrutiny of campaign contribution limits and briefly recounts the other opinions of the Justices in the case. Part III sets forth and assesses the competing interpretations of *Shrink Missouri*'s larger significance. It argues that current campaign finance reality has overtaken *Buckley*'s assumptions, suggesting that one way or another, *Buckley* is likely to leave America's living room in the not-too-distant future.

7. *Shrink Missouri*, 120 S. Ct. at 914 (Kennedy, J., dissenting).

8. *Id.* at 916-27 (Thomas, J., dissenting).

I. *BUCKLEY*, THE LOW CONTRIBUTION LIMIT CASES,
AND THE BACKGROUND OF *SHRINK MISSOURI*

In brief,⁹ *Buckley* upheld various contribution limits contained in the 1974 Amendments to the Federal Elections Campaign Act (“FECA”), including a \$1,000 limit on individual contributions to federal candidates.¹⁰ It also struck down expenditure limits, including a \$1,000 limit on independent expenditures relative to a clearly identified candidate.¹¹

Although recognizing that any law regulating campaign financing was subject to the “exacting scrutiny required by the First Amendment,”¹² the Court mandated divergent treatment of contributions and expenditures for two reasons. First, the Court held that campaign expenditures were core political speech, but a limit on the amount of campaign contributions only marginally restricted a contributor’s ability to send a message of support for a candidate.¹³ Thus, expenditures were entitled to greater constitutional protection than contributions. Second, the *Buckley* Court recognized only the interests in prevention of corruption and the appearance of corruption as justifying infringement on First Amendment rights.¹⁴ The Court held that large contributions raise the problem of corruption “[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential officeholders”¹⁵ But truly independent expenditures do not raise the same danger of corruption because a *quid pro quo* is more difficult if politician and spender cannot communicate about the expenditure.¹⁶ Finally, the Court rejected a proposed equality rationale for limiting expenditures, finding the idea “wholly

9. This part provides only brief background on those parts of *Buckley* necessary to put the *Shrink Missouri* issues in perspective; it is not meant to be a complete treatment. For more comprehensive analysis of current campaign finance law, see Daniel Hays Lowenstein, *Election Law—Cases and Materials* 509-797 (Carolina Academic Press, 1995), and Daniel H. Lowenstein and Richard L. Hasen, *Election Law—2000-2001 Supplement* 76-147 (Carolina Academic Press, 2000).

10. *Buckley*, 424 U.S. at 23-35.

11. *Id.* at 39-51.

12. *Id.* at 16.

13. *Id.* at 21.

14. *See Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985) (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”)

15. *Buckley*, 424 U.S. at 26-27.

16. *Id.* at 46-47. The Court also remarked that expenditure limits could be circumvented easily, meaning that such limits would serve “no substantial societal interest.” *Id.* at 45.

foreign to the First Amendment.”¹⁷ Although various members of the Court since have questioned the distinction between contributions and expenditures,¹⁸ the Court has never disavowed the distinction.

Significantly for purposes here, the Court in *Buckley* considered and rejected a challenge to the specific amount of the contribution limits. The plaintiffs argued the amounts set were not narrowly tailored to prevent corruption or its appearance. In response, the Court approvingly quoted the lower court opinion, which stated that “a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000.”¹⁹ The Supreme Court continued that “[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind.”²⁰ The Court also explained that the question was whether the limits were so low as to prevent “candidates and political committees from amassing the resources necessary for effective advocacy.”²¹

Following *Buckley*, especially in the 1990s, states and local jurisdictions adopted campaign finance laws containing contribution limits at or below \$1,000. Challengers to these laws argued that the contribution limits were so low compared to the value of \$1,000 in 1976 dollars as to be a “difference in kind” from the *Buckley* limits because the limits prevented candidates from amassing the resources necessary for effective advocacy.²²

Until *Shrink Missouri*, these challenges typically²³ met with success in the lower courts. Courts struck down contribution limits in Arkansas,²⁴ California,²⁵ Minnesota,²⁶ Missouri,²⁷ and

17. *Id.* at 48-49.

18. See *supra* note 3.

19. *Buckley*, 424 U.S. at 30.

20. *Id.*

21. *Id.* at 21.

22. See, e.g., *National Black Police Ass'n v. District of Columbia Bd. of Elections and Ethics*, 924 F. Supp. 270 (D.D.C. 1996), vacated as moot, 108 F.3d 346 (D.C. Cir. 1997).

23. But see *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir. 1997), cert. denied, 522 U.S. 860 (1997) (holding that a “\$1,000 limitation on direct contributions in connection with local and state elections in Kentucky is not different in kind from the \$1,000 limitation on direct contributions in connection with federal elections upheld in *Buckley*.”).

24. *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998), cert. denied, 525 U.S. 1001 (1998), and cert. denied, 525 U.S. 1145 (1999).

25. *California Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1297 (E.D. Cal. 1998). The Ninth Circuit affirmed the district court’s grant of a preliminary injunction on this issue but failed to reach the merits. 164 F.3d 1189 (9th Cir. 1999). The litigation remains pending.

Washington D.C.²⁸ on grounds they were unconstitutionally low. Before the Court decided *Shrink Missouri*, I speculated that the \$1,000 FECA limit itself could be subject to challenge because the limit was not indexed to inflation and was therefore worth only a fraction of \$1,000 in 1976 dollars.²⁹

Shrink Missouri started off as a typical low contribution limits case. In 1994, the Missouri legislature enacted campaign contribution limits ranging from \$250 for local races to \$1,000 for statewide races, with the amounts indexed to inflation.³⁰ Before the limits became effective, voters approved an initiative establishing even lower limits that overrode the legislatively set limits. The Eighth Circuit struck down the initiative limits in *Carver v. Nixon*,³¹ ruling that the "limits amount to a difference in kind from the limits in *Buckley*."³² *Carver* effectively revived the legislatively-enacted limits,³³ which then faced challenge in *Shrink Missouri*.

A political action committee, Shrink Missouri Government PAC, and Zev David Fredman, a candidate for the 1998 Republican nomination for state auditor, challenged the contribution limits in the state law. The PAC gave Fredman \$1,025, the maximum allowed by law as adjusted for inflation. "Shrink Missouri represented that, without the limitation, it would contribute more to the Fredman campaign. Fredman alleged he could campaign effectively only with more generous contributions than [the law] allowed."³⁴

Although the district court held that the contribution limit was not unconstitutionally low under *Buckley*,³⁵ the United States Court of Appeals for the Eighth Circuit reversed. The outcome itself was hardly a surprise given that the Eighth Circuit had struck down other Missouri contribution limits in *Carver* as

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

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

28. *National Black Police Ass'n v. District of Columbia Bd. of Elections and Ethics*, 924 F. Supp. 270 (D.D.C. 1996), vacated as moot, 108 F.3d 346 (D.C. Cir. 1997).

