When Money Talks: Reconciling Buckley, the First Amendment, and Campaign Finance Reform

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When Money Talks: 
Reconciling *Buckley*, the First Amendment, 
and Campaign Finance Reform

Stephanie Pestorich Manson*

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I. Introduction

Just imagine the headlines if teams started contributing to referees based on how that referee called their games. Sports fans everywhere would be absolutely outraged.¹

In the 1999-2000 election cycle, the two major political parties raised $1.2 billion.² Of that amount, $495.1 million was "soft money."³ By the end of the 1999-2000 cycle, more than 130 different groups had aired over 1,100 "issue advertisements" costing approximately $500 million.⁴ The press, public interest groups, and politicians are calling for reform of the current campaign finance system. However, questions remain as to what reforms would fix the campaign finance system’s problems and, significantly, whether these reforms would be constitutional.

During the 2000 presidential primary, Senator John McCain campaigned on specific campaign finance reforms, including a ban on soft money and disclosure of issue ads.⁵ Although it was McCain’s run for the presidency that helped the public focus on the problems of the campaign finance system,

³ Id. Soft money is money that is not regulated under the Federal Election Campaign Act (FECA). Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3. The current campaign finance system does not limit contributions to a political party committee as long as the unlimited funds are not used directly for the assistance of a candidate for federal office. See infra notes 172-86 and accompanying text (describing evolution of soft money). Soft money may not be donated directly to the campaign of a federal candidate; contributions to candidates are limited by FECA. See infra notes 172-86.
Congress has been debating his proposals for years. Senator McCain, along with Senator Russell Feingold and Representatives Christopher Shays and Marty Meehan, have introduced legislation that would ban soft money in federal campaigns. In the 106th Congress, the bill sponsored by Representatives Shays and Meehan passed the House of Representatives but died in the Senate. Much of the debate surrounding the bill focused on the constitutionality of the reforms.

The survival of the reforms depends upon which constitutional standard the Supreme Court applies. In 1976, the Supreme Court announced the current standard for examining limits on campaign contributions in Buckley v. Valeo. The Buckley Court applied "exacting scrutiny" under the First Amendment.

7. Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong.; Bipartisan Campaign Finance Reform Act of 2001, H.R. 380, 107th Cong; see infra notes 201-22 and accompanying text (describing S. 27 and H.R. 380). The bill also restricts "issue ads." S.27; H.R. 380. Issue ads are political advertisements that do not specifically advocate election or defeat of a political candidate. See also infra notes 187-95 and accompanying text (defining "issue ad").
10. 424 U.S. 1 (1976) (per curiam); see infra notes 72-140 and accompanying text (detailing Supreme Court's decision in Buckley). In Buckley v. Valeo, the Court reviewed the constitutionality of the Federal Election Campaign Act of 1971 (FECA). Buckley v. Valeo, 424 U.S. 1, 6 (1976) (per curiam). The Court first upheld the limits on the amount of money that individuals and organizations could contribute to federal candidates, political committees, and political parties. Id. at 12-38. The Court reasoned that the governmental interest in preventing corruption and the appearance of corruption outweighed the minor restrictions on the speech and association rights of potential donors. Id. at 58. The Court next looked at the restrictions on expenditures for individuals, candidates, and campaigns. Id. at 39-58. The Court struck down these limits because they burdened more speech than necessary. Id. at 39. Although the Court found that the limits on contributions adequately furthered the interest in preventing corruption, the Court also determined that the limits on expenditures actually reduced the amount of political discourse. Id. at 45, 58-59.

The Court then focused on FECA's disclosure and reporting requirements. Id. at 60-84. Although the requirements would discourage some donors, the Court concluded that the disclosure provisions burdened speech only slightly and provided a transparent system that promoted the prevention of corruption. Id. at 64, 66-68, 84. The Court next looked at FECA's system of public financing for presidential campaigns. Id. at 85-109. The Court upheld the system as a proper exercise of Congress's power to regulate federal elections. Id at 90-91. The Court rejected the argument that the requirements for funding, which require a candidate or party to gain specific percentages of the vote in order to qualify for the funds, invidiously discriminated against minor party candidates. Id. at 94-95. Finally, the Court invalidated the creation of the Federal Election Commission because it violated the Appointments Clause. Id. at 109-43.
Amendment to various campaign reforms passed by Congress. The limits on political speech could survive only if they were "closely drawn" to serve a "significant" government interest. The Court identified two government interests that justified the restrictions upheld in Buckley—preventing the corruption of officeholders and candidates and preventing the appearance of corruption. In subsequent decisions, the Court has assumed that these two interests are the only interests that allow restrictions on campaign finance to pass constitutional scrutiny. Therefore, any campaign finance reform that does not further one of these two interests will not be upheld. Instead, a limitation on campaign finance that does not prevent corruption or the appearance of corruption will be deemed an unconstitutional restriction on speech.

