

**NIXON V. SHRINK MISSOURI GOVERNMENT PAC: CAMPAIGN CONTRIBUTIONS,  
SYMBOLIC SPEECH AND THE APPEARANCE OF CORRUPTION**

I. INTRODUCTION

*Nixon v. Shrink Missouri Government PAC (Shrink III)*<sup>1</sup> is the most important case involving campaign finance reform since the Supreme Court decided *Buckley v. Valeo*.<sup>2</sup> The Court has addressed various campaign finance issues<sup>3</sup> subsequent to *Buckley*, but it has not addressed the constitutionality of limits on individual campaign contributions to a candidate.<sup>4</sup>

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<sup>1</sup>119 S. Ct. 901 (1999), *certifying questions to Shrink Missouri Government PAC v. Adams (Shrink II)*, 161 F.3d 519 (8th Cir. 1998).

<sup>2</sup>*Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Supreme Court addressed the issue of limits on campaign contributions in the context of the Federal Election Contributions Act (Act). *Buckley*, 424 U.S. at 14-30. The Act provided that no "person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed \$ 1,000." *Id.* at 189, *quoting* 18 U.S.C. § 608(b)(1) (1970 ed., Supp IV). A "person" is defined as "an individual, partnership, committee, association, corporation, or any other organization or group of persons." *Id.* at 187, *quoting* 18 U.S.C. § 591(g) (1970 ed., Supp IV).

<sup>3</sup>These issues include: expenditures by corporations and political committees: Federal Election Comm'n. v. National Conservative PAC (NCPAC), 470 U.S. 480 (1985) (invalidating certain expenditure limits by political action committees (hereinafter PACs) when a presidential candidate accepts public financing); contribution and expenditure limitations involving ballot measures, *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (invalidating expenditure restrictions on a corporation that intended to influence ballot initiatives); *Citizens Against Rent Control / Coalition for Fair Housing v. City of Berkeley, Cal. (Citizens Against Rent Control)*, 454 U.S. 290 (1981) (invalidating contribution limits to committees formed to support or oppose ballot initiatives); contributions to multicandidate PACs, *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (upholding \$5,000 contribution limit to multicandidate political committees).

<sup>4</sup>Numerous commentators disagree with effectiveness or propriety of limits on campaign contributions. Bradley A. Smith, *The Sirens' Song: Campaign Finance Regulations and the First Amendment*, 6 J.L. & POL'Y 1 (1997) (stating that political liberties will be sacrificed by another unsuccessful attempt to prevent corruption and promote equality in campaign financing); Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213 (1989) (concluding that the only way to ensure equality in campaign financing is to increase, or "level-up" spending because leveling-down benefits the wealthy at the expense of the working classes); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893 (1998) (stating that opponents of campaign finance reform promote equality by recognizing that voters use different decisional criteria when choosing a candidate, and increased speech as the result of increased spending is necessary to

The *Buckley* Court held that contributions limits are permissible,<sup>5</sup> but it was ambiguous about the appropriate standard of review.<sup>6</sup> As a result, courts employ varying standards and levels of proof to determine if a contribution limit is unconstitutionally low.<sup>7</sup> The Eighth Circuit is unique because it has reviewed more cases challenging contribution limits than any other circuit.<sup>8</sup> Some commentators believe that the Circuit's standard of review is so strict that campaign finance reform employing limits on campaign contributions is nearly impossible in the Eighth Circuit.<sup>9</sup>

The purpose of this note is two-fold. First, it reviews pertinent cases and sets forth the appropriate standard of review for contribution limits.<sup>10</sup> Second, it delineates the test that enables government to customize contribution limits to the characteristics of its voting districts without violating the First Amendment.<sup>11</sup> Part II provides a brief history of campaign finance reform, emphasizing limits on campaign contributions.<sup>12</sup> Part III examines the history of campaign contribution limits in Missouri and the Eighth Circuit's role.<sup>13</sup> Part IV concludes that contribution limits are entitled to a heightened

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facilitate these decisions).

<sup>5</sup>"Congress was surely entitled to conclude that . . . contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption." *Buckley*, 424 U.S. at 28.

<sup>6</sup>The Court fails to define the appropriate scope of review concerning contribution limits. Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance*, 73 CAL. L. REV. 1045, 1050 (1985).

<sup>7</sup>See *infra* notes 38-39 and accompanying text.

<sup>8</sup>For a history of campaign finance reform cases in the Eighth Circuit and a summary of contribution caps in the United States, see William J. Connolly, Note, *How Low Can You Go? State Campaign Contribution Limits and the First Amendment*, 76 B.U.L. REV. 483 (1996).

<sup>9</sup>See Matthew S. Criscimagna, Note, *The Narrow Application of Buckley v. Valeo: Is Campaign Finance Reform Possible in the Eighth Circuit?*, 64 MO. L. REV. 437 (1999).

<sup>10</sup>The appropriate standard of review is a heightened intermediate level of review. See *infra* notes 65-95 and accompanying text.

<sup>11</sup>*Nixon v. Shrink Government PAC (Shrink III)* addresses the singular issue of contribution limits and does not address other reform techniques such as limits on non-resident contributions, restrictions on intra-candidate contributions, or defined fundraising seasons. \_\_\_ U.S. \_\_\_, 119 S. Ct. 901 (1999). See *infra* note 19 (discussing other reform techniques).

<sup>12</sup>See *infra* notes 17-39 and accompanying text.

<sup>13</sup>See *infra* notes 40-64 and accompanying text.

intermediate standard of review.<sup>14</sup> The court should defer to a reasonable legislative determination that the electorate perceives corruption due to large campaign contributions<sup>15</sup> and address two questions to determine if contribution limits are unconstitutionally low: first, whether the limitation impairs a candidate's ability to amass the resources necessary for an effective campaign; and second, whether the percentage of contributors affected by the limits is within a reasonable range.<sup>16</sup>

## II. BACKGROUND

The cost of political campaigns began to increase in the early nineteenth century.<sup>17</sup> In response to the growing reliance on campaign contributions, state and federal governments have attempted to regulate campaign financing to eliminate the corruptive influences of large campaign

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<sup>14</sup>See *infra* notes 65-101 and accompanying text.

<sup>15</sup>See *infra* notes 102-121 and accompanying text.

<sup>16</sup>See *infra* notes 122-133 and accompanying text.

<sup>17</sup>Smith, *supra* note 4, at 9-11. Professor Smith attributes this to a number of factors. Inflation is one factor. *Id.* at 12. One dollar in 1900 is worth twenty dollars today. *Id.* In addition, the cost of essential items of campaigning such as paper, postage and advertising have increased more than the rate of inflation. *Id.* at 13. A second factor is the growth in the size of the electorate. *Id.* at 13-14. This is attributable to a number of events:

States gradually dropped religious and property qualifications for voting. The Fifteenth Amendment to the Constitution eliminated formal bans on voting based explicitly on race. The Nineteenth Amendment enfranchised women and the Twenty-Sixth Amendment gave eighteen year-olds the right to vote. Statutory changes have also expanded the franchise. Especially notable is the Voting Rights Act of 1965, a stunning success in eliminating legal barriers to black voter registration in the South. The Supreme Court also expanded the electorate, through a series of decisions striking down 'grandfather clauses,' whites-only primary elections, bans on voting by citizens in the military, poll taxes and unduly long residency requirements.

*Id.* (citations omitted). A third reason for the increase in the cost of elections is the "gradual democratization of campaign methods." *Id.* at 15. Political campaigns shifted away from communicating through partisan newspapers and circulars to a style of campaigning that brought the candidate in contact with the electorate. *Id.* Also important are the cost of complying with campaign regulations and the increase in available funds for campaigns. *Id.* at 16-17. Finally, the growth of government is the most important factor of all. *Id.* at 18. As Government has more power to "bestow benefits on the populace, or to regulate human endeavors," groups and individuals have more incentive to influence those who wield this power. *Id.* at 17.

donations and to equalize the voices of the electorate.<sup>18</sup> Since the early 1800s, the government has taken various approaches to “reform”,<sup>19</sup> but the most popular,<sup>20</sup> and the most controversial, are limitations on the amount one can spend on a campaign and the amount of money one can contribute to a candidate or political committee.