29. Richard L. Hasen, *Campaign Finance Just Gets Messier*, Nat'l L.J. A21 (Nov. 2, 1998).

30. *Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 901-02 (2000).

31. 72 F.3d at 645.

32. *Id.* at 644.

33. *Shrink Missouri*, 120 S. Ct. at 901.

34. *Id.* at 902 (citation omitted).

35. *Shrink Missouri Gov't PAC v. Adams*, 5 F. Supp. 2d 734, 740 (E.D. Mo. 1998) ("The Court finds that the effect of inflation since *Buckley* was decided has not created a 'difference in kind' between a \$1,000 contribution in 1976, and a \$1,075 contribution in 1998.").

well as contribution limits in Minnesota³⁶ and Arkansas.³⁷ The court's reasoning, however, was surprising.

Only one judge on the three-judge panel believed that the \$1,075 limit was unconstitutionally low.³⁸ But that judge was joined by a second judge³⁹ in holding the contribution law unconstitutional because the state failed to provide "some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place."⁴⁰ The majority rejected as "conclusory and self-serving" the affidavit of a Missouri legislator "that he and his colleagues believed there was the 'real potential to buy votes' if the limits were not enacted, and that contributions greater than the limits 'have the appearance of buying votes.'"⁴¹ The Court distinguished the evidence of corruption and its appearance that the Supreme Court held sufficient to justify the contribution limits in *Buckley*, namely "the perfidy that had been uncovered in federal campaign financing in 1972."⁴²

The Supreme Court granted certiorari, and by a 6-3 vote, reversed.

II. LOWERING THE BAR IN CONTRIBUTION LIMIT CASES

A. THE MAJORITY LOWERS THE BAR

Justice Souter, writing for himself, Chief Justice Rehnquist, and Justices Breyer, Ginsburg, O'Connor and Stevens, upheld the Missouri contribution law. The Court held that the state provided enough proof of corruption or the appearance of corruption to justify Missouri's contribution limits, and that the amount of the contribution limits was not unconstitutionally low.⁴³ Justices Stevens and Breyer, joined by Justice Ginsburg,

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

37. *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998), cert. denied, 525 U.S. 1001 (1998), and cert. denied, 525 U.S. 1145 (1998).

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

39. See also *id.* at 523 (concurring opinion joining in reversal of judgment but failing to join in that part of opinion "finding that the contribution limits are different in kind from those approved in *Buckley v. Valeo*." (citation omitted); *id.* at 524 (dissenting opinion)).

40. *Id.* at 521.

41. *Id.* at 522.

42. *Id.* (citing *Buckley*, 424 U.S. at 27 n.28).

43. *Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 910 (2000).

each wrote concurring opinions. Justice Kennedy, and Justice Thomas, joined by Justice Scalia, each dissented.

Although the majority characterized its opinion as a routine application of *Buckley*,⁴⁴ the opinion in fact lowered the constitutional bar in contribution limit cases in four different ways. Although one can read any of the four changes in isolation as either consistent with *Buckley* or merely small extensions of it, together they mark a significant departure in the direction of the Court's willingness to tolerate campaign contribution laws. I list these four changes in the order in which they appear in the Supreme Court opinion, not in order of importance. In fact, I believe the third and fourth changes listed are more significant than the first and second changes.

(1) *Ratcheting down the level of scrutiny.* As noted above, the Court in *Buckley* held that all campaign finance laws are subject to "exacting scrutiny" because of First Amendment concerns, but contribution limits were subject to somewhat less scrutiny than expenditure limits. Given the lack of clarity, some lower courts had construed *Buckley* to mandate strict scrutiny even for review of contribution limits.⁴⁵

The majority opinion in *Shrink Missouri* reexamined the level of scrutiny to which contribution laws should be subject and held the level to be low indeed. The Court began by noting that "[p]recision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley per curiam* opinion."⁴⁶ It then cited those portions of *Buckley* contrasting the interests at stake in contribution limit versus expenditure limit cases,⁴⁷ characterizing *Buckley* as saying, "in effect, that limiting contributions left communication significantly unimpaired."⁴⁸ After citing a few more Supreme Court campaign finance cases,⁴⁹ the Court explained that "[i]t has, in any event, been plain ever since *Buckley* that contribution limits would

44. *Id.* ("There is no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern this case in support of the Missouri statute.")

45. See, e.g., *Carver v. Nixon*, 72 F.3d 633, 637-38 (8th Cir. 1995). For a pre-*Shrink Missouri* scholarly examination of the level of scrutiny question surrounding contribution limits, see Marlene Arnold Nicholson, *Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine*, 10 *Hastings Const. L.Q.* 601, 607-08 (1983).

46. *Shrink Missouri*, 120 S. Ct. at 903.

47. *Id.* at 903-04.

48. *Id.* at 904.

49. *Id.* (citing *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986), and *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 610 (1996)).

more readily clear the hurdles before them.”⁵⁰ The Court concluded that

under *Buckley's* standard of scrutiny, a contribution limit involving “significant interference” with associational rights . . . could survive if the Government demonstrated that contribution regulation was “closely drawn” to match a “sufficiently important interest,” . . . though the dollar amount of the limit need not be “fine tuned.”⁵¹

Justice Thomas in his dissent derided as “*sui generis*” the majority’s new “*Buckley's* standard of scrutiny,” “which fails to obscure the Court’s ad hoc balancing away of First Amendment rights.”⁵² Whether or not one agrees with Justice Thomas that the standard the Court always should apply in campaign finance cases is strict scrutiny,⁵³ it is difficult to disagree with his conclusion that “the Court proceeds to apply something less—much less—than strict scrutiny.”⁵⁴

The standard set by the Court differs in two ways from strict scrutiny. First, the justification need only be “sufficiently important.” Under this language courts could perhaps begin to accept new and “non-compelling” interests (beyond the prevention of corruption and the appearance of corruption) to justify contribution limits.⁵⁵ Second, there need be no close relationship between the ends of the campaign finance law and the means. The Court’s explanation that “fine tuning” of contribution limits is unnecessary is at odds with the idea of narrow tailoring as required by strict scrutiny. In sum, the words “exacting scrutiny” used in *Buckley* may have suggested something like strict scrutiny, but the standard as explained in *Shrink Missouri* is considerably more deferential to government interests.

