Nixon v. Shrink Missouri Government PAC: Further Dissension over the Federal Election Campaign Act

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"There are two things that are important in politics. The first is money and I can't remember what the second one is."
-U.S. Senator Mark Hanna (OH), 1895.¹

"If you think this Congress, or any other, is going to set up a system where someone can run against them on equal terms at government expense, you're smoking something that you can't buy at the corner drugstore."
-U.S. Representative Richard Cheney (WY), 1983.²

Political campaigns and money have been intimately connected virtually since the creation of the American system of government.³ The financial needs of politicians were originally modest.⁴ As the nation grew in population and commercial
strength, however, the politicians' need for money also increased. Wealthy citizens usually supplied this money with an expectation of more from their elected officials than merely representation within the government. As the trend towards greater involvement by wealthy contributors developed, the political landscape of America began to be molded less by the statesman and more by the businessman. Calls for reform soon followed.

Congress responded by enacting various laws designed to curb the influence of generous donors over the politicians they helped elect. Most of these laws were ineffectual, yet the legislature routinely enact statutes in a ceaseless effort to limit the

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5. See id. at 27-29 (attributing the changes in election financing to the upsurge of the popular vote in elections). Campaign costs increased significantly during the presidency of Andrew Jackson due, in part, to the increase in eligible voters caused by the easing of voter qualifications. See id. at 28.

6. See id. at 30-31 (noting that wealthy businessmen recognized the growing need to influence government policies that affected their interests). During the mid-1800s, rising industrialists such as the DuPonts of Delaware contributed large amounts of money to political candidates to influence government policies. Id. at 31.

7. Id. at 30-31 (noting that “[wealthy industrialists] realized it was in their own interests to exert whatever influence they could over the legislative and bureaucratic processes of government. The easiest way to exert influence was with cash at campaign time.”).

8. See id. at 38-43. The late 1800s was a period when large businesses with interests in oil, railroads, and banks financed the majority of political campaigns. See id. at 38. A business would finance a particular candidate in an effort to block a specific area of legislation detrimental to their interests. See id. at 39. The extent of this influence was extensive. See id. at 38-43.

9. Id. at 52 (describing demands by Progressive Reformers to decrease the influence of big business in the political process).

10. Id. at 54. Among early legislative efforts passed to counter influential campaign contributions was the Publicity Act of 1910, 36 Stat. 822, which required detailed accountings of all campaign receipts and expenditures to be filed with the Clerk of the House of Representatives. Id.

11. See Anthony Corrado, Introduction to a History of Federal Campaign Finance Law, in CAMPAIGN FINANCE REFORM 29 (Anthony Corrado et al. eds., 1997) (explaining that most campaign finance legislation proved ineffective due to poor enforcement and loopholes in the laws that allowed contributors to counter individual limitations by funneling donations through multiple candidate committees).

corrupting influence of money in elections. In 1971, Congress enacted an extensive and important campaign finance reform, entitled the Federal Election Campaign Act (FECA). Central among the various regulations instituted by FECA were those implementing strict limitations on campaign contributions and restricting expenditures by candidates. The Supreme Court, in the 1976 case of Buckley v. Valeo, considered the constitutionality of these newly created caps on expenditures and contributions. Opponents of FECA argued that the statutorily imposed limitations suppressed speech in direct violation of the First Amendment. Although the Court agreed that both contributions and expenditures could be characterized as "speech," it distinguished between the two and provided greater protection to expenditures.

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13. See Corrado, supra note 11, at 27-34 (reviewing those laws enacted by Congress in the past century to reform campaign finance practices).

14. See Euchner & Maltese, supra note 1, at 39 (describing the Federal Election Campaign Act as "the most important piece of campaign finance legislation since the 1925 Federal Corrupt Practices Act").


17. 18 U.S.C. § 608(a) (1970 & Supp. IV 1975) (imposing limitations on expenditures by a candidate of his own personal funds or those of his immediate family for a federal election campaign); 18 U.S.C. § 608(c) (limiting overall expenditures by a candidate in a federal election campaign); 18 U.S.C. § 608(e) (restricting expenditures by individuals for a clearly defined candidate to $1000 per year). Expenditures by national banks, corporations, and labor organizations to support candidates for federal office were also prohibited. See 18 U.S.C. § 610.


19. Id. at 7 (reviewing the constitutionality of the statutory limitations enacted by the Federal Election Campaign Act and its 1974 amendments).

20. Id. at 11 ("In appellants' view, limiting the use of money for political purposes constitutes a restriction on communication violative of the First Amendment, since virtually all meaningful political communications in the modern setting involve the expenditure of money.").

21. Id. at 44 (clarifying that expenditure limitations impose much greater restraints on speech than do contribution limits; the "Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations.").

22. Id. at 44-45 (concluding that expenditure limitations impose greater restrictions on free speech than do contribution limitations and must, therefore,
Court reasoned that although both limitations restrained speech, those on contributions were "marginally restrictive," while those on expenditures were "substantially restrictive." The Court invalidated the expenditure limitations as an unconstitutional restraint on free speech. The Court, however, upheld the limitations on contributions because such restraints were less intrusive than those on expenditures and supported Congress's compelling interest in preventing corruption or the appearance of corrupt practices.

In Buckley, the Court largely re-wrote critical sections of FECA, dramatically altering the regulatory structure intended and created by Congress. In the twenty-five years after

meet the "exacting scrutiny" afforded First Amendment matters to be found constitutional.

23. Id. at 20 ("[A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication."). See infra note 99 (describing alternative modes of political expression available to contributors).

24. Id. at 19 (concluding that limitations on expenditures are substantially restrictive because they directly restrict the quantity of a candidate's communication). See infra note 106 (noting the direct correlation between a candidate's expenditures and the quantity of speech available to him).

25. Id. at 39 (contending that although the expenditure limitations were content-neutral, they were unconstitutional because their effects directly reduced the amount of speech that could be communicated by both candidates and political parties).

26. See id. at 20-21 (explaining that the quantity of expression did not increase proportionately with higher levels of campaign contributions). The Court reasoned that the expression involved was the actual act of giving money to a candidate and as long as that act was not prohibited, limitations relating to amounts were not significantly restraining expression. Id.

27. See id. at 29 (finding that the "weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms").

28. Compare 18 U.S.C. § 608(e), with Buckley, 424 U.S. at 51 (comparing FECA's $1000 limitation on individual expenditures for a candidate in a federal campaign to the Court's judgment that such a limitation is unconstitutional because it "fails to serve any substantial governmental interest . . . [and] heavily burdens core First Amendment Expression"). Compare 18 U.S.C. § 608(c), with Buckley, 424 U.S. at 55 (comparing FECA's overall limitation on expenditures by candidates to the Court's finding that "no governmental interest [] has been suggested [that] is sufficient to justify the restriction on the quantity of political expression imposed by § 608(c)'s campaign expenditure limitations") Compare 18 U.S.C. § 608(a), with Buckley, 424 U.S. at 52 (comparing statutory limitations on expenditures by candidates from personal or family resources to the Court's holding that such limits "clearly and directly interfere[] with constitutionally protected freedoms" and are thus unconstitutional).

Buckley, the Court continued to reformulate campaign finance regulations through its various decisions. During this time members of the Court often questioned the appropriateness of the Court's substantial revision of campaign finance laws.

Despite legislative and judicial efforts to guard against corruption, or the appearance of corruption, discontent with the current structure of campaign finance is vigorous and practically universal. Although FECA is still the primary regulatory scheme governing federal election campaigns, its

Congress's belief that limitations on both contributions and expenditures were necessary to establish an effective campaign finance regulatory scheme).


31. See First Nat'l Bank v. Bellotti, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting) (advising that the Court should defer to the judgments of Congress and state legislatures). According to then Justice Rehnquist, "[t]he judgment of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from this Court." Id.; see also FEC v. National Right to Work Comm., 459 U.S. 197, 210 (accepting Congress's judgment that FECA provisions prohibiting funds from corporations or labor unions to be used in federal elections). The Court explained that the provision reflected the legislature's judgment on the issue and it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." National Right to Work Comm., 459 U.S. at 210; see also Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (explaining the Court's deference to legislative action when a legislature has significantly greater institutional expertise . . . the Court in practice defers to empirical legislative judgments").


authority is continually challenged. The Court's most recent examination of such a challenge is found in *Nixon v. Shrink Missouri Government PAC* which considered the validity of state contribution limitations patterned after those upheld in *Buckley*. In *Nixon*, a deeply divided court ultimately followed *Buckley's* precedent and upheld the Missouri limitations.

Although the majority opinion set forth a routine application of stare decisis, the concurring and dissenting opinions looked beyond precedent and addressed the ineffectiveness of FECA and the Court's role in rendering that legislation unworkable. *Nixon* is significant because it clearly illustrates the intractable dissension that exists among the Justices regarding campaign finance reform. Although most Justices agreed that the current laws did not work, unanimity could not be reached with regards to a solution. This division closely reflects the

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34. See, e.g., *Massachusetts Citizens for Life, Inc.*, 479 U.S. at 241 (considering a challenge to the applicability of FECA regulations to expenditures of a non-profit corporation); *Nat'l Right to Work Comm.*, 459 U.S. at 197 (finding corporations and unions may only solicit funds for segregated political funds from members).


36. *Id.* at 382 (referring to the Missouri statute that limited campaign contributions to a range between $250 and $1000 depending on the office sought).

37. *Id.* (describing limitations imposed on contributions for state elected office that, like the contribution limitation in *Buckley*, may not exceed $1000).

38. *Id.* at 381, 398, 399, 405, 410. Five of the nine Justices filed or joined separate opinions in this case. *Id.; see also infra* note 43 and accompanying text.

39. *Id.* at 397-98 ("There is no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern this case in support of the Missouri statute.").

40. *See id.* at 382 (holding "*Buckley* to be authority for comparable state regulation").

41. See *infra* notes 209-59 and accompanying text (explaining the concurring and dissenting opinions in *Nixon*).

42. See *infra* Part III.A (examining differences between the Justices).

43. See *Nixon*, 528 U.S. at 405. Justice Breyer, joined by Justice Ginsburg, considered the possibility that *Buckley* acts as an obstacle to "comprehensive solutions to the problems posed by campaign finance." *Id.* (Breyer, J., concurring). Justice Kennedy stated that "*Buckley* has not worked." *Id.* at 408 (Kennedy, J., dissenting). Justice Thomas, joined by Justice Scalia, concluded that contribution limitations when analyzed under strict scrutiny are unconstitutional. *See id.* at 410 (Thomas, J., dissenting).

44. See *id.* at 397 (arguing for no change in the status quo). Justice Kennedy suggested that limitations on expenditures be treated similarly to
sentiments of citizens and politicians alike. Nearly everyone agrees the system does not work, but still a consensus on a workable solution remains elusive.

Nixon also illustrates the Justices' varying opinions regarding the appropriate role for the Supreme Court in such a highly political matter. The majority resisted appeals to overrule Buckley for policy reasons by maintaining that the Court may only decide cases and controversies before it. Other Justices,
such as Justice Kennedy, called for the Court to acknowledge and address the larger issue involved, namely that the system as implemented under *Buckley* does not work.  

This Note examines efforts to regulate campaign financing by focusing on the various arguments for and against limitations on contributions and expenditures. Part I of this Note reviews the long history of legislative efforts to guard against corrupt campaign financing practices and includes a detailed analysis of FECA. Part I also examines Court decisions subsequent to the enactment of FECA, primarily the *Buckley* decision, which have altered FECA's provisions and legislative intent. Part II of this Note considers recent political scandals, voter cynicism and the latest efforts to reform the system. Part II also analyzes how the majority, concurring and dissenting opinions in *Nixon* detail the different approaches to campaign finance reform advocated by the Justices. Part III of this Note evaluates the relative merits of the varying opinions and concludes that Justice Kennedy offers the most realistic assessment of the current situation and proposes the only solution bold enough to break the current impasse over campaign finance reform.

I. A LONG HISTORY OF FEDERAL CAMPAIGN FINANCE REFORM

A. Prior Legislative Efforts to Reform Campaign Finance

Efforts by Congress to increase the fairness of the American electoral process are not new. Public concerns regarding the escalating costs of campaigns and their financing by wealthy individuals and interest groups have existed for over one hundred years. Many of the campaign finance issues facing legislators and courts today were considered by Congress in past efforts to reform the electoral system.

50. *Id.* at 408 (Kennedy, J., dissenting) (admonishing the majority for “failing to acknowledge or evaluate the whole operation of the system that we ourselves created in *Buckley*”).

51. *See infra* notes 54, 58, 63, & 66 and accompanying text (describing various congressional laws enacted to reform campaign finance regulations).

52. *See Mann, supra* note 1, at 451 (describing how during the Progressive Era reform minded groups were concerned that large contributions were corrupting political candidates).