A. *Buckley v. Valeo*<sup>21</sup>

In 1974, Congress amended the Federal Election Campaigns Act of 1971 (FECA), in part, by limiting political contributions<sup>22</sup> and expenditures<sup>23</sup> by

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<sup>18</sup>The first campaign finance laws addressed the corruptive influence of corporate contributions. *Id.* at 20-21. Between 1907 and the present, Congress has amended federal election laws eleven times. *Id.* at 20-24. The Watergate scandals of 1972-74 prompted Congress to pass the 1974 Federal Election Campaigns Act (FECA) Amendments, which were the subject of *Buckley v. Valeo*. *Id.* at 24-25. In *Buckley*, the Court held that the goal of equalizing the electorate’s voice is an illegitimate state interest in the context of campaign expenditure limits. *Buckley*, 424 U.S. at 48-49 (emphasis added). “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .” *Id.*

<sup>19</sup>Other approaches to reform include: disclosure requirements, *Buckley*, 424 U.S. at 60-85; public financing schemes, *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir. 1997), *cert. denied*, 522 U.S. 860 (1997); limitations on non-resident contributions, *Vanatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 870 (1999); *Whitmore v. FEC*, 68 F.3d 1212 (9th Cir. 1995), *cert. denied*, 517 U.S. 1155 (1996); defined fundraising seasons, *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998), *cert. denied*, 119 S.Ct. 1112 (1999); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), *petition for cert. filed* (May 18, 1999); *Emison v. Catalano*, 951 F. Supp. 714 (E.D. Tenn. 1996); restrictions on intra-candidate transfers, *Service Employees Intern. Union, AFL-CIO, CLC v. Fair Political Practice Comm’n*, 955 F.2d 1312 (9th Cir. 1992), *cert. denied* 505 U.S. 1230 (1992); *Shrink Mo. Gov’t PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996); *Suster v. Marshall*, 951 F. Supp. 693 (N.D. Ohio 1996), *aff’d and remanded*, 149 F.3d 523 (6th Cir. 1998), *cert. denied*, 119 S.Ct. 890 (1999).

<sup>20</sup>Contribution limits are popular because it is one of the few accessible tools available in the current political climate. See *infra* note 37.

<sup>21</sup>424 U.S. 1 (1976).

<sup>22</sup>The relevant provisions addressing contribution limits were: 18 USCS § 608(b)(1) (limiting to \$1,000 political contributions by an individual, organization or group to any single candidate); 18 USCS § 608(b)(2) (limiting contributions by a political committee to any single candidate to \$5,000); 18 USCS § 608(b)(3) (limiting total annual contributions by any contributor to \$25,000); *Buckley*, 424 U.S. at 13 & nn.12-15.

<sup>23</sup>The relevant provisions addressing expenditure limitations were 18 USCS § 608(e)(1)

individuals, political committees and candidates in federal elections. Soon thereafter the Court questioned whether contribution and expenditure limitations violated the First Amendment rights of freedom of speech or association,<sup>24</sup> by drawing a parallel between spending money and political speech:

[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their expression, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.<sup>25</sup>

The Court then distinguished independent expenditures<sup>26</sup> and campaign contributions by focusing on the quantity of political speech affected by the limitations.<sup>27</sup> Under a "rigorous"<sup>28</sup> standard of review, the Court held that limits

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(limiting to \$1,000 total annual expenditures advocating election or defeat of a clearly identified candidate); 18 USCS § 608(a)(1) (limiting expenditures by a candidate for a calendar year); 18 USCS § 608(c) (limiting overall expenditures by a candidate). *Id.*<sup>24</sup>Contribution limits implicate freedom of association because there is value in "persons sharing common views banding together to achieve a common end." *Citizens Against Rent Control*, 454 U.S. at 294. "[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Id.* "[T]he freedom of association is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective'." *Id.* at 296, quoting *Buckley*, 424 U.S. at 65-66.

<sup>25</sup>*Buckley*, 424 U.S. at 19. Professor Balkin argues that "money as speech" is an example of the ideological shift occurring with free speech. J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (1990). "Freedom of speech has typically ensured that one could affect change in society by the expression of a viewpoint even though the viewpoint is unpopular." *Id.* at 383. In contrast today, business interests and conservative groups are using freedom of speech as a way to preserve the status quo. *Id.* at 384. "What was sauce for the liberal goose increasingly has become sauce for the more conservative gander." *Id.*

<sup>26</sup>An expenditure is independent if it is done without "prearrangement and coordination" with the candidate. *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 615 (1996).

<sup>27</sup>*Buckley*, 424 U.S. at 18-19. Justice White disagreed with this position. *Id.* at 259 (White, J., concurring in part and dissenting in part). He stated that the Act does not restrict speech, but only regulated "giving and spending money." *Id.* This has First Amendment significance because "money may be used to defray the expenses of speaking or otherwise communicating about the merits or demerits of federal

on independent expenditures are unconstitutional because they impose “substantial rather than merely theoretical”<sup>29</sup> restraints on speech, and therefore, directly infringe political speech and political association.<sup>30</sup> Conversely, the Court established the constitutionality of contribution limits, finding that campaign contributions are symbolic speech<sup>31</sup> and that contributors have other ways to exercise their First Amendment freedoms.<sup>32</sup> Finally, the government’s interest in preventing corruption and<sup>33</sup> the appearance of corruption<sup>34</sup> is a “sufficiently important interest”<sup>35</sup> to allow restrictions, and contribution limits are a narrowly tailored method to serve this interest.<sup>36</sup>

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candidates for election.” *Id.* Justice White believed that both contribution and expenditure limits are constitutional. *Id.* at 261-66. The distinction between contributions and expenditures has also drawn ire from Justice Thomas. See *Colorado Republican*, 518 U.S. at 635-37. However, in contrast to Justice White, Justice Thomas believes that limits on contributions and expenditures are an unconstitutional infringement on First Amendment rights. *Id.*

<sup>28</sup>*Buckley*, 424 U.S. at 29.

<sup>29</sup>*Id.* at 19.

<sup>30</sup>*Id.* In contrast, Professor Neuborne notes that the money equals speech relationship may hold true at lower levels of spending, but it does not hold true at extremely high expenditure levels. Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 796 (1998). At this level, “speech is merely repetitive” and is “better viewed as exercises of power, not speech.” *Id.*

<sup>31</sup>The speech is symbolic because it is a general expression of support for a candidate and the expression does not change significantly with the size of the contribution. *Buckley*, 424 U.S. at 19. *But see infra* note 72.

<sup>32</sup>*Buckley*, 424 U.S. at 20-22. A contributor could exercise First Amendment speech rights by discussing candidates and issues. *Id.* at 21. Further, a contributor is free to become a member of a political association or “assist personally in the association’s efforts on behalf of candidates.” *Id.* at 22. See also *infra* note 73.

<sup>33</sup>Arguably, the issue in *Shrink III* could turn on whether the legitimate harm is “corruption *and* the appearance of corruption,” or “corruption *or* the appearance of corruption.” See *infra* notes 114-15. This note assumes that preventing the appearance of corruption is a legitimate state interest without proof of actual corruption.

<sup>34</sup>Preventing corruption and the appearance of corruption were the only governmental interests the Court approved of in *Buckley*. *Buckley*, 424 U.S. at 26.

<sup>35</sup>*Id.* at 25.

<sup>36</sup>*Id.* at 28-29. This is because contribution limitations focus precisely on the problem of large campaign contributions --the narrow aspect of political association where the actuality and potential for corruption have been identified -- while leaving persons free to engage in independent political expression, to associate actively through

*B. Governmental and Judicial Response to Buckley.*

States and municipalities imposed a wide range of restrictions on contributions and expenditures in response to *Buckley*, and the courts responded in equally diverse ways when the restrictions were challenged.<sup>37</sup>

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their volunteering services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.

*Id.* at 28.

<sup>37</sup>Contribution limits that approach the absolute dollar limit in *Buckley* are usually upheld. *Kentucky Right to Life*, 108 F.3d at 648 (upholding \$1,000 per election year); *Florida Right to Life, Inc. v. Mortham*, No. 98-770-CIV-ORL-19A, 1998 U.S. Dist. LEXIS 16694, at \*24-25 (M.D. Fla. Sept. 29, 1998) (upholding \$500 per election); *Driver v. Distefano*, 914 F. Supp. 797 (D.R.I. 1996) (upholding \$1,000 per calendar year).