(2) *Expanding the Definitions of “Corruption” and “the Appearance of Corruption.”* In *Buckley*, the Court recognized the prevention of corruption and the appearance of corruption as a constitutionally sufficient justification for contribution limits.⁵⁶ The *Buckley* Court spoke of the “integrity of our system of rep-

50. *Id.*

51. *Id.* (citation and internal alterations omitted).

52. *Id.* at 922 (Thomas, J., dissenting).

53. *Id.* at 916 (Thomas, J., dissenting).

54. *Id.* at 922 (Thomas, J., dissenting).

55. That will not be necessary, however, given how the Court has expanded the definitions of corruption and the appearance of corruption and lowered the evidentiary burden, as I explain below.

56. *Buckley*, 424 U.S. at 25-26.

representative democracy [being] undermined” “[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders.”⁵⁷ The Court continued, “Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large financial contributions.”⁵⁸

The idea that corruption is equivalent to the *quid pro quo*, or as the Court put it in a later case—“dollars for political favors”⁵⁹—seemed well enshrined in Supreme Court jurisprudence. In 1990, however, the Court in *Austin v. Michigan State Chamber of Commerce*⁶⁰ appeared to expand the definition of corruption to include an equality-like⁶¹ rationale.⁶² There, the Court upheld a limit on corporate expenditures in a candidate campaign on grounds the law “aims at a different type of corruption in the political arena: 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.”⁶³

Since *Austin*, the Court had not relied upon or even discussed this “New Corruption,”⁶⁴ and some commentators have speculated that *Austin* might be an “aberration”⁶⁵ or merely a “corporations case,”⁶⁶ not generally applicable to campaign finance cases. The Court did not mention *Austin* in the *Shrink Missouri* case either, but the majority opinion did seem to expand further both the definition of “corruption” and the “appearance of corruption.”

57. *Id.* at 26.

58. *Id.* at 27.

59. *Federal Election Comm’n v. National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985).

60. 494 U.S. 652 (1990).

61. I explain why *Austin* provides an equality-like rationale in Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 Cal. L. Rev. 1, 40-42 (1996). But see Adam Winkler, *Beyond Bellotti*, 32 Loyola L.A. L. Rev. 133, 136 (1998) (arguing that the Court’s concern about “other people’s money” drives its decision in *Austin*).

62. See Lowenstein, *Election Law—Cases and Materials* at 625 (cited in note 9) (suggesting the Court first strayed from its definition of corruption in the *Massachusetts Citizens for Life* case).

63. *Austin*, 494 U.S. at 660.

64. The term is Justice Scalia’s in his *Austin* dissent. *Id.* at 684 (Scalia, J., dissenting).

65. Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 Cap. U. L. Rev. 381, 383 (1992).

66. Briffault, 14 Const. Comm. at 125 (cited in note 4).

Regarding corruption, the Court wrote, “In speaking [in *Buckley*] of ‘improper influence’ and ‘opportunities for abuse’ in addition to ‘*quid pro quo* arrangements,’ we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”⁶⁷ As for appearance of corruption, the Court remarked, “Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”⁶⁸

The Court did not define further what it meant for politicians to be “too compliant with the wishes of large contributors” or for large contributors to be (or simply appear to be but not really be) “call[ing] the tune” absent a *quid pro quo*. Perhaps the Court meant that politicians and large contributors would make deals with “winks and nods”⁶⁹ rather than through an explicit *quid pro quo*, and campaign contribution limits work to prevent this equivalent to bribery. More likely, the Court was expressing the view that large campaign contributions buy access to elected officials (or at least appear to do so), something objectionable in its own right (or at least objectionable to voters) even if there is no *quid pro quo* or “political favor” given in return for the money.

In any case, *Shrink Missouri* now stands for the proposition that a law limiting campaign contributions is justified if it prevents politicians from being “too compliant with the wishes of contributors” or if it prevents voters from believing politicians to be too compliant even if this fact is untrue.

(3) *Lowering the Evidentiary Burden*. The expansion of the definition of corruption would not be that significant if the Court required hard proof that politicians are “too compliant with the wishes of contributors” and that large contributors “call the tune,” or that voters believed they call the tune and that this belief undermined democratic legitimacy. Proof of corruption would be hard to come by in most cases because such information likely would be hidden, given the potential political and legal ramifications. The Eighth Circuit took the position that contribution limit laws could not be sustained absent “some

67. *Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 905 (2000).

68. *Id.* at 906.

69. *Cf. Evans v. United States*, 504 U.S. 255, 273 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

demonstrable evidence” of either corruption or of the erosion of public confidence in the democratic system caused by the appearance of corruption.⁷⁰

The Eighth Circuit’s position was not out in left field. The Court has demanded such evidence in other First Amendment cases,⁷¹ and indeed demanded such evidence in *Colorado Republican*. In that case, the Court held that it would not simply assume, absent evidence, that all party expenditures are coordinated with the party’s candidates.⁷²

In *Shrink Missouri*, however, the Court required virtually no evidence to support the government’s claim that the limits prevented corruption and the appearance of corruption. The Court began by explaining that the “quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.”⁷³

Although the Court insisted that “mere conjecture”⁷⁴ was not enough, it pointed to very little evidence actually supporting the claim that the Missouri contribution limits were necessary to prevent corruption or its appearance. First, the Court pointed to the only evidence on the point put forward by the State, the affidavit from the Missouri legislator⁷⁵ who stated that “large contributions ‘have the real potential to buy votes.’”⁷⁶ The Court further mentioned newspaper accounts, cited in the district court opinion, of possible corruption in Missouri politics.⁷⁷ Finally, the Court cited the overwhelming voter approval of the contribution limits initiative that the Eighth Circuit had struck down in *Carver v. Nixon*: “[A]lthough majority votes do not, as such, defeat First Amendment protections, the statewide vote on [the initiative] certainly attested to the perception [of corruption] relied upon here.”⁷⁸

70. See supra note 40 and accompanying text.

71. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

72. *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604, 617-22 (1996). For a critique of this reasoning, see Briffault, 14 Const. Comm. at 110-12 (cited in note 4).

73. *Shrink Missouri*, 120 S. Ct. at 906.

74. *Id.* at 907.

75. See supra note 41 and accompanying text.

76. *Shrink Missouri*, 120 S. Ct. at 907.