53. *See supra* note 51 and accompanying text (examining various efforts to reform campaign finance regulations).
An early legislative effort aimed at the perceived threat of corruption due to excessive contributions was the Tillman Act of 1907. The Tillman Act prohibited contributions by banks and corporations to candidates in federal elections. Congress hoped that its passage would satisfy the public demand to lessen the influence of wealthy participants in the electoral process. The actual impact of the legislation was diminished, however, by a lack of enforcement.

The next major effort to reduce the influence of money in campaigns was the Federal Corrupt Practices Act of 1925, which required the filing of detailed campaign finance statements and imposed strict limitations upon expenditures by candidates. The effectiveness of the legislation was limited however, by poor enforcement and the existence of numerous exceptions.

Several years later, concerned that New Deal policies would increase the political power of President Franklin Roosevelt, Congress imposed further restrictions on financing practices with the enactment of the Hatch Act. In addition to limiting

54. See Euchner & Maltese, supra note 1, at 38 (describing the enactment of the Tillman Act in 1907 as a response to allegations by muckraking journalists and political pressures).

55. Corrado, supra note 11, at 27-28 (noting that the ban is still in effect but is undermined by "soft money" loopholes).

56. Id. at 27 (explaining that Congress enacted the bill in response to public sentiment for reform and at the urging of its namesake, Benjamin Tillman).

57. Mann, supra note 1, at 451 (attributing the law's failure to "gaping loopholes," poor enforcement, and an uninformed public).

58. See Euchner & Maltese supra note 1 (describing this law as "the most important finance legislation until 1971").

59. Corrado, supra note 11, at 29 (saying that the Act required political committees, individuals, and candidates to provide, among other data, specific information regarding contributions and itemized accounts for both contributions and expenditures).

60. See id. (limiting spending in elections to $25,000 in the Senate and to $5000 in the House of Representatives).

61. See Thayer, supra note 3, at 62-63 (describing the law as "more show than substance"). A 1923 political commentator noted "that nowhere in the country has there been devised a legal method of effectively limiting the amount of money that may be spent in political fights. No law has been enacted through which the politicians cannot drive a four-horse team." Id.

62. See Corrado, supra note 11, at 30 (discussing speculations by Roosevelt's opponents that the newly expanded federal work force would support Roosevelt).

total contributions and expenditures by a political party over a one-year period, the Hatch Act prohibited federal employees from soliciting funds for political campaigns. Soon thereafter, Congress moved to counter the increasing political power of labor unions by enacting a provision within the Taft-Hartley Act of 1947, which prohibited the use of union treasury funds for campaign contributions.

Despite Congress's attempts to address corruption, efforts at reform were largely unsuccessful due to both noncompliance and the lack of adequate enforcement. By the 1970s, substantial increases in both the dollar amounts expended by candidates and the voters' access to political information led to the public's desire for a new solution.

B. Federal Election Campaign Act: Comprehensive Legislation for a System Gone Awry

FECA, enacted in 1972 and substantially revised in 1974, is a comprehensive statute designed to significantly limit the amount of money associated with federal elections. The American public's substantial distrust of politics and government contributed to the enactment of FECA. Prior to FECA, the nature of political campaigns changed significantly

64. Corrado, supra note 11, at 30 (reciting the $3 million limit on the amount a political party could receive or spend within a year).
65. Id. (noting that this restriction was an extension of the prohibition originally established in the Pendleton Civil Service Act of 1883).
67. See Corrado, supra note 11 (observing that the ban on labor union funds has remained part of campaign regulation up to the present).
68. See Mann, supra note 1, at 451 (considering the problems contributing to the failure of campaign finance regulations).
69. See Euchner & Maltese, supra note 1, at 39 (noting that both political spending and the average American's exposure to television advertising rose during the period from 1952 to 1968).
72. See Mann, supra note 1, at 451-52 (noting that FECA set limits on individual contributions, the amount of personal wealth a candidate could expend, and imposing limits on total campaign expenditures).
73. Euchner & Maltese, supra note 1, at 41 (noting that the 1974 amendments to FECA were enacted during a period of public discontent over the Watergate scandal).
with the advent and proliferation of the television. Television made it possible for a candidate to reach far more voters with a thirty-second television advertisement than through traditional outlets. The desire to buy effective but expensive air-time led to increased campaign costs. Between 1964 and 1968, campaign spending increased from $200 to $300 million. With the enactment of FECA, Congress hoped to decrease the influence of money in elections and restore Americans' confidence in government, which was seriously shaken by the Watergate scandal in 1974-1975.

As originally enacted, FECA instituted a comprehensive regulatory scheme to administer matters of federal campaign finance. Among its many provisions, the statute required full

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74. See Mann, supra note 1, at 461; Corrado, supra note 11, at 31. An excellent example of the visual impact television afforded a political candidate was the Nixon-Kennedy debate of 1960. See GIL TROY, SEE HOW THEY RAN: THE CHANGING ROLE OF THE PRESIDENTIAL CANDIDATE 210-11 (1996). Troy describes this landmark debate as follows: "Political folklore tells how the tanned, athletic Kennedy surmounted the stature gap and won the election... Nixon was 'half slouched, his 'Lazy Shave' powder faintly streaked with sweat, his eyes exaggerated hollows of blackness, his jaws, jowls, and face drooping with strain.'" Id.

75. See Troy, supra note 74, at 198 (explaining that during the 1952 presidential campaign, candidate Adlai Stevenson was able to reach twice the audience he had with radio by addressing the public on television).

76. See Corrado, supra note 11, at 31 (describing television as "an essential means of political communication").


78. Euchner & Maltese, supra note 1, at 39 (describing Congress's intent to "reduce what was seen as the insidious influences of private money").

79. See TROY, supra note 74, at 223 [stating that the Nixon scandal, in addition to other factors such as Vice-President Spiro Agnew's indictment and the legacy of sixties counter-culture, lead Americans to "yearn[] for an electoral overhaul").

80. See Mann, supra note 1, at 451-52 (noting that FECA continued prohibitions on corporate and union funds, limited the use of a candidate's family wealth, limited contributions by individuals and political parties during a campaign, imposed caps on total spending by a candidate and also independent expenditures made on behalf of a candidacy, strengthened disclosure laws and enforcement provisions, established the Federal Election Commission and instituted the Presidential Election Campaign Fund to provide public funding for presidential elections). The comprehensive nature of the law was also recognized by the California appellate court considering Buckley, "[t]his case presents for review the latest, and by far the most comprehensive, reform legislation passed by Congress concerning the election of the President, Vice-
disclosure of campaign contributions and expenditures, provided for public financing of presidential campaigns, and established the Federal Election Commission (FEC) to oversee implementation of the law. Although all of these provisions were intended to promote fairer, less costly elections, the regulations with the greatest and most immediate impact were those limiting campaign contributions and expenditures. Specifically, FECA limited political contributions "by an individual or a group to $1,000 and by a political committee to $5,000 to any single candidate per election, with an overall annual limitation of $25,000" and limited expenditures "by individuals or groups... to $1,000 per candidate." In addition, FECA restricted a candidate's ability to personally finance his own campaign and created a cap on permissible expenditures by candidates during primary and general elections.

81. See 2 U.S.C. § 434(a) (1975) (requiring in part, each candidate or committee supporting a candidate to "file with the Commission reports of receipts and expenditures on forms to be prescribed or approved").

82. 26 U.S.C. §§ 9001-9012, 9031-9042 (1975) (creating the Presidential Election Campaign Fund, providing public matching funds for qualified candidates, financed through revenue donated on individual tax returns in the amount of $1 per individual filing).

83. 2 U.S.C. § 437(c) (establishing the Federal Election Commission, the organization primarily responsible for enforcement of all FECA provisions).

84. See Orloski v. FEC, 795 F.2d 156, 163 (D.C. Cir. 1986) (noting Congress's purposes for the FECA were "to limit spending in federal election campaigns and to eliminate the actual or perceived pernicious influence over candidates for elective office that wealthy individuals or corporations could achieve by financing the 'political war chests' of those candidates").

85. See 18 U.S.C. § 608(b)(1) (limiting contributions by individuals to federal candidates to $1000); 18 U.S.C. § 608(b)(3) (restricting aggregate contributions by an individual to $25,000 per year); 18 U.S.C. § 608(c) (imposing expenditure limitations on federal candidates).

86. 18 U.S.C. § 608(b)(2) (limiting contributions by political committees to federal candidates to $5000 per election).

87. 18 U.S.C. § 608(e) (restricting expenditures made by an individual or group "to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000").

88. 18 U.S.C. § 608(a) (enacting limitations on the amount of personal and family funds a candidate could expend in a campaign). The relative limits varied depending on the office sought. Id.

89. See 18 U.S.C. § 608(c) (imposing expenditure limitations on candidates that varied according to the office sought).
C. The Court Changes the Rules: Buckley v. Valeo and Its Progeny—Varying Levels of Constitutional Protection For Contributions and Expenditures

In 1976, the Supreme Court considered a major challenge to the constitutional validity of FECA in *Buckley v. Valeo.* In *Buckley,* several candidates and political organizations challenged FECA claiming that the contribution and expenditure limitations violated the First Amendment protections of free speech and association. The Court began its analysis by noting that political contributions and expenditures both qualified as political speech governed by the First Amendment. The Court concluded that although both acts were forms of political speech, they were not entitled to the same degree of protection. According to the Court, limitations on expenditures represented a substantial restraint on speech because it directly reduced the quantity of expression afforded. In contrast, the contribution limitations were only a “marginal restriction” upon the contributor’s right of expression and were thus more amenable to reasonable restraints.

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90. 424 U.S. 1 (1976) (per curiam) (challenging four major provisions of the law namely, limitations on contributions and expenditures, disclosure requirements, establishment of the Presidential Campaign Fund and those provisions creating the Federal Election Commission).
91. Id. at 11 (arguing that methods of modern communication demand the expenditure of money, thus limitations restrict speech).
92. Id. at 14 (reflecting upon the importance of open political discussion and debate to the vitality of American government). The Court noted that political debate is essential in a system that is dependent upon the awareness and judgment of its citizenry. Id. The Court acknowledged the national commitment to the “principle that debate on public issues should be uninhibited, robust and wide-open.” Id.
93. Id. at 23.
94. See id. at 19 (addressing the direct correlation between money spent and communication conveyed). The Court conceded that virtually all political communication required some outlay of money, such as printing expenses for handbills and rentals fees for speech halls. See id. It determined that an expenditure restriction “necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” Id.
95. See id. at 20-21 (concluding that contribution limitations were marginally restrictive because they did not directly restrict the contributor’s ability to communicate his support for a candidate). The Court reasoned that a contribution, of either $10 or $10,000, acted as a general expression of support. See id. As such, a cap on the amount an individual or group could contribute did not prevent that symbolic act or support. See id. at 21. The Court further concluded that limitations would not reduce political activity, but would instead...
Because FECA imposed restrictions on protected speech, the Court applied what it identified as "exacting scrutiny required by the First Amendment." The Court ultimately upheld the contribution limitations, stating that the government's interest in reforming the electoral financing system was "sufficiently important," and that the contribution limitations were "closely drawn" to meet those interests without silencing free speech. Consequently, such restrictions only involved a marginal restraint on political communication. The Court explained that "the quantity of communication by the contributor does not require candidates to seek financial assistance from a broader base of contributors and would compel individuals to fund their own direct political expression. See id. at 21-22.

96. Id. at 16. The Court never clearly defined what was demanded by the "exacting scrutiny required by the First Amendment," and it subsequently altered its reference to this scrutiny throughout the opinion. See id. The Court later referred to the standard imposed as the "closest scrutiny" under which a state must demonstrate a sufficiently important interest and closely drawn means. Id. at 25. The Court again altered its terms when it described the judicial scrutiny as a "rigorous standard of review" which requires "weighty interest[s] . . . sufficient to justify the limited effect upon First Amendment freedoms . . ." Id. at 29. Justice Thomas labels the scrutiny applied as "the sui generis Buckley's standard of scrutiny," a deviation from the traditional test employed in free speech cases. See id. at 923. The vagueness regarding the level of scrutiny employed by the Court in its decision has brought much criticism and is often the foundation of arguments calling for the overruling of Buckley. See generally Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996). Justice Thomas, dissenting in Colorado Republican, maintained that the analytical framework utilized in Buckley was deeply flawed. Id. at 640 (Thomas, J., dissenting).

97. Buckley, 424 U.S. at 29-30. The government put forth two additional justifications for the limitations. See id. First, to limit the relative voice of wealthy individuals and groups in order to equalize the voice of all citizens and also to retard skyrocketing campaign costs. Id. The Court rejected both of these interests. Id. It found 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 . . ." Id. at 48-49. The Court also rejected the interest in slowing campaign costs as a basis for such limitations. See id. at 57.

98. Id. at 25 (maintaining that the limitations were a valid response to possible corrupting influences of large contributions). The Court held further that the amount of the limitation cap was a legislative, not judicial, matter. See id. The Court agreed with the Court of Appeals that a court "has no scalpel to probe whether . . . a $2,000 ceiling might not serve as well as $1,000." Id. at 30. The Court considered the expressive speech to be the act of contributing rather than the actual words later spoken by the candidate. Id. at 20.

