# THE COLORADO CASES AND COSTLY CAMPAIGNS: AN INVITATION TO REFORM

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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 is.*[1]
- United States Senator Mark Hanna (R-OH), 1895

## *I. Introduction*

Immediately before the Watergate scandals, Congress passed the Federal Election Campaign Act of 1971 ("FECA" or "the Act"),[2] the most comprehensive campaign finance reform legislation in United

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[1] Helen Dewar, *For Campaign Finance Reform, A Historically Uphill Fight*, WASH. POST, Oct. 7, 1997, at A5.

[2] Federal Election Campaign Act of 1971, 2 U.S.C. § 441a (1971).

States history.[3] The Act imposed limitations on the previously unregulated financial system of political campaigns. Under FECA, a political donor was permitted to give up to $1000 to any candidate per election cycle.[4] A donor could also give up to $20,000 to any national party committee per year.[5] In addition, the Act imposed an overall $25,000 cap on total contributions by a donor within any calendar year.[6] These dollar amount ceilings had remained the law until very recently. In the thirty-plus years since FECA was enacted, the contribution limits established by the Act have been subjected to numerous constitutional challenges on First Amendment free speech grounds.[7]

A touchstone of constitutional jurisprudence has been that the First Amendment[8] protects political speech above all else.[9] Whether political

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[3] *See* Buckley v. Valeo, 519 F.2d 821, 831 (D.C. Cir. 1975) (characterizing FECA as "by far the most comprehensive reform legislation passed by Congress concerning the election of the President, Vice-President, and members of Congress").

[4] 2 U.S.C. § 441a(a)(1)(A). An election cycle is any period of time between any two elections, typically two years between federal congressional elections. *Id.* ("with respect to any election for Federal office"). FECA expressly states that its $1000 contribution limit applies within an election cycle, and not a calendar year: "any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held." *Id.* § 441a(a)(3).

[5] *Id.* § 441a(a)(1)(B).

[6] 2 U.S.C. § 608(b)(3).

[7] *See, e.g.*, Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985); California Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182 (1981); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

[8] U.S. CONST. amend. I. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

[9] The U.S. Supreme Court has stated countless times that 'core political speech' is most deserving of First Amendment free speech protection. "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." Brown v. Hartlage, 456 U.S. 45, 52 (1982). "[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971). The Court likewise stated in *Mills v. Alabama*:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

"[S]peech concerning public affairs is more than self-expression; it is the essence of

spending, be it contributions or expenditures, is tantamount to speech, and whether restrictions on such political spending offends the First Amendment right to free speech, have been enduring questions for the courts and constitutional scholars. These issues were most recently addressed by the United States Supreme Court decision of *Federal Election Commission v. Colorado Republican Federal Campaign Committee*.[10]

The question of whether spending money for political purposes could be constitutionally restricted was first confronted in the landmark case *Buckley v. Valeo*,[11] which upheld FECA.[12] Numerous developments in the years since *Buckley* was decided have complicated the Supreme Court's campaign finance jurisprudence and required a more stringent campaign finance regime than FECA.[13] The cost of conducting political campaigns has skyrocketed, and these rising costs have fueled skepticism about the political system.[14] The rise in number

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self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." Stromberg v. California, 283 U.S. 359, 369 (1931).

[10] 533 U.S. 431 (2001). Although *FEC v. Colorado Republican Federal Campaign Committee* is the most recent Supreme Court decision dealing with campaign finance, it has been cited or followed numerous times in less than a year. *See* Beaumont v. Fed. Election Comm'n, 278 F.3d 261 (4th Cir. 2002); Minnesota. Ass'n of Nurse Anesthetists v. Allina Health System Corp., 276 F.3d 1032 (8th Cir. 2002); Fed. Election Comm'n v. Specter '96, 150 F. Supp. 2d 797, 818 (E.D. Pa. 2001); Missouri Republican Party v. Lamb, 270 F.3d 567, 569, 570, 572 (8th Cir. 2001); Lincoln Club of Orange County v. City of Irvine, 274 F.3d 1262 (9th Cir. 2001); Welker v. Cicerone, 174 F. Supp. 2d 1055 (C.D. Ca. 2001); Homans v. City of Albuquerque, 264 F.3d 1240, 1244 (10th Cir. 2001); Wertheimer v. Fed. Election Comm'n, 268 F.3d 1070, 1072, 1075 (D.C. Cir. 2001); 161 Dublin, Inc. v. Ohio State Liquor Control Comm'n, 2001 Ohio App. LEXIS 5905 (Ohio Ct. App. 2001).

[11] 424 U.S. 1 (1976) (per curiam).

[12] *Buckley*, 424 U.S. at 57.

[13] *See supra* notes 14-19 and accompanying text.

[14] Representative Harold E. Ford, Jr. & Jason M. Levien, *Policy Essay: A New Horizon for Campaign Finance Reform*, 37 HARV. J. ON LEGIS. 307, 308-09 (2000), stating:

> campaigns are too expensive. Over the past two decades, candidates for congressional seats have spent more then $2 billion. As the cost of political contests rises, voters come to view money, rather than issues and leadership, as the driving force behind elections. The sheer amount spent fuels speculation about the integrity of our democratic processes.

*Id. See also*, Jason M. Levien & Stacie L. Fatka, Article, *Cleaning Up Judicial Elections:*

and influence of interest groups has fundamentally altered American politics.[15] Additionally, the sea-change interest groups have effected in American politics has not been entirely beneficial to the body politic.[16] The Supreme Court has added layer upon layer to its campaign finance rulings, making all subsequent cases murkier.[17] Indeed, rifts have developed within the Supreme Court as to whether the First Amendment even applies to campaign finance cases.[18] Finally, politicians, candidates, and their financial benefactors have designed methods, and exploited loopholes, that violate the spirit, if not the letter, of FECA.[19]

## *II. STATEMENT OF THE CASE*

In light of both the increasing use of loopholes to undermine FECA and the uncertainty of the applicability and scope of FECA with respect to coordinated contributions made through political action committees ("PAC's"), the United States Supreme Court granted certiorari.[20] The Court held that a state party PAC's coordinated expenditures, as distinct from constitutionally protected independent

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*Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71, 95 (1997) ("Judicial campaign expenditures are escalating almost exponentially. The rising cost of judicial elections is often perceived as the rising cost of justice. This situation is a serious threat to public confidence in our judicial system.").

[15] Richard Kornylak, Note, *Disclosing the Election-Related Activities of Interest Groups Through 527 of the Tax Code*, 87 CORNELL L. REV. 230, 255 (2001) ("since the Court decided *Buckley* over a quarter-century ago . . . interest groups have become increasingly involved in elections at all levels of government.").

[16] *Id.* at 256 ("The problem of accountability and control was evident in a number of races during the 2000 election cycle in which interest groups played a role.").

[17] Leading Case, Federal Election Commission v. Colorado Republican Federal Campaign Committee, 115 HARV. L. REV. 416, 416 (2001) ("Over the past three decades, the Supreme Court has created a political campaign contribution doctrine rife with ambiguities and practical indeterminacies.").

[18] Ryan Cheshire, Case Comment, Nixon v. Shrink Missouri Government PAC, 77 N. DAK. L. REV. 309, 311 (2001) ("The Court has had difficulty deciding how to analyze campaign finance laws because while some justices find that speech, association, and equal protection are the primary constitutional interests associated with such laws, others find that the laws have implicated only property interests.").

[19] *Leading Case*, *supra* note 17, at 424 ("The campaign finance system is not a static environment. Rather, it is an ecosystem, adapting and evolving when confronted with change. When new regulations are enacted, political actors find new methods to achieve their goals.").

[20] Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 440 (2001).

spending, can be limited under FECA.[21]

A. *Facts*

The Colorado Republican Federal Campaign Committee ("the Committee") is a state party apparatus, registered as such and recognized as the official Republican political organization in Colorado.[22] In the spring of 1986, months before primary elections chose each party candidate, the Committee spent $15,000 on a radio advertisement that attacked a potential Democratic nominee in the upcoming U.S. Senate race in Colorado.[23] The advertisement, entitled "Wirth Facts #1", questioned the credibility of then-Congressman Timothy Wirth, who was running for the Democratic nomination for the U.S. Senate seat contested that fall.[24]

The Colorado Democratic Party filed a complaint with the Federal Election Commission ("FEC"), alleging that the Committee's financing of the radio advertisement violated the contribution limits of FECA.[25] After the failure of settlement negotiations, the FEC filed suit, believing that the advertisement expenditures fell within the Act's broad definition of "contribution."[26] The FEC thought all spending by parties in a federal election was automatically coordinated with a chosen candidate; that limitations on expenditures were limitations on contributions, and therefore constitutional.[27] The Committee challenged the restriction as a violation of its First Amendment right to free speech.[28]

B. *Procedural History*

1. *Colorado I*

The FEC filed suit in the United States District Court for the

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[21] *Id.* at 465.

[22] Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 839 F. Supp. 1448, 1450 (D. Co. 1993).

[23] *Id.* at 1451.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Colorado I*, 839 F. Supp. at 1451.