77. *Id.*

78. *Id.* at 908.

This evidence is pretty flimsy to support even the weakened corruption/appearance idea that politicians are “too compliant with the wishes of contributors” and the large contributors “call the tune” (or that voters believe they call the tune). The affidavit of a single legislator of a “potential” for vote buying⁷⁹ hardly seems to be the requisite “quantum of empirical evidence needed to meet heightened judicial scrutiny.” Nor do newspaper accounts that merely “support inferences of impropriety” rather than impropriety itself go to show either a real danger of corruption or mass public perception of corruption. These newspaper accounts, at least as described by the Court, did not point to a single criminal investigation, much less a criminal conviction, coming from alleged campaign finance improprieties: “One report questioned the state treasurer’s decision to use a certain bank for most of Missouri’s banking business after that institution contributed \$20,000 to the treasurer’s campaign. Another made much of the receipt by a candidate for state auditor of a \$40,000 contribution from a brewery and one for \$20,000 from a bank.”⁸⁰

The overwhelming support for the Missouri campaign finance initiative cited by the Court as evidence of a widespread perception of corruption instead could be evidence of voters’ desire to level the electoral playing field, an equality rationale for campaign finance reform. Moreover, the Court discussed no evidence showing a causal link between even a widespread perception of corruption and any new unwillingness of voters “to take part in democratic governance.”⁸¹ This is a very different attitude than the one the Court has shown in the past in reviewing this justification as applied to expenditure limits. In those cases, the Court time and again rejected for lack of evidence claims that campaign finance laws were necessary to preserve voters’ beliefs in the integrity of the political process.⁸²

79. On the power of the “vote buying” metaphor, see Richard L. Hasen, *Vote Buying*, 88 Cal. L. Rev. 1323 (2000).

80. *Shrink Missouri*, 120 S. Ct. at 907 (citations omitted). To be fair, the Court also cited to the Eighth Circuit’s opinion in the *Carver* case and described *Carver*’s citation of newspaper articles discussing alleged criminal activity involving large campaign contributions. *Id.*

81. *Id.* at 906.

82. See, e.g., *Citizens Against Rent Control v. City of Berkeley, California*, 454 U.S. 290, 299 (1981) (“the record in this case does not support the California Supreme Court’s conclusion that § 602 is needed to preserve voters’ confidence in the ballot measure process”); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978) (“If appellee’s arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather

In the end, the Court accepted the government's claim of "prevention of corruption or the appearance of corruption" on faith, not on evidence, believing that the point was virtually self-evident.⁸³ Although commentators have characterized *Buckley* itself as setting up a low evidentiary burden for review of campaign contribution limits,⁸⁴ after *Shrink Missouri* the burden is almost non-existent.

(4) *Creating a Difficult Test to Challenge the Amount of Contribution Limits.* Finally, the *Shrink Missouri* Court addressed the question of whether the dollar amounts in the Missouri contribution limits law were too low. The Court first noted that the district court concluded that the limits did not appear to prevent candidates from raising sufficient funds to run their campaigns.⁸⁵ Then, after stating that over 97% of contributors to state auditor candidates made contributions of \$2,000 or less,⁸⁶ the Court held that it mattered little if plaintiff Fredman was ad-

than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.") (citations and footnote omitted); see also *Federal Election Comm'n v. National Conservative Political Action Committee*, 470 U.S. 480, 499 (1985) (upholding district court's decision to exclude evidence the FEC claimed showed actual corruption or the appearance of corruption caused by unregulated PAC expenditures, including "evidence of high-level appointments in the Reagan administration of persons connected with the PACs and newspaper articles and polls purportedly showing a public perception of corruption").

83. The Court left open the possibility that there might "be need for a more extensive evidentiary documentation if petitioners had made any showing of their own to cast doubt on the apparent implications of *Buckley's* evidence and the record here." *Shrink Missouri*, 120 S. Ct. at 908. No doubt, lower court judges hostile to contribution limits will seize on this language to distinguish *Shrink Missouri*. The Tenth Circuit, reviewing *Colorado Republican* on remand after the Supreme Court decided *Shrink Missouri*, took exactly this approach in holding that parties have a right to make unlimited coordinated expenditures to candidates. *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 213 F.3d 1221, 1233 n.9 (10th Cir. 2000), cert. granted, 121 S. Ct. 296 (Oct 10, 2000). On the other hand, the First Circuit recently upheld Maine's new public financing system, citing as evidence of the appearance of corruption little more than press accounts suggesting that "large contributions have occurred in Maine and that Maine citizens are concerned about their impact on lawmakers." *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445, 457 (1st Cir. 2000).

84. *Briffault*, 14 Const. Comm. at 103-04 (cited in note 4).

85. *Shrink Missouri*, 120 S. Ct. at 908-09.

86. *Id.* at 909. But as Justice Thomas pointed out in dissent "the statistic provides no assurance that Missouri's law has not reduced the resources supporting political speech, since the largest contributors provide a disproportionate amount of funds." 120 S. Ct. at 925 (Thomas, J., dissenting). Justice Thomas also pointed out that total spending plummeted in both the primary and general elections after Missouri's contribution limits went into effect. The number of challengers to incumbents also declined. *Id.* at 925 n.10. The majority upheld the contributions despite these effects, which suggests these facts do not demonstrate a "system of suppressed political advocacy."

versely affected by the inability to raise larger amounts of money from fewer individuals: “[A] showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*.”⁸⁷ The Court thus focused on political speech in the aggregate, rather than on the individual rights of any particular candidate, contributor, or voter.

Perhaps most significantly, the *Shrink Missouri* Court then refined *Buckley* for determining whether contribution limits are so low as to impede the ability of candidates to amass the resources necessary for effective advocacy: “We asked, in other words, 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.”⁸⁸

The Court concluded that inflation was mostly irrelevant: “the issue . . . cannot be truncated to a narrow question about the power of the dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming.”⁸⁹

This new test will be exceedingly difficult for challengers to meet. How low would a contribution limit have to be before it is “pointless?” Even a \$100 contribution limit in many cases would allow the candidate to raise enough funds to get a message out through leaflets, faxes, and e-mails to media outlets. Leafleting, faxing, and sending e-mail may not be the most effective ways to campaign, but they are not “pointless.” Moreover, “political association” would not necessarily be “ineffective” even if no money could be contributed to political campaigns; people would find ways to associate that did not require expenditure of campaign funds.⁹⁰ The Court appears to be saying that so long as an average candidate could run a decent campaign within the challenged contribution limits, the amount of the limits meet the constitutional standard. Such evidence would counter a claim that the contribution limits imposed a “system of suppressed political advocacy,” even if less popular candidates would lack resources to compete effectively.

