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Beyond Campaign Finance: The First Amendment Implications of *Nixon v. Shrink Missouri Government PAC*[1]

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In *Buckley v. Valeo*[2] the United States Supreme Court decided the constitutionality of Congress's attempt to place limitations on political expenditures and contributions during federal election campaigns. While the Court acknowledged that the contribution and expenditure provisions "operate[d] in an area of the most fundamental First Amendment activities" requiring the closest of judicial scrutiny,[3] it ultimately came to different conclusions regarding the limitations. Specifically, the Court upheld the contribution provisions, arguing that they imposed only a marginal restriction upon the contributors' free speech and associational rights and that they were justified by the government's interest in preventing corruption or the appearance of corruption.[4] In contrast, the Court struck down the expenditure provisions, finding them to be far more burdensome than contribution limitations and unjustified in light of the government's concerns about corruption.[5]

Few people have been happy with the Court's approach. Scholars have especially criticized *Buckley*, generating an extensive body of literature along the way.[6] Much of this criticism focuses on three specific aspects of *Buckley*: (1) its willingness to treat monetary expenditures as protected expression,[7] (2) its determination that contribution and expenditure limits have different

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1. 528 U.S. 377 (2000).

2. 424 U.S. 1, 13 (1976).

3. *Id.* at 14-16.

4. *Id.* at 23-29.

5. *Id.* at 49-52.

6. *See* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 1 (1998) (noting that criticism of *Buckley* "was intense and has only mounted over time"); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 415, 467 (1996) (noting that *Buckley* is "one of the most castigated [decisions] in modern First Amendment case law").

7. *See, e.g.*, Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 796 (1998); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976).

constitutional status,[8] and (3) its refusal to consider other government interests supporting regulation, such as the need to equalize influence on the outcome of elections.[9] Nevertheless, later Courts have adhered to *Buckley*'s reasoning.[10] In its most recent pronouncement on the topic, *Nixon v. Shrink Missouri Government PAC*,[11] the Court largely reaffirmed *Buckley*'s basic principles and found that the strict contribution limits in Missouri's campaign finance law did not violate the First Amendment.

In light of the "mainstream orthodoxy" favoring limitations on political money,[12] *Shrink* is likely to fuel both states' attempts to reform campaign spending[13] and yet another round of scholarly arguments regarding the wisdom of *Buckley*. This Essay, however, is less concerned with the campaign finance[14] aspects of *Shrink* than with the decision's broader implications. In the course of

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8. *See, e.g.*, Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1054 (1985); Neuborne, *supra* note 7, at 796; Kathleen Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 666 (1997); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1395 (1994).

9. *See, e.g.*, Neuborne, *supra* note 7, at 797; Sunstein, *supra* note 8, at 1400; J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality*, 82 COLUM. L. REV. 609, 636-37 (1982).

10. *See* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996); Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986); FEC v. Nat'l Conservative PAC, 470 U.S. 480 (1985); FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982); Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981); Cal. Med. Ass'n v. FEC, 453 U.S. 182 (1981); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

11. 528 U.S. 377, 381-82 (2000).

12. *See* Sullivan, *supra* note 8, at 664.

13. As of 1993, thirty-two states had enacted contribution limitations. *See* William J. Connolly, Note, *How Low Can You Go? State Campaign Contribution Limits and the First Amendment*, 76 B.U. L. REV. 483, 497-98 (1996). A number of municipalities have also enacted contribution limitations. *See* Curtis K. Tao, Note, *A Compelling Opportunity to Rethink the Flawed Evolution of Contribution Speech*, 51 RUTGERS L. REV. 1345, 1349 (1999). Unlike Missouri, most contribution limitations are equal to or exceed *Buckley*'s $1000 limit. *See* Connolly, *supra*, at 498. *Shrink*'s willingness to uphold the stricter Missouri limits may spur states to follow Missouri's lead and enact lower contribution limits.

14. By using the term "campaign finance aspects," I refer to the typical scholarly focus on *Buckley* as described in Part I.A. *See also* Baker, *supra* note 6, at 1-2 (noting the "standard form" of the usual criticism of *Buckley*); Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1762 (1999) (linking criticisms of *Buckley* to academics' tendencies to "understand their task to be that of developing the implications of normative democratic theory"). While the issue of campaign finance reform is a worthy one, I leave it to others to discuss that topic—fully informed, I hope, by an understanding of *Shrink*'s other flaws.

its decision, the *Shrink* Court not only obfuscated the standard of scrutiny applicable to contribution regulations, it effectively ignored the government's lack of factual support for the law, instead accepting the state's assertions at face-value. Consequently, *Shrink* is far more than a simple application of *Buckley*. Rather, it reflects fundamental problems with the Court's standards of review in First Amendment cases generally. The more global nature of *Shrink*'s problems suggest that, despite scholarly focus on the *Buckley* framework, more than just campaign finance reform is at stake.

Part I of this Essay discusses legal background, focusing first on the Court's decision in *Buckley* and then on the *Shrink* litigation. Part II itemizes *Shrink*'s flaws, ultimately concluding that those flaws cannot be attributed solely to *Buckley*. Finally, Part III examines the Court's standards of scrutiny in First Amendment cases and argues that *Shrink* results at least in part from flaws found in those standards.

I. *NIXON V. SHRINK MISSOURI GOVERNMENT PAC*

A. Setting the Stage—Buckley v. Valeo

In 1974, in the wake of egregious campaign abuses by the Nixon administration,[15] Congress enacted the Federal Election Campaign Act[16] ("FECA"), its first comprehensive attempt to regulate election campaigns and the money associated with them.[17] Among other things, FECA included regulations limiting the amount of political expenditures and contributions related to specific candidates during federal election campaigns.[18] The statute prohibited individuals from contributing $1000 to any single candidate during an election campaign or from spending more than $1000 relative to a particular candidate.[19] Soon after its enactment, several political groups of varying interests challenged its constitutionality, relying primarily on the argument that FECA's limitations violated the First Amendment rights of free expression and association.[20]

The Supreme Court agreed to review the case after the Court of Appeals for the District of Columbia upheld both the contribution and expenditure limitations as limitations on expressive conduct rather than pure speech.[21] The Court

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15. *See* William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 339 (2000) (discussing Nixon campaign abuses).

16. Pub. L. No. 93-443, 88 Stat. 1263 (1974).

17. For a history of campaign-related regulations up to and including FECA, see Justin A. Nelson, Note, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524, 532-39 (2000).

18. *See* Buckley v. Valeo, 424 U.S. 1, 12-13 (1976).

19. *Id.* at 13.

20. *See* Marshall, *supra* note 15, at 346 (describing plaintiffs' interests and alliances).

21. *See* Buckley v. Valeo, 519 F.2d 821, 840 (D.C. Cir. 1975), *rev'd in part*, 424

rejected the appellate court's findings, noting that regulations on contributions and expenditures implicated core First Amendment rights related to political expression.[22] As such, the contribution and expenditure limitations were subject to "exacting scrutiny" rather than the intermediate scrutiny standard used to judge regulations of expressive conduct.[23]

Applying this standard, the Court in *Buckley* reached differing results regarding the contribution and expenditure limitations. According to the Court, expenditure limitations "necessarily reduce[] the quantity of expression [because] communicating ideas in today's mass society requires the expenditure of money."[24] Such significant restrictions could be justified only by a "substantial government interest."[25] The government proffered three interests to support the regulation: (1) the prevention of corruption or appearance of corruption, (2) the need to equalize citizens' ability to influence the outcome of elections, and (3) the need to make the political system more open to candidates by reigning in skyrocketing costs.[26] The Court found the latter two justifications to be antithetical to First Amendment principles.[27] Although noting that prevention of corruption or the appearance thereof might be a sufficient reason to regulate speech in some circumstances, the Court found that interest insufficient to justify expenditure limitations.[28]

In contrast, the Court upheld the contribution limitations. Although recognizing that such limitations affected core political rights, the Court believed them to place only a "marginal restriction" upon the contributor's ability to

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U.S. 1 (1976). The District of Columbia Circuit applied the four-prong test announced in *United States v. O'Brien*, 391 U.S. 367 (1968). Under that test, a regulation of expressive conduct does not violate the First Amendment as long as it is within the power of the government to regulate, furthers an important or substantial government interest, that interest is unrelated to free expression, and the regulation is no broader than essential to further the government interest. *Id.* at 377. Since *O'Brien*, the Court has made clear that its test is the equivalent of the intermediate scrutiny test applied in other contexts. *See* Ward v. Rock Against Racism, 491 U.S. 781, 797-98 (1989).