District of Colorado.[29] The district court ruled that the expenditures made by the Committee to finance the radio advertisement were independent expenditures and thus fell outside the proscription of FECA.[30] The district court issued the ruling without addressing the party's claim that limits on independent expenditures made during a political campaign but not "in connection with" a political campaign (spending done before party decided to endorse any one candidate, and without planning with potential nominees) were unconstitutional.[31] The FEC appealed to the United States Court of Appeals for the Tenth Circuit.[32]

The Tenth Circuit reversed the district court, finding that the Committee expenditure was, in fact, done "in connection with" the Republican Senate campaign, and therefore violated FECA.[33] The Tenth Circuit also held that the coordinated expenditure limitations in FECA did not violate the Committee's First Amendment right to free speech.[34] The Committee appealed by writ of certiorari to the United States Supreme Court.[35]

The Supreme Court granted certiorari in order to address the issue of whether FECA's Party Expenditure Provision[36] violated the First

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[29] *Id.*

[30] *Id.* at 1456-57.

[31] *Id.*

[32] Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 59 F.3d 1015, 1017 (10th Cir. 1995).

[33] *Id.* at 1023. "We conclude that the anti-Wirth publicity was an 'expenditure in connection with' the 1986 Colorado senatorial election because it named both a clearly identifiable candidate and contained an electioneering message. The Committee, therefore, violated the FECA. . . ." *Id.*

[34] *Id.* at 1024 ("Contribution limits regulate the quantity of speech, but do not foreclose speech or political association. . . . We uphold as constitutional, against the Committee's First Amendment challenge, the spending limits in 441a(d)(3).").

[35] Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 518 U.S. 604, 613 (1996).

[36] 2 U.S.C. § 441a(d)(3). The Party Expenditure Provision provided:

> The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—
>
> (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
>
> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e)); or
>
> (ii) $ 20,000; and

Amendment right to free speech.[37] In an opinion by Justice Breyer, the Court determined that the expenditure limit violated the Committee's right to free speech in this instance.[38] The Court also reversed the Tenth Circuit holding that FECA's contribution limits as applied to independent party expenditures violated the right to free speech.[39] The Court remanded the question whether all limits on federal campaign expenditures by a party are facially unconstitutional and unenforceable.[40]

### 2. *Colorado II*

Upon remand, the Committee moved for summary judgment in the United States District Court for the District of Colorado, requesting that FECA's expenditure limitation be declared unconstitutional.[41] The district court granted the motion for summary judgment and found the FECA limits an unconstitutional violation of the Committee's First Amendment right to free speech.[42]

The FEC appealed to the United States Court of Appeals for the Tenth Circuit.[43] By a divided panel, the Tenth Circuit affirmed the district court and found the FEC limits unconstitutional.[44] The court ruled that the expenditure limitation provision of FECA was not sufficiently narrowly tailored to effect a substantial government interest, and actually restricted the right to free speech.[45] The FEC, upon writ of certiorari, appealed the judgment of the Tenth Circuit to the United States Supreme Court.[46]

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(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $ 10,000.

*Id.*

[37] *Colorado I*, 518 U.S. at 613.

[38] *Id.* at 608 ("We conclude that the First Amendment prohibits the application of this provision to the kind of expenditure at issue here – an expenditure that the political party has made independently, without coordination with any candidate.").

[39] *Id.* at 616.

[40] *Id.* at 625-26.

[41] Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 41 F. Supp. 2d 1197, 1198 (1999).

[42] *Id.* at 1214.

[43] Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 213 F.3d 1221, 1223 (10th Cir. 2000).

[44] *Id.* at 1232-33.

[45] *Id.*

[46] Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 440 (2001).

The Supreme Court, in an opinion by Justice Souter, reversed the Tenth Circuit Court of Appeals and found the party expenditure limitation provision of FECA constitutional.[47] The acknowledged and substantial government interest that FECA furthered was the preclusion of corruption and avoidance of undue influence on the political process.[48] Coordinated expenditures of money contributed to political parties are engineered to undercut FECA's contribution limits.[49] If coordinated expenditures by political parties were allowed to continue unregulated by the Act, circumvention of the Act would accelerate, creating increasing corruption and distortion within the political process.[50] Because the Act's contribution limits legitimately sought to avoid this result, their similar application to coordinated expenditures was constitutional.[51]

## *III. Prior Case History*

### A. *Buckley v. Valeo*

*Buckley v. Valeo*,[52] the seminal campaign finance legislation case, was the United States Supreme Court's first examination of FECA. At the heart of *Buckley* was a constitutional challenge to the operative provisions of the Federal Election Campaign Act of 1971.[53] A group of federal officeholders,[54] candidates in federal elections and state and federal political parties filed suit in the United States District Court for the District of Columbia.[55] Defendants included the Secretary of the

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47 *Id.* at 465.

48 *Id.* at 441.

49 *Id.* at 464.

50 *Id.* at 460.

51 *Id.* at 465.

52 424 U.S. 1 (1976) (per curiam).

53 *Id.* at 6.

54 *Id.* at 35 n.41 ("Appellant Buckley was a minor-party candidate in 1970 when he was elected to the United States Senate from the State of New York.").

55 *Id.* at 8-9. Plaintiffs applied for a three-judge District Court panel "as to all matters and also certification of constitutional questions to the Court of Appeals." *Id.* at 9. The request for the three-judge panel was denied and the District Court ordered that the entire case be sent to the Court of Appeals for the D.C. Circuit. *Id.* The Court of Appeals hearing the matter en banc remanded with instructions to:

> (1) identify the constitutional issues in the complaint; (2) take whatever evidence was found necessary in addition to the submissions suitably dealt with by way of judicial notice; (3) make findings of fact with reference to those

United States Senate, Clerk of the United States House of Representatives, United States Comptroller General, Attorney General of the United States and Federal Election Commission.[56] Both a three-judge panel of the District Court and the United States Court of Appeals for the District of Columbia Circuit upheld the law against constitutional challenges, noting that there was "'a clear and compelling interest' in preserving the integrity of the electoral process."[57] On the basis of that "clear and compelling interest," the Court of Appeals upheld the operative provisions of FECA regarding contributions, expenditures, and disclosure.[58] Additionally, the court rejected the constitutional challenges to the Federal Election Commission and the constitutionality of that agency was established.[59]

The Supreme Court granted certiorari to determine the constitutionality of FECA and concluded in a per curiam opinion that contribution provisions of the Act regulating maximum amounts for individual donations were constitutional, but that expenditure provisions regulating spending by parties and candidates were unconstitutional infringements on First Amendment free speech rights.[60] For the Court, the "critical constitutional question" is whether the Act "interferes with First Amendment freedoms or invidiously discriminates against nonincumbent candidates and minor parties in contravention of the Fifth Amendment."[61]

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issues; and (4) certify the constitutional questions arising from the foregoing steps to the Court of Appeals.

*Id.* Also in its en banc order, the Court of Appeals suggested that a three-judge panel of the District Court hear arguments regarding the constitutionality of Subtitle H of FECA. *Id.* at 10 n.6. As a consequence, in a bizarre twist of civil procedure, the case was tried simultaneously before both the Court of Appeals and a three-judge panel in the District Court. *Id.* The Supreme Court treated the two cases as one, noting that "[s]ince the jurisdiction of this Court to hear at least one of the appeals is clear, we need not resolve the jurisdictional ambiguities that occasioned the joint sitting of the Court of Appeals and the three-judge court." *Id.*

[56] *Id.* at 8.

[57] *Id.* at 10 (quoting Buckley v. Valeo, 519 F.2d 821, 841 (D.C. Cir. 1975)).

[58] *Buckley*, 424 U.S. at 10. In actuality, the Court of Appeals concluded that section 437a of the Act was "unconstitutionally vague and overbroad on the ground that the provision is 'susceptible to a reading necessitating reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussions of issues of public importance.'" *Id.* at 10 n.7 (quoting *Buckley*, 519 F.2d at 832). Defendants did not appeal this ruling. *Id.*

[59] *Id.*

[60] *Id.* at 12-59.

[61] *Id.* at 13-14.

In determining the constitutionality of FECA's provisions, the Supreme Court distinguished between the limits on individual political contributions and limitations on political spending.[62] According to the Court, the limits on individual donations are constitutional because "contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties."[63] Additionally, the Court characterized the contribution limitation as an important weapon against "the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions."[64]

Under a First Amendment inquiry, however, the Court concluded that the spending of money in a political campaign is tantamount to core political speech and invalidated the provisions of FECA that restrict expenditures in political campaigns.[65] The First Amendment, the Court explained, is designed to prevent government from being able to dictate the content of one's speech, which includes speech regarding political candidacies that is expressed through the expenditure of money.[66] Thus, although FECA's limitation of political contributions was constitutional, limitations on political spending were unconstitutional violations of the First Amendment right to free

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[62] *Id.* at 24. "In sum, although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions." *Id.*

[63] *Id.* at 28-29.

[64] *Buckley*, 424 U.S. at 58.

[65] *Id.* at 39. The Court stated:

> The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech. . . . It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression "at the core of our electoral process and of the First Amendment freedoms."