99. See id. at 20-21 (finding contribution limitations to be marginally restrictive because the contributor was able to express himself politically through other means, such as discussions with others regarding issues and the candidates).
increase perceptibly with the size of his contribution."^{100} Because the statute did not prohibit all contributions, but merely limited the amounts, the Court found FECA's marginal restraint of expression acceptable.\(^{101}\)

In contrast to contribution limitations, the Court found the restrictions on expenditures to be unconstitutional.\(^{102}\) The Court characterized these limitations as "direct and substantial restraints"\(^{103}\) on speech and, therefore, unconstitutional.\(^{104}\) Unlike contributions, in which the quantity of expression does not increase in proportion to the amount contributed,\(^{105}\) the Court reasoned that limitations on expenditures directly impair the quantity of political speech.\(^{106}\)

Despite its ruling, the Court was far from unified on the holdings.\(^{107}\) Five justices,\(^{108}\) including Chief Justice Burger, filed separate opinions with each member joining in part and dissenting in part. The opinions covered the spectrum of

100. *Id.* at 21. Unlike expenditures where less money necessarily equals less communication, a restriction on the amount an individual may contribute does not necessarily limit the quality of a contributor's communication. *See id.* at 19-21.

101. *Id.* at 20-22 (noting the limitations restricted actual contributions but not the potential for political activity by a contributor).

102. *Id.* at 58-59 (concluding that expenditure limitations "place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate").

103. *Id.*

104. *Id.* at 58. The Court also indicated that limitations, although content neutral with regards to the communication expressed, were still unconstitutional due to their stifling effect on core political expression. *See id.* at 39.

105. *See id.* at 21 [explaining that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of the contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing"].

106. *See id.* at 19 (finding that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached").

107. *See infra* notes 109-112 and accompanying text (examining the Justices' varied opinions regarding the applicability of limitations on contributions and expenditures).

debate. Justices White and Marshall asserted the need for expenditure limits. Chief Justice Burger argued against contribution limits. Justice Blackmun, meanwhile, maintained that it was impossible to make a proper distinction between a contribution and an expenditure. Though most could agree that various provisions within FECA were impermissible and in need of revision, a consensus on what would represent a valid replacement proved elusive. Despite the lack of consensus, Buckley significantly altered the structure of campaign finance regulation from that originally intended by Congress.

109. See id. at 264-65 (White, J., concurring in part and dissenting in part) (maintaining expenditure limitations are a necessary reinforcement of contribution caps and will help to dispel the public's impression "that federal elections are purely and simply a function of money").

110. See id. at 288 (Marshall, J., concurring in part and dissenting in part) (arguing specifically for limitations on the amounts a candidate may spend from personal funds). Justice Marshall contended that such a limitation is necessary to lessen the financial advantage a wealthy candidate would hold over a less affluent opponent. See id.

111. Id. at 235 (finding the infringement upon First Amendment rights by limits on campaign contributions to be equal to those imposed by expenditure restrictions). Additionally, Justice Burger argues that "[b]y dissecting the Act bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts." Id.

112. Id. at 290 (Blackmun, J., concurring in part and dissenting in part) (attributing his dissent in various sections of the Court's ruling to his doubts that the Court can make a principled distinction between contribution and expenditure limitations).

113. See id. at 241 (Burger, C.J., concurring in part and dissenting in part) (stating his disapproval of contribution limitations, public financing of presidential elections and the disclosure provisions). Justice Blackmun voiced his opposition to expenditure limitations based on his belief that there is no real distinction between contributions and expenditures. See id. (Blackmun, J., concurring in part and dissenting in part).

114. See supra note 107 and accompanying text (reciting various opinions put forth by the Justices).

115. See supra note 80 and accompanying text (describing the original structure of FECA). The Buckley decision altered FECA's structure by prohibiting limitations on expenditures. See Buckley, 424 U.S. at 52. In addition, the Court found that the composition of the Federal Election Commission violated the Appointments Clause and was thus unconstitutional. Id. at 143. However, the Court upheld the constitutionality of the Presidential Election Campaign Fund, as well as the disclosure provisions of the law. Id. at 143. Chief Justice Burger feared the Court had altered FECA too extensively, stating that, "Congress intended to regulate all aspects of federal campaign finances, but what remains after today's holding leaves no more than a shadow of what Congress intended. I question whether the residue leaves a workable program." Id. at 236.
Four years after *Buckley*, the Court again considered the constitutionality of FECA in *California Medical Association v. FEC.* The decision focused on the validity of a FECA provision that prohibited individuals from contributing more than $5000 to a multi-candidate political committee. The California Medical Association (CMA) maintained that the restriction was not merely a limitation on contributions but, in fact, an unconstitutional expenditure limitation because it prevented the medical association from expressing its views through its political action committee (PAC). In the CMA's view, the PAC was not an independent organization but rather an integral and invaluable arm of the medical association. The CMA further argued that even if a donation to its PAC was properly classified as a contribution, FECA was still unconstitutional because the donation was internal and not directed outside the organization. The CMA reasoned that the risk of "actual or apparent corruption of the political process" did not exist because the association was giving money to its own PAC, not to a candidate for public office. Thus the substantial interest that justified the limitation in *Buckley* was not present in this case.

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117. *Id.* at 183 (referring to 2 U.S.C. § 441a(a)(1)(C) (1976)). In *California Medical*, the plaintiff was a physician's association that wished to contribute funds to its political action committee, called the "California Medical Political Action Committee (CALPAC)." *Id.* at 185.
118. *See id.* at 195 (challenging the classification of funds as contributions rather than expenditures, arguing that CALPAC was in actuality disseminating CMA's political speech and thus money transferred to that organization should be classified an expenditure).
119. *See id.* (maintaining that CMA directly conveyed its political speech through CALPAC). Appellant argued that "this is the manner in which CMA has chosen to engage in political speech." *Id.* at 196.
120. *See id.* (noting that funds were not being directed to an entity wholly independent of CMA, but instead to the political action committee formed to pursue its political interests).
121. *See id.* at 196-97 (maintaining that the justification for limitations, preventing corruption or the appearance thereof within the electoral process, does not exist in a case such as this, where an organization is funding its own speech and not that of an independent candidate).
122. *See Buckley*, 424 U.S. at 25-26 (noting that the only justification sufficient to impose restrictions upon contributions is the threat or appearance of corruption).
123. *See California Medical*, 453 U.S. at 195 (arguing that corruption or the
The Court ultimately rejected the CMA's characterization of PAC donations as expenditures rather than contributions.\textsuperscript{124} The Court labeled the expression "speech by proxy"\textsuperscript{125} and concluded that under \textit{Buckley}, contribution limitations imposed on this type of communication were valid.\textsuperscript{126} As in \textit{Buckley}, the restrictions were marginal in scope and appropriate to further the government's substantial interest.\textsuperscript{127}

Six months after \textit{California Medical}, the Court considered the constitutionality of contribution limitations imposed by a municipal government in \textit{Citizens Against Rent Control v. City of Berkeley}.\textsuperscript{128} In \textit{Berkeley}, the issue was whether a city ordinance that restricted to $250 individual contributions to a "committee formed to support or oppose ballot measures"\textsuperscript{129} was

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\textsuperscript{124} Id. at 195 (concluding the disbursements CMA made to CALPAC could not be characterized as independent expenditures and thus were not eligible for protection as such). The Court held that nothing "limits the amount CMA or any of its members may independently expend in order to advocate political views; rather, the statute restrains only the amount that CMA may contribute." Id.

\textsuperscript{125} Id. at 196. "Speech by proxy" refers to a situation when an individual, rather than speaking directly on an issue, expresses his views through the communications of another. See id. at 197.

\textsuperscript{126} Id. at 196-97 The Court determined that "speech by proxy" was "not the sort of political advocacy that this Court in \textit{Buckley} found entitled to full First Amendment protection." Id. at 196.

\textsuperscript{127} See id. at 198-99 (reasoning that limitations upon contributions made to multi-candidate committees such as CMA, are necessary to prevent individuals and groups from evading other statutory caps on contributions). The Court contended that without the limitation imposed on CMA, contributors would circumvent the $1000 cap on individual contributions to candidates by donating higher amounts to "multicandidate" PACs. See id. at 198.

\textsuperscript{128} 454 U.S. 290 (1981). Both the state Superior Court and the California Court of Appeals found a city ordinance unconstitutional, which restricted to $250 the amount an individual could contribute to "committee[s] formed to support or oppose ballot measures." Id. at 291-93. The California Supreme Court reversed these lower holdings, however, concluding that the infringement of First Amendment rights caused by the ordinance was outweighed by the compelling governmental interests in guarding against corruption or the appearance thereof. See \textit{Citizens Against Rent Control v. City of Berkeley}, 167 Cal. Rptr. 84 (Cal. 1980).

\textsuperscript{129} \textit{City of Berkeley}, 454 U.S. at 291. The ordinance provided that "[n]o person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250)." Id. at 292.
constitutional. Employing an "exact ing judicial review," the Court weighed the contributor's constitutional right to free speech against the government's compelling interest in enacting the ordinance. Unlike previous decisions, the Berkeley Court concluded that the city's interest was "insubstantial" and unable to warrant restraints on speech. The Court reasoned that contributions to support or oppose an initiative were much less likely to lead to corruption than were contributions to an individual candidate.

In *Colorado Republican Federal Campaign Committee v. FEC*, the Court considered the constitutionality of a specific FECA provision relating to expenditures by political parties in general elections. Under the Party Expenditure Provision, political parties were exempted from the $5000 limit on contributions to political candidates. The parties were governed, however, by a substitute limitation that varied by state and was determined

130. *Id.* at 294.
131. *See id.* at 295-98 (referring to a contributor's right to finance a message he supports and the city's interest in preventing corruption with the ballot measure process).
132. *See supra* notes 97 & 122 and accompanying text (noting the acceptance in *Buckley* of the state's interest in preventing corruption or its appearance within the electoral system).
133. *City of Berkeley*, 454 U.S. at 298.
134. *See id.* at 296-98 (finding that "[the risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue"] (citations omitted)).
136. *Id.* at 608 (discussing the "Party Expenditure Provision," an exception to the general limitation on contributions and expenditures by political parties). Expenditures by a party or individual, spent in coordination with a political candidate were considered "indirect contributions" and subject to FECA contribution limitations. *Id.* at 611. Coordinated expenditures were defined as "expenditures made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i) (1994). Some attribute the high price tag and scandals of the 1996 presidential election to the Court's decision that year. *See* Bruce Buchanan, *The Presidency and the Nominating Process*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM*, 251, 255-56 (Michael Nelson ed., 5th ed. 1998) (speculating that the decision in *Colorado Republican Campaign Committee v. FEC* "opened the money floodgates even wider, permitting parties to solicit donations directly from rich individuals and corporations").
137. *See id.* at 610-11 (quoting 2 U.S.C. § 441 (d)(1) which states: "[n]otwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, . . . political party [committees] . . . may make expenditures in connection with the general election campaign of candidates for Federal office . . . ").
based on the voting age population of the state. In *Colorado Republican*, the Colorado Republican Party challenged the Party Expenditure Provision as unconstitutional. A divided Court held that the FECA regulation did indeed violate the Constitution as applied. Although the provision regulated expenditures spent in coordination with a political candidate, the Court determined that the provision was not applicable to expenditures that were independent in nature. The Court concluded that political parties were entitled to the same protection afforded individuals or private groups making independent expenditures.

II. CAMPAIGN FINANCE REGULATION TODAY

A. Corruption, Cynicism, and the McCain-Feingold Bill: The

138. See *id.* at 611 (calculating the substitute expenditure limitation in a senatorial campaign as "the greater of $20,000 or '2 cents multiplied by the voting age population of the State").

139. See *id.* at 612.

140. *Id.* at 613. Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, filed an opinion concurring in the judgment and dissenting in part. *Id.* at 626. Although he supported the Court's decision, Justice Kennedy argued that both coordinated and independent expenditures should receive First Amendment protection. See *id.* The candidate, he reasoned, is just a communicator of the party's message and it is, therefore, unrealistic to view their expenditures separately. *Id.* at 629-30. Consequently, limitations barring candidate expenditures should likewise bar those made by political parties. See *id.* at 630. Justice Thomas, also joined by Chief Justice Rehnquist and Justice Scalia, wrote separately, concurring in the judgment, but dissenting in part. *Id.* at 631. Justice Thomas argued for the abandonment of the framework established in *Buckley*, reasoning that under strict scrutiny, all expenditure and contribution limitations are unconstitutional. See *id.* at 640-41. According to Justice Thomas, "[a] contribution is simply an indirect expenditure; though contributions and expenditures may thus differ in form, they do not differ in substance." *Id.* at 638. Lastly, Justice Stevens, joined by Justice Ginsburg, offered a dissenting opinion. *Id.* at 648. He contended that all expenditures by political parties, coordinated or independent, are, in fact, contributions and as such should be subject to contribution limitations. *Id.* Justice Stevens relied on the state's interest in preventing corruption and the circumvention of other contribution limitations to support his opinion. *See id.* at 648-49. He further embraced an interest that *Buckley* lacked, namely, the "leveling [of] the electoral playing field by constraining the cost of federal campaigns." *Id.* at 649.