22. *See Buckley*, 424 U.S. at 14.

23. *Id.* at 14-18.

24. *Id.* at 19; *see also id.* at 39 ("It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates.").

25. *Id.* at 47.

26. *Id.* at 25-26.

27. *Id.* at 26. In one of its most-quoted passages, the Court specifically noted that:

> [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 . . . . The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

Id. at 48-49.

28. *Id.* at 45-48.

communicate regarding, and associate with, political candidates.[29] In addition, the *Buckley* per curiam noted that even association rights could be overcome if the contribution limits were "closely drawn" and justified by a "sufficiently important interest."[30] Unlike expenditure limitations, the Court found that large contributions posed a greater likelihood of the actual incidence or appearance of a *quid pro quo* arrangement.[31] Thus, the government's interest in preventing corruption or the appearance of corruption presented a "sufficiently important interest" for regulating contributions.[32] Furthermore, the Court found that the contribution limitations were not so unreasonably low as to fail the "closely tailored" requirement.[33] Refusing to question the legislature's capping of contributions at $1000, the Court noted that "'a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.'"[34]

B. Nixon v. Shrink Missouri Government PAC

1. Background and Lower Court Decisions

In 1994, the Missouri legislature amended its campaign finance law, restricting contributions that persons could make to candidates for political office.[35] Specifically, the new law contained a sliding-scale of contribution limitations ranging from $1075 to $275 depending on the office sought.[35] The

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29. *Id.* at 20-22. The Court reasoned that:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. . . .
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> . . . .
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> [Furthermore the] contribution ceilings thus limit one important means of associating with a candidate or a committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates.

Id. at 21-22.

30. *Id.* at 25.

31. *Id.* at 26-28.

32. *Id.* at 25.

33. *Id.* at 29.

34. *Id.* at 30 (quoting Buckley v. Valeo, 519 F.2d 821, 842 (D.C. Cir. 1975)).

35. *See generally* Shrink Mo. Gov't PAC v. Adams, 5 F. Supp. 2d 734, 736-37 (E.D. Mo.), *rev'd*, 161 F.3d 519 (8th Cir. 1998), *rev'd sub nom.* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (describing amendments and their history).

36. *See* MO. REV. STAT. § 130.032.1 (Supp. 1999). The original scale ranged from $1000 to $250 but was adjusted for inflation as required by other statutory provisions. *See* MO. REV. STAT. § 130.032.2 (Supp. 1999). In 1998, the Missouri Ethics Commission, the entity in charge of implementing the campaign finance laws, amended

Shrink litigation arose when Zev David Fredman, a candidate for state auditor in the Republican primary, was unable to accept contributions greater than $1075 from Shrink Missouri Government PAC ("Shrink PAC"), a political action committee.[37] Fredman and Shrink PAC filed suit in federal court claiming that the statutory limitations violated their First Amendment rights of free speech and association because the limits in current dollars were substantially below those in *Buckley*. The defendants, various state officials, relied on *Buckley*'s appearance of corruption rationale and argued that the contribution limitations were necessary to battle "the perception that the individuals or entities making these contributions are attempting to curry favor with the state's elected officials."[38]

The district court upheld the contribution limitations using a strict scrutiny standard, which it believed was required by *Buckley*.[39] According to the district court, Missouri's interest in preventing the appearance of corruption was a "'real harm'" even if no actual corruption was documented.[40] In support of the fact that such a harm existed, the court relied on an affidavit by Senator Wayne Goode, chair of the Missouri Senate Committee on Campaign Finance Reform, which recounted the committee hearings regarding large contributions and which stated his belief that such contributions "have the appearance of buying votes as well as the potential to buy votes."[41] Based upon Senator Goode's affidavit, certain newspaper articles advocating campaign finance reform,[42] and an earlier statewide referendum attempting to pass contribution limitations ("Proposition A"),[43] the district court found that Missouri satisfied strict scrutiny's "compelling

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the amounts in the statute to reflect inflation. Thus, the $1000 limit was raised to $1075. *See* Shrink Mo. Gov't PAC v. Adams, 161 F.3d 519, 520 (8th Cir. 1998), *rev'd sub nom.* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000). The *Shrink* opinions typically refer to the $1075 figure rather than the original amount.

37. As a candidate for state auditor, Fredman fell under the portion of the statute limiting contributions to $1075 for candidates for governor, lieutenant governor, secretary of state, state treasurer, state auditor, or attorney general. *See* MO. REV. STAT. § 130.032.1(1) (Supp. 1999).

38. *Shrink*, 5 F. Supp. 2d at 738.

39. *Id.* at 737.

40. *Id.* at 738 (quoting Buckley v. Valeo, 424 U.S. 1, 27 (1976)).

41. *Id.*

42. The district court singled out three newspaper stories and editorials from the same period that tend[ed] to support the senator's statements. *Id.* at 738 n.6.

43. In 1994, the Missouri legislative assembly passed Senate Bill 650, which eventually became the law challenged in *Shrink*. Before that law could take effect, the citizens of Missouri passed Proposition A, which placed significantly more restrictive limits on campaign contributions than Senate Bill 650. Specifically, contributions were limited to a sliding scale ranging from $100 to $300 depending on the political office sought. The Missouri Attorney General determined that Proposition A superseded Senate Bill 650 and that its provisions governed campaign contributions. *Id.* at 735-36. The Eighth Circuit struck down the limits imposed by Proposition A, however, arguing that

interest" requirement. It further found the contribution limitations to be "narrowly tailored" because they were aimed at preventing the large donations perceived to be the source of influence peddling while not being so low as to prevent effective fund-raising.[44]

The Eighth Circuit reversed the district court. It too believed that strict scrutiny was the appropriate standard of review under *Buckley*.[45] It also agreed with the district court that the state's interest in preventing the appearance of corruption was compelling in the abstract. It found, however, that the state's evidence on this point was insufficient. According to the Eighth Circuit, "the State . . . must prove that Missouri has a *real problem* with corruption or a perception thereof as a direct result of large campaign contributions."[46] The court noted that the state's reliance on Senator Goode's affidavit was insufficient to meet this burden because it contained nothing other than the Senator's "belief" as to the appearance of corruption, which could not be extrapolated to the general public.[47] The court further ruled that the amount of the contribution limitations violated *Buckley*. Although it acknowledged that *Buckley* did not set a minimum threshold of acceptable contribution limits, the court noted that the $1075 limitation in Missouri's law was substantially smaller in real dollars than the $1000 limit approved in *Buckley* in 1976.[48] Thus, the limits were "'too low to allow meaningful participation in protected political speech and association, and, . . . not narrowly tailored to serve' the alleged interest."[49]

2. The Supreme Court Decision

The Supreme Court granted certiorari in *Shrink* in order to determine whether the Eighth Circuit's decision comported with *Buckley*.[50] Ultimately, the Court found that it did not. Initially, the Court discussed the appropriate standard of review in such cases. It recognized that *Buckley* had eschewed

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they were "dramatically lower" than those allowed in *Buckley* and inconsistent with the First Amendment. *See* Carver v. Nixon, 72 F.3d 633, 641-42 (8th Cir. 1995). After invalidation of Proposition A, Senate Bill 650 became the controlling law in Missouri regarding campaign contributions for state officers. *See* Shrink Mo. Gov't PAC v. Adams, 5 F. Supp. 2d 734, 737 (E.D. Mo.), *rev'd*, 161 F.3d 519 (8th Cir. 1998), *rev'd sub nom.* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

44. *See Shrink*, 5 F. Supp. 2d at 740-42.

45. *See* Shrink Mo. Gov't PAC v. Adams, 161 F.3d 519, 521 (8th Cir. 1998), *rev'd sub nom.* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

46. *Id.* at 522 (emphasis added).

47. *Id.*

48. *Id.* at 522-23. The court relied on the plaintiffs' figures showing that $1075 in 1976 dollars equaled approximately $378 in current dollars. *Id.* at 523 n.4.

49. *Id.* at 523 (quoting Day v. Holahan, 34 F.3d 1356, 1366 (8th Cir. 1994)).

50. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 381-82 (2000).

application of intermediate scrutiny in favor of a more "exacting scrutiny."[51] Nevertheless, the *Shrink* Court reasoned that "exacting scrutiny" meant different things depending upon the context. Specifically, the Court argued that "'[w]e have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.' It has . . . been plain ever since *Buckley* that contribution limits would more readily clear the hurdles before them."[52] Accordingly, the Court described the appropriate standard of scrutiny in cases involving contribution limitations:

> [U]nder *Buckley*'s standard of scrutiny, a contribution limit involving "significant interference" with association 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 "finely tun[ed]."[53]

With the newly-clarified standard in hand, the Court turned to its application in the context of the Missouri statute. First, the Court reiterated *Buckley*'s finding that the perception of corruption "'inherent in a regime of large individual financial contributions'" was a sufficiently important interest to justify the statute.[54] It also found the evidence adduced in support of the statute (i.e., the Goode affidavit, newspaper articles, and Proposition A)[55] adequate to satisfy this standard of scrutiny. According to the Court, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."[56] In this case, because the notion that large contributions might cause corruption or a perception thereof was "neither novel nor implausible," the evidence presented by the state was "more than sufficient."[57] The Court thus rejected Shrink PAC's claim that cases since *Buckley* had supplemented its evidentiary standard, requiring a more concrete showing of real harm.[58]

Finally, the Court found that Missouri's contribution limitations were adequately tailored, noting that the $1075 limit bore a "striking resemblance" to the $1000 limit in *Buckley* and was not fundamentally different from it in kind.[59] Rejecting respondent's argument regarding the disparity in the value of $1000

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51. *Id.* at 386.

52. *Id.* at 387 (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259-60 (1986)).

53. *Id.* (citations omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 25, 30 (1976)).

54. *Id.* at 390.

55. *Id.* at 393-95.

56. *Id.* at 391.

57. *Id.*

58. *Id.* at 391-92.

59. *Id.* at 395.

in current and 1976 dollars, the Court found that the real issue was whether the limits had a dramatic effect on a candidate's fund-raising abilities.[60] The *Shrink* Court specifically noted that since the statute's 1994 enactment, candidates were able to amass "'funds sufficient to run effective campaigns,'" and that prior to 1994, most contributions for state political offices already fell below the limits set forth in the Missouri statute.[61] Accordingly, the statute was "closely tailored" to meet the state's interest in preventing the appearance of corruption while still allowing effective campaign fund-raising.

II. *SHRINK*'S FLAWS

A. The Standard of Review

Shrink's flaws begin with its standard of review—or, more specifically, with its waffling regarding the relevant standard of review. In reviewing regulations of obviously high value speech, the Court currently uses one of two standards of review: strict scrutiny or intermediate scrutiny. When applying the former, and more stringent, standard of review, the Court asks whether the regulation is "narrowly tailored or necessary" to meet a "compelling" government interest.[62] When applying the latter, the Court asks whether the regulation is "narrowly tailored" to serve a "legitimate" or "substantial" interest, with an understanding that the regulation "need not be the least-restrictive or least-intrusive means" of meeting those interests.[63]

In discussing the appropriate standard of scrutiny, *Shrink* acknowledged *Buckley*'s rejection of intermediate scrutiny and its use of "exacting scrutiny" to examine contribution and expenditure limitations.[64] One might conclude from this that *Shrink* meant to adopt the stricter of the two standards of scrutiny discussed above. The Court has generally used the term "exacting scrutiny" synonymously with "strict scrutiny"[65] and many scholars[66] and lower courts[67]

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60. *Id.* at 396.

61. *Id.* For example, the Court noted that over 97% of all contributions to state auditor candidates were $2000 or less, and that less than 1.5% of contributions to candidates for secretary of state exceeded $2000. *Id.* at 396 & n.9.

62. R.A.V. v. City of St. Paul, 505 U.S. 377, 377-78 (1992). For more on these standards of scrutiny, see *infra* Part III.A.

63. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

64. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386 (2000).

65. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-42 (1994) ("Our precedents . . . apply the most exacting scrutiny to regulations that suppress . . . speech because of its content."); *Id.* at 677-78 (O'Connor, J., concurring in part, dissenting in part) (noting that content-based regulations are subject to strict scrutiny).

66. *See* BeVier, *supra* note 14, at 1761; James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 11 REGENTS U. L. REV. 235, 241 (1999); David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*,

interpret *Buckley* as applying that standard. Moreover, *Buckley*'s recognition that campaign finance regulations affect core First Amendment values[68] argues in favor of applying strict scrutiny. But a sentence acknowledging that strict scrutiny governs the issue in *Shrink* never materialized. Rather, the *Shrink* majority segued immediately into an explanation of *Buckley*'s distinction between expenditure and contribution limitations and its willingness to uphold the latter.[69] In fact, the *Shrink* Court ultimately concluded that, under *Buckley*, regulations of campaign contributions were constitutional if the government proffered a "sufficiently important" government interest and a "closely drawn" (although not "finely tuned") statute.[70]

The *Buckley* standard as interpreted by *Shrink* sounds far more like intermediate scrutiny than strict review. It is entirely possible that the *Shrink* majority meant such an interpretation. At one point it characterized *Buckley* as intimating that "different standards might govern expenditure and contribution limits" and that "restrictions on contributions require less compelling justification than restrictions on independent spending."[71] Yet even here the Court sent mixed signals. *Shrink* never actually rejected the lower courts'

1999 SUP. CT. REV. 203, 245; Richard E. Levy, *The Constitutional Parameters of Campaign Finance Reform*, 8 KAN. J.L. & PUB. POL'Y 43, 44-48 (1999); Molly Peterson, Note, *Re-Examining Compelling Interests and Radical State Finance Reforms: So Goes the Nation?*, 25 HASTINGS CONST. L.Q. 421, 429-30 (1998); Mary Sherris, Note, Colorado Republican Campaign Committee v. Federal Election Commission*: Maintaining What Remains of the Federal Election Campaign Act Through Constitutional Compromise*, 30 AKRON L. REV. 561, 564 (1997); Tao, *supra* note 13, at 1351-52. *But see* Marshall, *supra* note 15, at 351-52 (describing *Buckley*'s standard as "arguably less-than-strict-scrutiny"); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 62 (1987) (arguing that Buckley applied intermediate scrutiny to contribution limitations).

67. In cases other than *Shrink*, the Eighth Circuit consistently has interpreted *Buckley* as requiring strict scrutiny review for contribution limitations. *See* Russell v. Burris, 146 F.3d 563, 567 (8th Cir. 1998); Carver v. Nixon, 72 F.3d 633, 637 (8th Cir. 1995); Day v. Holahan, 34 F.3d 1356, 1365 (8th Cir. 1994). Other jurisdictions operate on a similar assumption. *See, e.g.*, N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999); Kruse v. City of Cincinnati, 142 F.3d 907 (6th Cir. 1998); Ky. Right to Life, Inc. v. Terry, 108 F.3d 637 (6th Cir. 1997); Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995); Citizens for Responsible Gov't State PAC v. Buckley, 60 F. Supp. 2d 1066 (D. Colo. 1999); Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176 (C.D. Cal. 1998); Barker v. Wis. Ethics Bd., 815 F. Supp. 1216 (W.D. Wis. 1993); State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999); Barnes v. State Farm Mut. Auto. Ins. Co., 20 Cal. Rptr. 2d 87 (Ct. App. 1993); Winn-Dixie Stores, Inc. v. State, 408 So. 2d 211 (Fla. 1981); Winborne v. Easley, 523 S.E.2d 149 (N.C. Ct. App. 1999); Ethics Comm'n v. Keating, 958 P.2d 1250 (Okla. 1998); Kimbell v. Hooper, 665 A.2d 44 (Vt. 1995).

68. *See* Buckley v. Valeo, 424 U.S. 1, 14-16 (1976).

69. *See Shrink*, 528 U.S. at 386.

70. *Id.* at 387-88.

71. *Id.* at 387.

application of strict scrutiny. In fact, it explicitly denied that it was in any way "relaxing" *Buckley*'s standard of review.[72] Moreover, in giving content to its characterization of *Buckley*'s standard, the *Shrink* majority dropped a footnote to several freedom of association cases, all of which used the strict scrutiny standard.[73] *Shrink* thus leaves us in a sort of purgatory, wondering which of the existing standards it uses or, if it uses an altogether new standard, where such a standard falls in the spectrum of review.[74]

One could argue that *Shrink*'s lack of clarity is not new, but stems essentially from *Buckley*. *Buckley*'s willingness to uphold limits on contributions after applying "exacting scrutiny," suggests that its application of that standard is less rigorous than typically associated with strict scrutiny.[75] Additionally, other than the phrase "exacting scrutiny," *Buckley* never used the buzzwords commonly associated with strict scrutiny and instead used a variety of terms to describe the standard of review. In referring to the government interest necessary to support the statute, for example, *Buckley* used the terms "substantial,"[76] "sufficiently important,"[77] and "weighty."[78] Similarly, *Buckley* tempered its requirement that a statute be "closely drawn"[79] with the observation that contribution limits need not be surgically precise,[80] which suggests something less than a strict scrutiny standard. Finally, the Court's decisions since *Buckley* are not altogether clear regarding the standard of review applied

72. *Id.* at 389 n.4.