87. *Id.* at 909 (emphasis added).

88. *Id.*

89. *Id.*

90. Volunteer time, for example, does not count as a contribution under the FECA. See *Buckley v. Valeo*, 424 U.S. 1, 36-37 (1976) (per curiam) (upholding limitations on volunteers’ incidental expenses).

B. THE CONCURRING OPINIONS

Justice Stevens and Justice Breyer, joined by Justice Ginsburg, each wrote concurring opinions. Justice Stevens wrote briefly to express his view that “[m]oney is property; it is not speech.”⁹¹ He argued that the “right to use one’s own money to hire gladiators, or to fund ‘speech by proxy,’ certainly merits significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases.”⁹²

Although Justice Stevens did not indicate in his *Shrink Missouri* concurrence precisely how far he would go toward allowing greater campaign finance regulation, he did so indicate in his dissent in the *Colorado Republican* case. There, joined by Justice Ginsburg, he wrote, “I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns.”⁹³

Justice Breyer, in a *Shrink Missouri* concurring opinion joined by Justice Ginsburg, indicated a strong willingness to allow greater campaign finance regulation than contemplated by *Buckley*. At bottom, Justice Breyer, like Justice Stevens in *Colorado Republican*, indicated an acceptance of an equality rationale for campaign finance reform. He faulted the dissent for not seeing that “constitutionally protected interests lie on both sides of the legal equation.”⁹⁴

On the one hand, a decision to contribute money to a campaign is a matter of First Amendment concern—not because money is speech (it is not); but because it enables speech

On the other hand, restrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech

91. *Shrink Missouri*, 120 S. Ct. at 910 (Stevens, J., concurring). For an early skeptical view of the equivalence of money and speech by a judge who was on the lower court panel deciding *Buckley*, see J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 Yale L.J. 1001 (1976). For a recent exploration more sympathetic to the position that money is speech, see Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 Geo. L.J. 45 (1997).

92. *Shrink Missouri*, 120 S. Ct. at 910 (Stevens, J., concurring).

93. *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604, 649 (1996) (Stevens, J., dissenting). Justice Stevens also expressed deference to Congress’s judgment in this area, *id.* at 650, something Justice Breyer echoed in his *Shrink Missouri* concurring opinion. See *infra* note 97.

94. *Shrink Missouri*, 120 S. Ct. at 911 (Breyer, J., concurring).

into concrete governmental action. Moreover, by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear on the electoral process. In doing so, they seek to build public confidence in that process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.⁹⁵

Perhaps most tellingly, Justice Breyer remarked that the statement in *Buckley* rejecting as "wholly foreign to the First Amendment" an equality rationale for campaign finance reform "cannot be taken literally."⁹⁶ Applying his standard to the facts of the *Shrink Missouri* case, Justice Breyer concluded, "I agree that the legislature understands the problem—the threat to electoral integrity, the need for democratization—better than do we."⁹⁷

C. THE DISSENTING OPINIONS

Justice Kennedy in his dissent indicated that he too would overrule *Buckley*, but in the other direction—to disallow any campaign contribution limits. Justice Kennedy argued that it "mocks the First Amendment" that "[i]ssue advocacy, like soft money, is unrestricted, while straightforward speech in the form of financial contributions paid to a candidate, speech subject to full disclosure and prompt evaluation by the public, is not."⁹⁸ He stated his general agreement with Justice Thomas's dissent and remarked that the *Buckley* "halfway-house" should be eliminated. He nonetheless expressly left open "the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than fundraising."⁹⁹ Justice Kennedy thus appeared to endorse tentatively, though without citation, Professor Blasi's argument that candidate time-protection is a compelling interest to justify campaign finance reform.¹⁰⁰

95. *Id.* at 911 (Breyer, J., concurring) (citations omitted).

96. *Id.* at 912 (Breyer, J., concurring).

97. *Id.* at 913 (Breyer, J., concurring).

98. *Id.* at 914 (Kennedy, J., dissenting) (citation omitted).

99. *Id.* at 916 (Kennedy, J., dissenting).

100. Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994).

Justice Thomas's position in his *Shrink Missouri* dissent was scarcely in doubt, as he had already indicated in his *Colorado Republican* concurrence that he wished to overrule *Buckley*'s tolerance of any campaign finance limits. This time, joined by Justice Scalia (who had declined to join that portion of Justice Thomas's *Colorado Republican* concurrence calling for *Buckley* to be overruled¹⁰¹), Justice Thomas wrote that he "would subject campaign contribution limitations to strict scrutiny, under which Missouri's contribution limits are patently unconstitutional."¹⁰²

Justice Thomas spent much of his opinion criticizing *Buckley*'s relative tolerance of contribution limits.¹⁰³ The remainder of his opinion criticized the *Shrink Missouri* majority for further weakening the test for the constitutionality of contribution limits.¹⁰⁴

III. TWO READINGS OF *SHRINK MISSOURI* AND THE FUTURE OF "THE THING THAT WOULDN'T LEAVE"

A. INTRODUCTION

Part II demonstrated that the Court in *Shrink Missouri* had four choices to make in reading those parts of *Buckley* dealing with campaign contributions. In confronting each of these four choices, the *Shrink Missouri* Court interpreted *Buckley* to allow for greater, rather than lesser, state regulation of campaign contributions.

Such a result was not foreordained. For example, the Court could have said that the paltry evidence presented in the district court—the affidavit of the state legislator regarding the "potential" for vote buying—simply was not enough to show that the problem of the *quid pro quo* really existed or that voters believed that it did. The message would have been, as it appears to be in certain other First Amendment cases,¹⁰⁵ that next time leg-

101. Justice Scalia and Chief Justice Rehnquist did not join Part II of Justice Thomas's opinion. *Colorado Republican*, 518 U.S. at 631. Part II called for *Buckley* to be overruled.

102. *Shrink Missouri*, 120 S. Ct. at 916 (Thomas, J., dissenting).

103. *Id.* at 917-23.

104. *Id.* at 923-27.

105. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. at 632-33. The Court also has been inconsistent in its treatment of the evidentiary issue in its recent federalism cases. Compare *United States v. Lopez*, 514 U.S. 549, 562 (1995) (suggesting Congress needed more evidence of a substantial effect on commerce to justify law under Commerce Clause power), with *United States v. Morrison*, 529 U.S. 598 (2000) (dismissing Congress-

islators will have a better chance of success if they make the legislative findings necessary to support the law.

Alternatively, the Court could have seized on the language in *Buckley* regarding “exacting scrutiny” and demanded a greater fit between the ends (prevention of corruption and the appearance of corruption) and the means (campaign contribution limits). The Court also could have given more teeth to the *Buckley* language about not preventing candidates and political associations from amassing the resources necessary for effective advocacy by requiring trial courts to conduct evidentiary hearings on the issue.¹⁰⁶

That the Court did not do so is perhaps unsurprising. Even if the *Shrink Missouri* Court had struck down the Missouri limits without a wholesale rewriting of *Buckley*, it thereby would have called into question most state and local campaign contribution limits and the FECA \$1,000 limits as well.¹⁰⁷ The question remains, however, whether the case has greater significance in terms of the Court’s willingness to tolerate other campaign finance regulations, especially two other major campaign finance issues, expenditure limitations and regulation of so-called “issue advocacy.”

Buckley struck down three kinds of expenditure limits: (1) restrictions on independent expenditures; (2) restrictions on candidate spending of personal wealth; and (3) restrictions on the total amount of spending by a candidate.¹⁰⁸ *Buckley* also drew a sharp distinction between express advocacy for or against a candidate, which could be subject to contribution limits and disclosure of expenditures, and issue advocacy. In drawing the line, *Buckley* limited the reach of electoral regulation to only “expenditures for communications that expressly advocate the

sional evidence of a substantial effect of violence against women on commerce as irrelevant). See also *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639-40 (2000) (suggesting Congress must supply evidence to support its exercise of power under Section 5 of the Fourteenth Amendment); *City of Boerne v. Flores*, 521 U.S. 507, 525-27 (1997) (same).

106. For example, the district court in *National Black Police Ass’n* (discussed above in note 22) conducted a trial and made detailed findings on this issue. 924 F. Supp. 270 (D.D.C. 1996).

107. See Hasen, Nat’l L.J. at A21 (cited in note 29); see supra note 29 and accompanying text.

108. *Buckley v. Valeo*, 424 U.S. 1, 39-51, 51-54, 54-59 (1976) (per curiam). I focus below on the first of these restrictions. For an argument that restrictions on candidate spending of personal wealth help prevent the corruption of their opponents, see E. Joshua Rosenkranz, *Faulty Assumptions in “Faulty Assumptions”: A Response to Professor Smith’s Critiques of Campaign Finance Reform*, 30 Conn. L. Rev. 867 (1998).

election or defeat of a clearly identified candidate,”¹⁰⁹ such as advertisements saying “vote for,” “elect,” or “defeat” a candidate.¹¹⁰

B. TWO READINGS

One reading of *Shrink Missouri* is that it portends no change from the *Buckley* regime (other than loosening the standards for approval of contribution limits). The *Shrink Missouri* majority opinion went out of its way to argue numerous times that its reasoning and analysis is consistent with *Buckley*.¹¹¹ Despite urging by the dissenting Justices, the majority refused to reconsider *Buckley* itself because “we are supposed to decide this case. *Shrink* and *Fredman* did not request that *Buckley* be overruled.”¹¹² It concluded that “[t]here is no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern this case in support of the Missouri statute.”¹¹³

Under this reading, the Court will not be more hospitable to expenditure limitations or relaxed definitions of issue advocacy. As for expenditure limitations, *Buckley* concluded and *Colorado Republican* recently reaffirmed that expenditure limitations are constitutionally infirm.¹¹⁴ Moreover, nothing in *Shrink Missouri* explicitly considered regulation of expenditures or issue advocacy.

The other reading of *Shrink Missouri* is that the Court is disingenuous in its claims of deep fidelity to *Buckley*. Had the Court faced only one of the four issues and resolved it in a way more favorable to regulation, we might chalk it up to coincidence. But the Court faced four choices and resolved each choice in a pro-regulation manner. Thus, although the Court went out of its way to show congruence with *Buckley*, it also

109. *Buckley*, 424 U.S. at 80.

110. *Id.* at 44 n.52. The Court in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 248-50 (1986), appeared to slightly expand the definition of express advocacy. For a look at the jurisprudence of issue advocacy regulation in greater depth, see Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 *Tex. L. Rev.* 1751, 1755-63 (1999).

111. *Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 901, 905, 906, 909, 910 (2000).

112. *Id.* at 909.

113. *Id.* at 910.

114. *Buckley*, 424 U.S. at 19, 47; *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 615 (1996). But see *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) (upholding limitation on corporate expenditures in candidate campaigns).

went out of its way to make it easier to sustain contribution limits. It would be far from impossible for a Court majority more sympathetic to campaign finance regulation to draw upon parts of its *Shrink Missouri* opinion to allow greater regulation of campaign expenditures and issue advocacy.

Consider, for example, the television advertisements that a supporter of George W. Bush, Sam Wyly, ran in a few select television markets last March where Bush was competing fiercely for the Republican Party's presidential nomination with Senator John McCain. The advertisements never expressly urged a vote for Bush or a vote against McCain¹¹⁵ although that was their clear intent;¹¹⁶ instead, they criticized McCain's environmental record.¹¹⁷ Wyly spent \$2.5 million on these advertisements,¹¹⁸ which were especially controversial before Wyly voluntarily disclosed that he was the one paying for them.¹¹⁹ These advertisements did not count as contributions to the Bush campaign because they were produced independent of the campaign. Furthermore, the advertisements, lacking the magic words like "vote for" or "vote against," fell outside the scope of the FECA's disclosure provisions for express advocacy.

Suppose Congress, citing the Wyly advertisements, passed a law regulating such advertisements. Congress could redefine "express advocacy" or electioneering to include "any broadcast from a television or radio broadcast station which refers to a clearly identified candidate for Federal office" and is made within sixty days of a general election or thirty days of a primary election and that is broadcast to the relevant electorate for that office.¹²⁰ It could then subject independent expenditures to dollar limitations, as the FECA did before that portion of it was struck down.¹²¹ A Supreme Court hospitable to such a new law

115. For a transcript and critique, see Richard Pérez-Peña, *Air of Mystery Clouds Shot at McCain*, N.Y. Times A15 (Mar. 3, 2000).