*Id.* (citing Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

[66] *Id.* at 57. The majority explained:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign.

*Id.*

speech.[67] This *Buckley* distinction between contributing and spending has colored all subsequent constitutional adjudication of the campaign finance issue.[68]

B. *Nixon v. Shrink Missouri Government PAC*

In the interim, after *Colorado I* was remanded by the United States Supreme Court and before *Colorado II* again reached final constitutional review, the Court decided *Nixon v. Shrink Missouri Government PAC*.[69] The *Shrink Missouri* case was prompted by the passage of a Missouri state statute that placed limitations on campaign contributions to state political candidates.[70] The statute limited contributions to state office candidates to $1000[71] and tied that dollar amount ceiling to inflation.[72] Plaintiffs included Shrink Missouri Government PAC, a political action committee, and Zev Fredman, a candidate for the Republican nomination for state auditor.[73] Plaintiffs sued the Missouri Ethics Commission, Missouri Attorney General and St. Louis prosecutor.[74] The gravamen of the complaint was that Fredman could only run an effective campaign without the contribution limit, and that the state statute violated plaintiffs' First Amendment rights of free speech and association and Fourteenth Amendment right of equal protection.[75]

Plaintiffs filed suit in the United States District Court for the

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[67] *Id.*

[68] *See generally*, Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 437 (2001) ("Later cases have respected this line between contributing and spending."); Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 386-88 (2000); Fed. Election Comm'n v. Massachusetts Citizens For Life, Inc., 479 U.S. 238, 259-60 (1986).

[69] 528 U.S. 377 (2000).

[70] *Id.* at 382. Missouri Senate Bill 650 (SB 650) was enacted in 1994 and codified as MO. REV. STAT. § 130.032 (1994). *Id.*

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

[72] *Id.* at 382-83 ("The statutory dollar amounts are baselines for an adjustment each even-numbered year, to be made 'by multiplying the base year amount by the cumulative consumer price index. . .and rounded to the nearest twenty-five-dollar amount, for all years since January 1, 1995.'").

[73] *Id.* at 383.

[74] *Id.* at 383 n.1.

[75] *Shrink Missouri*, 528 U.S. at 383.

Eastern District of Missouri.[76] Scrutinizing the law's contribution limitations through the prism of *Buckley v. Valeo*, the District Court upheld the state statute.[77] On appeal, the Court of Appeals for the Eighth Circuit reversed the District Court and held that the limitations were an unconstitutional violation of the First Amendment right to free speech.[78] Believing that *Buckley* had established strict scrutiny review for all campaign finance legislation, "the Court of Appeals held that Missouri was bound to demonstrate 'that it has a compelling interest and that the contribution limits at issue are narrowly drawn to serve that interest.'"[79] The Court of Appeals determined that Missouri failed to meet the strict scrutiny burden and found the law unconstitutional.[80] The United States Supreme Court granted certiorari in order to reconcile the Eighth Circuit Court of Appeals' holding and *Buckley*.[81]

The Supreme Court, in an opinion by Justice Souter, reversed the Eighth Circuit and held that the state campaign contribution cap was constitutional in light of the state's adequate evidence demonstrating its substantial interests in passing the statute.[82] At issue in *Shrink Missouri* were (1) whether *Buckley* applies to state statutory regulation of campaign finance; and (2) whether the dollar amounts approved in *Buckley* as to FECA apply to state statutes as well.[83]

First, Justice Souter examined the applicability of *Buckley v. Valeo* to the Missouri statute.[84] According to the Court, the *Buckley* decision and its analysis of campaign finance laws are as applicable to state statutes as they are to federal statutes.[85] Concluding that *Buckley* does apply to state regulations, the Justice noted the standard of review under

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[76] Shrink Missouri Government PAC v. Adams, 5 F. Supp. 2d 734 (E.D. Mo. 1998).

[77] *Shrink Missouri*, 528 U.S. at 383 (citing *Shrink Missouri*, 5 F. Supp. 2d at 738: "the court found adequate support for the law in the proposition that large contributions raise suspicions of influence peddling tending to undermine citizens' confidence 'in the integrity of. . .government'").

[78] Shrink Missouri Government PAC v. Adams, 161 F.3d 519 (8th Cir. 1998).

[79] *Shrink Missouri*, 528 U.S. at 384 (citing *Shrink Missouri*, 161 F.3d at 521 (quoting Carver v. Nixon, 72 F.3d 633, 637 (8th Cir. 1995)).

[80] *Id.*

[81] *Id.* at 385.

[82] *Id.* at 387-98.

[83] *Id.* at 381-82.

[84] *Id.* at 382.

[85] *Shrink Missouri*, 528 U.S. at 382 ("We hold *Buckley* to be authority for comparable state regulation").

the seminal case.[86] According to Justice Souter, "under *Buckley*'s standard of scrutiny, a contribution limit involving 'significant interference' with associational rights could survive if the Government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important interest,' though the dollar amount of the limit need not be 'fine tuned.'"[87] Considering whether the Missouri statute involved such a sufficiently important interest, the Court weighed the purported constitutional intrusion and the justification proffered by Missouri.[88]

The Supreme Court, in considering the constitutionality of the state statute, adopted the "sufficiently important interest" relied on in *Buckley* to uphold FECA.[89] In *Buckley*, Justice Souter explained, the Court found that combating corruption, or the appearance of corruption, was adequate to justify the Act.[90] According to the majority, this interest in combating corruption is of the utmost importance.[91] Also considering the historical context in which *Buckley* arose, the Court in *Shrink Missouri* was unable to deny the existence of corruption as a force at all levels of American politics.[92] The Court concluded that the Missouri law was justified by the same concerns about corruption that motivated the *Buckley* Court to uphold FECA.[93]

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[86] *Id.* at 387.

[87] *Id.* at 387-88.

[88] *Id.* at 388-90.

[89] *Id.* at 388.

[90] *Id.* ("'The prevention of corruption and the appearance of corruption,' was found to be a 'constitutionally sufficient justification.'") (quoting Buckley v. Valeo, 424 U.S. 1, 25-26 (1976) (per curiam)).

[91] *Shrink Missouri*, 528 U.S. at 388-91. "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 388 (quoting *Buckley*, 424 U.S. at 27) (citing Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 565 (1973)). The Court acknowledged that "[t]he importance of the governmental interest in preventing [corruption] has never been doubted." *Id.* at 389 (quoting First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 788 n.26 (1978)). Supporting a similar notion, Justice Souter noted that "[d]emocracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.'" *Id.* at 390 (quoting United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1961)).

[92] *Id.* at 391 ("'[T]he deeply disturbing examples surfacing after the 1972 election demonstrate that the problem [of corruption] is not an illusory one.'") (quoting *Buckley*, 424 U.S. at 27, and n.28).

[93] *Id.* at 393 (concluding that "the substantiation of the congressional concerns reflected in *Buckley* has its counterpart supporting the Missouri law").

The Court next analyzed whether the Missouri campaign finance limitations had worked a detriment to political advocacy in the state.[94] The majority rejected the respondents' argument that the law had undermined their ability to run effective campaigns.[95] Likewise, the Court was not swayed by the appeal of the individual respondent who may have actually suffered, but instead considered his failed campaign a singular event insufficient to invalidate the Missouri law under *Buckley*.[96]

Turning its attention to the second part of its analysis in the case, the majority addressed whether the dollar limits established in *Buckley* would apply to state regulations.[97] In a cursory manner, Justice Souter dismissed the respondents' interpretation of *Buckley*'s dollar value ceilings.[98] The Justice concluded that inflation never enters the constitutional equation, even when the issue at hand is the constitutionality of dollar limitations in a state law.[99] According to the majority, "the dictates of the First Amendment are not mere functions of the Consumer Price Index."[100]

The Court refused to overrule *Buckley*, as the dissenters called for, noting that neither respondent had requested such a drastic measure.[101] The Missouri statute at issue passed muster under *Buckley*, as it had adequate evidentiary support for its objective of counterbalancing corruption and its perceived presence,[102] and the statute did not

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[94] *Id.* at 395-96.

[95] *Id.* at 396 ("The District Court found here that in the period since the Missouri limits became effective, 'candidates for state elective office [have been] quite able to raise funds sufficient to run effective campaigns,' and that 'candidates for political office in the state are still able to amass impressive campaign war chests.'") (citing Shrink Missouri Government PAC v. Adams, 5 F. Supp. 2d 734, 740-41 (E.D. Mo. 1998)).

[96] *Id.* at 396 (observing that "a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*").

[97] *Shrink Missouri*, 528 U.S. at 396-97.

[98] *Id.* at 396 (pointing out that in *Buckley*, "[w]e asked . . . whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless. Such being the test, the issue in later cases cannot be truncated to a narrow question about the power of the dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming.").

[99] *Id.* at 397.

[100] *Id.*

[101] *Id.* ("Each dissenter would overrule *Buckley* and thinks we should do the same. The answer is that we are supposed to decide this case. Shrink and Fredman did not request that *Buckley* be overruled . . . .").