73. *Id.* at 388 n.3.

74. Not surprisingly, *Shrink*'s dissenters took issue with the majority's cavalier treatment of the standard of review. Justices Thomas and Scalia argued that the *Shrink* Court's standard was "*sui generis*." *Id.* at 410 (Thomas, J., dissenting). The dissent also deemed it to be "something less—much less—than strict scrutiny," which the dissent noted *Buckley* at least purported to apply. *Id.* at 421. Justice Kennedy also bemoaned the majority opinion, noting that "in defining the controlling standard of review and applying it to the urgent claim presented, the Court seems almost indifferent." *Id.* at 405 (Kennedy, J., dissenting).

75. *See supra* note 66.

76. Buckley v. Valeo, 424 U.S. 1, 47 (1976).

77. *Id.* at 25.

78. *Id.* at 29.

79. *Id.* at 25.

80. *Id.* at 30. The difficulty in determining the standard of review is exacerbated by the *Buckley* Court's tendency to sprinkle its discussion over numerous pages regarding various aspects of contribution and expenditure limitations. *Id.* at 14-59.

to contribution limits, with some apparently using strict scrutiny[81] and others intimating that a lower standard is appropriate.[82]

To be sure, *Buckley* is not a model of clarity. Nevertheless, *Shrink* does not merely reflect *Buckley*'s shortfalls. We can forgive *Buckley* for much of its ambiguity because it came at a time when tiers of scrutiny in the First Amendment were in their infancy, having only recently been imported into First Amendment jurisprudence from Equal Protection jurisprudence.[83] *Buckley*'s use of differing terminology, then, is at least partly a result of the Court's transition from earlier tests regarding speech regulations, such as the "clear and present danger" test,[84] to the more formalized tiers of review popular today. The Court's current use of either strict or intermediate scrutiny, however, is firmly grounded, and *Shrink*'s refusal to confront and clarify its standard of review in light of the prevailing approach is inexcusable. Moreover, *Buckley* used much the same terminology in discussing expenditure limits as it did in discussing contribution limits.[85] *Shrink*'s intimation that *Buckley*'s terminology indicates a lower-than-strict scrutiny standard never adequately deals with that fact nor explains away the evolution of the standard towards strict scrutiny in the expenditure context.[86]

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81. *See, e.g.*, Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 298 (1981) ("Contributions by individuals . . . [are] beyond question a very significant form of political expression . . . [and] regulation of First Amendment rights is always subject to exacting judicial scrutiny."); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-28, at 1139-40 (2d ed. 1988) (noting that *Citizens Against Rent Control* appeared to apply a standard akin to strict scrutiny).

82. *See, e.g.*, FEC v. Mass. Citizens for Life, 479 U.S. 238, 259-60 (1986); Cal. Med. Ass'n v. FEC, 453 U.S. 182, 195-98 (1981); *see also* TRIBE, *supra* note 81, § 13-28, at 1138-39 (characterizing *California Medical Ass'n* as applying a standard of scrutiny lower than strict scrutiny).

83. *See, e.g.*, Police Dep't of Chicago v. Mosely, 408 U.S. 92 (1972); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (generally noting the use of an equal protection framework in First Amendment cases).

84. The Court originally assessed speech regulations using this test. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 510 (1951) (plurality opinion); Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34 (1943); Bridges v. California, 314 U.S. 252, 263 (1941); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940). Since *Mosely*, however, the Court uses the clear and present danger test only in limited circumstances, such as incitement of illegal activity, *see* Brandenburg v. Ohio, 395 U.S. 444 (1969), or criticism of the judicial process, *see Bridges*, 314 U.S. at 252.

85. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 47-48 (1976) (noting that the "independent expenditure ceiling . . . fails to serve any substantial government interest in stemming corruption or the appearance of corruption"); *Id.* at 14-15 (noting that both contribution and expenditure limitations operated "in an area of fundamental First Amendment activities . . . [where] the constitutional guarantee has its fullest and most urgent application").

86. *See, e.g.*, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263-65 (1986) (requiring a "compelling" state interest to justify expenditure limitations and that the

Beyond simply being inexcusable, *Shrink* can be interpreted as a deliberate attempt to obfuscate.

B. The Evidence

Shrink's second significant flaw comes in its application of the standard of review to the evidence. According to the Court, Senator Goode's affidavit, the newspapers relied upon by the lower court, and Proposition A all provided ample evidence supporting the state's assertion that Missouri citizens' perceived problems of corruption stemming from large campaign contributions.[87] A close review of that evidence, however, reveals several problems.

Turning first to Senator Goode's affidavit, the relevant portions read:

> 6. The campaign contribution limits proposed in SB 650 . . . were the work product of the Interim Joint Committee [on Campaign Finance Reform]. A broad spectrum of opinions were heard on the issue of campaign contribution limits. The members of the Committee discussed among ourselves at length not only what it cost to run a campaign and deliver a message to the populace, but also at what point is there the potential for contributions to become unduly influential.
>
> . . . .
>
> 8. The Committee heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence. . . .
>
> 9. I believed in 1993 and I believe today that the contributions over those limits have the appearance of buying votes as well as the real potential to buy votes. The greater the contribution, the greater potential there is for the appearance of and the actual buying of votes.
>
> . . . .
>
> 11. I believe that the experience in the last three elections has also shown that the appearance of corruption because of campaign contributions has decreased in state elections. Imposing limits prevents the disproportionate funding of a particular campaign and, therefore, prevents the potential for buying influence.[88]

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regulation "curtail speech only to the degree necessary to meet the particular problem at hand").

87. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 393-95 (2000).

88. *See* Petitioners' Brief at 46a-47a, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (No. 98-963) (J.A., Aff. of Sen. Wayne Goode).

Notably missing from the affidavit are descriptions of the number and status[89] of persons testifying before the committee as well as concrete examples of the public's concern regarding large contributions. In reality, the affidavit is little more than a conclusory statement regarding the Senator's belief as to the problem.[90] A comprehensive legislative history with recorded testimony and committee reports might have alleviated this problem as they would have allowed the Court to check the validity of the affidavit. As the *Shrink* majority acknowledged, however, Missouri does not maintain formal legislative history.[91] Thus, the affidavit provides little solid foundation for concluding that the public perceives large contributions as amounting to influence peddling.

The *Shrink* Court's reliance on a handful of newspaper articles and Proposition A was similarly flawed. While many of the articles cited in the decision advocated limits on campaign financing, the Court's assumption that these articles represented the public's general fear of corruption is unwarranted. Several of the cited articles were editorial pieces,[92] which newspapers take great pains to separate from their general reporting precisely because they represent only the writers' point of view. Furthermore, at least one of the articles relied upon took no position on contribution limitations at all, instead noting only that both candidates for state auditor received large contributions from local businesses.[93] The other simply cited then-Governor Mel Carnahan's opinion that "[w]e need a system that will make sure that our democratic institutions care as much about John Doe and Jane Doe as they do about any big company or wealthy individual."[94] Merely because a few citizens, politicians, or newspaper reporters expressed their views favoring campaign finance limitations does not provide evidence of a similar state-wide trend.

Proposition A, the now-defunct state-wide referendum that overwhelmingly approved campaign contributions limitations,[95] did provide a foundation for

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89. The affidavit does not indicate, for example, whether its conclusions are drawn from statements of the public at large or simply from other legislators.

90. *See, e.g.*, Shrink Mo. Gov't PAC v. Adams, 161 F.3d 519, 522 (1999), *rev'd sub nom.* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (noting the "self-serving and conclusory" nature of the Senator's statements given his "vested interest in having the courts sustain the law that emerged from his committee").

91. *Shrink*, 528 U.S. at 393.

92. *See, e.g.*, Editorial, *Four Proposals on the Missouri Ballot*, ST. LOUIS POST-DISPATCH, Oct. 20, 1994, at 6B; Editorial, *The Central Issue is Trust*, ST. LOUIS POST-DISPATCH, Dec. 31, 1993, at 6C; Kathy Richardson, Letter to the Editor, ST. LOUIS POST-DISPATCH, Nov. 5, 1994, at 15B; Robyn Steely, *Money and State Senators*, ST. LOUIS POST-DISPATCH, Aug. 21, 1994, at 3B.

93. *See* Jo Mannies, *Auditor Race May Get Too Noisy To Be Ignored*, ST. LOUIS POST-DISPATCH, Sept. 11, 1994, at 4B.