However, courts strike down a wide range of limits. See *California ProLife Council PAC v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998) *aff'd* 164 F.3d 1189 (9th Cir. 1999) (striking down limits of \$500 per election if candidate does not agree to expenditure caps); *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995) (striking down limits of \$100 for privately-financed candidates per election); *National Black Police Ass'n v. District of Columbia Bd. of Elections and Ethics*, 924 F. Supp. 270, 275-81 (D.D.C. 1996), *vacated as moot* 108 F.3d 346 (D.C.Cir. 1997) (mooted by passage of legislation increasing contribution limits) (striking down per election cycle limits for city officials of: \$50 for ward office or political party posts, \$100 for District-wide office), *Vannatta v. Keisling*, 931 P.2d 770 (OR. 1997) (striking down limits of \$500 to candidate of statewide office and \$100 to candidate running for state senator or representative).

The Eighth Circuit has struck down every limit it has reviewed. *Shrink Missouri Government PAC v. Adams (Shrink II)*, 161 F.3d 519 (8th Cir. 1998), *cert. granted*, *Nixon v. Shrink Missouri Government PAC*, 119 S. Ct. 901 (1999) (striking down limits tied to race and population in district: \$275 for state representative or population under 100,000, \$525 for state senator or population over 100,000, \$1,075 for governor, lieutenant governor, secretary of state, state treasurer, state auditor, attorney general or population over 250,000); *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998), *cert. denied*, 119 S.Ct. 510 (1998), *and cert. denied*, 119 S.Ct. 1040 (1999) (striking down limits of \$300 for office of governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, and commissioner of state lands; \$100 for all other state public offices); *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied* 518 U.S. 1033 (1996) (striking down per election cycle limits tied to number of residents in district: \$100 if under 100,000, \$200 if over 100,000 and other than statewide election, \$300 if statewide election); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995) (striking down \$100 limit to political committee or political fund). See also *Arkansas Right to Life State PAC v. Butler*, 29 F. Supp. 2d 540 (W.D. Ark. 1998), *cert. denied* 119 S. Ct. 1041 (1999) (striking down

Although courts employ *Buckley's* "rigorous" standard of review, they interpret "rigorous" to require extremes ranging from complete deference to governmental findings,<sup>38</sup> to requiring actual proof of corruption.<sup>39</sup>

### III. STATEMENT OF THE CASE

#### A. *History of Limitations on Campaign Contributions in Missouri.*

In the spring of 1994, the Missouri General Assembly passed Senate Bill 650 which limited campaign contributions to \$250, \$500, or \$1,000, per election.<sup>40</sup> In November, 1994, the Missouri electorate approved Proposition A, which supplanted Senate Bill 650 by lowering contribution limits to \$100, \$200, or \$300, and applied the limits to each election cycle.<sup>41</sup> The Eighth Circuit invalidated Proposition A in *Carver v. Nixon*<sup>42</sup> because the State did not submit

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limits of \$500 to independent expenditure committees).

<sup>38</sup>For example, in *Kentucky Right to Life*, the Sixth Circuit did not require proof of corruption or the appearance of corruption, it merely restated the legislative purpose of the act: "to combat actual and perceived corruption in Kentucky politics." *Kentucky Right to Life*, 108 F.3d at 640. The court then considered the next step of the analysis: whether the limits are narrowly drawn to meet these legitimate interests. *Id.* at 648.

<sup>39</sup>The Eighth Circuit falls in the latter category and interprets "rigorous" to mean strict scrutiny. See *infra* note 59. See also *Vannatta v. Keisling*, 931 P.2d at 785-86 (employing strict scrutiny and requiring proof of harm).

<sup>40</sup>*Carver*, 72 F.3d at 635. The exact limit depended on the type of race or the population in the district for which the candidate was running: \$250 for state representative or population under 100,000; \$500 for state senator or population over 100,000; \$1,000 for governor, lieutenant governor, secretary of state, state treasurer, state auditor, attorney general or population over 250,000. *Id.* at 635. The limit applied to primary and general elections separately. *Shrink Missouri Government PAC v. Adams (Shrink I)*, 5 F. Supp. 2d 734 (E.D. Mo. 1988), *rev'd Shrink Missouri Government PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998), *cert. granted*, *Nixon v. Shrink Missouri Government PAC*, 119 S. Ct. 901 (1999), *citing* Mo. Ann. Stat. § 130.011 (West Supp. 1998). Thus, the contributor could contribute double the limitation per election cycle by making a contribution in both the primary and general elections. *Carver*, 72 F.3d at 635. The limits were to become effective January 1, 1995. *Id.* at 634.

<sup>41</sup>*Carver*, 72 F.3d at 634 n.1. Proposition A permitted per candidate contributions of \$100 in districts with fewer than 100,000 residents; \$200 in districts of 100,000 or more residents, other than statewide office; and \$300 for statewide candidates. *Id.* These limits were very low, because an election cycle includes both the primary and general elections and a per election limit is essentially half of the stated limits. *Id.* at 635 n.3.

<sup>42</sup>72 F.3d 633 (8th Cir. 1995).

evidence to justify why the specific limits were selected, nor why the limits were narrowly tailored to combat the corruption or appearance of corruption associated with large contributions.<sup>43</sup> The *Carver* court enjoined the implementation of Proposition A,<sup>44</sup> and the limits in Senate Bill 650 replaced Proposition A's limits.<sup>45</sup>

*B. Shrink Missouri Government PAC v. Adams (Shrink I):*<sup>46</sup>

The contribution limits under challenge in *Shrink I* were \$275, \$525 or \$1075, per election.<sup>47</sup> The district court upheld the limits using an analysis similar to the one that the Eighth Circuit employed in *Carver v. Nixon*.<sup>48</sup> First, the court determined that the State provided sufficient evidence of the appearance of corruption as the result of large campaign contributions.<sup>49</sup> Next, the court analyzed whether the limits were unconstitutionally low. It noted that Senate Bill 650's limits were not different in kind<sup>50</sup> from the limits approved in *Buckley*,<sup>51</sup> even though they were worth only \$378, \$184.80, and \$96.70 after

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<sup>43</sup>*Id.* at 641-43.

<sup>44</sup>*Id.* at 645. See also *infra* note 41.

<sup>45</sup>*Shrink I*, 5 F. Supp. 2d at 737.

<sup>46</sup>5 F. Supp. 2d 734 (E.D. Mo. 1988).

<sup>47</sup>Mo. Ann. Stat. § 130.032 (West Supp. 1998). These reflect Senate Bill 650's requirement that the state make biannual adjustments for the effects of inflation. Mo. Ann. Stat. § 130.032.2.

<sup>48</sup>*Shrink I*, 5 F. Supp. 2d at 742.

<sup>49</sup>*Id.* at 737-39. "The Court does not believe that polling the citizenry is required . . . , members of the legislature are uniquely qualified to gauge whether allowing [large] contributions to go unchecked endangers our democratic system of government, and, if so, to prescribe an appropriate remedy therefore." *Id.* at 738. "Even for one unschooled in politics, no great deductive leap is required to reach a conclusion that the contribution of substantial sums to a candidate for political office gives rise to a perception among the public that the contributor is trying to curry favor with the recipient." *Id.* at 739. The circumstances surrounding the enactment of the limits and common sense were sufficient proof of a perception of corruption. *Id.* at 738-39 nn.6-7. The trial court gave a detailed account of newspaper articles, emphasizing that Proposition A and Senate Bill 650 were enacted based on the public's perception that the current system was corrupt, or at least that it appeared corrupt. *Id.* at 737-39 nn.6-7.

<sup>50</sup>*Shrink I*, 5 F. Supp. 2d at 740. A contribution limit is different in kind from the limits in *Buckley* if the consequence of the restriction is more than "a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20.

<sup>51</sup>The court reasoned that "despite Missouri's contribution limits, candidates for state

adjusting for inflation to reflect their value in 1976 dollars.<sup>52</sup> The court concluded that Senate Bill 650's limits were narrowly tailored to meet the legitimate state goal of preventing corruption and the appearance of corruption.<sup>53</sup>

C. *Shrink Missouri Government PAC v. Adams (Shrink II)*<sup>54</sup>

The Eighth Circuit disagreed with the district court's analysis and reversed the ruling<sup>55</sup> by rejecting Missouri's argument that the limits are subject to intermediate scrutiny, not strict scrutiny.<sup>56</sup> Relying on its own rulings<sup>57</sup> and language from *Citizens Against Rent Control / Coalition for Fair Housing v. City of Berkeley, Cal.*,<sup>58</sup> the court concluded that a "rigorous standard of review" is strict scrutiny.<sup>59</sup> The court focused on one issue after defining the appropriate

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elected office are still quite able to raise funds sufficient to run effective campaigns." *Shrink I*, 5 F.Supp 2d at 740-41. The court also noted that the statute required an adjustment for inflation and that technological advances such as the fax machine, e-mail and the Internet may also help offset the effects of inflation. *Id.* at 742. In addition, the court compared the percentage of contributors affected by the limits with the percentage affected in *Buckley*. *Id.* at 741. Senate Bill 650 limits would have affected only 1.5% to 2.38% of the contributions in a recent election, and this was below the 5.1% affected in *Buckley*. *Id.* at 741. Finally, the court concluded that the median income of a Missouri household was \$31,046 and that the head of this household "would certainly consider 'large' a political contribution in excess of \$1,075." *Id.* at 742. This is important because *Buckley* stated that the only interest to justify limitations is the "real or imagined coercive influence of *large* financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25 (emphasis added).