[102] *Id.* at 393. "[T]he substantiation of the congressional concerns reflected in *Buckley*

detrimentally affect legitimate campaign contributions.[103]

Justice Stevens, in a concurring opinion, observed simply that "[m]oney is property; it is not speech."[104] In the opinion of the Justice, the fact that campaign contributors have donated money does not necessarily qualify that act for First Amendment protection.[105] Instead, Justice Stevens drew a clear distinction between speech that inspires, and money that buys.[106]

Justice Breyer, joined by Justice Ginsburg, wrote a concurring opinion that immediately took issue with the dissenters' assertion that the Court had undercut the First Amendment.[107] Insisting that the dissent "oversimplifies the problem faced in the campaign finance context,"[108] Justice Breyer reminded all observers that strong countervailing interests exist on both sides of the case.[109] According to the Justice, the case was not so simple as to be decided under a standard of strict scrutiny,[110] but required a more complex and nuanced balancing of interests.[111]

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has its counterpart supporting the Missouri law." *Id.*

[103] *Shrink Missouri*, 528 U.S. 395-96 (citing *Buckley*, 424 U.S. at 21). "Here, as in *Buckley*, 'there is no indication . . . that the contribution limitations imposed by the [law] would have any dramatically adverse effect on the funding of campaigns and political associations,' and thus no showing that 'the limitations prevented the candidates and political committees from amassing the resources necessary for effective advocacy.'" *Id.*

[104] *Id.* at 398 (Stevens, J., concurring).

[105] *Id.*

[106] *Id.* The Justice explained:

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

*Id.*

[107] *Id.* at 399 (Breyer, J., concurring).

[108] *Id.*

[109] *Shrink Missouri*, 528 U.S. at 400 (Breyer, J., concurring) (observing that "this is a case where constitutionally protected interests lie on both sides of the legal equation.").

[110] *Id.* (contending that "there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.'").

[111] *Id.* at 400-01 (Breyer, J., concurring). Justice Breyer noted:

> On the one hand, a decision to contribute money to a campaign is a matter of First Amendment concern – not because money *is* speech (it is not); but because it *enables* speech. . .On the other hand, restrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process – the means through which a free society democratically translates political speech into concrete governmental action.

Justice Breyer determined that campaign finance regulations are properly supported by the strong public interest in maintaining free and fair elections.[112] Moreover, the Justice resolved that the free speech rights of the few may be necessarily constrained to protect the free speech rights of the many.[113] Additionally, the concurrence thought it appropriate to defer to legislative judgment in such a case as this, where political calculations predominate.[114] After balancing all of the interests implicated, and concluding that "the statute does not work disproportionate harm,"[115] Justice Breyer concurred that the Missouri regulation at issue should be upheld.[116]

Justice Kennedy wrote a brief dissenting opinion dedicated to destabilizing the underpinnings of *Buckley*.[117] According to Justice Kennedy, the majority opinion had lent new life to *Buckley*, a case at odds with the First Amendment.[118] The Justice objected to two main phenomena resulting directly from *Buckley*.[119] Firstly, the case caused

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*Id.*

Additionally, the Justice contended:

> In such circumstances – where a law significantly implicates competing constitutionally protected interests in complex ways – the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests.

*Id.* at 402.

[112] *Id.* at 401-03 (Breyer, J., concurring) (pointing out that "by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process," and quoting Storer v. Brown, 415 U.S. 724, 730 (1974) ("There must be a substantial regulation of elections if they are to be fair and honest.")).

[113] *Id.* at 402 (Breyer, J., concurring) (explaining that "[t]he Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many.").

[114] *Id.* at 402-05 (Breyer, J., concurring). The Justice explained:

> Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments. . .I agree that the legislature understands the problem – the threat to electoral integrity, the need for democratization – better than do we. We should defer to its political judgment that unlimited spending threatens the integrity of the electoral process.

*Id.*

[115] *Shrink Missouri*, 528 U.S. at 404 (Breyer, J., concurring).

[116] *Id.*

[117] *Id.* at 405 (Kennedy, J., dissenting).

[118] *Id.* at 406 (Kennedy, J., dissenting) (asserting that "the Court. . .perpetuates and compounds a serious distortion of the First Amendment resulting from our own intervention in *Buckley*.").

[119] *Id.*

the driving of legitimate political speech underground, where it could be financed and broadcast outside the realm of campaign contribution limits.[120] Justice Kennedy believed this so-called "covert speech. . .mocks the First Amendment."[121] Secondly, *Buckley* legitimized our current 'soft money' system, a problem-rich system that cannot be adequately addressed by politicians who need soft money to win campaigns.[122] In other words, Justice Kennedy concluded that *Buckley* created a political Catch 22: it established the deeply flawed soft money system, as well as insulated the system from political tampering by the politicians that needed it.[123] Because "*Buckley* has not worked,"[124] and because the same free speech problems found in the aftermath of *Buckley* would likely follow the operation of the Missouri statute,[125] Justice Kennedy concluded that "the law before us cannot pass any serious standard of First Amendment review."[126]

Justice Thomas, in a fashion characteristic of his First Amendment

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[120] *Id.* Justice Kennedy maintained:

> The plain fact is that the compromise the Court invented in *Buckley* set the stage for a new kind of speech to enter the political system. It is covert speech. The Court has forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits, limits which take no account of rising campaign costs.

*Id.*

[121] *Shrink Missouri*, 528 U.S. at 407 (Kennedy, J., dissenting).

[122] *Id.*

[123] *Id.* The Justice further explained the problem with the *Buckley* rule:

> By operation of the Buckley rule, a candidate cannot oppose this system in an effective way without selling out to it first. Soft money must be raised to attack the problem of soft money. In effect, the Court immunizes its own erroneous ruling from change. Rulings of this Court must never be viewed with more caution than when they provide immunity from their own correction in the political process and in the forum of unrestrained speech. The melancholy history of campaign finance in Buckley's wake shows what can happen when we intervene in the dynamics of speech and expression by inventing an artificial scheme of our own.

*Id.*

[124] *Id.* at 408 (Kennedy, J., dissenting).

[125] *Id.* The dissent insisted:

> Our First Amendment principles surely tell us that an interest thought to be the compelling reason for enacting a law is cast into grave doubt when a worse evil surfaces in the law's actual operation. And our obligation to examine the operation of the law is all the more urgent when the new evil is itself a distortion of speech.

*Id.*

[126] *Id.*

jurisprudence,[127] dissented and advocated the overruling of *Buckley v. Valeo*.[128] The Justice began by explaining that all campaign finance restrictions should be subjected to strict scrutiny, and that the Missouri statute at issue should fail constitutional review under strict scrutiny.[129] Core political speech, the Justice reasoned, "is the primary object of First Amendment protection."[130] The contributions at issue and subject to the Missouri law are clearly core political speech that, according to Justice Thomas, warranted strong protection.[131] The Justice criticized the majority for not affording such contributions the constitutional protection that he thought they deserved: "the majority today, rather than going out of its way to *protect* political speech, goes out of its way to *avoid* protecting it."[132]

Justice Thomas contended that it was entirely reasonable for citizens to exercise their core political speech rights by contributing to political campaigns because, after all "[p]olitical campaigns are largely candidate focused and candidate driven."[133] Additionally, the dissent emphasized that "[c]ampaign organizations offer a ready-built, convenient means of communicating for donors wishing to support and amplify political messages."[134] Thus, the act of making donations to

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[127] Justice Thomas has consistently demonstrated a willingness to read the First Amendment free speech clause more broadly than other Justices on the Court. *See generally*, Avis Rent-A-Car Sys. v. Aguilar, 529 U.S. 1138, 1138 (2000) (Thomas, J., dissenting) (concluding that a writ of certiorari should have been granted in workplace harassment case implicating First Amendment issues); Columbia Union College v. Clark, 527 U.S. 1013, 1013 (1999) (Thomas, J., dissenting) (concluding that a writ of certiorari should have been granted in school financial aid case implicating First Amendment issues); Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 504 (1997) (Thomas, J., dissenting) (maintaining that a high standard of review should be applied to all speech, whether commercial or not); Morse v. Republican Party, 517 U.S. 186, 283 (1996) (Thomas, J., dissenting) (concluding that §5 of the Voting Rights Act violates First Amendment rights); Denver Area Educ. Telecoms. Consortium v. FCC, 518 U.S. 727, 812 (1996) (Thomas, J., dissenting) (explaining that Court-made distinctions among print, broadcast, and cable media are unwarranted under the First Amendment).

[128] *Shrink Missouri*, 528 U.S. at 410 (Thomas, J., dissenting) ("*Buckley* was in error, and I would overrule it.").

[129] *Id.* ("I would subject campaign contribution limitations to strict scrutiny, under which Missouri's contribution limits are patently unconstitutional.").

[130] *Id.* at 410-11 (Thomas, J., dissenting).

[131] *Id.* at 412 (Thomas, J., dissenting) (noting that "contributions to political campaigns generate essential political speech").

[132] *Id.*

[133] *Id.* at 415-16 (Thomas, J., dissenting).