94. John A. Dvorak, *Election Reform Backed Lid on Contributions to Campaign's Wins Carnahan's Support*, K.C. STAR, Nov. 14, 1993, at B1.

95. Approximately seventy-four percent of Missouri voters approved of

assuming that citizens generally favor such limitations. The mere fact that the referendum passed, however, does not explain *why* it passed, and that lack of explanation is significant. *Buckley* and its progeny made clear that combating corruption or the appearance of corruption was the only compelling interest of those proffered in favor of campaign finance limitations. Other justifications, such as the desire to equalize citizens' ability to influence the outcome of elections or to make the political system more open to candidates, are insufficient.[96] It is unclear, however, whether citizens of Missouri supported Proposition A because they feared potential corruption or because they simply wished for the ability to compete on the same playing field with wealthy citizens and corporations. In fact, many of the newspaper articles cited to prove citizens' perception of corruption contain statements reflecting the operation of an invalid justification as well. Thus, one newspaper reported that "Proposition A supporters said the limit would temper the influence of special interests *and put political newcomers on a more level playing field* at election time."[97] Other reports discuss the need to eradicate "big money" from campaigns, but are unclear as to whether supporters of Proposition A fear corruption or simply desire a more equal playing field.[98]

Proposition A. *See* Jo Mannies, *Nixon Backs Lower Lid on Campaign Donations*, ST. LOUIS POST-DISPATCH, Nov. 18, 1994, at 1A. For a discussion of Proposition A's fate in the legal system, see *supra* note 43.

96. *Buckley* did not consider the latter interests in upholding contribution limitations, finding it "unnecessary to look beyond" the appearance of corruption rationale. Buckley v. Valeo, 424 U.S. 1, 26 (1976). In reviewing expenditure limitations, however, the Court noted that the equalization and competition rationales were invalid interests altogether. *Id.* at 48-49. In later cases, the Court emphasized that "preventing corruption or the appearance of corruption [were] the only legitimate and compelling government interests thus far identified for restricting" campaign contributions as well as expenditures. FEC v. Nat'l Conservative PAC, 470 U.S. at 496-97; Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley, 454 U.S. 290, 296-97 (1981).

97. Kevin Q. Murphy, *Low-Key Proposition A Would Refashion Election Financing*, K.C. STAR, Oct. 28, 1994, at A1 (emphasis added); *see also id.* (quoting one source as approving Proposition A because "many people can afford to give $300 but not $1,000, which would put their contributions on a par with corporations and other traditional big players").

98. One proponent of Proposition A apparently saw "big money" as the source of increasingly negative and expensive campaigning. While one could interpret her underlying rationale as relating to corruption, she never mentions corruption or the appearance of corruption in her letter. *See* Richardson, *supra* note 92, at 15B. Another proponent described "the overwhelming role that business plays in our political process" because "[a]lmost 70 percent of the state Senate campaign funds were from the business sector." Steely, *supra* note 92, at 3B. Again, while one could logically presume that the writer fears corruption of politicians, one could just as easily assume that she desires to have her voice heard on an equal basis.

None of this is to say that Missouri was wrong in thinking that its citizens feared potential corruption from large campaign contributions. However, the state did not prove that fact. The Court's willingness to rely on a self-serving affidavit and ambiguous newspaper articles to support the appearance of corruption rationale amounts to little more than an acceptance of the "mere conjecture" it claimed was inadequate to satisfy First Amendment review.[99] This is not the kind of review that we typically associate with strict scrutiny. Nor does it reflect the Court's application of intermediate scrutiny, which has become increasingly more stringent in recent years.[100] The *Shrink* Court's approach is simply not scrutiny. It is unquestioning deference to the legislature. Such deference has no place in a framework that purports to apply something other than minimal review, as do *Shrink* and the Court's First Amendment jurisprudence generally.[101]

One could again attribute *Shrink*'s evidentiary shortfalls to *Buckley*. In upholding the contribution limitations, *Buckley* barely mentioned, much less discussed, Congress's evidence supporting the corruption/appearance of corruption rationale.[102] Perhaps, then, *Shrink* merely followed *Buckley*'s lead. Upon further review, however, *Shrink* goes well beyond *Buckley*'s apparent disinterest in evidentiary support.

Although the *Buckley* Court did not discuss the evidence at length, it specifically referred to the lower court's evidentiary findings as supporting the notion that "the problem [of corruption or the perception thereof was] not an illusory one."[103] Those findings included cites to legislative history[104] detailing specific campaign abuses, including milk industry donations of more than two million dollars to President Nixon in exchange for an alleged price support increase,[105] lavish (and sometimes illegal) contributions by special interests to

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99. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 392 (2000).

100. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (citations omitted) (quoting Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985)) (The state must "do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.").

101. While the Court has applied minimal or rational basis scrutiny in equal protection analysis, it applies that analysis in First Amendment jurisprudence only in the case of incidental burdens on speech. *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 305 (1997).

102. Buckley v. Valeo, 424 U.S. 1, 26-27 (1976). Even Shrink PAC's and Fredman's lawyers characterized *Buckley*'s evidentiary foundation as thin at best. *See* D. Bruce LaPierre, *Raising A New First Amendment Hurdle for Campaign Finance "Reform"*, 76 WASH. U. L.Q. 217, 225 (1998); *see also* Tao, *supra* note 13, at 1374.

103. *Buckley*, 424 U.S. at 27 & n.28.

104. The appellate court relied heavily on the Congress's investigations, hearings, and report regarding campaign abuses. *See* FINAL REPORT OF THE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, S. REP. NO. 93-981, at 587-621 (1974).

105. *See* Buckley v. Valeo, 519 F.2d 821, 839 n.36 (D.C. Cir. 1975), *rev'd in part*,

various Senators that were designed to "obtain governmental favor,"[105] and President Nixon's practice of requiring large contributions before considering candidates for particular ambassadorships.[107] The substance and timing of these allegations, coupled with President Nixon's apparent use of campaign donations to finance the Watergate break-in,[103] explain much of the Supreme Court's willingness to accept the government's appearance of corruption rationale for regulating contributions.

The *Shrink* Court's deference, however, cannot be so explained. *Shrink*'s record referred to no legislative history documenting campaign finance abuses. Nor did the affidavit, newspaper articles, or passing of Proposition A provide concrete evidence of citizens' perception of such abuses. Moreover, unlike the era in which *Buckley* was decided, there appears to have been no extraordinary circumstances explaining the Court's willingness to assume a public perception of corruption.[109] Thus, while *Buckley* arguably did not require much evidence of perceived corruption, at least the Court relied upon something. *Shrink* upheld Missouri's contribution limitations based upon no evidence at all.

III. THE IMPLICATIONS OF *SHRINK*'S FLAWS

Given their obvious parallels, it would be foolish to argue that *Buckley* did not influence the *Shrink* decision. Nevertheless, as evidenced in the above discussion, something more is going on. This Section discusses what that "something more" is. Specifically, it argues that *Shrink* results as much from the Court's current multi-tiered system of judicial review as it does from *Buckley*. In order to understand the relationship between *Shrink* and the Court's broader jurisprudence, this Section first recounts a brief history of the Court's standards of scrutiny and their flaws, and then discusses the manner in which *Shrink* reflects those flaws.

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424 U.S. 1 (1976). The milk industry specifically crafted these donations to avoid disclosure requirements, a maneuver that further supports the corruption/appearance of corruption rationale.

106. *Id.* at 839 n.37.

107. *Id.* at 840 n.38.

108. *See* Marshall, *supra* note 15, at 339.

109. A few of the newspaper articles cited as evidence referred to a scandal involving former Missouri Attorney General William Webster, who steered state business to certain lawyers later indicted for overcharging the state. *See* Mannies, *supra* note 93, at 4B; Murphy, *supra* note 97, at A1. Webster himself was imprisoned for using state resources to finance his campaign for governor. *See* Murphy, *supra* note 97, at A1. While these incidents evidence corruption arguably linked to campaign contributions, they are pale shadows of the occurrences giving rise to *Buckley*. Moreover, the nature of the evidence—a passing mention of the Webster scandal in a newspaper article—is not comparable to the legislative history available to the *Buckley* Court.