141. See *id.* at 615. The Court grounds its reasoning in the varying levels of constitutional protection afforded contributions and expenditures first set out in *Buckley*. See *id.* at 614-15.

142. *Id.* at 618 (questioning "how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties").
Current State of Campaign Finance Regulation

The Supreme Court has consistently held that First Amendment rights may only be infringed to further a compelling state interest.\(^\text{143}\) To date the only interest found to be compelling with regard to campaign finance is the prevention of corruption or the appearance of corruption in the electoral process.\(^\text{144}\) Limitations on campaign contributions are repeatedly upheld in the name of this compelling interest.\(^\text{145}\) Despite these efforts, corruption within the electoral process continues to flourish, with numerous scandals reported over the past two decades.\(^\text{146}\)

One such scandal, uncovered during the late 1980s, involved five U.S. Senators charged with accepting prohibited contributions in exchange for political considerations.\(^\text{147}\) Over on million dollars in contributions were made to various Senators by Charles Keating, manager of the failed Lincoln Savings and

\(^{143}\) See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (requiring all government imposed racial classifications to be reviewed under strict scrutiny which requires a compelling state interest to infringe upon a constitutional right); Department of Human Res. v. Smith, 494 U.S. 872, 899 (1990) [O'Connor, J., concurring] (requiring the state to demonstrate a compelling government interest to infringe upon claimant’s use of peyote for alleged religious practices).

\(^{144}\) See Buckley v. Valeo, 424 U.S. 1, 25-29 (1976) (per curiam) (relying on the government’s weighty interest in preventing corruption and the appearance of corruption attributable to large contributions); see also FEC v. Nat’l Conservative PAC, 470 U.S. 480, 496-97 (1985) (finding the only compelling interest to infringe upon a First Amendment right is the prevention of corruption or its appearance); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296-97 (1981) (identifying the only compelling interest justifying infringement upon First Amendment rights as that relating to “the perception of undue influence of large contributors to a candidate”).

\(^{145}\) See Buckley, 424 U.S. at 143 (finding FECA limitations on contributions to be constitutionally valid); California Med. Ass’n v. FEC, 453 U.S. 182, 201 (1981) (upholding restrictions limiting contributions to PACs).

\(^{146}\) See CHARLES LEWIS, THE BUYING OF CONGRESS: HOW SPECIAL INTERESTS HAVE STOLEN YOUR RIGHT TO LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS 16-17 (1998) (considering various political scandals involving contributions and improprieties by various politicians). Two instances of corruption were revealed within days of each other in 1989. See id. House Majority Whip Tony Coelho resigned amid revelations of an improper bond arrangement extended to him by a savings and loan operator. Id. Several days later, Speaker of the House Jim Wright resigned following disclosure of his inappropriate financial transactions with a lobby group. Id.

\(^{147}\) See id. at 17 (noting that Democratic Senators Alan Cranston (CA), Dennis DeConcini (AZ), John Glenn (OH), Donald Riegel Jr. (MI), and Republican Senator John McCain (AZ) were charged with improper conduct).
Loan Association. The Senate ultimately found these donations improper. When asked by reporters whether he thought his contributions improperly influenced the five senators, Keating responded, "I certainly hope so." Alan Cranston of California, one of the Senators reprimanded, defended his conduct by blaming campaign finance regulations—"[t]he present system makes it virtually impossible... to avoid what some will assert is a conflict of interest... how many of you [Senators]... could rise and declare you have never, ever helped—or agreed to help—a contributor close in time to the solicitation or receipt of a contribution?" He implied it was the system, not him, that was corrupt. Each of the five Senators was subsequently reprimanded for unethical conduct.

Later in the mid-1990s, then Speaker of the House Newt Gingrich was accused of improprieties relating to his involvement with a conservative political group, GOPAC. Although GOPAC was originally touted as an educational organization, its purpose was in fact to promote the conservative political agenda of its members. In the process of soliciting large contributions for this organization, Gingrich violated various campaign regulations. For his actions, the Speaker was fined $300,000.

Larger than both the Keating Five and Gingrich scandals are those associated with Bill Clinton's 1996 re-election campaign and his departing presidential pardons. Numerous charges of

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148. See id. (disclosing the total amount of contributions given to be approximately $1.4 million, eighty percent of which constituted "soft money").

149. See id.

150. Id. Charles Keating was imprisoned for his involvement in defrauding customers of his failed Savings and Loan. Id.

151. Id.

152. See id. (noting that Senator Cranston received the harshest reprimand).


154. Id. (describing GOPAC's transformation from an organization designed to groom future Republican candidates to a "money machine").

155. See id. (describing how Congressman Gingrich subverted regulations by maintaining GOPAC was an educational organization when it, in fact, was a partisan political machine).

156. LEWIS, supra note 146, at 19.

157. See BIRNBAUM, supra note 153, at 47 (contending that "[n]o one...
impropriety were brought against both the President and Vice President with regards to their fundraising practices. The charges against the President included "renting out" the Lincoln Bedroom to large contributors, soliciting donations from foreign nationals, having "coffees" with large contributors, and diverting millions of dollars from the Democratic National Committee (DNC) to the President's election campaign. President Clinton was also accused of coordinating directly with the DNC in the financing and production of his presidential campaign advertisements, in direct violation of the law as determined in *Colorado Republican*.

Equally scandalous was the presidential pardon of fugitive financier Marc Rich. Rich, who fled the country and avoided prosecution in the U.S. courts for seventeen years, was went as far as Bill Clinton" when it came to violating campaign finance regulations). See also Robert L. Jackson & Richard A. Serrano, *U.S. Atty. Launches Inquiry on Rich Case Law: Prosecutor in New York Reportedly Decides to Investigate if Clinton's Pardon of Broker Was the Result of Illegal Merits*, L.A. TIMES, Feb. 15, 2001, at A1 (describing the "176 pardons and commutations," which included that for fugitive financier Marc Rich).

158. LEWIS, supra note 146, at 20 (listing numerous campaign finance violations attributed to President Clinton's fundraising efforts and referring to him as a "flawed vessel' on the subject of integrity in government and keeping an arm's length from special interests").

159. Id. (analyzing campaign financing practices associated with what the author refers to as "the most expensive and possibly the most corrupt [election] in U.S. history").

160. See David A. Pepper, Article, *Recasting the Issue Ad: The Failure of the Court's Issue Advocacy Standards*, 100 W. VA. L. REV. 141, 162 (1997) (examining the President's participation in DNC presidential campaign advertisements). President Clinton is described as the "day-to-day operational director of our [DNC] TV ad campaign," and it is reported that he held direct meetings with "top DNC officials discussing the strategy and content of the ads"). *Id.*

161. See Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 617 (1996) (finding the "constitutionally significant fact" in determining whether funds are independent in nature and free of limitations or subject to regulation as contributions is whether the candidate has coordinated efforts with the organization). According to *Colorado Republican*, if the parties have worked in coordination then the funds are considered contributions and are subject to FECA limitations. *See id.*

162. See Mike Dorning, *House Panel Grills Clinton Official Pardon for Financier Skipped Review by Justice Prosecutors*, CHI. TRIB., Feb. 9, 2001, at A3 (reporting the pardon of Marc Rich, who was listed on the FBI's Ten Most Wanted List for "the largest tax evasion scheme in U.S. history" and for "trading with Iran during the hostage crisis in violation of U.S. sanctions").

163. See *U.S. Atty.*., supra note 157 (noting that Rich lived as a fugitive in Switzerland to "avoid[] prosecution in New York").
granted a pardon months after his former wife gave "roughly $1 million in contributions to Democratic candidates" including "$450,000 to Clinton's presidential library fund." Numerous politicians were quick to publicly note the corrupt appearance of the situation including former Clinton Labor Secretary, Robert Reich, who stated "if there ever was an argument for campaign finance reform, this is it." The prevalence and magnitude of political scandals such as these makes it evident that current financing regulations, which evolved from Buckley and its progeny, fail to prevent corruption within the electoral process.

Existing campaign finance regulations failed to prevent the appearance of corruption within the electoral process and the voter disenchantment that accompanies it. Newspapers and magazines abound with articles and commentaries discussing the average American's disgust and disinterest with politics and voting. Former U.S. Senator, Presidential candidate and reform proponent, Bill Bradley, once stated that "money is to politics what acid is to cloth—it eats away at the fabric of Democracy." Archibald Cox, constitutional law expert and

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164. Id.
165. See id. (quoting several outraged politicians, such as Sen. Dianne Feinstein (D-Ca.) who voiced "concerns not only about the Rich pardon but about a number of others" and Sen. Charles Schumer (D-N.Y.) who maintained the Clinton pardons made a "mockery of the system").
166. See Fox News: The Edge With Paula Zahn (FOX television broadcast, Jan. 24, 2001) (responding to questions regarding whether the Rich pardon was influenced by large political contributions). Secretary Reich referred bluntly to the corrupt appearance of the transaction: "it smells bad and it looks bad." Id.
167. See supra notes 146-61 and accompanying text (examining numerous instances of political corruption within the past two decades).
168. See, e.g., Jeff Barker, McCain Adamant on Campaign Finance, ARIZ. REPUBLIC, July 1, 1999, at 1 [reporting John McCain's positions on campaign finance reform and quoting Arizona Representative Kathleen Flora's opinion that "[a] lot of people are feeling cynical or disenchanted with government today"]; Aaron Bernstein, Too Much Corporate Power?, BUS. WEEK, Sept. 11, 2000, at 144 (examining public distrust of large corporations and their influence on politics); Peter D. Cimini, Address the Scandal of Campaign Finance, HARTFORD COURANT, Nov. 6, 1999, at A16 (referring to polls that show the public thinks the system is corrupt).
169. See BILL BRADLEY, THE JOURNEY FROM HERE 84 (2000). Senator Bradley recalled experiences on the Senate Finance Committee when public meetings involving interests important to specific groups were aligned with special interest lobbyists while other meetings regarding issues of general welfare were virtually unattended. See id. at 86. He found that money seriously distorts the principle of "one person . . . one vote" and concluded that those with more money have more political clout. Id. at 87.
former Watergate prosecutor, also voiced his concerns regarding
the current regulations and maintains that "campaign finance
abuses are far worse today than during Watergate."\footnote{170}

Numerous polls indicate cynicism is widespread among voters,
particularly among the young.\footnote{171} Many attribute this high level
of distrust among voters to their perception that the political
system is corrupt.\footnote{172} It is clearly evident that current campaign

comments made by Archibald Cox in an interview) Mr. Cox also concluded that
Americans have "much less trust in government today than there was during
the Watergate years").}

\footnotetext{171}{See Meredith Kruse & Ian Zack, Poll: Campaign Funds Concern Voters,
VA. PILOT, Nov. 22, 1999, at A1 (reporting on a 1999 poll indicating that voters
believe money improperly influences politicians). This poll conducted in 1999
by The Old Dominion University's Social Science Research Center, reported that
"half of all voters think state legislators' votes are for sale" and that "only three
out of ten people think that their representative has a high ethical standard."
Id. In addition, eighty-three percent of Virginia voters polled thought too much
money was spent on campaigns. Id.; see also Alexa Aguilar, Southern Illinois U.:
Elusive Young Voters Could Swing Election, U-WIRE, Sept. 7, 2000, available at
2000 WL 24492243 (referring to poll showing disinterest in the election by
voters aged eighteen through twenty-four). This poll conducted that same year
by Project Vote Smart, found that "24 percent of all potential voters aged 18-24
did not trust any level of government, with only 9 percent claiming they trusted
the federal government." Id. The author noted that student participation in
elections is low and cited statistics for a predominantly student precinct
showing only eleven percent of those registered actually voted in 1998. Id.
Despite efforts that targeted specifically at mobilizing this age group, such as
MTV's "Choose or Lose," "Rap the Vote," and the "WWF Smackdown Your Vote!"
many students feel disconnected from the process. Id.; see also Kathryn E.
Smith, U. Southern Mississippi: Apathy Among Young Voters Alive Despite
(noting results of poll showing people aged eighteen through twenty-four are
voting in smaller numbers).}

\footnotetext{172}{See Kruse & Zack, supra note 171, at A1 (citing various opinions
regarding corruption within the system). Old Dominion University Professor
Stephen K. Medvic concluded that voter cynicism "begins to show a corrupting
effect of money on our society." Id. A state delegate from Arlington, Virginia,
Robert H. Brink, voiced his concern that "campaigns are getting so expensive
and negative that we've driven participation and faith in the system down
and down in a downward spiral." Id. at A10. Finally, a private contractor stated his
opinion that "people are buying what they want with these large campaign
contributions." Id. at A1; see also Smith, supra note 171 and accompanying
text (relaying the conclusion of University of Southern Mississippi Professor
Ronald Marquardt that "young voters often cite corruption [and] big money" as
reasons for not voting); Diane Carman, It's Back to "Reform" School, DEN. POST,
Jan. 4, 2000, at B1 (concluding that "[t]he corruption of the process by big
money has alienated a whole generation of young voters who see participation
in the democratic process as an insulting waste of time"). There are indications
that some voters feel differently as was cited in a Detroit News article discussing
finance regulations are failing to prevent the appearance of corruption within the electoral process.\footnote{173}

In response to the failure of current campaign finance regulations, numerous alternatives to FECA were proposed or enacted.\footnote{174} Thus far the greatest success is found at the state and local levels.\footnote{175} Several states including Maine and Arizona, implemented public financing programs for all general campaigns.\footnote{176} New York City instituted a matching fund program for all candidates who abide by expenditure limitations.\footnote{177}

Efforts to reform federal regulations did not find similar success.\footnote{178} One of the most visible legislative efforts to pass

\footnote{173}{\it See supra} notes 168-71 (discussing the public’s perception that politicians in general are corrupt).