<sup>52</sup>These figures reflect an adjustment using the Consumer Price Index. *Shrink I*, 5 F. Supp. at 740 n.9.

<sup>53</sup>*Id.* at 742.

<sup>54</sup>161 F.3d 519 (8th Cir. 1998), *cert. granted*, *Nixon v. Shrink Missouri Government PAC*, 119 S. Ct. 901 (1999).

<sup>55</sup>*Shrink II*, 161 F.3d at 523.

<sup>56</sup>*Id.* at 521.

<sup>57</sup>*Id.* at 521, *citing Carver*, 72 F.3d at 637, *Russell*, 146 F.3d at 567.

<sup>58</sup>454 U.S. 290 (1981). Quoting the "[r]egulation of First Amendment rights is always subject to exacting judicial review." *Shrink II*, 161 F.3d at 521, *quoting Citizens Against Rent Control*, 454 U.S. at 294.

<sup>59</sup>The court stated that "the Supreme Court 'articulated and applied a strict scrutiny standard of review' to the federal contribution limits . . . and 'has not ruled that anything other than strict scrutiny applies in cases involving contribution limits.'" *Shrink II*, 161 F.3d at 521, *quoting Carver*, 72 F.3d at 637, *citing Citizens Against Rent Control*, 454 U.S. at 294.

standard of review: whether the state provided evidence of corruption or the perception of corruption. Quoting,

[w]hen the Government defends a regulation on speech . . . it must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited harms are real, . . . and that the regulation will in fact alleviate these harms in a direct and material way [.]<sup>60</sup>

the court discounted the State's evidence as "conclusory and self-serving,"<sup>61</sup> holding that strict scrutiny requires objective proof of perceived corruption in Missouri's political process.<sup>62</sup> Not only had the state failed to show a compelling interest that would be served by the restrictions, the restrictions were not narrowly tailored.<sup>63</sup> It reversed the lower court and held that the

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<sup>60</sup>*Shrink II*, 161 F.3d at 522 n.3, quoting *U.S. v. National Treasury Employees Union (NTEU)*, 513 U.S. 454, 475 (1995) (internal quotations omitted). This passage is the court's primary support for its contention that the Government must submit proof of actual corruption or the perception of corruption. See also *Carver*, 72 F.3d at 638. The court also relies on other Eighth Circuit rulings that demanded proof of actual harm. *Shrink II*, 161 F.3d at 521-22, citing *Day*, 34 F.3d at 1365; *Russell*, 146 F.3d at 568-69; *Carver*, 72 F.3d at 638.

<sup>61</sup>*Shrink II*, 161 F.3d at 522. As proof of the appearance of corruption, the State submitted an affidavit of Senator Wayne Goode, who co-chaired the Interim Joint Committee on Campaign Finance Reform, when Senate Bill 650 was enacted. *Id.* at 522. "The senator did not state that corruption then existed in the system, only that he and his colleagues believed there was the 'real potential to buy votes' if the limits were not enacted, and that contributions greater than the limits 'have the appearance of buying votes.'" *Id.* at 522, quoting affidavit of Senator Wayne Goode at p.9. *Contra*, *Shrink I*, supra note 49.

The court characterized the State's position as assuming "that corruption and the perception thereof are inherent in political campaigns where large contributions are made, and that it is unnecessary for the State to demonstrate that these are actual problems in Missouri's electoral system." *Shrink II*, 161 F.3d at 521. The court cites *NTEU*, 513 U.S. 454 (1995), to support its demand for "some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." *Id.* at 521, citing *Russell*, 146 F.3d at 568. Professor La Pierre argues that although the Eighth Circuit's requirement of proof of real harm is more rigorous than *Buckley's*, it comports with more recent Supreme Court cases, such as *NTEU*. D. Bruce La Pierre, *Raising a New First Amendment Hurdle for Campaign Finance "Reform,"* 76 WASH. U. L.Q. 217 (1998).

<sup>62</sup>See *Shrink II*, 161 F.3d at 522.

<sup>63</sup>*Id.* After adjusting for inflation, the court stated that the "limits appear likely to 'have a severe impact on political dialogue' by preventing many candidates for public office 'from amassing the resources necessary for effective advocacy.'" *Id.* at 523, quoting

contribution limits violate a contributor's First Amendment rights.<sup>64</sup>

#### IV. ANALYSIS

##### A. *Standard of Review*

The Supreme Court applies a "rigorous" standard of review<sup>65</sup> to both contribution and independent expenditure limits in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>66</sup> However, regardless of the actual label given to the test, the Court applies a heightened intermediate level of review<sup>67</sup> to contribution limits and strict scrutiny<sup>68</sup> to independent expenditure limits. The most important issue that determines the appropriate level of scrutiny is

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*Buckley*, 424 U.S. at 21. Ironically, the court appeared to endorse Senate Bill 650's limits in *Carver v. Nixon*. *Carver*, 72 F.3d at 642-43. The court compared Proposition A with Senate Bill 650 to highlight why Proposition A limits were not narrowly tailored. *Id.*

In considering whether Proposition A limits are narrowly tailored, we must also recognize that the limits were not adopted in a vacuum. The question is not simply that of some limits or none at all, but rather Proposition A as compared to those in Senate Bill 650 . . . . The Proposition A limits are only ten to twenty percent of the higher limits in Senate Bill 650. . . . The record is barren of any evidence of a harm or disease that needed to be addressed between the limits of Senate Bill 650 and those enacted in Proposition A.

*Id.*

<sup>64</sup>*Shrink II*, 161 F.3d at 523.

<sup>65</sup>For a review of various approaches to the issue of constitutionality, see *supra* notes 37-39.

<sup>66</sup>*Buckley*, 424 U.S. at 14, quoting *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>67</sup>"Even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25, quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963) (internal quotation marks omitted); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975).

<sup>68</sup>Strict scrutiny requires a compelling interest and the governmental restriction must be necessary to address the compelling need. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 53 (1987). The Court uses strict scrutiny when analyzing direct infringements on First Amendment rights for political advocacy. See *infra* note 81.

whether the limitation directly infringes First Amendment rights.<sup>69</sup>

### 1. Freedom of Speech and Freedom of Association<sup>70</sup>

Both a contributor's and a candidate's free speech rights are affected by limits on campaign contributions. Individuals who make a campaign contribution are expressing support for a candidate and the candidate's views. However, campaign contributions are merely a "general expression of support" for a candidate and "[t]he expression rests solely on the undifferentiated, symbolic act of contributing."<sup>71</sup> At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.<sup>72</sup> The Court believes that narrowly drawn contribution limits are not a direct infringement on political dialogue because contributors can engage in political dialogue of their own, and they have other ways to express support for a candidate.<sup>73</sup>

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<sup>69</sup>This is because the Court applies strict scrutiny at the point at where a campaign restriction imposes a substantial restraint on freedom of speech and freedom of association. See *infra* note 77.

<sup>70</sup>*Buckley*, 424 U.S. at 19. Although not specifically mentioned in the Constitution, "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 460 (1958). The Constitution protects freedom of association "where the association's goal or purpose is one that the first amendment independently protects such as political advocacy, litigation to advance social goals, or religious worship." Ann H. Jameson, Note, *Roberts v. United States Jaycees: Discriminatory Membership Policy of a National Organization held not Protected by First Amendment Freedom of Association*, 34 CATH. U. L. REV. 1055, 1065-66 (1985).

<sup>71</sup>*Buckley*, 424 U.S. at 21. Limitations on independent expenditures directly infringe upon political dialogue, while narrowly tailored contribution limits affect the content-neutral aspect of speech, and are therefore a marginal interference with associational freedoms. *Id.* at 19-39.