A. The History of Multi-Level Review

The Court's multi-tiered system of judicial review is a substantial feature of its constitutional jurisprudence.[110] That system consists of three levels of scrutiny—strict, intermediate, and rational basis—all of which share the same general structure. Each judges a law affecting the exercise of a constitutional right by (1) examining the importance of the government's interest, and (2) asking whether the law is sufficiently tailored to meet that interest. Thus, the government's interest must be compelling, substantial, or legitimate and the law must be necessary, narrowly drawn, or reasonably related to that interest depending upon whether the Court uses, respectively, strict, intermediate, or rational basis scrutiny.[111] The Court determines which standard of scrutiny to use depending upon the burden placed upon a constitutional right. Strict scrutiny is reserved for laws seriously burdening constitutional rights, such as laws discriminating against the expression of particular viewpoints in the First Amendment context, or laws discriminating based upon race in the Fourteenth Amendment context.[112] The Court applies intermediate scrutiny to laws that somewhat burden the exercise of individual rights, such as content-neutral laws directly affecting expression or laws that discriminate on the basis of gender.[113] Finally, a law that only minimally burdens constitutional rights (the vast bulk of all laws) is subject only to rational basis scrutiny.[114]

The multi-tiered system of review is largely a product of the Warren and Burger Courts and arose as an effort to obtain objectivity in the Court's jurisprudence after critics in the first half of the twentieth century accused the Court of using ad hoc, activist, and policy-oriented balancing tests[115] to

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110. *See* Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 161 (1984) (noting that "[c]ontemporary constitutional adjudication is characterized by an elaborate system of judicial review composed of multiple levels of scrutiny").

111. *See* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 955 (1999); Bhagwat, *supra* note 101, at 303-04.

112. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (striking down under strict scrutiny race-based classifications); R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) (noting that viewpoint-based restrictions are subject to strict scrutiny).

113. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (intermediate scrutiny applied to content-neutral law requiring performers in city park to use certain sound amplification equipment); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (intermediate scrutiny applied to gender-based exclusion from nursing school).

114. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

115. I use the term "balancing" in the same manner as Alexander Aleinikoff who defines it as the process of "analyz[ing] a constitutional question by identifying interests implicated by [a] case and reach[ing] a decision or construct[ing] a rule of constitutional

determine the constitutionality of many laws.[116] Reluctant to give up the flexibility and pragmatism of balancing tests entirely, the Court sought to "externaliz[e] the balancing process," extending it beyond judges' subjective preferences to focus on objectively "out there" societal interests that might, in some instances, justify infringement of constitutional rights.[117] The Court also sought to formalize balancing, by applying it in the manner of a mathematical formula.[118] The Court's tiers of scrutiny, with their mandate that judges examine the nature of government interests at stake and the care with which a law is tailored, appear to accomplish these tasks.[119]

The Court's attempt to create a more detached system of constitutional review was not entirely successful. As many critics have noted, the Court's standards, as written, are abstract.[120] They require judges to balance "compelling," "substantial," or "legitimate" interests, but they provide no

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law by explicitly or implicitly assigning values to the identified interests." T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987).

116. *See id.* at 948-63 (discussing the Court's history of balancing and academic calls for change); *see also* Bhagwat, *supra* note 101, at 306-07 (discussing origin of tiers of scrutiny in Warren and Burger Courts' jurisprudence); Shaman, *supra* note 110, at 161-62 (attributing current tiers of scrutiny to Roosevelt's Court-packing plan and the resulting lack of legitimacy of the Court's actions).

117. Aleinikoff, *supra* note 115, at 962-63.

118. *See* Aleinikoff, *supra* note 115, at 963.

119. The Court's standards of scrutiny do not explicitly incorporate a balancing analysis. Nevertheless, many scholars conceive of them as requiring Aleinikoff's balancing of interests. As Kathleen Sullivan notes, the typical configuration of constitutional litigation includes:

> [A] right or structural provision, a claimed government infringement of the right or the structural provision, and a claimed government interest or justification for the infringement. Balancing takes into account background principles or policies affecting each of these components—how important is the right, how bad was the infringement, and how good is the government's reason.

Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 60 (1992). This description encompasses much of what the Court's tiers of scrutiny, as written, are designed to do.

For scholars describing tiers of scrutiny as involving balancing, see Aleinikoff, *supra* note 115, at 946; Ashutosh Bhagwat, *Hard Cases and the (D)evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 963-64 (1998); Solove, *supra* note 111, at 954-55. *Cf.* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 711-12 (1994) (noting that "judicial rhetoric" of tiers of scrutiny appears to use balancing although "balancing does not describe the actual process operating in large areas of constitutional decision making").

120. *See* Aleinikoff, *supra* note 115, at 992-93; Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 199-200 (1985); Shaman, *supra* note 110, at 174.

mechanism for determining which interests fall into which category.[121] Similarly, there is no internal mechanism for determining when a law meets the requirement that it be "necessary," "narrowly drawn," or "rationally related" to the state's interest.[122] Thus, while these standards of review purport to give mathematical precision, they actually give little guidance to judges in resolving disputes. As a consequence, the objectivity manifested in the Court's multi-level review may simply mask, rather than eradicate, ad hoc judicial decision-making.[123]

To some extent, the Court has managed to work around the abstractness of its standards. It has primarily done so by making the application of a particular standard so rigid as to reach the same result in almost every case. Thus, while strict scrutiny ostensibly allows a court to uphold a law if it is necessary to meet a compelling state interest, that standard almost always results in the law's demise.[124] Hence, the saying that strict scrutiny is "'strict' in theory and fatal in fact."[125] Similarly, the Court almost never strikes down a law using rational basis review, which has become equated with total judicial deference.[126] In effect, the categorization of a law as subject to either strict or minimal scrutiny is outcome determinative, with the actual application of those standards a rhetorical and mechanical afterthought.[127] This approach relieves judges of the need to guess regarding the application of standards of scrutiny, except in the case of intermediate scrutiny, which remains a true balancing test.[128]

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121. *See* Bhagwat, *supra* note 101, at 308; Hans A. Linde, *Who Must Know What, When, and How: The Systemic Incoherence of "Interest" Scrutiny, in* PUBLIC VALUES IN CONSTITUTIONAL LAW 219, 220-22 (Stephen E. Gottlieb ed., 1993).

122. *See* Bhagwat, *supra* note 101, at 322 (noting that "means scrutiny" component of the Court's standards of scrutiny is "notoriously manipulable").

123. *See, e.g.*, Nagel, *supra* note 120, at 202 (The formulaic "style reflects intellectual embarrassment about the existence of judicial discretion but is designed to assure plentiful opportunities for its exercise.").

124. *See* Bhagwat, *supra* note 101, at 304; Sullivan, *supra* note 119, at 60.

125. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

126. *See* Shaman, *supra* note 110, at 161-62; Sullivan, *supra* note 119, at 60.

127. *See* Sullivan, *supra* note 119, at 60 (noting that although tiers of scrutiny "employ nominal balancing rhetoric" the Court has "tie[d] itself to the twin masts of strict scrutiny and rationality review in order to resist (or appear to resist) the siren song of the sliding scale").

128. *See* Shaman, *supra* note 110, at 162-63 (noting that intermediate scrutiny developed as a method to soften the rigidity of strict and rational basis scrutiny); Sullivan, *supra* note 119, at 61 (categorizing intermediate scrutiny as a balancing test located somewhere between strict and rational basis scrutiny); *see also* Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 166-70 (1995) (discussing ad hoc balancing involved in the intermediate scrutiny standard used for judging content-neutral

Even this interpretation, however, presents substantial problems. First, the Court occasionally finds itself boxed in by its rigidly defined levels of review, causing it to engage in subterfuge. By this, I mean that the Court sometimes faces a case that logically should be assessed under one level of scrutiny. For whatever reason, however, the Court dislikes the result of that application but cannot justify using a lower level of scrutiny. As a consequence, it manipulates another aspect of the case to reach the desired result. In *City of Renton v. Playtime Theatres, Inc.*,[129] for example, the Court faced the constitutionality of a law regulating the location of adult theaters. The law was facially content-based and under typical circumstances would have been struck down under strict scrutiny. The Court's ambivalence toward sexually explicit speech, however, led it to uphold the statute.[130] It did so by sleight-of-hand, claiming that the law was actually content-neutral and subject to more lenient, intermediate scrutiny.[131] By subverting the content-based/content-neutral distinction, the Court thus managed to work around its rigidly defined tiers of scrutiny.[132]

At other times, the Court, faced with having to choose which standard to apply, has simply declined to do so. In *Rostker v. Goldberg*,[133] for example, the Court faced a due process challenge to a male-only draft law. That challenge required the Court to determine whether it should apply intermediate scrutiny to review a law discriminating against women or rational basis scrutiny to review a law governing military matters.[134] Although the Court cited much precedent, a close reading of the case reveals that it never actually chose a standard of review and instead upheld the law simply because it was "well within [Congress's] constitutional authority."[135] In fact, the Court explicitly noted that standards of review were unhelpful as they "may all too readily become facile

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regulations of speech).