[134] *Shrink Missouri*, 528 U.S. at 416-17 (Thomas, J., dissenting) ("'Individuals contribute to a political organization in part because they regard such a contribution as a

political campaigns, for Justice Thomas, was a natural corollary to exercising First Amendment free speech rights.[135] The Justice posited that inherent in the First Amendment is the idea that individual speakers are in the position to determine how best to use and broadcast their speech.[136]

The Justice continued Justice Kennedy's attack on *Buckley* and called for its reversal.[137] The opinion pointed out that *Buckley* affected not only individuals making donations to political campaigns but also candidates.[138] The Justice suggested that candidates are silenced by the Court's decision in *Buckley* because individual candidates are limited in the amounts they can raise from contributors.[139] For the Justice, this was identical to forcing silence.[140] Justice Thomas thought the idea of constraining political dialogue, even in the form of campaign contributions, repugnant to our Constitution that has enshrined free speech as a fundamental right.[141]

The dissent criticized the majority on several fronts. First, Justice Thomas questioned why the majority used a standard of review more lenient than the higher standard ordinarily used in free speech cases.[142] Moreover, the Justice attacked both the majority opinion and the Missouri statute on vagueness grounds, asserting that "precisely what

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more effective means of advocacy than spending the money under their own personal direction.'") (quoting Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 261 (1986)).

135 *Id.*

136 *Id.* at 417-18 (Thomas, J., dissenting) (acknowledging a "'First Amendment interest in touting [one's] wares as he sees fit'") (quoting Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 488 (1997) (Souter, J., dissenting)). Justice Thomas also noted that "'[t]he First Amendment protects [individuals'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.'" *Id.* at 417 (Thomas, J., dissenting) (quoting Meyer v. Grant, 486 U.S. 414, 424 (1988)). Similarly, the opinion explained that "'[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.'" *Id.* at 418 (Thomas, J., dissenting) (quoting Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 790-91 (1988)).

137 *Id.* at 418-20 (Thomas, J., dissenting).

138 *Id.* at 418 (Thomas, J., dissenting).

139 *Id.* at 420 (Thomas, J., dissenting).

140 *Shrink Missouri*, 528 U.S. at 420 (Thomas, J., dissenting) (noting that "the silencing of a candidate has consequences for political debate and competition overall").

141 *Id.* The Justice asserted "[i]n my view, the Constitution leaves it entirely up to citizens and candidates to determine who shall speak, the means they will use, and the amount of speech sufficient to inform and persuade. *Buckley*'s ratification of the government's attempt to wrest this fundamental right from citizens was error." *Id.*

142 *Id.* at 421 (Thomas, J., dissenting).

the 'corruption' may consist of we are never told with assurance."[143] In addition, Justice Thomas accused the majority of approving a state law that had a much broader reach than the law approved in *Buckley*.[144] Finally, the dissent insisted that the dollar amount contribution ceilings at issue "could never be 'closely drawn' to preventing *quid pro quo* corruption."[145] Thus, Justice Thomas advocated that *Buckley* be overturned and the Missouri statute be found unconstitutional.[146]

### C. *Postscript*

Likely knowing that its campaign finance jurisprudence was evolving from lesser to greater tolerance for governmental oversight and restrictions, the majority opinion in *Shrink Missouri* went to lengths to point out that its recent decisions could be harmonized with the seminal decision in *Buckley*.[147] The stage was set for the final determination of the *Colorado* case.

## *IV. Opinion*

The Supreme Court granted certiorari in order to review the Tenth Circuit holding that any restrictions on federal campaign expenditures by a political party, even when done in coordination with a specific political campaign, are facially unconstitutional.[148] In a majority opinion authored by Justice Souter, the Court reversed the Tenth Circuit and held that the Act's contribution limits were clearly constitutional as adequate measures to forestall corruption or undue influence of the political process.[149] As applied to coordinated expenditures, the contribution limits legitimately served to stave off further erosion of the Act.[150]

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[143] *Id.* at 424 (Thomas, J., dissenting) (quoting Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 498 (1985)).

[144] *Id.* at 424-25 (Thomas, J., dissenting).

[145] *Id.* at 425 (Thomas, J., dissenting) (emphasis in original). The Justice pointed out that the majority did not defend the law as being "closely drawn." *Id.*

[146] *Shrink Missouri*, 528 U.S. at 410, 428-30 (Thomas, J., dissenting).

[147] *Id.* at 393 ("*Colorado Republican* thus goes hand in hand with *Buckley*, not toe to toe.").

[148] Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 440 (2001).

[149] *Id.* at 465.

[150] *Id.* at 464.

A. *Justice Souter's majority opinion*

The opinion initially reiterated the *Buckley* distinction between contributing and spending, and reemphasized that limitation of the former was generally constitutional and limitation of the latter was generally unconstitutional.[151] However, the Court qualified the *Buckley* distinction in the instant case: FECA had a functional definition of "contribution," which encompassed expenditures coordinated with a political candidate.[152]

While acknowledging that both spending and contributing belong under the First Amendment free speech protection, the Court noted that limitations on political expenditures warrant more searching scrutiny than limitations on political contributions.[153] The Court explained that spending was more closely related to the associative political activity the First Amendment was intended to protect than contributing, and justified its binary treatment on those grounds.[154] Additionally, the majority noted that only "independent" expenditures, and not simply expenditures per se, were deserving of heightened protection.[155]

Justice Souter reached back to the landmark *Buckley* case to support the majority's different treatment of coordinated, as opposed to independent, expenditures.[156] According to Justice Souter, *Buckley* recognized that labeling coordinated expenditures as 'contributions' under FECA "prevents attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions."[157] After detailing the procedural history of the instant case and posing the issue for review, the Court specified the Committee's argument: that a political party's most critical speech is inherently coordinated with candidates and restrictions of it always

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[151] *Id.* at 437.

[152] *Id.* at 438.

[153] *Id.* at 440.

[154] *Colorado II*, 533 U.S. at 440.

[155] *Id.* at 441-42. "*[W]e have routinely struck down limitations on independent expenditures by candidates, other individuals, and groups*, while repeatedly upholding contribution limits." *Id.* (emphasis in original).

[156] *Id.* at 443 ("In *Buckley*, the Court acknowledged Congress's functional classification. . .treating coordinated expenditures as contributions. . .*Buckley*, in fact, enhanced the significance of this functional treatment by striking down independent expenditure limits on First Amendment grounds while upholding limitations on. . .coordinated expenditures").

[157] *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 47 (1976) (per curiam)).

deserve strict scrutiny.[158] The argument, according to the majority, was that a political party's very nature is to support candidates, and financial support of those candidates is the sine qua non of a party's existence; that coordination with candidates is entirely necessary to conduct any party's political business; and that limiting coordinated expenditures would emasculate the very core of a party's free speech.[159] In essence, as the Court saw it, the party was arguing that it and its favored candidates were inextricably intertwined to the extent that coordinated spending was necessary to conduct their joint political business.[160]

The Court read the FEC's argument as a retread of *Buckley*:[161] that coordinated expenditures are practically the same as cash for a political campaign, and that these 'disguised contributions' could easily corrupt the political process and compromise political candidates.[162] The Court discerned, though, that the FEC argument reached beyond *Buckley* and enunciated other reasons why coordinated expenditures merited limitation.[163] The majority recognized that were coordinated spending to continue unabated, individual contributors would have the perfect incentive to donate their money to various party organizations and still have their dollars directly benefit candidates to whom they had already donated the maximum.[164] The Court opined that such a result would accelerate circumvention of the Act's contribution limits that were upheld in *Buckley*.[165]

Justice Souter split the Committee's argument into two assertions: that coordination is so essential to the party-candidate dynamic that it cannot operate effectively without coordinated spending, and that it is the very nature of a party to spend money for political victory.[166] Justice

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158 *Id.* at 443-45.

159 *Id.* at 445-46.

160 *Colorado II*, 533 U.S. at 448. "[C]oordinated spending is essential to parties because 'a party and its candidate are joined at the hip.'" *Id.*

161 *Id.* at 446. "The Government's argument for treating coordinated spending like contributions goes back to *Buckley*." *Id.*

162 *Id.*

163 *Id.* at 446-47.

164 *Id.* at 446. "A party's right to make unlimited expenditures coordinated with a candidate would induce individual and other nonparty contributors to give to the party in order to finance coordinated spending for a favored candidate beyond the contribution limits binding on them." *Id.*

165 *Id.* at 447.

166 *Colorado II*, 533 U.S. at 449.

Souter proceeded to debunk both assertions.[167]

The Court observed that the first part of the Committee's argument was somewhat paradoxical: if they are insisting that they cannot effectively operate without permission for coordinated expenditures, then they have obviously been operating in flagrant violation of FECA for decades.[168] The Court reasoned that instead of systematically violating FECA, political parties have not been making coordinated expenditures to remain viable, but have instead remained more than viable (even powerful) throughout the decades of constitutional limitation of coordinated spending.[169] Thus, according to the majority, the first argument rings hollow; coordinated spending is not so essential that parties cannot operate effectively without it – in fact, they have thrived without it.[170]

Turning its attention to the second part of the Committee's argument, the Court responded that the party role cannot be adequately defined as bankroller of political causes.[171] The Court remarked that parties are themselves bankrolled by individuals and groups with their own narrow, parochial interests.[172] According to the majority, classifying parties as engines for the election of candidates oversimplifies their true status; instead, parties are liaisons between office-seekers and those who contribute in order to generate indebted officeholders.[173]

Observing that political parties are powerful organizations that marshal the financial resources of many citizens and groups, and that individuals are ordinarily subject to the contribution limits of FECA, the Court thought it would be incongruous to not also subject political parties to the same limitations.[174] The Court allowed, though, that political parties would be free to make independent expenditures, as

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167 *Id.* at 449-56.