\footnote{175}{\it See infra} notes 176, 177 (describing several successful campaign finance reforms instituted at the state and local levels).

\footnote{176}{\it See} BRADLEY, supra note 169, at 92 (describing public financing systems that provide public funds for candidates willing to forego private donations). In addition to Maine and Arizona, Vermont and Massachusetts have similar programs. \textit{id.}, at 93.

\footnote{177}{\it See id.} at 92 (referring to the city plan that makes a four to one match on all donations under the amount of $250 for candidates agreeing to expenditure limitations).

\footnote{178}{\it See infra} notes 179-184 and accompanying text (describing failed
comprehensive campaign finance reform is the McCain-Feingold bill. Among its proposals, the legislation calls for a complete ban on soft money, an increase in hard money contribution limits, and restrictions on the airing of issue advertisements within sixty days of a general election and thirty days of a primary. Although McCain-Feingold has many supporters and is currently the most visible reform effort, many fear it will not withstand inevitable judicial scrutiny. Congress faces a huge task in structuring a system that is both fair and less reliant on money while still practical enough to provide for individual campaigning needs. It is apparent that legislative efforts to reform campaign finance regulations will continue to face obstacles in the future.

B. Nixon v. Shrink Missouri Government PAC: Supreme Court's Latest Confirmation of Buckley

In Nixon v. Shrink Missouri Government PAC, the Supreme Court again considered the constitutionality of campaign
contribution limits and once again upheld the restrictions. At issue in *Nixon* was a Missouri statute that imposed campaign contribution limitations similar to FECA, ranging from $250 to $1000, depending on the office sought. The action, initiated by a PAC and an individual seeking state office, challenged the constitutionality of contribution limitations by arguing that such restraints violate the First and Fourteenth Amendments. The U.S. District Court for the Eastern District of Missouri upheld the statute relying on precedent set in *Buckley* that allowed such limitations to prevent voter suspicion and distrust of large campaign contributions. The U.S. Court of Appeals for the Eighth Circuit reversed, finding that the state was unable to prove through demonstrable evidence the compelling interest necessary to validate a statute that infringes upon constitutional rights. Citing the large number of states enacting similar statutes, the Supreme Court granted certiorari to consider the "congruence of the Eighth Circuit's decision with *Buckley*.

1. The Majority Upholds Buckley by Strictly Deciding the Case Before It

A six-to-three majority of the Court reversed the Eighth Circuit, finding that *Buckley* provided direct authority and

186. *Id.* at 397-98 (relying on precedent in *Buckley* to uphold the Missouri statute).

187. *Id.* at 382 (quoting the statute: "[t]o elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, [t]he amount of contributions made by or accepted from any person other than the candidate in any one election shall not exceed one thousand dollars").

188. *Id.* at 383.

189. *See id.* (noting that respondents had not specifically identified the alleged constitutional violations, but the Court assumed they were for "free speech, association and equal protection").


191. *Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 519, 521-22 (8th Cir. 1998) (demanding that the state provide "some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place").


193. *See id.* at 390-92 (directly reversing the lower court's holding requiring demonstrable evidence of corruption within the electoral process).
precedent for the Missouri limits. The opinion, authored by Justice Souter, began by reviewing the judicial scrutiny used in *Buckley* and reiterating the distinction between contribution and expenditure limitations. Following *Buckley*, the Court determined that limitations on expenditures were unconstitutional because they were a direct restraint on speech, but similar limits on contributions were permissible because of their marginal effect on speech. The Court reasserted that a regulation enacted to advance a "sufficiently important interest," which does so in a "closely drawn" manner, is acceptable as a marginal restraint on speech. The Court determined that the Missouri law only marginally restrained free speech and consequently upheld the statute.

194. See *id.* at 382 ("We hold *Buckley* to be authority for comparable state regulation.").

195. See *id.* at 386 (explaining that the *Buckley* Court did not clearly identify the judicial scrutiny employed in its decision). The Court noted that neither the intermediate scrutiny of *United States v. O'Brien*, 391 U.S. 367 (1968), nor that utilized for time, place, and manner restrictions were adopted in *Buckley*. *Id.* The Court described the level of judicial review as "the exacting scrutiny required by the First Amendment." *Id.* (quoting *Buckley*, 424 U.S. at 16).

196. See *Nixon*, 528 U.S. at 386 (determining that "expenditure restrictions [are] direct restraints on speech").

197. See *id.* at 386-87 (relying on *Buckley* to hold that a contribution limit "involves little direct restraint on . . . [the contributor's] political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues").

198. *Id.* at 388. The Court held that "[t]he prevention of corruption and the appearance of corruption," were found to be "constitutionally sufficient justifications" for infringing on constitutional rights. *Id.* The Court supported this holding by concluding that unchecked corruption, or the appearance thereof, would cause voters to lose confidence in the electoral process and would weaken the political system in general. *Id.* at 388-89.


200. *Nixon*, 528 U.S. at 387. The Court extended the analysis to include association rights, finding the same distinction between contributions and expenditures. See *id.* The Court stated that an "expenditure limit 'precludes most associations from effectively amplifying the voice of their adherents' . . . [however, the contribution limits] 'leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates.'" *Id.* (quoting *Buckley*, 424 U.S. at 22).

201. *Id.* at 392-93. In reaching this holding, the Court concluded that it was permissible for Congress to legislate against less obvious forms of corruption, stating that "Congress could constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery."
The majority also responded to criticisms by the dissenters that the Court did not address the consequences of \textit{Buckley} and whether the standard should be overruled,\textsuperscript{202} which the dissenters called the "real issue[s]" before the Court.\textsuperscript{203} The majority did not robustly defend the merits of \textit{Buckley}, but instead relied upon the argument that the Court was required to only decide the narrow issues presented in \textit{Nixon}.\textsuperscript{204} The majority argued that the petitioners had not asked that \textit{Buckley} be overruled and it was thus not appropriate for the Court to consider such action.\textsuperscript{205} Although the concurring and dissenting opinions argued strongly for the Court to consider the practical and political consequences of its past decisions,\textsuperscript{206} the majority believed its sole task was to consider the narrow legal issues relating to the Missouri statute and to follow precedent.\textsuperscript{207} The Court concluded that the statute was not unconstitutional and subsequently reversed and remanded the case for action consistent with its decision.\textsuperscript{208}

\textit{Id.} at 389 (quoting \textit{Buckley}, 424 U.S. at 28). The Court also determined that additional demonstrable evidence was not necessary to prove the nexus between large contributions and political corruption. \textit{See id.} at 391-92. The Court found the evidence presented during lower court proceedings, such as "newspaper accounts of large contributions supporting inferences of impropriety" and the fact that Missouri voters had passed a ballot initiative to strictly limit campaign contributions, to be adequate. \textit{Id.} at 393-94. Finally, the Court reasoned that the limitations were not preventing candidates from raising the necessary funds to seek office and thus should be allowed. \textit{See id.} at 395-96.

\textsuperscript{202} \textit{See id.} at 397 (recognizing that the "dissenters in this case think our reasoning evades the real issue").

\textsuperscript{203} \textit{Id.} (Kennedy, J., dissenting) (arguing that the Court does "much disservice to our First Amendment jurisprudence by failing to acknowledge or evaluate the whole operation of the system that we ourselves created in \textit{Buckley}"). Justice Thomas also criticized the majority for "blindly" following precedent set in \textit{Buckley} and failing to consider subsequent breakdowns of the logic distilled in that decision. \textit{Id.} at 420-21.

\textsuperscript{204} \textit{See id.} at 397 (responding to calls from the other Justices to consider the policy implications of its holding by stating that "[t]he answer is that we are supposed to decide this case").

\textsuperscript{205} \textit{See id.} (stating that petitioners "did not request that \textit{Buckley} be overruled").

\textsuperscript{206} \textit{See infra} Parts II.B.2-B.3 (calling for the Court to consider factors such as soft money issue advocacy and the capacity of the legislature to address the problem).

\textsuperscript{207} \textit{Nixon}, 528 U.S. at 397-98. The Court asserted that "[t]here is no reason in logic or evidence to doubt the sufficiency of \textit{Buckley} to govern this case in support of the Missouri statute." \textit{Id.} (emphasis added).

\textsuperscript{208} \textit{See id.} (proclaiming its confidence in relying on \textit{Buckley} precedent).
2. The Concurring Opinions: Money Is Property and Balancing of Interests

Justice Stevens and Justice Breyer authored separate opinions. Although both opinions agreed with the judgment upholding the Buckley precedent, neither was satisfied with the analytical approach utilized by the majority to evaluate campaign finance matters.

Justice Stevens noted the dissenters' call to reexamine the Buckley decision and wrote solely to assert his view that contribution limits should be analyzed not as a First Amendment issue but rather as property and liberty concerns. In a brief opinion, he colorfully described the differences between free speech and property issues and concluded that the Constitution affords greater protection to the former. Justice Stevens maintained that contribution limitations involve property rights and as such should be evaluated under a lower standard of review than that applied by the majority.

In his concurring opinion, Justice Breyer, who was joined by Justice Ginsburg, countered Justice Stevens's contention that contribution limitations do not warrant First Amendment protection by arguing that "a decision to contribute money to a campaign is a matter of First Amendment concern—not because

209. Id. at 398-400 (Stevens, J., concurring) (writing separately to assert his view that the issue did not relate to rights of free speech but instead to property and liberty concerns); (Breyer, J., concurring) (agreeing with the Court's outcome but addressing the issue of judicial scrutiny and the proper role of the Court).

210. See id. at 389-405 (Stevens, J., concurring) (challenging the Court to consider a different approach to evaluating campaign finance laws).

211. Id. at 398 (Stevens, J., concurring) (responding to Justice Kennedy's suggestion to re-examine FECA provisions) as though Justice Stevens does not explicitly state his willingness to reconsider Buckley, it may be inferred because he contends that the scrutiny standard utilized in Buckley is faulty, he would support a reevaluation of Buckley precedent. See id. at 398-99.

212. Id. at 398-99 (supporting his assertion with an example: "telling a grandmother that she may not use her own property to provide shelter to a grandchild—or to hire mercenaries to work in that grandchild's campaign for public office—raises important constitutional concerns that are unrelated to the First Amendment").