<sup>72</sup>*Id.* at 21. It is arguable, however, that for some contributors a higher contribution level expresses more support than a lower contribution level. *Id.* The Court stated that the contributor's financial ability and past history of contributions are factors that may assess the intensity of the support, but it did not integrate these factors in its analysis of whether the *Buckley* limits were narrowly tailored. *Id.* at 21 n.22. The fact that the Court recognized these factors underscores the importance of ensuring that the restriction is narrowly drawn.

<sup>73</sup>*Id.* at 28-29. "[C]ontribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and

Contribution limits may also affect a candidate's free speech rights. Pooling contributions may be the only way for candidates lacking personal wealth to engage in political dialogue.<sup>74</sup> Narrowly drawn contribution limits do not dramatically affect campaign funding because a candidate can raise funds from a greater number of contributors, or encourage contributors to engage in direct political expression.<sup>75</sup> However, limits on campaign contributions directly impair political dialogue if a candidate or political committee is unable to "amass the resources necessary for effective advocacy."<sup>76</sup>

A contribution limit is unconstitutional at the point it directly interferes with political speech or association. A contributor must be able to express support for a candidate, and the candidate must be able to engage in political advocacy. A narrowly drawn contribution limit does not regulate political communication but only regulates the content-neutral speech<sup>77</sup> that lies beyond the political communication.<sup>78</sup> However, because of the difficulty in determining the precise level of regulation that may or may not affect political speech,<sup>79</sup> a heightened level of intermediate scrutiny is required.<sup>80</sup>

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campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." *Id.* at 29. This is because "persons [are] free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Id.* at 28. *See also supra* note 30.

<sup>74</sup>*Buckley*, 424 U.S. at 21.

<sup>75</sup>*Id.* at 22.

<sup>76</sup>*Id.* at 21. Supporting its argument that the FECA limits did not directly affect political dialogue, the Court notes that only 5.1% of the money raised for candidates in the 1974 Congressional race was obtained in amounts that exceeded the Act's \$1,000 limitations. *Id.* at 21 n.23. In addition, "two major-party senatorial candidates . . . operated large-scale campaigns on contributions raised under a voluntarily imposed \$100 contribution limitation." *Id.* at 21 n.23.

<sup>77</sup>A narrowly drawn contribution limit is content-neutral because it does not affect the contributor's expression of support for a candidate. Symbolic speech inherent in campaign contributions is not proportional to the size of the contribution. *Buckley*, 424 U.S. at 19. Consequently, because different levels of contributions do not necessarily involve different levels of speech, a narrowly drawn limitation only affects the content-neutral aspect of the speech.

<sup>78</sup>*See supra* note 73.

<sup>79</sup>*See supra* note 72.

<sup>80</sup>*See Stone*, *supra* note 68. There are at least seven standards of review for content-neutral speech that represent three distinct standards: deferential, intermediate, and

## 2. *Buckley's* Plain Language

Support for intermediate scrutiny is also found in the plain language of *Buckley*. Under strict scrutiny, the Court demands “a compelling rather than substantial interest and that the challenged restriction is ‘necessary’ to achieve that interest.”<sup>81</sup> In discussing contribution limits, however, the Court characterizes the governmental goal of limiting corruption or the appearance of corruption as a “constitutionally sufficient justification”<sup>82</sup> and a “weighty interest,”<sup>83</sup> but not a compelling interest.<sup>84</sup> The Court also deferred to Congressional judgment that a contribution limit is the appropriate method to combat corruption or the appearance of corruption<sup>85</sup> and did not require proof

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strict review. *Id.* at 50. In *Buckley*, the Court rejected the deferential standard which treats contribution limits as conduct, not political speech. *Buckley*, 424 U.S. at 16, *citing* *United States v. O'Brien*, 391 U.S. 367 (1968). *Contra, supra* note 27.

<sup>81</sup>Stone, *supra* note 68 at 53, *citing* *Minneapolis Star & Tribune v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 582-83 (1983); *Brown v. Socialist Workers ‘74 Campaign Comm.*, (1982) 459 U.S. 87, 92; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982); *NAACP v. Button*, 371 U.S. 415, 438-39. (1963) *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), further illustrates why expenditure limits are subject to strict scrutiny.

*Buckley* “stands for the proposition that speaker-based laws demand strict scrutiny when they reflect the Government’s preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say). . . . *Because the expenditure limit in Buckley was designed to ensure that the political speech of the wealthy not drown out the speech of others, we found that it was concerned with the communicative impact of the regulated speech. . . .* Indeed, were the expenditure limitation unrelated to the content of expression, there would have been no perceived need for Congress to ‘equalize the relative ability’ of interested individuals to influence elections.”

*Turner Broadcasting*, 512 U.S. at 658, *quoting Buckley*, 424 U.S. at 48 (emphasis added) (internal citations omitted).

<sup>82</sup>*Buckley*, 424 U.S. at 26.

<sup>83</sup>*Id.* at 29.

<sup>84</sup>In contrast, the Court characterized preventing corruption or the appearance of corruption as a compelling interest in cases that challenged the constitutionality of expenditure limits. *NCPAC*, 470 U.S. at 496-97 (stating that these interests are “the only legitimate and compelling government interests thus far identified”); *Colorado Republican*, 518 U.S. at 609 (stating that the Court has weighed First Amendment interests against compelling governmental interests).

<sup>85</sup>*Buckley*, 424 U.S. at 27-28. The Court stated that “Congress was surely entitled to conclude that . . . contribution ceilings were a necessary legislative concomitant to

that the limits were necessary to meet this goal.<sup>86</sup> Consequently, the Court applied a heightened level of intermediate scrutiny to the speech analysis as pertaining to contribution limits.<sup>87</sup>

Limitations affect the contributor's freedom of association<sup>88</sup> more so than freedom of speech.<sup>89</sup> Freedom of association plays a very important role in political advocacy because pooling campaign contributions may be the only way for contributors to deliver a political message.<sup>90</sup> However, contribution limits merely restrict, not prohibit, this aspect of associational freedom.<sup>91</sup> As with freedom of speech, contributors are left with a variety of ways to exercise

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deal with the reality or appearance of corruption," and that bribery and disclosure laws are only partial solutions. *Id.* at 28.

<sup>86</sup>For the requirements of strict scrutiny, see *supra* note 68.

<sup>87</sup>Stone, *supra* note 68. Contribution "restrictions are constitutional if they serve 'sufficiently strong, subordinating' interests by means of 'narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.'" *Id.* at 49-50. (Internal citations omitted). In *Turner Broadcasting*, the Court noted that under intermediate scrutiny, a court should consider whether "'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests" do not exist in order to prevent suppressing more speech than necessary. *Turner Broadcasting*, 512 U.S. at 668, *quoting* *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989).

<sup>88</sup>See *supra* note 24.

<sup>89</sup>"[T]he primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributors's *freedom of political association*." *Buckley*, 424 U.S. at 24-25 (emphasis added). The political expression inherent with campaign contributions is valued by our society, and restricting that expression impairs associational freedoms. *Id.* at 15. "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Id.*, *quoting* *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

<sup>90</sup>If a message that depends on associational freedoms is suppressed, the only message heard will be from the speaker with independent funds. See *Citizens Against Rent Control*, 454 U.S. at 299. In *Citizens Against Rent Control*, a Berkeley, California ordinance placed a limitation of \$250 on contributions to committees formed to support or oppose ballot measures, but it did not limit the amount of money an individual could spend for the same activity. *Id.* at 292. The Court held that singling out and restricting those who pool their money was a restraint of their associational freedoms. *Id.* at 300.

<sup>91</sup>Contribution limits affect only one narrow aspect of associational freedoms: the ability of "like-minded persons to pool their resources in furtherance of common political goals." *Buckley*, 424 U.S. at 22.

their associational freedoms.<sup>92</sup> The Court held in *Buckley* that a restriction becomes unconstitutional when it is no longer “closely drawn to avoid unnecessary abridgment of associational freedoms.”<sup>93</sup> This is not strict scrutiny.<sup>94</sup>

### 3. The Eighth Circuit’s Analysis

The Eighth Circuit applies strict scrutiny to all campaign restrictions but it does not address whether a contribution restriction directly infringes First Amendment rights.<sup>95</sup> To circumvent this question, it mischaracterizes Supreme Court analysis by stating that The Court expressed support for intermediate scrutiny in dicta only.<sup>96</sup> In reality, the Court repeatedly questions whether a particular restriction directly limits the expression of political views, and when it does the Court strikes down the restriction under a strict analysis.<sup>97</sup> The converse is true when the restriction does not directly infringe

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<sup>92</sup>See *supra* note 73.