168 *Id.* at 449.

169 *Id.* at 449-50.

170 *Id.* "[P]olitical scientists. . .observe that 'there is little evidence to suggest that coordinated party spending limits adopted by Congress have frustrated the ability of political parties to exercise their First Amendment rights to support their candidates. . .in reality, political parties are dominant players, second only to the candidates themselves, in federal elections.'" *Id.* (citing Brief for Paul Allen Beck et al. as *Amici Curiae* 5-6).

171 *Id.* at 450-51.

172 *Colorado II*, 533 U.S. at 451.

173 *Id.* at 452.

174 *Id.* at 453-54.

would all other individuals and groups.[175]

In evaluating the constitutionality of the law, the Court adopted the standard of scrutiny established in *Nixon v. Shrink Missouri Government PAC*: "whether the restriction is 'closely drawn' to match what we have recognized as the 'sufficiently important' government interest in combating political corruption."[176] The Court also isolated the remaining issue: "whether adequate evidentiary grounds exist to sustain the limit under that standard, on the theory that unlimited coordinated spending by a party raises the risk of corruption (and its appearance) through circumvention of valid contribution limits."[177]

The majority documented the history of testing the limits of FECA, and determined that "contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open."[178]

The Court held "that a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits."[179] Because the problem of circumvention of campaign finance laws is such a serious threat to the political system, Congress was well within its power in enacting the law.[180]

### B. *Justice Thomas' dissenting opinion*

Justice Thomas, joined by Justices Scalia and Kennedy and joined in part by Chief Justice Rehnquist, dissented.[181] At the very inception of the dissenting opinion, in a manner reminiscent of his dissent in *Shrink Missouri*,[182] Justice Thomas advocated the overruling of *Buckley v. Valeo*.[183] Justice Thomas based his conclusion on the supreme

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[175] *Id.* at 455.

[176] *Id.* at 456 (citing Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 387-88 (2000) (quoting Buckley v. Valeo, 424 U.S. 1, 25, 30 (1976) (per curiam)).

[177] *Id.*

[178] *Colorado II*, 533 U.S. at 457. The Court illustrated its point by describing a prevalent practice of campaign finance known as 'tallying.' "Donors give to the party with the tacit understanding that the favored candidate will benefit." *Id.* at 458.

[179] *Id.* at 465.

[180] *Id.* at 464-65.

[181] *Id.* at 465 (Thomas, J., dissenting).

[182] *See supra* note 128 and accompanying text. Specifically, Justice Thomas maintained that "*Buckley* was in error, and I would overrule it." Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 410 (2000) (Thomas, J., dissenting).

[183] *Colorado II*, 533 U.S. at 465 (Thomas, J., dissenting).

importance of 'core political speech' in First Amendment jurisprudence.[184] According to the dissent, because *Buckley* legitimized the stanching of perfectly valid political speech (in the form of cash contributions to political campaigns), it was incorrectly decided.[185]

The dissent observed that FECA fails to survive constitutional muster under the Court's strict scrutiny test.[186] However, the dissent insisted, the Court need not overrule *Buckley* nor apply strict scrutiny for the FECA provision at issue to be found unconstitutional.[187] This was so, Justice Thomas explained, because the campaign spending at issue was equivalent to an independent expenditure and therefore deserving of full First Amendment protection;[188] and because the expenditure was made by a political party and not by an individual or a political action committee, whose spending is the true target of the law's proscriptions and the Court's true concern.[189]

The dissent was persuaded by the party's argument that it and its chosen candidates were 'inextricably intertwined' such that coordinated spending was necessary for normal operations.[190] Justice Thomas believed that there was nothing extraordinary in a political party and its candidate working in conjunction during elections.[191] Placing undue restrictions on the natural dynamic between parties and candidates would unfairly burden the relationship and make it difficult for all involved to effectively communicate what Justice Thomas saw as

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[184] *Id.* at 465-66 (Thomas, J., dissenting). "Political speech is the primary object of First Amendment protection." (citing *Shrink Missouri*, 528 U.S. at 410-11 (Thomas, J., dissenting)).

[185] *Id.* at 466 (Thomas, J., dissenting).

[186] *Id.*

[187] *Id.*

[188] *Id.* at 467-68 (Thomas, J., dissenting). Justice Thomas noted:

> [e]xpenditures that largely resemble, and should be entitled to the same protection as, independent expenditures. . . . It is not just "symbolic expression," but a clear manifestation of the party's most fundamental political views. By restricting such speech, the Party Expenditure Provision undermines parties' "freedom to discuss candidates and issues," and cannot be reconciled with our campaign finance jurisprudence.

*Id.*

[189] *Colorado II*, 533 U.S. at 468 (Thomas, J., dissenting). "The source of the 'contribution' at issue is a political party, not an individual or a political committee, as in *Buckley* and *Shrink Missouri*." *Id.*

[190] *Id.* at 469 (Thomas, J., dissenting).

[191] *Id.* at 469-70 (Thomas, J., dissenting).

protected speech.[192] Indeed, the dissent posited, the law not only chilled protected speech, but also precluded parties from exercising their inherent function: communicating on behalf of political candidates.[193]

The dissent rejected the majority opinion's conclusion that political parties have adjusted and thrived in the 30 years since the FECA regime took effect.[194] In fact, Justice Thomas contended, the perseverance of political parties is irrelevant; laws are not found constitutional because people or institutions can survive them.[195] At any rate, according to the dissent, party power has diminished as of late.[196] Justice Thomas suggested that political parties have survived because they have learned how to communicate 'underground,' away from the prying FECA regime.[197]

The dissent emphasized that parties and candidates have a symbiotic relationship, with common interests, and that interfering with their common connection would only harm the party's effectiveness in broadcasting its message.[198] The dissent also underlined the lack of evidence showing that parties have succumbed to the whims of wealthy contributors.[199] According to Justice Thomas, so long as parties are not shown to be the willing foot soldiers of rich political patrons, they cannot rationally be treated the same as individuals and PACs.[200] From the dissent's view, since the record lacked any substantiated corruption, and since the law was not closely drawn to combat corruption, the campaign finance restriction did not pass constitutional scrutiny under the First Amendment.[201]

In fact, Justice Thomas insisted that the Party Expenditure Provision was never intended as an anti-corruption device; it was passed in order to rein in "wasteful and excessive campaign spending."[202] The dissent took every opportunity to emphasize the lack

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192 *Id.* at 470 (Thomas, J., dissenting).

193 *Id.* at 471 (Thomas, J., dissenting).

194 *Id.* at 472 (Thomas, J., dissenting).

195 *Colorado II*, 533 U.S. at 472 (Thomas, J., dissenting). "[W]e have never before upheld a limitation on speech simply because speakers have coped with the limitation for 30 years." *Id.*

196 *Id.* at 473 n.4 (Thomas, J., dissenting).

197 *Id.*

198 *Id.* at 473 (Thomas, J., dissenting).

199 *Id.*

200 *Id.* at 474 (Thomas, J., dissenting).

201 *Colorado II*, 533 U.S. at 474 (Thomas, J., dissenting).

202 *Id.* at 475 (Thomas, J., dissenting) (quoting Fed. Election Comm'n v. Colorado

of corruption in the record and in the political process,[203] and concluded that the 'tally system' cited by the Court "is not evidence of corruption-by-circumvention."[204] Justice Thomas maintained that the First Amendment requires a more thorough showing of corruption before political parties would be denied an activity that comes naturally to them.[205]

The dissent proceeded to undermine the Court's rationale that striking down the Party Expenditure Provision would serve to intensify current circumvention of campaign finance laws.[206] Additionally, the dissent determined that the Party Expenditure Provision was unconstitutional because there existed better tailored measures for combating corruption.[207]

## *V. Conclusion*

*FEC v. Colorado Republican Federal Campaign Committee* represents a refinement of *Buckley v. Valeo*. *Buckley* first announced that coordinated expenditures were considered contributions under the Federal Election Campaign Act.[208] But, it took 25 years for the United States Supreme Court to reinforce this ruling in *FEC v. Colorado Republican Federal Campaign Committee*. *Buckley* suggested that, at least in the political arena, money was speech, difficult to limit. Such an approach to political spending did not bode well for more comprehensive campaign finance reform legislation than FECA, which has been in desperate need of revision almost since its passage. However, *Colorado* opens the door for closer scrutiny of and tighter control on political spending, and does indeed bode well for current

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Republican Fed. Campaign Comm., 518 U.S. 604, 618 (1996) ("'Rather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections.'").