213. See id. (Stevens, J., concurring).

214. Id. (Stevens, J., concurring) (maintaining that property rights are entitled to legal protection, but not the maximum protection afforded First Amendment rights).
money is speech (it is not); but because it enables speech."^{215}
Justice Breyer asserted that campaign finance regulations are
entitled to thoughtful review but argued that the use of strict
scrutiny, proposed by Justice Thomas's dissenting opinion,^{216}
was inappropriate.\textsuperscript{217}

Strict scrutiny and its presumption against constitutionality,
Breyer maintained, was not an appropriate standard for
analyzing statutory limitations on campaign contributions.\textsuperscript{218}
Justice Breyer suggested that a better approach was to balance
the conflicting interests present in campaign finance cases,
specifically the right of free speech and the integrity of the
electoral system.\textsuperscript{219} Unlike the majority, Justice Breyer argued
that the Court was not restricted to considering only the
statutory limits of the Missouri law.\textsuperscript{220} Instead, Justice Breyer
suggested that the Court should also address the implications of
the decision on campaign finance issues at large.\textsuperscript{221}

In concurring with the majority's judgment, Justice Breyer
agreed that contribution limits were constitutional because their
effect did not prohibit speech but rather "permit[ted] all

\footnotesize

\begin{itemize}
  \item \textsuperscript{215} \textit{id. at 911} (Breyer, J., concurring) (discussing the associational aspects
  of contributing, namely that a contributor helps a candidate who espouses his
  beliefs to become elected).
  \item \textsuperscript{216} \textit{id. at 916} (Thomas, J., dissenting) (arguing that political speech
  represents core First Amendment activity, thus laws abridging that activity
  should be "met with the utmost skepticism and should receive the strictest
  scrutiny").
  \item \textsuperscript{217} \textit{id. at 911} (Breyer, J., concurring) (agreeing with Justice Thomas that
  political speech "lies at the heart of the First Amendment" but arguing against
  strict scrutiny because constitutionally protected interests were at issue on
  both sides, and the "strong presumption against constitutionality" was thus
  inappropriate).
  \item \textsuperscript{218} \textit{See id. at 911} (Breyer, J., concurring) (asserting that there is "no place
  for a strong presumption against constitutionality, of the sort often thought to
  accompany the words 'strict scrutiny'").
  \item \textsuperscript{219} \textit{See id. at 912} (Breyer, J., concurring) (maintaining that the Court's
  primary consideration should be whether one party was burdened under the
  law to a greater degree than the other).
  \item \textsuperscript{220} \textit{id. at 910-11} (Breyer, J., concurring) (referring to the difficult
  constitutional problems raised by campaign finance regulation). Justice Breyer,
  unlike the majority, acknowledged the conflicting constitutional interests and
  recognized the issues involved reached beyond a mere determination of
  Respondents' rights. \textit{See id.}
  \item \textsuperscript{221} \textit{See id. at 401} (Breyer, J., concurring). Generally, Justice Breyer
  contends that limitations "democratize the influence that money itself may
  bring to bear upon the electoral process" by forcing candidates to seek a
  broader base of contributors. \textit{id.} 
\end{itemize}
supporters to contribute the same amount of money, in an attempt to make the process fairer and more democratic.222 In Breyer's opinion, the holding protected the rights of contributors to express their views and also provided for a more equal political system.223 Thus, Breyer argued that the outcome was a just balancing of conflicting interests.224 Justice Breyer presumed the Court's holding was in accordance with legislative purposes.225 but stated unequivocally that the Constitution demands that the Court reconsider Buckley if the Court's action inadvertently blocks prospective comprehensive campaign finance legislation.226 It can be inferred therefore, that Justices Breyer and Ginsburg would consider reevaluating Buckley.227

3. The Dissenters: Covert Speech and Strict Scrutiny Analysis

The most passionate examinations of the current state of campaign finance controls, as well as the Court's role in molding that area of law, were offered in the dissenting opinions of Justice Kennedy228 and Justice Thomas.229 Though they argued for opposite solutions, both emphatically call for Buckley to be

222. Id. (Breyer, J., concurring) (countering the criticism that contribution limitations cannot be imposed to enhance the voice of non-contributing individuals).

223. See id. (Breyer, J., concurring) (stating that "the statute imposes restrictions of degree"). The contributor is still allowed to associate himself with a chosen candidate, but by limiting the amount that may be contributed the relative influence of other participants is increased and the electoral process is subsequently more democratic. See id.

224. See id. at 403 (Breyer, J., concurring) (concluding that in "[a]pplying this approach [balancing of interests] to the present case, I would uphold the statute essentially for the reasons stated by the Court").

225. See id. (Breyer, J., concurring) (referring to the broad discretion Buckley granted to the legislature in formulating campaign finance regulations and concluding that the "legislature understands the problem... better than do we"). Justice Breyer used as evidence of this discretion the fact that the legislature had chosen to act on some issues, such as public financing of elections, but not on others, such as reduced-price media time. See id.

226. See id. at 913-14 (agreeing with Justice Kennedy that if "Buckley denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance... the Constitution would require us to reconsider Buckley").

227. See id. (stating specifically that a re-evaluation of the contribution and expenditure distinction may be in order).

228. See infra notes 234-44 and accompanying text (considering the dissenting arguments of Justice Kennedy).

229. See infra notes 245-59 and accompanying text (examining the dissenting opinion of Justice Thomas).
Justice Kennedy, in his dissenting opinion, supported limitations on both contributions and expenditures. Justice Thomas, on the other hand, argued adamantly against contribution limitations. Both Justices recognized that the Court’s acceptance of their respective opinions would reach beyond the narrow issue presented in *Nixon*, but still they both called for an extensive reformulation of the campaign finance system.

Justice Kennedy challenged the majority’s reliance on the principle of stare decisis in reaching its decision. Kennedy fervently argued that the Court could not rely on precedent unless it had the “capacity, and responsibility, to acknowledge its missteps.” The Court had, in Kennedy’s estimation, misstepped in its campaign finance decisions, and it was time

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230. *See Nixon*, 528 U.S. at 915-16 (Kennedy, J., dissenting) (asserting repeatedly his opinion that *Buckley* should be overruled because “*Buckley* has not worked”). Justice Thomas provided an equally hostile treatment of *Buckley* referring to the “analytic fallacies of our flawed decision in *Buckley*.” *Id.* at 916 (Thomas, J., dissenting).

231. *Id.* at 916 (Kennedy, J., dissenting) (suggesting “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 on fundraising”).

232. *Id.* at 916 (Thomas, J., dissenting) (finding contribution limits “patently unconstitutional”). Though not explicitly stated in *Nixon*, Justice Thomas advocates annulling all campaign financing limitations from prior decisions. *See* Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996). In *Colorado Republican Federal Campaign Committee*, Justice Thomas reiterated Chief Justice Burger’s comment from *Buckley* that “contributions and expenditures are two sides of the same First Amendment coin.” *Id.* at 636 (quoting *Buckley*, 424 U.S. at 241). Justice Thomas explicitly stated his conviction “that under traditional strict scrutiny, broad prophylactic caps on both spending and giving in the political process . . . are unconstitutional.” *Id.* at 640-41 (Thomas, J., dissenting).

233. *See Nixon*, 528 U.S. at 405 (Kennedy, J., dissenting). Justice Kennedy supported overruling *Buckley* and allowing the legislature to create a new regulatory structure for campaign finance. *Id.* at 409-10. Likewise, Justice Thomas described the analytical foundation of *Buckley* as “tenuous” and “eroding” and argued that there is no adequate justification for continuing a system that unconstitutionally limits contributions. *Id.* at 412 (Thomas, J., dissenting).

234. *See id.* at 405 (Kennedy, J., dissenting) (dismissing the idea that the case represented a “routine application of our analysis in *Buckley*”).

235. *Id.* at 406 (Kennedy, J., dissenting) (reasoning that “[t]he justifications for the case system and stare decisis must rest upon the Court’s capacity, and responsibility, to acknowledge its missteps”).

236. *See id.* (Kennedy, J., dissenting) (maintaining that the Court failed to respond to the adverse consequences of its *Buckley* decision, but instead
for the Court to accept responsibility for the adverse, unintended consequences resulting from such decisions. Justice Kennedy maintained that the rules established in Buckley did not lead to a fairer electoral process but in fact caused the subversion of political speech. He explained that by upholding only half of FECA's original provisions, the Court created a "misshapen system, one which distorts the meaning of speech." The Court's complex campaign finance holdings did not limit the influx of large amounts of cash in elections but merely caused candidates to utilize loopholes allowing unregulated practices such as "issue advocacy" advertisements and "soft money" contributions.

"perpetuates and compounds a serious distortion of the First Amendment resulting from our own intervention in Buckley").

237. See id. (Kennedy, J., dissenting) (describing the unintended consequences of the current reliance by candidates on "soft money," which is unregulated contributions to political parties that is often used to sponsor "issue advocacy" advertisements). Justice Kennedy concluded his opinion by stating that the Court should overrule Buckley to prevent further consideration of First Amendment issues under, what he labels, "the artificial" campaign finance system." Id. at 410.

238. Id. (Kennedy, J., dissenting) (explaining that Buckley had not improved campaign financing, but had forced politicians to be more covert in their actions).

239. See id. at 406-07 (Kennedy, J., dissenting).

240. Id. at 407 (Kennedy, J., dissenting).

241. Id. at 406-07 (Kennedy, J., dissenting) (describing how issue advocacy advertisements, paid for by unregulated contributions to political parties, act as covert commercials for the candidate). Justice Kennedy maintained that issue advocacy advertisements have led to "an indirect system of accountability that is confusing, if not dispiriting, to the voter." Id. at 408. His argument has been voiced by others including political scientist Anthony Corrado who explained the detrimental effects of issue advocacy upon the electoral system:

When campaign funds are raised and spent by candidates or political parties in coordination with candidates, the ballot provides accountability: candidates can be voted in or out of office, and parties can be voted in or out of legislative control. But when individuals or groups not formally affiliated with candidates or parties acting independently of candidates are engaged in political spending, the efficacy of the ballot box as a means of promoting accountability is diminished. This lack of accountability makes it more difficult for voters to hold elected officials accountable for the manner in which they conduct their campaigns, which can be an important voting cue for citizens . . .


242. Nixon, 528 U.S. at 406 (attributing the rise in soft money issue advocacy by political parties to the system created in Buckley). Justice Kennedy argued that Buckley "forced a substantial amount of political speech underground, as
The core of Justice Kennedy's opinion was that the system established by *Buckley* did not work. The Court needed to make amends for its past mistakes by overturning the decision so that Congress could enact new legislation that would allow elected officials to focus their time and efforts on governing rather than fundraising.

In a separate dissenting opinion, Justice Thomas, who was joined by Justice Scalia, also called for the elimination of the *Buckley* standard. His opinion was grounded in the principle that both campaign expenditures and contributions were forms of speech that should be protected vigorously and equally. Justice Thomas challenged the assumption that contribution limitations are marginal restraints that are entitled to a lesser degree of constitutional protection. He maintained that in

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243. See id. at 408 (noting that the campaign finance system established in *Buckley* has generated dangers, namely covert speech, that are as serious as those it was created to eliminate).

244. See id. at 409 (arguing that it was time to "open the possibility that Congress . . . might devise a system . . . permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising"). Although Justice Kennedy was hopeful that Congress would create a system that limited both contributions and expenditures, he noted his concern that the legislature would be unable to do so. See id. According to Justice Kennedy, "the existing distortion of speech caused by the half-way house we created in *Buckley* ought to be eliminated." Id. at 410. Although Justice Kennedy intended for Congress to formulate a new campaign finance regulations, he was unwilling to maintain the *Buckley* system until such legislation was enacted and called for the immediate elimination of the *Buckley" half-way house." Id.

245. Id. (Thomas, J., dissenting) (declaring that "our decision in *Buckley* was in error, and I would overrule it").

246. See id. at 413 (Thomas, J., dissenting). Justice Thomas did not agree that contribution limitations were only a marginal restraint on free speech or that there was a qualitative difference between contributing to a candidate or directly spending money. See id. He argued that all speech involved input by individuals other than the speaker and the fact that a contributor enabled speech by one other than himself should not lessen its constitutional value. See id. He reasoned that "[e]ven in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message—for instance, an advertising agency or a television station." Id.

247. See id. (Thomas, J., dissenting) (arguing that limits force contributors to employ less effective means of communicating a chosen message). According to Justice Thomas "[t]he decision of individuals to speak through contributions rather than through independent expenditures is entirely reasonable." Id. at 415. Reasonable because candidates generally utilize the money in a more productive manner. See id. at 416. As Justice Thomas explains, "[c]ampaign
practice contribution limitations directly restrained free speech and the majority, by applying its own unique and less stringent level of scrutiny, was obstructing constitutionally protected speech and limiting the voice of the people.

Justice Thomas's other principal argument for renouncing Buckley focused on the improper level of scrutiny traditionally used by the Court in adjudicating campaign finance cases. The Buckley Court never clearly articulated its "exact scrutiny" standard, and Justice Thomas asserted that the Court should demand nothing less than strict scrutiny because of the First Amendment implications. He argued that under strict scrutiny the limitations would fail because the State of Missouri lacked both the requisite compelling interest and the organizations offer a ready-built, convenient means of communicating for donors wishing to support and amplify political messages."

248. See id. at 417 (Thomas, J., dissenting) (asserting that contribution limitations do, in fact, restrain speech because that discount the "distinct role of candidate organizations as a means of individual participation in the nation's civic dialogue").

249. See id. at 410 (Thomas, J., dissenting) (concluding that the majority, by not applying strict scrutiny, has "balance[d] away First Amendment freedoms").

250. See id. at 420 (Thomas, J., dissenting) (arguing that decisions regarding "who shall speak, the means they will use, and the amount of speech sufficient to inform and persuade" were issues properly determined by the citizens and candidates and not the government).

251. See id. at 421 (Thomas, J., dissenting) (admonishing the majority for applying "something less—much less—than strict scrutiny").

252. See Buckley v. Valeo, 424 U.S. 1, 16 (1976) (per curiam) (referring to the judicial scrutiny to be applied in the case as "the exacting scrutiny required by the First Amendment"). Questions relating to the standard of review utilized in Buckley remain unsettled. See Lillian R. BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 CAL. L. REV. 1045, 1050 (1985) (discussing the Court's failure to apply a consistent standard of review in post-Buckley campaign finance cases); see also Jane Conard, Nixon v. Shrink Missouri Government PAC: Campaign Contributions, Symbolic Speech and the Appearance of Corruption, 33 AKRON L. REV. 551, 552 (2000) (arguing that courts apply various standards of review in cases involving campaign finance because the Buckley decision was ambiguous on this point); James Bopp, Jr., Constitutional Limits on Campaign Contribution Limits, 11 REGENT U. L. REV. 235, 240 (1999) (noting that "the scrutiny to be applied to contribution limits is still an open exercise, due primarily to the Supreme Court's inconsistent use of key language").