116. "Mr. Wyly [who paid for the ads] said that 'of course' he hoped the commercials would benefit Mr. Bush." Richard W. Stevenson with Richard Pérez-Peña, *Wealthy Texan Says He Bought Anti-McCain Ads*, N.Y. Times A1, A10 (Mar. 4, 2000).

117. Pérez-Peña, *Air of Mystery Clouds Shot at McCain* at A15 (cited in note 115).

118. Stevenson, *Wealthy Texan Says He Bought Anti-McCain Ads* at A1 (cited in note 116).

119. Pérez-Peña, *Air of Mystery Clouds Shot at McCain* at A15 (cited in note 115).

120. This language appeared in an earlier version of the McCain-Feingold campaign finance bill. See S. 26, 106th Cong. § 201 (1999), available at 1999 CONG. U.S. S. 26 Westlaw CONG-BILLTXT database.

121. See Joel M. Gora, *Buckley v. Valeo: A Landmark of Political Freedom*, 33 Akron L. Rev. 7 (1999) (comparing the McCain-Feingold bill and other modern attempts to regulate campaign finances with the campaign finance regime in the FECA as the Court

could say that *Buckley's* decisions regarding expenditures and issue advocacy were made under the pressure of the 1976 election, before there had been an opportunity to gather evidence on the corruption and the appearance of corruption stemming from independent expenditures¹²² and before those engaged in electioneering routinely evaded the FECA through electioneering that did not mention the magic words like "vote for" or "vote against." The Court could then say that evidence now demonstrates that such expenditures are meant to influence the outcome of electoral campaigns. Further, even absent evidence of coordination, voters may believe that Wyly will "call the tune" for Bush; no proof of a *quid pro quo* is required under *Shrink Missouri*, only the possibility that Bush might be "too compliant" with the interests of his benefactor.

The Court might not require much evidence from Congress if it believed these claims were "neither novel nor implausible."¹²³ Perhaps it would be enough to point to a *New York Times* profile of Wyly in which the Texas director of consumer group Public Citizen recounted how Wyly, who has an interest in a company investing in renewable energy, had offered to help convince Governor Bush to include a provision in an energy bill requiring that certain coal plants reduce their pollution. The director said "the episode 'is a crystalline example of what donors get from Bush for their contributions—an opportunity to make their pitch.'"¹²⁴

The Court would not even need to expressly overrule *Buckley* to uphold this new federal law; instead, it could distinguish *Buckley* on grounds that new evidence is available that was not available in *Buckley* that would justify a law even under *Buckley's* strict scrutiny-like standard for expenditures. But the practical effect of such a ruling would be to overrule *Buckley* in favor

struck down in *Buckley*).

122. Consider the following statement from the Court's opinion in *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985):

It is of course hypothetically possible here [with PAC expenditures], as in the case of the independent expenditures forbidden in *Buckley*, that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidates. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.

123. *Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 906 (2000).

124. Richard A. Oppel, Jr., with Richard Pérez-Peña, *Role in Ads Puts Focus on Bush Friend*, N.Y. Times A16 (Mar. 6, 2000).

of greater regulation. Of course, the Court could get there as well by accepting equality as a compelling interest to justify campaign finance regulation.¹²⁵ Three Justices have signed on to this view,¹²⁶ but there may not be two more votes for this position. The former path seems more likely, therefore, if the Court is to move in this direction.

C. WHERE WILL THE COURT GO?

The two readings present dramatically different pictures of where the Court might go with campaign finance regulation. The first reading suggests that *Buckley* remains viable. The second reading suggests that "The Thing" will leave some time soon.

In answering the question of which reading, if either, will prevail, one can count noses on the Court or look at broader trends. As far as counting noses, the answer depends in part on changes in Supreme Court personnel. Three Justices (Breyer, Ginsburg, and Stevens), all in the *Shrink Missouri* majority, already are on record supporting an equality rationale for campaign finance reform that is more hospitable to regulation.¹²⁷ They almost certainly would support the second reading of the case.

Three Justices (Kennedy, Scalia, and Thomas), all dissenting in *Shrink Missouri*, are on record that *Buckley* should be overruled to disallow any limits on campaign finances beyond disclosure. These Justices would not accept either reading of *Shrink Missouri* but would instead throw it out along with the rest of the *Buckley* jurisprudence.¹²⁸

That leaves three Justices (Chief Justice Rehnquist and Justices O'Connor and Souter) whose views on the two readings of *Shrink Missouri* are less clear. Chief Justice Rehnquist's views are perhaps the easiest of the three to decipher from past cases. He joined in most of the *Buckley* opinion except for that part of *Buckley* upholding unequal treatment for minor parties and independent candidates in the presidential public financing regime.¹²⁹ He also has been a steadfast adherent to *Buckley*, ex-

125. I have advocated that the Court accept the equality interest as compelling. See Hasen, 84 Cal. L. Rev. at 42 (cited in note 61).

126. See supra notes 93-97.

127. See id.

128. See supra notes 98-104.

129. *Buckley v. Valeo*, 424 U.S. 1, 290-94 (1976) (Rehnquist, J., concurring in part

cept insofar as he is willing to allow just about any regulation of corporate campaign financing.¹³⁰ Finally, the Chief Justice joined those portions of Justice Thomas's concurring opinion in *Colorado Republican* that would have struck down the FECA's party expenditure provision on grounds that there was no proof of corruption as required by *Buckley*.¹³¹ But he declined to join that portion of Justice Thomas's opinion calling for *Buckley* to be overruled.¹³² Given this evidence, Chief Justice Rehnquist probably would advocate the first reading of *Shrink Missouri* reaffirming *Buckley*'s distinction between contributions and expenditures and not altering *Buckley*'s position on issue advocacy.

Justices O'Connor and Souter recently have taken a cautious approach to campaign finance regulation. Both joined in Justice Breyer's narrow plurality opinion in *Colorado Republican* refusing to examine the facial challenge to the FECA's party expenditure provision.¹³³ Both Justices also declined to sign on to Justice Breyer's more expansive concurring opinion in *Shrink Missouri* recognizing equality as a worthy reason for campaign finance regulation. Back in 1990, however, Justice O'Connor joined in Justice Kennedy's dissenting opinion in the *Austin* case, arguing against the majority's new, broader definition of corruption.¹³⁴ This fact suggests that she would stick with *Buckley*. On the other hand, Justice O'Connor's concurrence in the *Shrink Missouri* majority opinion shows that she has changed views about how broadly to define corruption,¹³⁵ suggesting perhaps that she would reconsider other aspects of *Buckley* as well.