[203] *Id.* at 476-78 (Thomas, J., dissenting) (pointing out that "*Colorado I*. . .concluded that any opportunity for corruption was 'at best, attenuated.'").

[204] *Id.* at 478 (Thomas, J., dissenting).

[205] *Id.* at 479 (Thomas, J., dissenting).

[206] *Id.* ("'We have never accepted mere conjecture as adequate to carry a First Amendment burden.'") (quoting Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 392 (2000)).

[207] *Colorado II*, 533 U.S. at 481 (Thomas, J., dissenting).

[208] Buckley v. Valeo, 424 U.S. 1, 24 n.25 (1976) (per curiam). "Expenditures by persons and associations that are 'authorized or requested' by the candidate or his agents are treated as contributions under the Act." *Id.*

campaign finance reform legislation pending in Congress. The decision represents a window of opportunity for Congress. In the wake of *Colorado*, all that is necessary is the political wherewithal to finally pass meaningful campaign finance reform legislation like the McCain-Feingold bill[209] and the Shays-Meehan bill.[210] Both bills are aggressive measures that take aim at current campaign finance and outlaw soft money.[211]

The Shays-Meehan bill has recently eclipsed its Senate counterpart, the McCain-Feingold bill, in both media exposure and success in being enacted into law. Shays-Meehan bans soft money,[212] the unlimited donations to political parties that violate the spirit, if not the letter, of FECA. While fortifying FECA, Shays-Meehan also amends integral sections of the Act. The Shays-Meehan bill increases the hard money amount a person may contribute to a political candidate from $1000 to $2000.[213] Additionally, the bill increases the amount a person may give in the aggregate during any calendar year from $25,000 to $30,000.[214] The bill also proscribes campaign advertisements by groups that promote the election of defeat of any candidate within 60 days of a general election and 30 days of a primary election.[215] Shays-Meehan also provides a more rigorous reporting regime for campaign finance,[216] and supplies a narrower definition of the term "independent expenditure."[217] Presumably, the stricter definition of "independent

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209 Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. (2001).

210 Bipartisan Campaign Reform Act of 2001, H.R. 2356, 107th Cong. (2001). H.R. 2356 was signed into law on March 27, 2002 and became Public Law 107-155. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

211 S. 27 and H.R. 2356. "When you have a member of Congress picking up the phone and raising unlimited amounts of soft money, that's where the problem is. Our bill bans any member of Congress from raising soft money for anyone." Congressman Martin Meehan, referring to the Shays-Meehan bill (H.R. 2356), appearing on NBC News' *Meet The Press*, Sunday, February 10, 2002, *available at* http://www.msnbc.com/news/702555.asp.

212 Bipartisan Campaign Reform Act of 2001, H.R. 2356, 107th Cong. § 101 (2001).

213 *Id.* § 308(a)(1).

214 *Id.* § 102(b).

215 *Id.* §§ 201-202.

216 *Id.* § 103.

217 *Id.* § 211.

> The term 'independent expenditure' means an expenditure by a person
> (A) expressly advocating the election or defeat of a clearly identified candidate; and
> (B) that is not made in concert or cooperation with, at the request or suggestion of, or pursuant to any general or particular understanding with, such candidate, the candidate's authorized political committee, or their agents,

expenditure" would preclude the type of lengthy and costly litigation seen in the *Colorado* cases.

The United States House of Representatives has brought the Shays-Meehan bill to a vote twice before, in 1998 and 1999; it passed with large majorities both times and then died in the Senate before a filibuster championed by Senator Mitch McConnell (R-KY).[218] The Shays-Meehan bill was put up for a vote on the House floor again in 2002, albeit its journey there this time was slightly unorthodox. Floor debate on the bill was scheduled only after House members gathered the 218 signatures required to force the parliamentary move.[219]

Testament to the degree to which current events shape political change, members of Congress responsible for moving the Shays-Meehan bill to the House floor for a vote noted that "their quest to ban the unlimited contributions to the political parties known as soft money had been revived by the collapse of the energy trading giant, Enron."[220] Whether the collapse of Enron has served as a catalyst for action on the Shays-Meehan bill is purely speculative. And whether the demise of the corporate giant will ultimately serve to change the way political campaigns are run in America is, again, anyone's guess. Whether personal embarrassment over the corporate scandal motivated President George W. Bush to sign the Shays-Meehan bill when it arrived at his desk is another mystery.[221] Nevertheless, it is undeniable (and heartening) that legislative events unfolded as fast as can be expected on campaign finance reform at a time when national attention was focused overseas.

The reaction of House leaders to the possibility of campaign finance reform being enacted into law reveals the comprehensive, far-reaching effect such enactment would have on American politics. Speaker of the House of Representatives Dennis Hastert (R-IL) allegedly stated to House Republican colleagues that "they 'might lose

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or a political party committee or its agents.

*Id.*

218 Alison Mitchell, *House Vote Is Set On Campaign Bill*, N.Y. TIMES, January 15, 2002, at A18.

219 *Id.* at A1. "Twenty of the 218 were Republicans who defied their leaders." *Id.*

220 *Id.*

221 Congressman Meehan has maintained that "the President recognizes the same thing that the American people recognize, and that is. . .we have to end this system, and the Shays-Meehan bill does that, and it's long overdue." NBC News' *Meet The Press*, Sunday, February 10, 2002, *available at* http://www.msnbc.com/news/702555.asp.

the House' if the bill passes" and that "'we might not be here' if it becomes law."[222] The congressional daily *Roll Call* reported that Speaker Hastert went so far as to liken the upcoming vote on the Shays-Meehan bill to "'Armageddon,' and said the outcome was critical for Republicans. 'You guys need to realize this is a life-or-death issue for our party.'"[223] Desiring to see Speaker Hastert's worst dreams come true, Congressman Meehan (D-MA) said of his legislative strategy: "We have to shore up the majority that passed this bill twice already."[224] Handicapping his bill's chances, Congressman Meehan stated that, "I think we're going to win in the end because the public is behind us."[225] Likewise, Congressman Shays (R-CN), the bill's co-sponsor, was equally optimistic: "I'd rather be us than them. We should win it. I think our cause is just."[226]

As battle lines hardened and House members braced for the imminent debate and vote, "supporters of the bill weighed changes, Republican critics worked on proposals to complicate passage,"[227] and the contours of campaign finance in the twenty-first century hung in the balance.

Despite efforts to frustrate passage from the highest reaches of government,[228] the Shays-Meehan bill passed on February 15, 2002 by a comfortable margin of 240-189.[229] In anticipation of the bill's passage, both major political parties spent weeks in a furious drive to amass as

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[222] *Republicans Worry Over Campaign Finance Bill*, February 7, 2002, *available at* http://www.cnn.com/2002/ALLPOLITICS/02/07/hastert.campaign.finance.ap/index.html. *See also* Richard L. Berke and Alison Mitchell, *White House Is Backing Foes Of Finance Bill*, N.Y. TIMES, February 12, 2002, at A18 ("J. Dennis Hastert. . .told his party's House members last week in a closed-door meeting that the end of soft money could cause Republicans to lose control of the House.").

[223] NBC News' *Meet The Press*, Sunday, February 10, 2002, *available at* http://www.msnbc.com/news/702555.asp.

[224] *Republicans Worry*, *supra* note 222.

[225] *Meet The Press*, *supra* note 211.

[226] Berke and Mitchell, *supra* note 222, at A18.

[227] *Republicans Worry*, *supra* note 222.

[228] Berke and Mitchell, *supra* note 222, at A1 ("With White House consent, the Republican National Committee is lobbying to defeat the Shays-Meehan bill. . .a Bush adviser said, 'At the R.N.C., they're like drug addicts. The party thinks it would be a great idea to kick the habit, but not right now.'").

[229] Ted Barrett and Dana Bash, *Campaign Finance Battle Moves To Senate*, February 15, 2002, *available at* http://www.cnn.com/2002/ALLPOLITICS/02/14/campaign.finance/index.html. "In the House, 41 Republicans joined all but 12 Democrats to support the bill." *Id.*

much soft money as possible before a law proscribed the practice.[230]

The critical question whether Shays-Meehan would die in another Republican-led filibuster in the Senate was quickly answered in the upper house of Congress. The last time the legislation came before the Senate, it passed with 59 votes, one vote less than the 60 required for cloture.[231] However, on March 20, 2002, the Senate voted 68-32 in favor of ending debate on the bill and thereby giving campaign finance reform supporters enough votes to end any filibuster.[232] And, indeed, Senate Majority Leader Tom Daschle (D-SD) was prepared for any parliamentary maneuvers to derail the legislation.[233] Senator Daschle preempted opponents of the bill by bringing it immediately to the Senate floor for a vote and avoiding the addition of poison-pill amendments in a conference committee.[234]

At the end of the legislative day, Senator Daschle's parliamentary procedure, arguments[235] and votes carried the bill to passage. The Senate passed the bill on March 20, 2002 by a 60-40 vote, "putting the political system at the cusp of the broadest change in a generation."[236] The focus shifted to the White House.