253. Nixon, 528 U.S. at 427 (Thomas, J., dissenting) ("In light of the importance of political speech to republican government, Missouri's substantial restriction of speech warrants strict scrutiny.").

254. See id. at 423 (Thomas, J., dissenting) (reminding the Court that the only interest held "compelling" and thus sufficient to restrict political contributions is that associated with reducing corruption or the appearance of
narrowly tailored means. Justice Thomas concluded by reminding his colleagues that political speech was the core of First Amendment protection and by admonishing the majority for providing greater protection to judicially defined forms of speech, such as nude dancing and flag burning than to an essential conduit of political speech.

\[255\] See *id.* at 427-28 (Thomas, J., dissenting) (asserting the statute is overinclusive). Justice Thomas argued that the Missouri statute is both broader in scope and more restrictive than the FECA provisions upheld in *Buckley.* *Id.* at 424-25 (Thomas, J., dissenting). Justice Thomas noted that although *Buckley* limited contributions to $1000 for individuals and $5000 for political committees, the Missouri statute imposes limits on both ranging from $250 to $1000; these limitations are even harsher, he argued, when inflation is considered. *Id.* at 425 (Thomas, J., dissenting). Justice Thomas also challenged the majority's contention that the statute does not limit the fundraising totals by a candidate. *Id.* (Thomas, J., dissenting). Justice Thomas argued that because "the largest contributors provide a disproportionate amount of funds" limiting such contributions must affect total amounts raised. *Id.* at 426 (Thomas, J., dissenting). On the other hand, Justice Thomas noted that if "large contributions provide very little assistance to a candidate... the Court fails to explain why a candidate would engage in 'corruption' for such a meager benefit." *Id.* (Thomas, J., dissenting). Justice Thomas maintained further that a more narrowly tailored means, such as bribery and disclosure laws, exist to prevent corruption within the electoral process. *Id.* at 428 (Thomas, J., dissenting). Justice Thomas concluded the limitations were poorly drafted and overly inclusive, and did little more than "directly suppress the political speech of both contributors and candidates, and only clumsily further[ed] the governmental interests that they allegedly serve." *Id.* (Thomas, J., dissenting).

\[256\] *Id.* at 410-11 (Thomas, J., dissenting) (asserting that the Founding Fathers guaranteed free speech for political purposes so the self-governed could exchange political information). Justice Thomas argued that "that free exchange should receive the most protection when it matters the most—during campaigns for elective office." *Id.* at 411 (Thomas, J., dissenting).


\[258\] See *United States v. Eichman*, 496 U.S. 310, 317-18 (1990) (finding unconstitutional the Flag Protection Act of 1989, which prohibits the knowing mutilation, defacement, burning, or trampling upon the United States flag).

\[259\] See *Nixon*, 528 U.S. at 411-12 (Thomas, J., dissenting) (maintaining contributions represent political speech).
III. THE SIGNIFICANCE OF NIXON: MEMBERS OF THE COURT MOVE IN VARIOUS DIRECTIONS ON CAMPAIGN FINANCE REFORM

A. The Court's Dissatisfaction with Current Campaign Finance Regulation Is Clearly Evident in Nixon v. Shrink Missouri Government PAC

It has been twenty-five years since Buckley was decided and one could argue that efforts to reform campaign financing have failed miserably. Nixon was decided in the wake of huge expenditures during the 1996 presidential campaign and the subsequent scandals that accompanied those campaign finance practices. It may appear at first glance that Nixon merely reinforces of the status quo and thus not notable. The decision in fact is significant because it illustrates the Court's strong dissatisfaction with the current state of campaign finance regulation and its willingness to reform these laws in the future. Two-thirds of the Justices participated in separate opinions stating either explicitly or implicitly their support for a reconsideration of Buckley. Current campaign finance regulations fail to halt corruption within the electoral process and the growth of cynicism among voters. Congress has shown itself to be unable to pass reform legislation. Current regulations are failing. In Nixon, the Justices offer varied and opposing solutions to the matter at hand. This Note now argues that Justice Kennedy proposes the bold and definitive action necessary to break the current impasse over campaign finance regulations.

260. See supra Part II.A and accompanying notes (examining corruption within the political system and voter skepticism).
261. See supra notes 157-61 and accompanying text (reciting the scandals emanating from the 1996 Clinton presidential re-election campaign).
262. See supra Part II.B and accompanying notes (considering the varied opinions presented in Nixon).
263. See supra notes 205, 227, 233 and accompanying text (examining suggestions by concurring and dissenting justices that Buckley be reconsidered).
264. See supra Part II.A and accompanying notes (considering examples of corrupt financing practices and distrust among American voters).
265. See supra note 177 and accompanying text (examining the failure of the McCain-Feingold bill to pass in the Senate).
266. See supra Part II.A and accompanying text.
267. See supra Part II.B and accompanying text (reciting the various opinions of the Nixon Justices).
The majority refused to accept that its decision possessed broader implications beyond the issues and litigants in *Nixon*. The Court maintained that its role was limited to considering the case before it and arriving at a conclusion based on precedent. The majority examined whether the Missouri statute represented a constitutionally permissible means of curtailing the influence of money in elections, but did not consider whether the statute was effective in achieving its goals. The majority also did not examine whether the FECA provisions as modified by the Court actually prevent corruption or the public's perception of corruption within the electoral process. Aware of the intractable public debate ensuing over campaign finance practices, the majority chose not to address the broader dispute. As the highest court in America and the implicit creator of current regulations, the Court should have, in Justice Kennedy's words, "face[d] up to [the] adverse, unintended consequences flowing from [the Court's] prior decisions."

Although Justice Breyer likewise did not directly examine the effectiveness of contribution limitations, he did consider the broader implications of these restrictions on the political system as a whole. Breyer argued that there are legitimate

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268. *See supra* notes 202-05 and accompanying text (presenting the majority's view that its role was limited to deciding only those issues pertaining to the *Nixon* litigation).

269. *See id.* (considering the majority's refusal to expand its review to factors beyond those in *Nixon*).

270. *See supra* note 196 and accompanying text (examining the majority's consideration of the Missouri statute's constitutional validity). Although the Court found the statutory limitations did not prevent candidates from running effective campaigns, and noted that voters generally supported such limitations, it never examined the effectiveness of contribution limitations either within Missouri or throughout the United States, in preventing corruption or the appearance thereof. *See Nixon*, 528 U.S. at 382, 396.

271. *See Part II.B.1* and accompanying notes (considering the majority's examination of *Nixon* and noting its omission of relevant factors).

272. *See supra* note 205 and accompanying text (noting the majority's choice to narrow the scope of its consideration in *Nixon*).

273. U.S. CONST. art. III, § 1 (establishing the Supreme Court as the highest court in America).

274. *See supra* note 238 and accompanying text (reciting Justice Kennedy's contention that the Court had created the unworkable system through its holding in *Buckley*).


276. *See id.* at 399-405 (Breyer, J., concurring) (considering the larger
constitutional interests on both sides of the issue and it is the Court's role to strike a balance between them. Justice Breyer upheld the contribution limitations because he considered them beneficial to the electoral process by democratizing the influence of money within the system and encouraging voter trust and participation. He also asserted that the Court should defer to legislative judgments regarding the need for and scope of contribution limitations, and should restrict its consideration to the relative burdens imposed on the various participants. Justice Breyer stated specifically that the Court should "defer to [the legislature's] political judgment that unlimited spending threatens the integrity of the electoral process." Such decisions, he contended, are better made by elected officials. Despite these assertions of support for the majority's decision, Justice Breyer concluded his opinion by questioning the effectiveness of the Court's prior decisions regarding campaign finance regulation and stating his willingness to reconsider

277. See id. at 401 (Breyer, J., concurring) (acknowledging the state's interest in protecting the integrity of the electoral process and the First Amendment interest in free speech through political contributions). Justice Breyer agreed with Justice Stevens' contention that money is not speech, but maintained that it is entitled to First Amendment protection because it enables speech. See id. at 400 (Breyer, J., concurring).

278. See id. at 401 (Breyer, J., concurring) (asserting that limitations have the potential of protecting the integrity of the electoral process). Justice Breyer supported an interest that was specifically struck down in Buckley, namely the restriction of "speech [by] some elements of our society in order to enhance the relative voice of others." Id. at 402 (Breyer, J., concurring) (quoting Buckley, 424 U.S. at 48-49). The Court, in Buckley, firmly rejected this interest as "wholly foreign to the First Amendment." Buckley, 424 U.S. at 49. Justice Breyer contended that the government routinely employs this practice, citing as examples the rules of congressional debate and ballot restrictions. See Nixon, 528 U.S. at 402 (Breyer, J., concurring).

279. See Nixon, 528 U.S. at 402 (Breyer, J., concurring) (asserting his opinion that the Court should employ judicial restraint "[w]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation").

280. See id. (Breyer, J., concurring) (clarifying that although the Court must defer to legislative judgments regarding the need for restrictions, it should still examine and evaluate statutes to guarantee their constitutional validity).

281. Id. at 403-04 (Breyer, J., concurring).

282. See id. at 403 (Breyer, J., concurring) (concluding that the legislature has a better understanding of the menacing effects of large contributions on the electoral system than does the Court).

283. See id. at 404-05 (Breyer, J., concurring). In questioning the usefulness of the Court's decisions Justice Breyer considers two points: (1) that the
Although Justice Breyer considered the larger issues implicated by the Court's decision in *Nixon*, his reliance on the legislature to cure the ills of campaign finance regulation is flawed. It is unrealistic to presume the legislature possesses the fortitude to enact tough and probably unpopular campaign finance regulations, considering the nature of politics and recent congressional financing indiscretions. Although politicians assert their opposition to big money interests, modern elections require significant amounts of money and candidates are dependent upon large contributors. Consequently, Justice Breyer's undiminished deference to the legislature on such a highly political matter appears imprudent.

Justice Stevens's assertion that contributions implicate property interests rather than rights of free speech is interesting but inconsistent. He considered money to be property, not speech, and argued that contributions did not merit the same level of protection as actions that clearly implicate free speech. This assertion is successfully rebutted by Justice Breyer's reasoning that although money is not speech, it enables speech, and as thus should be afforded First Amendment protection.

Justice Stevens is alone in his opinion that contribution limitations do not implicate First Amendment rights, and it seems unlikely that his fellow Justices would be swayed by his reasoning. Although Justice Stevens concurred with the majority in upholding the contribution limitations, he adamantly

284. See id. at 405 (Breyer, J., concurring) (agreeing that it may be necessary to reconsider the holding of *Buckley*).

285. See supra note 225 and accompanying text (noting Justice Breyer's assertion that the Court should defer to the legislature's judgment regarding campaign finance regulation).

286. See *Nixon*, 528 U.S. at 398-99 (Stevens, J., concurring) (clarifying the proper scrutiny due to contribution limitations).

287. See id. (Stevens, J., concurring) (justifying the varying levels of protection assigned to property and speech rights).

288. See supra note 215 and accompanying text (examining Justice Breyer's argument that contributions implicate First Amendment rights).

289. See supra Part II and accompanying notes (noting that all of the other Justices agree that the act of contributing does involve First Amendment speech).
rejected the analytical framework employed to do so and one can infer that he would consider a reevaluation of *Buckley* in the future.\textsuperscript{290}

Unlike the majority, Justice Thomas eagerly accepted an opportunity to reevaluate the law set forth in *Buckley*, and willingly considered the larger arguments relating to *Nixon*.\textsuperscript{291} He focused his attention on protecting campaign contributions as First Amendment speech.\textsuperscript{292} Justice Thomas argued that *Buckley* should be overturned because the Court fails to employ strict scrutiny in its analysis of the Missouri contribution limitations.\textsuperscript{293} According to Justice Thomas, some individuals express their political beliefs through contributions to a candidate articulating a desired message.\textsuperscript{294} Such activity, he maintains, is political speech and should be protected under the First Amendment as ardently as campaign expenditures.\textsuperscript{295} Thomas argues for the Court to overturn *Buckley* because it does not provide equal protection for expenditures and contributions and Justice Thomas views such limitations as restraints on free speech.\textsuperscript{296} *Buckley*, he maintains, discounts First Amendment rights\textsuperscript{297} and enfeebles constitutional protections.\textsuperscript{298}

\textsuperscript{290.} See *Nixon*, 528 U.S. at 399 (Stevens, J., concurring) (holding that "[t]he right to use one's own money to hire gladiators, or to fund 'speech by proxy,' certainly merits significant constitutional protection . . . [but not] the same protection as the right to say what one pleases").