129. 475 U.S. 41 (1986).

130. The Court's ambivalence toward sexually explicit speech was best summarized by Justice Stevens: "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in theaters of our choice." Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 70 (1976).

131. *See Renton*, 475 U.S. at 48-50.

132. For a more detailed discussion of *Renton*, see Christina E. Wells, *Of Communists and Anti-Abortion Protestors: The Consequences of Falling Into the Theoretical Abyss*, 33 GA. L. REV. 1, 55-58 (1998). The Court arguably engaged in a similar subterfuge in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), where, over the vociferous dissent of four Justices, it upheld an arguably content-based statute by deeming it to be content-neutral and subject to intermediate scrutiny. For a more in-depth discussion of *Turner*, see Bhagwat, *supra* note 128, at 155-67; C. Edwin Baker, Turner Broadcasting: *Content-Based Regulations of Persons and Presses*, 1994 SUP. CT. REV. 57, 58-61.

133. 453 U.S. 57 (1981).

134. *Id.* at 64-69.

135. *Id.* at 83.

abstractions used to justify a result."[136] While the Court may have been right regarding the abstract nature of its standards, its refusal to choose one allowed it to dodge difficult issues and left it with enormous flexibility in interpreting the case as precedent in subsequent proceedings. Ultimately, although the Court's rigidly defined levels of review aim for objectivity, cases such as *Renton* and *Goldberg* reveal that potentially subjective and ad hoc judgments can still occur.

A second problem with the Court's multi-tiered review comes in the application of intermediate scrutiny. Although the Court treats strict and rational basis scrutiny rigidly, intermediate scrutiny is still a balancing test. In the context of the Court's tiers of scrutiny, balancing relies upon empirical and factual assessments, including "a valuation of the end that the law aims to achieve" as well as "the viability of means [to achieve the law], the effectiveness of means, and the existence and effectiveness of alternative means."[137] The Court's standards, however, impede its ability to balance in this manner.

First, the Court has not developed a jurisprudence regarding the nature of governmental interests in any context. Because of its rigid treatment of strict and rationality review, there was often no need to value the government's interest—the presumption of constitutionality or unconstitutionality associated with each standard was actually the determining factor.[138] The practice of ignoring the government's interest spilled over into intermediate scrutiny as well. Thus, regardless of the test applied, the Court generally eschews an examination of governmental interests altogether, often accepting them at face value.[139] Second, the tailoring requirement, although ostensibly the critical factor in the Court's standards of review,[140] is equally empty. As with the Court's examination of governmental interests, the outcome-determinative aspect of strict and rational basis scrutiny allows the Court to avoid any significant review of tailoring in those contexts.[141] This approach leaves intermediate scrutiny as the sole area in which the Court must make real determinations regarding the

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136. *Id.* at 69-70. For a more in-depth discussion of cases in which the Court refused to choose a standard of review, see Shaman, *supra* note 110, at 165-66.

137. Solove, *supra* note 111, at 955.

138. *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992) (noting in the context of rationality review, that "the government is supposed to win—and any lawyer who hires expert witnesses to dispute the empirical basis for legislation . . . is wasting the client's money").

139. *See* Bhagwat, *supra* note 101, at 307-08; Solove, *supra* note 111, at 960-66.

140. *See* Bhagwat, *supra* note 101, at 308; Solove, *supra* note 111, at 955.

141. This is not to say that the Court refuses to engage in such an analysis. Indeed, examination of a law's tailoring often comprises the bulk of opinions applying strict and rationality review. However, that application is often rhetorical in nature. *See* Bhagwat, *supra* note 101, at 304 ("[T]he categorization process has in most cases been outcome-determinative. . . . [E]ven scrutiny of the fit between means and ends has tended to be a mere formality.").

law's viability, effectiveness, and whether other, narrower laws could serve the same purpose. Without a presumption regarding constitutionality or any guideposts against which to gauge the meaning of "substantial" or "narrowly tailored," the Court's application of that standard is remarkably inconsistent, at best, or remarkably deferential, at worst.

As initially applied in the free speech context, for example, intermediate scrutiny was more rigorous than rationality review. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[142] the Court struck down a regulation of commercial speech after announcing that it would use intermediate scrutiny to review such regulations.[143] Similarly, the Court's cases applying early versions of intermediate scrutiny to content-neutral regulations of speech also resulted in findings of unconstitutionality.[144] In both situations, the Court undertook substantial examination of the law's tailoring to determine whether there was factual support for it. Subsequent cases, however, took a different approach to intermediate scrutiny. Apparently uncomfortable with the abstract nature of the test and its ability to evaluate the government's evidentiary support, the Court began to apply intermediate scrutiny far more leniently.[145] Eventually, the Court's application of intermediate scrutiny, especially its review of the government's evidence in support of the law, became so deferential[146] that

142. 447 U.S. 557 (1980).

143. Although the four-pronged test in *Central Hudson* appears somewhat different from the traditional iteration of intermediate scrutiny, the Court has intimated that *Central Hudson*'s test amounts to intermediate scrutiny. *See* Bd. of Trustees of S.U.N.Y. v. Fox, 492 U.S. 469, 477 (1989).

144. *See, e.g.*, United States v. Grace, 461 U.S. 171 (1983).

145. For commercial speech cases applying a deferential form of intermediate scrutiny, see *Fox*, 492 U.S. at 469; *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). For cases applying a deferential form of intermediate review to content-neutral regulations of speech, see *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984); *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

146. *Posadas*, which upheld a law banning casino advertising directed at residents of Puerto Rico, represents the culmination of the Court's deferential review in the commercial speech context. As one commentator noted, the Court's review upheld the law "without evidence of record on the basis of mere representations of the State." Philip B. Kurland, Posadas de Puerto Rico v. Tourism Company: *"'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful"*, 1986 SUP. CT. REV. 1, 7-12; *see also* Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724, 1746 (1995). In *Ward*, the Court took a similarly deferential approach in reviewing a content-neutral regulation of speech, weakening the tailoring prong of intermediate scrutiny so as to require that a law be only "reasonable." *Ward*, 491 U.S. at 799.

it amounted to little more than rationality review.[147] Recently, the Court has intimated that its intermediate scrutiny standard has more teeth than previously thought.[148] While a promising move away from deference, the Court's lack of consistency in this area reinforces the argument that intermediate scrutiny is utterly untethered and capable of substantial manipulation.

B. Multi-Level Review and Shrink

This understanding of the Court's multi-level review sheds light on *Shrink*'s flaws. First, the rigidity of the Court's multi-level review played a significant role in *Shrink*. *Buckley*'s rhetoric suggests that the Court intended to apply a standard akin to strict scrutiny. The Missouri law limiting campaign contributions should fail under our current understanding of that scrutiny. To strike down the law, though, appears to be inconsistent with *Buckley*, which admittedly applied a more balancing-like version of the strict scrutiny test. Application of *Buckley* in light of the Court's usual treatment of strict scrutiny thus presented the *Shrink* Court with a dilemma—should it openly acknowledge that *Buckley* meant to apply a lower standard of scrutiny than its rhetoric indicated, or should it acknowledge strict scrutiny as the appropriate standard but find a way to justify upholding the law?

Both options posed substantial questions regarding the Court's consistency. Most courts applying *Buckley* have assumed that it announced a strict scrutiny standard.[149] The *Shrink* Court's decision to change that standard would have affected numerous lower court decisions and, moreover, would have required an explanation regarding the Court's apparent change of heart. The second option, upholding contribution limitations after applying strict scrutiny, flies in the face of the Court's generally rigid approach.[150] Applying that test as an actual

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147. For scholarly discussions of the Court's increasingly deferential application of intermediate scrutiny, see Bhagwat, *supra* note 128, at 169-70 (intermediate scrutiny applied to content-neutral regulations); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 654 (1991) (same); Albert P. Mauro, Jr., Comment, *Commercial Speech After* Posadas *and* Fox*: A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931, 1931-32 (1992) (intermediate scrutiny applied to commercial speech); David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 369-81 (1990) (same).

148. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (subjecting a regulation banning commercial speech to a rigorous form of intermediate scrutiny imposing a "heavy burden" on the State to justify the law); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 624 (1994) (requiring under intermediate scrutiny that the government "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"); *see also* Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).

149. *See supra* note 67.