<sup>93</sup>*Buckley*, 424 U.S. at 25.

<sup>94</sup>Arguably, this may be strict scrutiny for associational freedoms, but it requires the same level of proof as intermediate scrutiny in the speech analysis. The *Buckley* Court purported to apply strict scrutiny when it reviewed the Act’s disclosure requirement and its affect on associational freedoms. *Buckley*, 424 U.S. at 64-66. It stated that “[t]he strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights.” *Id.* at 66. However, immediately following that statement, the Court only required a “sufficiently important” governmental interest and a reasonable conclusion by Congress that full disclosure will “prevent the corrupt use of money to affect elections.” *Id.* at 66-67. If strict scrutiny was applied, the Government would be required to show that the restriction was necessary to serve a compelling interest.

<sup>95</sup>Ironically, the Eighth Circuit recognizes that there is a constitutional distinction between restrictions on independent expenditures and contributions. *Carver*, 72 F.3d at 637. However, it does not acknowledge the distinction between the levels of scrutiny. Because the Supreme Court has not specifically held that intermediate scrutiny applies to contribution limits, the Eighth Circuit applies strict scrutiny to contribution limitations. *Id.* at 637-38.

<sup>96</sup>*Carver*, 72 F.3d at 637, citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986); *California Medical Ass’n*, 453 U.S. at 196 (Marshall, J., plurality); *Citizens Against Rent Control*, 454 U.S. at 301 (Marshall, J., concurring in judgment).

<sup>97</sup>*California Medical Ass’n*, 453 U.S. at 194-95 (stating that the contribution limits in *Buckley* “did not directly infringe on the ability of contributors to express their own political views”); *Colorado Republican*, 518 U.S. at 614-16 (1996) (stating that a fundamental constitutional difference exists between independent expenditures and contributions, and that contribution limitations only impose a marginal restriction on

speech. For example, in *California Medical Ass'n v. FEC*,<sup>98</sup> the appellants, California Medical Association (CMA), argued that the Federal Election Campaign Act's<sup>99</sup> \$5000 multicandidate political committee contribution limit was the same as an unconstitutional expenditure limitation because it restricted their ability to engage in political speech through PAC expenditures.<sup>100</sup> The Court rejected this proposition, stating that

the 'speech by proxy' that CMA seeks to achieve through its contributions . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection . . . . Our decision in *Buckley* precludes any argument to the contrary. . . . [T]he First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization . . . .<sup>101</sup>

*B. Deference to a Governmental Determination of Corruption or the Appearance of Corruption*

The Supreme Court has consistently relied on the prevention of

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speech), *citing NCPAC*, 470 U.S. at 497. In *Bellotti*, the Court struck down a state statute that forbid certain independent expenditures by business corporations aimed at influencing ballot initiatives. *Bellotti*, 435 U.S. at 767-68. "Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, the State may prevail only upon showing a subordinating interest which is compelling . . . ." *Id.* at 786 (internal citations omitted).

<sup>98</sup>453 U.S. 182 (1981).

<sup>99</sup>The FECA provides in pertinent part that "no person shall make contributions . . . to any other political committee in any calendar year which, in the aggregate, exceed \$5,000." *Id.* at 185 n.2, *quoting* 2 USC § 441a(a)(1)(C). "A 'multicandidate political committee' is defined as a 'political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and . . . has made contributions to 5 or more candidates for Federal Office.'" *Id.* at 185 n.1, *quoting* 2 USC § 441a (a)(4).

<sup>100</sup>*Id.* at 195. CMA filed a declaratory judgment action challenging the constitutionality of the contribution limitation in response to a Federal Election Commission enforcement action. *Id.* at 186. The FEC believed that CMA contributed more than \$5,000 to a political committee that it formed, the California Medical Political Action Committee (CALPAC). *Id.*

<sup>101</sup>*Id.* at 196-97 In *Buckley*, the Court found that independent expenditures are entitled to full First Amendment protection because restrictions "impose direct and substantial restraints on the quantity of political speech." *Buckley*, 424 U.S. at 39. "[T]he governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the Act's] ceiling on independent expenditures." *Id.* at 45.

corruption or the appearance of corruption to determine if the government has sufficiently justified a limit on political contributions or independent expenditures.<sup>102</sup> In *FEC v. National Conservative Political Action Committee (NCPAC)*,<sup>103</sup> Chief Justice Rehnquist defined corruption as “a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors.”<sup>104</sup> In *NCPAC*, the Court legitimized the governmental interest of preventing both actual quid pro quo corruption, but also the prospect of elected officials being influenced by financial gain or infusions of money.<sup>105</sup>

Even though states consistently rely on corruption or the appearance of corruption to argue the constitutionality of a particular reform measure,<sup>106</sup> inconsistencies arise when courts analyze whether the State has proven that it

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<sup>102</sup>*NCPAC*, 470 U.S. at 496-97; *Citizens Against Rent Control*, 454 U.S. at 296-97; *Bellotti*, 435 U.S. at 788-89.

<sup>103</sup>470 U.S. 480 (1985).

<sup>104</sup>*Id.* at 497. This is a broader concern than given in *Buckley*, where the Court was concerned only with “the extent that large contributions are given to secure political quid pro quo . . . .” *Buckley*, 424 U.S. at 26.

<sup>105</sup>Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENTARY 127 (1997). Arguably, the Court expanded the concept of corruption again in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). *Austin* upheld restrictions on campaign expenditures by a corporation in order to protect election campaigns from the distorting effects of wealth. Neuborne, *supra* note 30, at 808. Protecting the election campaign is a broader purpose than focusing on the improper influences large contributions may have on an elected official. *See id.*

<sup>106</sup>Commentators and courts hold tight to the notion that preventing corruption or the appearance of corruption is the *only* legitimate governmental interest to justify restrictions on campaign contributions. *See, e.g., supra* note 4. However, in *NCPAC*, the Court held that these are the “only legitimate and compelling governmental interests *thus far identified* . . . .” *NCPAC*, 470 U.S. at 496-97 (emphasis added). In *Buckley*, the Court did not invalidate the interest of equalizing “the relative ability of all citizens to affect the outcome of elections” as it pertains to contribution limits. *Buckley*, 424 U.S. at 26. It merely avoided the issue by holding that the corruption rationale was a sufficient justification to impose contribution limits. *Id.*

When discussing independent expenditure limits, however, the Court stated that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” *Id.* at 48-49. This distinction is explained by the fact that independent expenditure limits are a direct restraint on political expression and contribution limits are not. *See supra* note 81.

has been harmed by large contributors. Some courts, including the Eighth Circuit, require the State to provide objective proof of harm.<sup>107</sup> Other courts defer to the government's determination that the harm exists.<sup>108</sup>

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<sup>107</sup>In the Eighth Circuit, if the state claims that limitations are necessary to remedy perceived corruption, it must prove that the perception is reasonable and derived from the magnitude of the contributions. See *Shrink II*, 161 F.3d at 519 (syllabus). In *Russell*, the court held that if the state claims a limit is necessary to prevent actual corruption, it must provide demonstrable evidence that a state representative's position on a bill changed due to an intervening contribution, or evidence of voting in a relevant fashion in response to a contribution. *Russell*, 146 F.3d at 569-70. The court stated that concealing the source of a contribution is also reasonable proof of corruption. *Id.* at 570. See also *National Black Police Ass'n*, 924 F.Supp at 281-81.

The Eighth Circuit's analysis is similar to the district court's in *Democratic Party of the United States v. National Conservative Political Action Committee*, where it rejected evidence of the appearance of corruption. *Democratic Party of the United States v. National Conservative Political Action Committee (NCPAC I)*, 578 F. Supp. 797, 824-830 (E.D. Pa. 1983) aff'd in part, rev'd in part, *FEC v. NCPAC*, 470 U.S. 480 (1985). In *NCPAC I*, the district court held that "evidence of high-level appointments in the Reagan administration of persons connected with the PACs, [] newspaper articles and polls purportedly showing a public perception of corruption . . . [and] [a] tendency to demonstrate distrust of PACs" was not sufficient evidence of corruption or the appearance of corruption. *NCPAC*, 470 U.S. at 499. "[A]n exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more." *Id.* at 498. Although *NCPAC I* rejected proof that is similar to the proof accepted in *Shrink I*, an important distinction between the cases is the manner in which the restrictions infringe First Amendment rights. *NCPAC* imposed limitations on a presidential candidate's independent expenditures when accepting public financing for their general election campaign. *Id.* at 482, citing 26 USC § 9012(f). However, these limitations result in a direct infringement on speech and the Court employed strict scrutiny. *Id.* at 496-97. In contrast, *Shrink III* addresses contribution limits, in which narrowly drawn limits demand intermediate scrutiny, not strict scrutiny. See *supra* note 87.