\textsuperscript{291.} See supra notes 245-59 and accompanying text (setting out Justice Thomas's argument).

\textsuperscript{292.} See *Nixon*, 528 U.S. at 412 (Thomas, J., dissenting) (accusing the majority of abandoning the principle that political speech represents the core of First Amendment rights).

\textsuperscript{293.} See supra notes 251-59 and accompanying text (outlining Justice Thomas's argument that strict scrutiny should be applied in evaluating contribution limitations).

\textsuperscript{294.} See supra note 247 (presenting Justice Thomas's argument that contributions represent political speech).

\textsuperscript{295.} See supra note 246 (examining Justice Thomas's contention that contributions and expenditures should be treated equally).

\textsuperscript{296.} See supra note 245 (calling for *Buckley* to be overturned).

\textsuperscript{297.} See *Nixon*, 528 U.S. at 412 (Thomas, J., dissenting) (maintaining that the majority's refusal to apply strict scrutiny to campaign contributions is attributable to "Buckley's discounting of the First Amendment interests at stake").

\textsuperscript{298.} See id. at 410 (Thomas, J., dissenting) (admonishing the majority for weakening the "already enfeebled constitutional protection that *Buckley* afforded campaign contributions").
Justice Thomas offered a strong argument for overturning *Buckley* and contribution limitations based solely on constitutional considerations. Justice Kennedy made an equally compelling argument based primarily on practical considerations. Justice Kennedy professed three arguments in support of his conclusion that *Buckley* and its imposed amendments to FECA should be overturned. He first argued that the unintended consequences of the Court's past decisions are far more threatening to the integrity of the electoral system than are large contributions. A primary unintended consequence is the issue advocacy advertisement paid for by unregulated soft money. Justice Kennedy argues such advertisements conceal the speaker's true intent and subsequently mocks the First Amendment. Contribution limitations, he argued, do little to promote the public's trust in the electoral process and instead cause participants to subvert their true intentions. Growing cynicism and disillusionment among voters lends support to Justice Kennedy's conclusion.

299. See id. at 430 (Thomas, J., dissenting) (maintaining that *Buckley* should be overruled because it diminishes First Amendment rights).

300. See id. at 408 (Kennedy, J., dissenting) (calling for *Buckley* to be overturned because the system it created is more harmful to the political process than the corruption it sought to eliminate).

301. See infra notes 302, 307, 314 and accompanying text (presenting Justice Kennedy's arguments for overturning *Buckley*).

302. See *Nixon*, 528 U.S. at 406-07 (Kennedy, J., dissenting) (acknowledging that the current campaign financing practices camouflage the speaker's true purpose and create questions regarding accountability).

303. See id. (Kennedy, J., dissenting) (finding issue advocacy advertisements to be covert speech).

304. See id. at 406-07 (Kennedy, J., dissenting) (arguing the irrationality of a system where "[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") (citation omitted).

305. Id. (Kennedy, J., dissenting) (describing how candidates and other political participants disguise their true intentions to avoid contribution limitations). Political campaigns increasingly rely on "soft money" issue advocacy to covertly advertise support for a candidate. See id. (Kennedy, J., dissenting). Contributions of soft money funds to political parties, purportedly used for party building activities such as "get out the vote" efforts, are not subject to limitations. See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 668 (1997). Soft money contributions have increased substantially within the past decade rising from $89 million in 1992 to $250 in 1996. See id.
that *Buckley* hinders, rather than helps, the electoral process.\(^{306}\)

Justice Kennedy's second argument asserted that the entire system of campaign finance is broken and the legislature is incapable of fixing it.\(^{307}\) Politicians, he maintained, face an inherent dilemma, "how to exercise their best judgment while soliciting the continued support and loyalty of constituents whose interests may not always coincide with that judgment."\(^{308}\) Justice Kennedy argued that it is unrealistic to expect a legislature comprised of individuals who must rely on campaign contributions to be elected to exercise the unbiased judgment needed in this matter.\(^{309}\) Thus far Congress has been unable to successfully reform campaign finance regulations.\(^{310}\) Many Congressmen are concerned about the amount of time that is spent on fundraising activities.\(^{311}\) Despite these concerns, Congressmen are equally apprehensive about the effects of campaign finance reforms on their ability to raise the necessary funds for campaigning.\(^{312}\) Justice Kennedy correctly concludes that the legislature "cannot oppose this system [*Buckley*] in an effective way without selling out to it first, soft money must be raised to attack the problem of soft money."\(^{313}\)

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306. See supra notes 168-70 and accompanying text (examining the public's increasing alienation from the political process).

307. See *Nixon*, 528 U.S. at 408-09 (Kennedy, J., dissenting) (concluding politicians may find it impossible to pursue valid campaign finance reform while still pleasing contributors).

308. Id. at 409 (Kennedy, J., dissenting) (examining political considerations that make it difficult for the legislature to reform campaign finance regulations).

309. See id. (Kennedy, J., dissenting) (recognizing the ongoing tension between a politician's need for impartiality and his indebtedness to the contributors). Justice Kennedy asserted that "[w]hether our officeholders can discharge their duties in a proper way when they are beholden to certain interests both for reelection and for campaign support is, I should think, of constant concern not alone to citizens but to conscientious officeholders themselves." Id.

310. See supra note 179 and accompanying text (noting the failure of the McCain-Feingold campaign finance reform bill).

311. See Robert D. Novak, *McCain's No-Win Win*, WASH. POST, Apr. 2, 2001, at A19 (quoting frustrated Senator Christopher Dodd: "you have to raise something like $10,000 almost daily in order to raise the money to wage an effective defense of your seat.").

312. See Lancaster, supra note 183 (quoting Senator Patty Murry's concerns regarding the impact of campaign finance reform on her ability to raise funds, "[o]f course everyone looks at this and says what will it do to me personally, it's obviously a part of our lives").

313. See *Nixon*, 528 U.S. at 407 (Kennedy, J., dissenting) (recognizing a legislator's reliance on campaign contributions to be elected).
This dilemma leads to Justice Kennedy's final argument that the Court must act to resolve the problems of campaign finance regulation. He concludes that the current state of campaign finance regulation should be attributed to missteps taken by the Court and that it is time for the Court to face up to the "unintended consequences" of its prior decisions. Buckley and the subsequent structure of FECA are creatures of the Court. The legislature originally envisioned a system that limited both contributions and expenditures. The Court destroyed this original structure, and with it Congress's intent, and replaced its own inherently flawed system of regulation.

Unlike his fellow justices, Justice Kennedy examined not only the constitutional validity of the statutory limitations but also their practical application and effectiveness. In doing so he concluded that Buckley does not work and should be overturned. Justice Kennedy pointedly stated that the current system of restrictions are failing their purpose because "[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." Because political considerations leave the legislature incapable of comprehensive reform and corruption and voter discontent are increasing,

314. See id. at 409 (Kennedy, J., dissenting) (arguing that the legislature is unable to rectify the situation and it is, thus, the Court's responsibility to move forward with campaign finance reform).

315. Id. at 405 (Kennedy, J., dissenting) (arguing that the majority is incorrectly applying precedent). Justice Kennedy declared that stare decisis should only be employed when the Court is willing to correct past mistakes, which Justice Kennedy maintained, the Court is unwilling to do. See id.

316. See id. at 407 (Kennedy, J., dissenting) (attributing "the unhappy origins" of the current system to the Court's prior campaign finance decisions).

317. See supra note 85 and accompanying text (describing FECA as enacted by Congress, which included limitations on both contributions and expenditures).

318. See Nixon, 528 U.S. at 407 (noting the unfairness of the current system, which imposes relatively low limitations on regulated contributions while funds such as soft money go unregulated). Justice Kennedy conceded the inequality that exists in a campaign where one candidate enjoys the support of soft money while the other does not. See id.

319. Id. at 408 (Kennedy, J., dissenting) (concluding a statute intended to stop and to prevent corruption should be overturned when "a worse evil surfaces in the law's actual operation").

320. Id. (Kennedy, J., dissenting).

321. See id. at 407 (Kennedy, J., dissenting) (considering the practical effects of politics within the issue of campaign finance reform). Justice Kennedy
Justice Kennedy concluded by arguing that it is the Court's responsibility to reform the impractical, ineffective system it created.\textsuperscript{323}

The legislature's inability or unwillingness to correct the inherent problems of campaign finance regulations lends support to Justice Kennedy's conclusion that the Court must fix the problems created by \textit{Buckley}.\textsuperscript{324} The Court has concluded that a state's interest in preventing corruption or the appearance of corruption within the electoral process is the only interest found compelling enough to justify the infringement of constitutional rights.\textsuperscript{325} Current FECA regulations are failing in that task,\textsuperscript{326} and the time is right for the Court to reconsider and overturn \textit{Buckley}. The Court has an opportunity to alter dramatically campaign finance regulations. It is evident from \textit{Nixon} that most members of the Court are unhappy with the current state of the law.\textsuperscript{327} It is equally evident that candidates and campaigns are still employing corrupt financing practices\textsuperscript{328} and that the public is losing faith in the system.\textsuperscript{329} Current campaign finance regulations are broken and Congress cannot or will not fix it. It is probable that the Court will consider campaign finance regulation again\textsuperscript{330} since many on the Court

\textsuperscript{322.} See Part II.A and accompanying notes (examining corruption within the electoral process and disillusionment among voters).

\textsuperscript{323.} \textit{Nixon}, 528 U.S. at 406-07 (Kennedy, J., dissenting) (attributing the current system of campaign financing to the Court's prior decisions and placing upon it the burden of reform). Justice Kennedy observed that "[t]he current system would be unfortunate, and suspect under the First Amendment, had it evolved from a deliberate legislative choice; but its unhappy origins are in our earlier decree in \textit{Buckley}, which... created a missshapen system, one which distorts the meaning of speech." \textit{Id.}

\textsuperscript{324.} See supra notes 173-78 and accompanying text (discussing Congress's inability to enact substantive reform).

\textsuperscript{325.} See supra note 254.

\textsuperscript{326.} See Part II.A (disclosing numerous examples of corrupt practices by politicians and examining the public's perception of corruption within the electoral process and politics in general).

\textsuperscript{327.} See Part II.B and accompanying notes (discussing the various opinions expressed in \textit{Nixon}).

\textsuperscript{328.} See Part II.B and accompanying notes (examining political corruption in the House of Representatives, the Senate, and the Presidency).

\textsuperscript{329.} See Part I.B and accompanying notes (considering apathy among voters and the public's general distrust of politics and politicians).

\textsuperscript{330.} The Court examined FECA regulations once again when it heard oral
previously voiced their willingness to reconsider *Buckley.*\(^{331}\) The *Nixon* decision provides an excellent source to predict the positions to be taken by the individual justices.

**IV. CONCLUSION**

The significance of *Nixon* is not that it upheld *Buckley,* but that it upheld *Buckley* when the majority of the Justices were dissatisfied with either the analysis used in that case or the unintended consequences that emerged since that decision. Although the limitations established in *Buckley* were upheld by a six-to-three majority, five of the Justices would consider overruling *Buckley.* FECA limitations are clearly not fulfilling their intended purpose. Corruption within the electoral process appears alive and well, and voter cynicism is rising nearly proportionally to skyrocketing campaign costs and politicians' efforts to gather yet more money. Thus far the legislature is unable or unwilling to enact the comprehensive reform so desperately needed.

*Nixon* is a clear indicator of the various positions taken by the Justices on this complex and pressing problem. Justice Kennedy's opinion provides a realistic evaluation of the current situation and is correct in suggesting that the Court should reconsider *Buckley.* The unintended consequences of that earlier decision have proven worse than the corruption it sought to contain. Political interests have robbed the legislature of its ability to offer the bold, and perhaps unpopular, reforms necessary to break the impasse on this issue. It is time for the Court to reconsider *Buckley* and the unworkable system of campaign finance it partially created.

arguments in *FEC v. Colorado Republican Federal Campaign Committee* this term. See 69 USLW 3249, 69 USLW 3257. This case was originally considered by the Court in 1996. See Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996). The Court held that limitations imposed on party expenditures made in coordination with candidates or their campaigns were valid. See id. at 624-25. After its decision, the case was remanded to a district court for consideration of whether the party's First Amendment right to free speech was violated by the expenditure limitation. See Linda Greenhouse, *High Court Takes Colorado Campaign Finance Dispute,* DEN. POST, Oct. 11, 2000, at A2. The district court and the Tenth Circuit Court of Appeals both held limitations on party expenditures made in coordination with candidates violated free speech rights. See Joan Biskupic, *Justices to Review Political Spending Limit,* USA TODAY, Oct. 11, 2000, at A1. As of publication, the Supreme Court has not issued an opinion in this case.

331. See supra note 226.
Twenty-four years after *Buckley*, the process is far from improved and, in fact, is worsening. *Nixon* clearly illustrates the Court's discontent with the present state of the law and indicates the likelihood that it will thoroughly reexamine the *Buckley* standard soon.