150. *See supra* notes 124-25 and accompanying text. Professor Bhagwat argues that the Court increasingly uses strict scrutiny as a true balancing test. Bhagwat, *supra*

balancing test could easily lead to accusations of bias and politicking.[151] At the very least, it requires an explanation as to whether and why the strict scrutiny standard should move toward a true balancing test, a task made especially difficult in light of the Court's recent reiteration that strict scrutiny poses a heavy burden on government to justify infringement of constitutional rights.[152] The analogical crisis[153] facing the *Shrink* Court ultimately caused it to blink. Rather than directly addressing these problems, the Court instead purported to apply *Buckley* while never quite actually telling us what *Buckley* required. Such a move is reminiscent of the *Renton* and *Goldberg* Court's manipulation and suggests just the sort of "ad hoc" review so heavily criticized in association with the Court's tiers of scrutiny.[154]

Second, *Shrink*'s review of the state's evidence reflects the phenomenon of deference associated with an untethered balancing test like intermediate scrutiny. *Shrink*'s seeming deviation from the Court's traditional tiers of scrutiny left it with no basis for assessing the government's purported interests, or the Missouri

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note 119, at 964-66. While there is truth to this statement, this phenomenon is still relatively rare and viewed as anomalous. *See* Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L. REV. 1, 43 n.192 (2000).

151. *See* Wells, *supra* note 150, at 48.

152. *See* United States v. Playboy Entm't Group, Inc., No. 98-1682, slip op. at 8-14 (Nov. 30, 1999).

153. *See* Sullivan, *supra* note 138, at 297 (noting that the Court's deviation from strict or rationality review often comes about because of a crisis in analogical reasoning).

154. The Court had a possible "out" in this regard. Although it has applied strict scrutiny to laws interfering with the First Amendment right to freely associate, in the past it typically upheld them. *See, e.g.*, Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984). Thus, freedom of association cases represent an area in which strict scrutiny has a meaning different from its typical application in the First Amendment context. *See* David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 94-100 (2001). Because the *Buckley* Court emphasized the association aspects of contribution limitations when upholding them, *Shrink* could simply have noted that strict scrutiny was appropriate and that this, like other association cases, was a case in which strict scrutiny was met. *Shrink*'s refusal to do this is somewhat mystifying. Perhaps it feared that creating an explicit exception to its typically rigid approach would open it up to accusations of bias and politicking. *See supra* note 150-51 and accompanying text. That approach, however, had some basis in the Court's existing practice and would have alleviated the need to obfuscate its standards.

It is also possible that the *Shrink* majority felt that its hands were tied by the Court's most recent association case, *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), in which the Court struck down a public accommodations law while reaffirming that strict scrutiny was the appropriate standard of review. *Id.* at 2449, 2456-57. *Dale* suggests that the Court's application of strict scrutiny to laws interfering with the right to expressive association may be moving back to a more common understanding of strict scrutiny. If so, *Shrink*'s refusal to clarify the standard of review looks even more political.

law's tailoring. Apparently believing itself to be incapable of reviewing the legitimacy of the government's corruption rationale, the Court accepted, without question, the government's proffered interest and the minimal evidence supporting it, even though that evidence contained indications of potentially illegitimate purposes. *Shrink*'s review of the contribution law's tailoring is similarly deferential, with little attempt by the majority to examine empirical findings regarding the contribution limitation's effect and whether there were less restrictive alternatives.[155] Instead, *Shrink* found the law to be "good enough" because "surgical precision" was not required. To be sure, that rhetoric stems from *Buckley*. But *Shrink*'s abdication of its obligation to review the evidence goes much further than the Court's earlier decision in *Buckley* and reflects a more fundamental phenomenon within the Court's First Amendment jurisprudence.

IV. CONCLUSION

Why does all of this matter? After *Shrink*, it is apparent that contribution limitations will survive judicial scrutiny. Whether that is so because *Shrink* applied *Buckley* or because of some other phenomenon is arguably immaterial; the result remains the same. Nevertheless, the manner in which *Shrink* reached its result does matter, both to the campaign finance debate and generally to First Amendment jurisprudence.

The *Shrink* Court's utter abdication of judicial review, for example, signifies that future attempts to regulate contribution limits—no matter how restrictive or how improper their actual motivation—will easily survive constitutional scrutiny. The Court's actions thus suggest that the rules of the contribution limitations game have changed. Although their purpose ostensibly must be prevention of corruption or the appearance thereof, the absence of meaningful judicial review after *Shrink* may result in pretextual use of such interests by the legislature. Indeed, legislators' self-interest in preserving their power suggests that such use is highly likely.[156] Understanding the manner in

155. In fact, one could characterize the Court's assessment of empirical data as highly selective. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 426 & n.10 (2000) (Thomas, J., dissenting) (noting that the Court's brief discussion of empirical data failed to assess the percentage of funds raised by contributions in excess of the limits and overlooked the quantitative data indicating that spending decreased by half after imposition of the contribution limits). According to the dissent, the overlooked data supported the notion that the law was overly restrictive. *Id.*

156. *See* Marshall, *supra* note 15, at 339-40 (noting the problem of "legislative entrenchment" that impedes campaign finance reform). Although scholars have noted this concern with respect to *Buckley*, *see, e.g.*, Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1278-79 (1994); Marshall, *supra* note 15, at 339-40; Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the*

which *Shrink* effected its deferential review may allow scholars and litigators to educate the Court and prevent such occurrences. Rather than simply rely on normative and abstract arguments regarding the need to move away from *Buckley*—none of which seem to have impressed a majority of the Court—they can also use methodological critiques, explaining the manner in which the Court's approach to judicial review causes problems. Eventually, the Court may re-examine its application of *Shrink*'s standards and strengthen them over time, as it has done in other areas, such as its application of intermediate scrutiny.[157]

Moreover, the *Shrink* Court's deference may have substantial implications for the place that "purpose scrutiny" has in the Court's First Amendment jurisprudence. Much of that jurisprudence aims at guarding against "illegitimate" purposes.[158] Indeed, the entire structure of its jurisprudence appears to be geared toward guarding against such purposes.[159] Even the *Buckley* Court acknowledged that some reasons simply were insufficient to justify speech regulation.[160] The *Shrink* Court's deference, however, indicates a striking lack of concern for the government's possible use of pretextual reasons. That, coupled with the Court's manipulation of its existing tiers of scrutiny, may signal an erosion of the Court's willingness to use government purposes as a cornerstone of its jurisprudence. It is not enough to say that in this particular area the public's fear of corruption is so obvious that it can be assumed. In past cases, the assumption of an "obvious" motive allowed the Court to uphold regulations that we now agree were grounded in illicit motivation.[161] The Court must maintain not only its strict sense of legitimate versus illegitimate motives, it must also maintain a method by which such motives are discerned.

Finally, and ever more globally, understanding the source of *Shrink*'s flaws is necessary to expose the Court's perfidy and urge it toward a more useful jurisprudence. The Court's increasing tendency to hide behind abstractions and rhetorical decisions[162] calls into question its legitimacy as an institution. To be

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Democratic Dilemma, 93 NW. U. L. REV. 1083 (1999); Martin Shapiro, *Corruption, Freedom and Equality in Campaign Financing*, 18 HOFSTRA L. REV. 385, 390-91 (1989), *Shrink*'s removal of the threat of judicial review altogether can only encourage legislators to extreme actions.

157. *See supra* note 148.

158. *See* Bhagwat, *supra* note 101, at 302.

159. *See* Christina E. Wells, *Reinvigorating Autonomy: Freedom & Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. CR-CL L. REV. 159 (1997).

160. *See* Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

161. *See, e.g.*, Dennis v. United States, 384 U.S. 855 (1966) (upholding criminal convictions of communist party members).

162. *See* Wells, *supra* note 132, at 5-6 (noting that "the Court's decisions have evolved haphazardly and are empty and easily manipulable" that the Court tends to "support[] its decisions by simply citing to past precedent with little or no explanation,"

sure, many of the decisions with which the Court is faced are hard. But application of abstract and manipulable standards, although easing the writing of a difficult opinion, do not justify it. As Professor Fallon has noted:

> [W]e trust the Supreme Court to . . . at least be disciplined by the demands of principle and by the requirement of articulate reason giving. . . . For the most part, it may be fair for the Court simply to presume that prior decisions have established doctrine that reasonably implements constitutional principles. But when the Court's majority declines a dissenting opinion's express challenge to justify its decision at a deeper level, it refuses to accept the full discipline of articulate justification that helps to support the legitimacy of judicial review.[163]

Cases like *Shrink*, in which the Court pretends to apply law while essentially abdicating its role, support notions that the Court is merely a political institution, even if in most cases such an accusation is untrue.

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and that its citation of precedent is "often selective").

163. Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 117 (1997).