In contrast to the Eighth Circuit, the Middle District of Florida held in *Florida Right to Life* that although the evidence did not specifically involve large contributions in exchange for political favors, evidence pointing to a willingness to exchange favors for money is a legitimate basis of concern over large contributions. *Florida Right to Life*, 1998 U.S. Dist. LEXIS 16694, at \*21 n.12. Some courts do not engage in the analysis at all. See *Kentucky Right to Life*, 108 F.3d 637 (1997).

<sup>108</sup>Some courts first analyze whether a particular contribution limitation is different in kind from *Buckley* limitations. See, e.g., *Kentucky Right to Life*, 108 F.3d at 648. The Sixth Circuit makes an absolute comparison but does not explain why a \$1,000 per election year limit in 1997 is not different in kind from *Buckley's* \$1,000 per election limit in 1976. *Id.* See also *Florida Right to Life*, 1998 U.S. Dist. LEXIS 16694, at \*25 (making an absolute dollar comparison with *Buckley*).

If the government relies solely on preventing corruption to justify contribution limitations it should provide objective proof of corruption. Even under an intermediate level of scrutiny, “[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’”<sup>109</sup> Speculation about harm is not a sufficient justification to restrain First Amendment rights.<sup>110</sup> If government claims that large campaign contributions result in corruption, the government should provide proof of corruption. Deference to a legislative finding of corruption is unnecessary because quid pro quo corruption<sup>111</sup> is essentially bribery,<sup>112</sup> and this can be proven in a court of law. A more difficult problem involves what proof will satisfy a showing of the appearance<sup>113</sup> of corruption as the result of a large contribution.

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<sup>109</sup>*Turner Broadcasting*, 512 U.S. at 664, quoting *Quincy Cable TV Inc. v. FCC*, 768 F.2d 1434, 1455 (CA-10 1985). See also *Colorado Republican*, 518 U.S. at 618; *NTEU*, 513 U.S. at 475; *Shrink II*, 161 F.3d at 522 n.3.

<sup>110</sup>Even “a ‘reasonable’ burden on expression requires a justification far stronger than mere speculation about serious harms.” *NTEU*, 513 U.S. at 475, quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) (“Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women . . . . To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced.”). In discussing contribution limits, the *Buckley* Court noted that there were “deeply disturbing examples” of corruption in the 1972 election, proving that the governmental justification of preventing corruption was not based on mere speculation of corruption. *Buckley*, 424 U.S. at 27.

<sup>111</sup>Quid pro quo corruption occurs when elected officials are “influenced to act contrary to their obligations of office.” *NCPAC*, 470 U.S. at 497.

<sup>112</sup>Bribery is defined as “the giving, offering, or taking of bribes.” WEBSTER’S NEW WORLD DICTIONARY 66 (2d college ed. 1974). Bribes are “anything given or promised to induce a person to do something against his wishes.” *Id.* It is reasonable to assume that elected officials wish to meet their obligations of office, but there are many interpretations of what is an obligation of office.

Professor Strauss argues that bribery of elected officials is not the most important concern with campaign contributions because elected officials do not enrich themselves by the receipt of contributions. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1372 (1994). The candidate uses contributions to obtain votes through a campaign, but this is no different than the ordinary practice of taking a position on an issue to obtain votes. *Id.* at 1373. One could argue, however, that personal enrichment is not narrowly limited to immediate monetary gain. Undoubtedly, elected officials are enriched by notoriety, power and career opportunities as a direct result of winning a campaign and serving in office.

<sup>113</sup>Appearance is defined as “the look or outward aspect of a person or thing . . . , the way things seem to be.” WEBSTER’S NEW WORLD DICTIONARY 66 (2d college ed. 1974).

Perceived corruption could require actual corruption, arguing that without actual corruption, the appearance of corruption is unreasonable.<sup>114</sup> This argument fails because the *Buckley* Court addressed the appearance of corruption as a separate matter and only required “public awareness of the *opportunities* for abuse inherent in a regime of large individual financial contributions.”<sup>115</sup> Therefore, the Government should prove that the public is aware of the opportunity for abuse by elected officials and that the abuse comes from large contributions. Unfortunately, this is not as simple as charging an elected official with accepting bribes and relying on a jury to render a verdict.<sup>116</sup> The focus is on the broader belief of the electorate, not on the conduct of one or several elected officials. As a result, courts should give deference to a reasonable legislative determination regarding the appearance of corruption as perceived by the electorate.<sup>117</sup>

In *Shrink I* the district court found that the electorate perceived corruption of elected officials as the result of large contributions.<sup>118</sup> In *Shrink*

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<sup>114</sup>The Eighth Circuit would probably reject empirical evidence of perceived corruption by the electorate if not accompanied by proof of actual corruption. See *supra* note 61.

<sup>115</sup>*Buckley*, 424 U.S. at 27 (emphasis added). Concern about the public’s awareness of “improper influence ‘is [] critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’” *Id.*, quoting United States Civil Service Comm’n v. National Ass’n of Letter Carriers, 413 U.S. 548, 565 (1973).

<sup>116</sup>Which would be the case for quid pro quo corruption. See *supra* notes 111-12.

<sup>117</sup>This position is supported by the Court in *Turner Broadcasting*, where it noted that “[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.” *Turner Broadcasting*, 512 U.S. at 665. For intermediate scrutiny, the government only has to show “reasonable inferences based on substantial evidence.” *Id.* at 666.

<sup>118</sup>First, the district court cited an affidavit by Senator Wayne Goode who co-chaired the Interim Joint Committee on Campaign Finance Reform.

In that affidavit, the Senator stated that the Committee ‘heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence.’ He further testified to his belief that contributions in excess of the limits set by Missouri [in Senate Bill 650] ‘have the appearance of buying votes as well as the real potential to buy votes.’

*Shrink I*, 5 F. Supp. 2d at 738. The district court cited numerous newspaper stories and editorials leading up to the adoption of Senate Bill 650 and Proposition A, concluding that the public’s perception of corruption comported with the Senator’s affidavit. *Id.* at 738-39 nn.6-7. The court also noted that seventy-four percent of voters

*II*, the Eighth Circuit focused on proof of actual corruption and granted no deference to the legislature's determination of perceived corruption.<sup>119</sup> However, intermediate scrutiny requires that "courts must accord substantial deference to the predictive judgments" of the government.<sup>120</sup> This includes a reasonable legislative determination that there is an appearance of corruption as the result of large contributions. Once the government reasonably ascertains that it is necessary to remedy the appearance of corruption, the court should question whether the limits are narrowly drawn.<sup>121</sup>

### C. Narrowly Drawn Contribution Limits

When a court finds that the government has stated a legitimate interest or put forth sufficient proof of harm, it employs one of several tests to determine if a contribution limit is unconstitutionally low. Some courts make absolute dollar comparisons with *Buckley*, claiming that a \$1,000 contribution limit is not "different in kind" from *Buckley's* \$1,000 limit.<sup>122</sup> Other courts make inflationary adjustments to the challenged limits and then compare them with *Buckley*.<sup>123</sup> Courts may also evaluate the percentage of contributors affected

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supported Proposition A, further proof that the public shared the Senator's views. *Id.* at 739 n7.

<sup>119</sup>The Eighth Circuit simply focused on Senator Goode's affidavit and dismissed the evidence of perceived corruption. *Shrink II*, 161 F.3d at 522. The "senator pointed to no evidence that 'large' campaign contributions were being made in the days before limits were in place, much less that they resulted in real corruption or the perception thereof." *Id.*, citing *Buckley*, 424 U.S. at 28. "The senator did not state that corruption then existed in the system, only that he and his colleagues believed there was the 'real potential to buy votes' if the limits were not enacted, and that contributions greater than the limits 'have the appearance of buying votes.'" *Id.*

In contrast, the district court noted that "members of the legislature are uniquely qualified to gauge whether allowing those contributions to go unchecked endangers our democratic system of government, and, if so, to prescribe an appropriate remedy therefor." *Shrink I*, 5 F. Supp. 2d at 738.