As the Court stands constituted right now, there may or may not be five Justices who would support the second reading of *Shrink Missouri*, and there do not appear to be five Justices to

and dissenting in part).

130. See Briffault, 14 Const. Comm. at 125 n.121 (cited in note 4) ("Chief Justice Rehnquist has consistently supported the *Buckley* framework, but has equally consistently made a special exception to permit restrictions on corporations.")

131. *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 647-48 (1996) (Thomas, J., concurring in the judgment and dissenting in part).

132. *Id.* at 631.

133. *Id.* at 604.

134. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 702 (1990) (Kennedy, J., concurring).

135. It appears Justice O'Connor (as well as Justice Scalia) changed views on the meaning of corruption at least once before, by concurring in that portion of *Massachusetts Citizens for Life* that was consistent with *Austin*'s broader view of corruption. See Lowenstein, *Election Law—Cases and Materials* at 640 (cited in note 9) (asking "[c]an Justice Scalia's and Justice O'Connor's dissenting posture in *Austin* be reconciled with their joining in Part III(B) of the Court's opinion in *MCFL*?").

overrule *Buckley* to create a laissez faire campaign finance regime. This stalemate could well be broken in the next few years, depending upon which Justices, if any, leave the Court and who might replace them. I leave that question to fortunetellers and the next presidential election.

Beyond nose-counting, it is difficult to imagine that the first reading of *Shrink Missouri* is tenable because it is difficult to imagine *Buckley* continuing as stable precedent for the foreseeable future. Current campaign finance reality has overtaken *Buckley's* assumptions. The explosive growth of soft money¹³⁶ and party and non-party issue advocacy¹³⁷ has fundamentally altered the nature of (at least federal) campaigns.

Congress enacted public financing of presidential campaigns at least partly to take presidential candidates out of the fundraising business.¹³⁸ But now these candidates spend much of their time raising soft money,¹³⁹ which may dwarf the amount of public financing available to them.¹⁴⁰ Similarly, if current trends continue, we can expect "issue advocacy" to swamp campaign financing subject to the FECA during the current presidential election campaign.

It is not as though a coherent federal campaign finance law exists with a few loopholes. The loopholes have overtaken the law itself. Regulating hard money but not soft money and express advocacy but not issue advocacy may not "mock[]the First Amendment"¹⁴¹ as Justice Kennedy claims, but it certainly undermines any arguments that the FECA contribution limits currently in place serve a valid function. We have a campaign finance system moving ever closer to a mere illusion of regulation, trapping only the unsophisticated contributors or spenders in a

136. Richard Briffault, *The Political Parties and Campaign Finance Law*, 100 Colum. L. Rev. 620, 630-31 (2000) (describing explosion of party use of soft money in the 1990s). Soft money is money raised outside the FECA limits nominally for party building activities but actually supporting the party's candidates for federal office. Jill Abramson, *The Nation: The Hard Business of Soft Money*, N.Y. Times, Week in Review 3 (Mar. 26, 2000). Soft money is outside the FECA because it is used to pay for things other than express advocacy, like issue advocacy.

137. Briffault, 77 Texas L. Rev. at 1761-62 (cited in note 110), reports that the Democratic National Committee coordinated \$46 million in issue advocacy expenditures with the Clinton-Gore '96 campaign.

138. *Buckley v. Valeo*, 424 U.S. 1, 91 (1996) (per curiam) (citing S. Rep. No. 93-689, pp. 1-10 (1974)).

139. Abramson, *The Nation* at 3 (cited in note 136).

140. See Briffault, 77 Texas L. Rev. at 1760-62 (cited in note 110).

141. *Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897, 914 (2000) (Kennedy, J., dissenting).

web of complex regulation.¹⁴² Anyone with half a brain and a good lawyer can get around just about all the limits, disclosures, and rules to promote the candidates of his choice.¹⁴³

In the meantime, voters through the initiative process continue to pass campaign finance laws on the state and local level. John McCain's campaign finance reform message in his campaign for the Republican Party's presidential nomination has put the issue on the table for the other candidates. Voters do not like the current system, but little can change while *Buckley* remains viable precedent.

In the end, the first reading of *Shrink Missouri* cannot be sustained because the loophole-ridden system is nonsensical and voters will continue to clamor for real change. Even assuming Congress does not act on the federal level, voters, pushed by the reform community, will continue to pass initiatives pushing the edges of *Buckley* on the state and local level.

The pressures from voters and reformers who will continue to challenge *Buckley* on the one hand, and the loophole-driven campaign finance reality that undermines the Court's *Buckley* structure on the other, suggest that something must give. *Shrink Missouri* indicates that the Court is considering greater deference toward campaign finance regulation. But the position is tentative and precarious. A change in just two key Justices could bring the opposite result, an end to the constitutionality of any campaign finance regulation besides disclosure. The forces of change may soon overtake the forces of inertia, but the direction of change remains uncertain.¹⁴⁴

142. For a district court's detailed factual findings demonstrating how the current federal campaign finance system allows easy evasion, see *Mariani v. United States*, 80 F. Supp. 2d 352 (M.D. Pa. 1999). For further proceedings, see *Mariani v. Federal Election Commission*, 212 F.3d 761 (3rd Cir. 2000), cert. denied, 69 U.S.L.W. 3363 (2000).

143. See Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditure Funding Sham Issue Advocacy*, 48 UCLA L. Rev. 265 (2000).

144. We may learn a bit more about how the current Court views campaign regulation this Term. As this Article went to press, the Court granted certiorari in *FEC v. Colorado Republican Federal Campaign*, 2000 WL 1201886 (No. 00-191, Oct. 10, 2000) [*Colorado Republican II*]. The case presents the question whether parties should be exempt from contribution limits when they coordinate their spending with candidates; such coordinated spending is treated as a contribution to a candidate. See 2 U.S.C. § 441 a(a)(7)(B)(i). The Colorado Republican Party argues that political parties do not pose the same danger of corruption as other individuals and entities do, and therefore it is unconstitutional to limit party contributions to candidates. Regardless of how the current Court decides *Colorado Republican II*, the underlying tensions in campaign finance doctrine explained in the Article likely will remain to be fleshed out by the Court in a future case that more directly concerns the continuing vitality of *Buckley*.

“The Thing,” a.k.a. *Buckley*, will leave America’s living room. The remaining question is who will come visit in its place. If the next guest will stay for 25 years or more, the Court had better get it right this time.