Once the campaign finance reform legislation passed both houses,

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230 Alison Mitchell, *Fearing Limits on Soft Money, Parties Fill Coffers*, N.Y. TIMES, February 11, 2002, at A1 ("Republicans and Democrats alike have been raising money so aggressively that they are breaking records. . .Fear of change is. . .spurring the fund-raising to new heights. . .So the parties have been in a helter-skelter drive to raise soft money in case such fund-raising is suddenly ended.").

231 Barrett and Bash, *supra* note 229.

232 Alison Mitchell, *Campaign Finance Bill Wins Final Approval In Congress And Bush Says He'll Sign It*, N.Y. TIMES, March 21, 2002, at A34 ("Even some opponents of the bill believed it was time to move on and voted to shut off debate.").

233 Barrett and Bash, *supra* note 229. At a post-House vote news conference, Senator Daschle stated:

> We know that there are still some in the Senate who think that they may have a chance to keep this bill from becoming law. . .We say to them, 'Look what happened in the House. Opponents in the House used every conceivable argument and excuse, every imaginable ploy. They failed and so will you.' If it looks like we're going to face a filibuster, we're going to find the time and find the way to break that filibuster in the United States Senate.

*Id.*

234 Mitchell, *supra* note 232, at A34 ("the fact that the Democrats controlled the Senate became pivotal.").

235 *Id.* ("In a reference to Enron, he said, 'Is it good enough that half the government has to recuse itself from an investigation of a failed company because it spread so much money to so many people? Is it good enough that in every election the amount of money spent goes up and the number of people voting goes down?'").

236 *Id.* at A1.

it would have been political suicide for President Bush to veto the bill.[237] In the 2000 election, then-Governor Bush amassed more money than any other presidential candidate in American history.[238] A veto would be seen as selfishly perpetuating a corrupt system for personal political gain. By the same token, signing any campaign finance reform bill into law would give a long-sought and much-deserved victory to the President's most formidable political combatant from the 2000 campaign: Senator John McCain. President Bush was thus caught in his own political Catch-22. Nevertheless, the President would salvage an opportunity to gain political points from the legislative battle, despite his ardent opposition to the bill.[239]

With remarkable lack of formal ceremony, President Bush signed the campaign finance reform bill into law on March 27, 2002.[240] He promptly embarked on an aggressive multi-state fundraising tour.[241] In case his lukewarm support for the legislation had been lost on anyone,[242] the President made sure to publicize his criticism of its shortcomings.[243]

The endgame of this difficult, protracted battle will occur in the courts. Senator Mitch McConnell, the Senate's arch-nemesis of

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[237] Lois Redisch, *Grassroots Redux?*, February 27, 2002, *available at* http://www.politicsnj.com/redisch022702.htm. "[I]t will be. . .an arrogant President who would consider a veto of the Campaign Finance Reform bill. . .President Bush will not veto the bill. He knows he can't." *Id.*

[238] During his campaign for the Presidency in 2000, Bush collected a total of $94,466,341. No other Presidential aspirant, in the 2000 election or otherwise, had ever collected more than $50 million. Statistics *available at* http://www.fec.gov/finance/precm8.htm.

[239] Op-Ed, *An Extraordinary Victory*, N.Y. TIMES, March 21, 2002, at A36 (The "irony [is] that Mr. Bush is likely to enjoy some credit for making it law, even after encouraging his Republican allies to oppose it."). *See also* Richard L. Berke, *The $2000 Answer*, N.Y. TIMES, March 21, 2002 at 34 (explaining that "[t]hough Democrats pressed most energetically for the legislation, its biggest immediate beneficiary will be President Bush" because the Pioneers, his main financial backers, could now raise money twice as quickly by collecting $2000 checks from individuals instead of the previously allowed $1000).

[240] Elisabeth Bumiller & Philip Shenon, *President Signs Bill On Campaign Gifts; Begins Money Tour*, N.Y. TIMES, March 28, 2002, at A1.

[241] *Id.*

[242] *Id.* at A1, A22 ("The quiet, no-cameras signing, with the fund-raising tour as a follow-up, underscored how little enthusiasm the president has for the legislation. . .The absence of a signing ceremony also meant no White House photo opportunity for Mr. McCain. . .The campaign finance bill's four major House and Senate sponsors were informed of the president's signature on it only after the fact. . .").

[243] *Id.* President Bush "issued a statement critical of major provisions. . .[b]ut he signed it, he said, because 'it does represent progress in this often-contentious area of public policy debate.'" *Id.*

campaign finance reform, filed suit challenging the law's constitutionality within hours of the President's signature.[244] Senator McConnell promised such litigation even before the bill was signed into law,[245] and insisted he was bringing the suit "to defend the First Amendment right of all Americans to be able to fully participate in the political process."[246]

The expedited court review provided by the law[247] begs the question: when (not if) the constitutionality of the law is called into question, what would be the reaction of the United States Supreme Court? Undoubtedly, the judiciary will play an instrumental role in the future of campaign finance reform.[248] How will the highest court in the land rule? The opposing sides in the recent *Nixon v. Shrink Missouri* case are instructive. Both concurring and dissenting opinions in that case unmistakably invited legislative initiatives like the Shays-Meehan bill.

Justice Breyer, concurring in *Shrink Missouri*, stated that, "After all, *Buckley*'s holding seems to leave the political branches broad authority to enact laws regulating contributions that take the form of 'soft money.'"[249] Justice Kennedy, dissenting in *Shrink Missouri*, echoed a similar refrain:

> For now. . .I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties

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244 David E. Rosenbaum, *Foes Of New Campaign Law Bring Two Suits Against It*, N.Y. TIMES, March 28, 2002, at A22.

245 Mitchell, *supra* note 232, at A1 ("Today is not the end," said Senator Mitch McConnell. . ."There is litigation ahead. . .I am consoled by the obvious fact that the courts do not defer to Congress on matters of the Constitution.").

246 Rosenbaum, *supra* note 244, at A22.

247 Bipartisan Campaign Reform Act of 2001, H.R. 2356, 107th Cong. § 403 (2001). The law provides for cases challenging it to be heard before a three-judge panel in Washington, D.C., with direct appeal to the U.S. Supreme Court. *Id.* § 403 (a)(1), (3).

248 *See generally*, Christopher J. Ayers, *Survey of Developments in North Carolina Law and the Fourth Circuit, 2000: Perry v. Bartlett: A Preliminary Test for Campaign Finance Reform*, 79 N.C. L. REV. 1788, 1791 (2001) ("the recurrent Bipartisan Campaign Finance Reform Act of 2001. . .may eventually win approval in Congress only to be defeated in the courts"); Ryan Cheshire, Case Comment, *Nixon v. Shrink Missouri Government PAC*, 77 N. DAK. L. REV. 309, 343 (2001) ("the issue of campaign finance reform will likely continue to be a battle in the judiciary. . .As campaign finance reform continues to be an important societal and legislative concern, a great deal of judicial examination is likely to continue.").

249 Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 404 (2000) (Breyer, J., concurring).

> rather than on fundraising. . .[T]here are serious constitutional questions to be confronted in enacting any such scheme, but I would not foreclose it at the outset. I would overrule *Buckley* and then free Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it is possible to do so.[250]

In sum, both sides in *Shrink Missouri* agree that the path is open for campaign finance reform of some type. Congress was wise to take advantage of the opportunity.

To be sure, the time is ripe for Congress and the courts to agree on a major overhaul of our campaign finance laws.[251] "It has never been more critical for the American people to have confidence in the motives behind the federal government's every action. The terror attacks and their aftermath have actually made it more important than ever that the Shays-Meehan bill become law."[252] Indeed, if we want to fulfill the promise of full political participation that our democratic Republic rests upon, it is incumbent on us to change campaign finance as we know it, and level the playing field for all Americans.[253] This is a necessary step in order to make Senator Mark Hanna's adage[254] as anachronistic as his era.

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[250] *Id.* at 409-10 (Kennedy, J., dissenting).

[251] *See generally*, Ayers, *supra* note 248, at 1794 ("The current political climate could give rise to new and compelling arguments which will convince the Supreme Court. . .to allow more meaningful campaign finance regulation.").

[252] Op-Ed, *A Return to Fund-Raising as Usual*, N.Y. TIMES, Oct. 16, 2001, at A22.

[253] Ayers, *supra* note 248, at 1799-1800. Ayers noted:

> In order to realize the ideals of a democratic system, all participants must be assured an equal voice. Political equality serves as the foundation of our democratic system. The necessity of providing equal opportunity to communicate ideas among the public should allow the regulation of political speech to ensure this end. Campaign contribution limits on all sources would ensure that no one person or group could 'speak' with a louder voice simply because he or she is wealthy. It would ensure that the capability to exercise one's First Amendment right to political speech is not a function of wealth. Wealthier individuals and organizations would no longer have an inherent advantage by being able to purchase the right to be heard. Limiting all expenditures and contributions by issue-oriented organizations promoting or opposing candidates will promote equity by leveling the playing field among participants in the political process.

*Id.*

[254] *See supra* note 1 ("There are two things that are important in politics. The first is money and I can't remember what the second is.").