<sup>120</sup>*Turner Broadcasting*, 512 U.S. at 665.

<sup>121</sup>*Buckley* "stressed that the judiciary should not take out a scalpel to probe dollar limitations because 'distinctions in degree become significant only when they can be said to amount to differences in kind.'" *Kentucky Right to Life*, 108 F.3d at 64 quoting *Buckley*, 424 U.S. at 30 (upholding \$1,000 contribution limit because it was not different in kind from *Buckley*).

<sup>122</sup>See *Kentucky Right to Life*, 108 F.3d at 648; *Florida Right to Life*, 1998 U.S. Dist LEXIS 16694, at \*25.

<sup>123</sup>The Eighth Circuit employs this standard. See text accompanying *supra* notes 46-53. In dissent, Judge Gibson strongly disagrees with this analysis. *Shrink II*, 161

by the limits,<sup>124</sup> and whether the contribution limits prevent a candidate from mounting an effective campaign.<sup>125</sup>

When determining if a contribution limit unconstitutionally infringes a contributor or candidate's First Amendment rights<sup>126</sup> the Court considers whether the restriction directly impairs an essential function of the First Amendment, which is to enable all members of society to participate in democratic decision-making.<sup>127</sup> The point at which a contribution limit directly

F.3d at 525 (Gibson, J., dissent).

[E]ven if it were proper to adjust *Buckley* for inflation, [this analysis] lacks a principled yardstick to assess the constitutionality of any contribution limit. Its measure of what 'differs in kind' and what 'differs in degree' from the *Buckley* limits is standardless and lacks any explanation to support its bald conclusion that the limits at issue are 'overtly restrictive as a matter of law.'

*Id.*

<sup>124</sup>In *National Black Police Ass'n*, the court held that the contribution limits were unconstitutional because 17% to 84% of individual contributions were higher than the imposed limits, and as a result, candidates had to resort to less effective methods of disseminating their message. *National Black Police Ass'n*, 924 F. Supp. at 275-81.

<sup>125</sup>[C]ontribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. See also *California ProLife*, 989 F.Supp. at 1297 (holding that \$500 per election makes it impossible for an ordinary candidate to mount an effective campaign); *Fireman v. United States*, 20 F. Supp. 2d 229 (D. Mass. 1998). Citing *Buckley*, the *Fireman* court stated that it must consider how the contribution limitation affects the financing of political campaigns, and "such assessment should occur in a evidentiary context of actual figures on costs, contributions, and expenditures in order fully to assess the impact" of the contribution limit. *Fireman*, 20 F.Supp. 2d at 236, citing *Buckley*, 424 U.S. at 21-22.

<sup>126</sup>See *supra* note 97 and accompanying text.

<sup>127</sup>Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 882-84 (1963). Professor Emerson identifies reasons why the First Amendment freedoms of speech and association serve political decision-making. *Id.* First, "[f]reedom of expression in the political realm is usually a necessary condition for securing freedom elsewhere." *Id.* at 883. Next, speech enables the government to ascertain "the needs and wishes of its citizens" and to be responsive to its people. *Id.* Finally, the Declaration of Independence states that the government derives its power from the consent of its citizens, and "the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment." *Id.* See also Kent Greenawalt, *Free Speech Justifications*, 89 COLUM L. REV. 119 (1989).

This function of the First Amendment raises additional questions regarding the

infringes upon the First Amendment rights of candidates and contributors is the point at which a court should reject the limit as unconstitutional.<sup>128</sup> The court should evaluate if the candidate can engage in effective political advocacy in the candidate's district despite the contribution limits.<sup>129</sup> This measure will also help determine if the contributors' right to associate with a candidate is infringed. If candidates cannot deliver political speech a supporting contributor may be unable to associate with their candidate of choice.<sup>130</sup> A court should also examine the percentage of contributors affected by the limitation to determine if the government favors individual speech over speech that relies on the pooling of money.<sup>131</sup> Because different voting districts demand different levels of funds to engage in effective political advocacy, a limitation can be tailored to the type or character of the campaign without preventing the purpose of association or speech.<sup>132</sup> The Eighth Circuit's inflation analysis<sup>133</sup> is not a meaningful measure. *Buckley* did not establish \$1,000 as a constitutional floor for a contribution limit. The Court merely held that the limitation would not affect First Amendment rights to any significant degree.<sup>134</sup> An inflationary analysis makes no distinction between the cost of a Federal campaign with that of a campaign for city council in a municipality of less than 100,000 people. This analysis is an easy way for a court to strike down a campaign limitation without placing it in context for the community the limitation

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role of the government to meet these goals. Some commentators argue that the First Amendment is a grant of governmental power to ensure that the voices of the electorate are equalized and not drowned out by the voices of the wealthy. See, e.g., Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (Feb. 1987); Others view the First Amendment as a restraint on governmental power for the purpose of allowing unfettered speech. See, e.g., BeVier, *supra* note 6.

<sup>128</sup>See *supra* note 125. Intermediate scrutiny requires that the restriction not unnecessarily infringe First Amendment rights while strict scrutiny requires that the restriction is necessary. See *supra* notes 60, 75. However, commentators argue that almost all forms of campaign finance reform are ineffective. See *supra* note 4. Therefore, like strict scrutiny, if the contribution limit is a direct infringement but there is no impact on the appearance of corruption, it unnecessarily infringes on the contributor or candidates's rights.

<sup>129</sup>*Buckley*, 424 U.S. at 21. See *supra* notes 97-101 and accompanying text

<sup>130</sup>Affiliating with a candidate is one aspect of freedom of association. *Buckley*, 424 U.S. at 22. See also *infra* note 70.

<sup>131</sup>This analysis is similar to that employed in *Citizens Against Rent Control*. See *supra* note 90.

<sup>132</sup>This was reflected in the contribution scheme set forth by Missouri that the Eighth Circuit invalidated in *Carver and Shrink II*. See *supra* note 40-41.

<sup>133</sup>See *supra* note 52 and accompanying text.

<sup>134</sup>*Shrink II*, 161 F.3d at 525 (Gibson, J., dissenting). See also *supra* note 123.

purports to serve.

## V. CONCLUSION

The Eighth Circuit's analysis is faulty in several respects. First, the *Buckley* Court did not employ strict scrutiny to analyze the constitutionality of restrictions on campaign contributions. It employed the lesser standard of heightened intermediate scrutiny.<sup>135</sup> Second, the Eighth Circuit requires objective proof of harm while ignoring the circumstances under which contribution limits were effectuated in Missouri.<sup>136</sup> Senate Bill 650 and Proposition A were enacted in consideration of the influence of large contributions on the democratic process.<sup>137</sup> The facts established in the district court<sup>138</sup> are sufficient proof of the appearance of corruption under intermediate scrutiny.<sup>139</sup> Finally, merely adjusting for inflation is not the proper test to determine if a contribution limit is narrowly tailored to serve both speech and associational rights.<sup>140</sup> The proper test determines the effect of the limits on both the percentage of total contributions received, and the number of contributors affected.<sup>141</sup> Under this analysis, the Supreme Court should overturn the Eighth Circuit in *Shrink III* and reinstate Senate Bill 650's contribution limits.<sup>142</sup>

**Jane Conrad**

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<sup>135</sup> See *supra* notes 65-101 and accompanying text.

<sup>136</sup> See *supra* notes 118-21 and accompanying text.

<sup>137</sup> *Id.*

<sup>138</sup> See *supra* note 118.

<sup>139</sup> See *supra* notes 87. Curiously, although the Eighth Circuit demanded objective proof of harm regarding the appearance of corruption, the court relied on pure speculation when stating, in dicta, that the contribution limits were not narrowly tailored. *Shrink II*, 161 F.3d at 523. "In today's dollars, the SB650 limits appear likely to 'have a severe impact on political dialogue' by preventing many candidates for public office 'from amassing the resources necessary for effective advocacy,'" *Id.*, quoting *Buckley*, 424 U.S. at 21 (emphasis added).

<sup>140</sup> See *supra* note 123.

<sup>141</sup> See *supra* notes 124-32 and accompanying text.

<sup>142</sup> See *supra* note 40 and accompanying text.