For example, restricting soft money does not prevent the possibility of a quid pro quo between a donor and a candidate because soft money is donated to political parties and not to individual candidates. Because the money is not donated directly to any federal candidate, there is no candidate for the donor to influence. A ban on soft money, therefore, may not satisfy this strict standard. The same can be said for a ban on issue ads. A candidate who is featured in an issue ad has not received anything by the group paying for the advertisement. This is because, by definition, the ad cannot expressly promote or oppose a federal candidate. The opportunity for the advertiser

11. See Buckley, 424 U.S. at 16 (per curiam) (describing level of scrutiny to be applied).
12. Id. at 25.
13. See infra notes 79-86 and accompanying text (explaining how Buckley Court justified upholding contribution limits).
14. See infra notes 141-63 and accompanying text (looking at cases in which Supreme Court has identified interest in preventing corruption or preventing appearance of corruption as only interests sufficient to overcome exacting scrutiny required by Buckley).
15. See infra notes 141-63 and accompanying text (illustrating how Supreme Court requires campaign reforms to prevent corruption or to prevent appearance of corruption in order to pass constitutional scrutiny).
16. See infra notes 143-63 and accompanying text (discussing Supreme Court cases that upheld only those restrictions that prevented corruption).
17. See infra notes 232-49 and accompanying text (describing how soft money is analyzed under current constitutional standard).
18. See infra notes 172-73 and accompanying text (explaining how soft money is donated not to individual candidates, but to political committees).
19. See infra notes 232-49 and accompanying text (evaluating soft money ban under Buckley).
21. See infra notes 187-95 and accompanying text (discussing how issue advertisements cannot expressly advocate election or defeat of federal candidate).
to influence the candidate is diminished because the candidate has nothing for which to be grateful. As these examples illustrate, the standard applied by the Court stands in the way of many of the proposed reforms.

The Supreme Court's current emphasis on preventing corruption may seal the fate of the proposed reforms. However, several Justices have grown increasingly dissatisfied with the current campaign finance jurisprudence laid out in Buckley and its progeny. If the Court's standard changes, the fate of the proposed reforms may change with it.

In one of the Supreme Court's most recent decisions dealing with campaign finance reform, Nixon v. Shrink Missouri Government PAC, six Justices expressed their unhappiness with Buckley. Because of their dissatisfaction, the Justices offered four competing frameworks for evaluating campaign finance reform. The most radical idea was that of Justice Stevens; he sug-

22. See infra notes 229-67 and accompanying text (describing how corruption analysis may stand in way of reform).
23. See infra notes 270-300 and accompanying text (examining current Supreme Court's dissatisfaction with Buckley standard).
24. See infra Part IV (evaluating how fate of reform proposals would change based on application of differing constitutional standards).
25. 528 U.S. 377 (2000). More recently, the Court decided FEC v. Colorado Republican Federal Campaign Committee, 121 S. Ct. 2351 (2001). Colorado Republican dealt with the regulation of expenditures that are coordinated between candidates and campaigns. Id. at 2356. Because this Note focuses on two specific campaign finance issues, soft money and issue advertisements, and not on coordinated expenditures, the Court's decision in Colorado Republican is not discussed in detail. However, this decision is relevant to determine the attitude of the current Court toward campaign finance issues in general. See infra note 319 (discussing relevance of Colorado Republican on Court's formulation of standard of review for campaign finance issues).
26. See infra notes 268-300 and accompanying text (outlining various opinions in Shrink PAC). In Shrink PAC, the Supreme Court considered whether Buckley controlled state campaign contribution limits and whether the specific limits approved in Buckley were the minimum limits allowable. Id. at 381-82. Missouri set maximum contribution limits for various state candidates from $250 to $1000 depending on the specified office or size of constituency. Id. at 382. The Shrink PAC Court reiterated the reasoning from Buckley, stating that contribution limits place less of a burden on speech than do expenditure limits. Id. at 386-89. In Buckley, the Court identified preventing corruption, Missouri's stated interest in Shrink PAC, as a legitimate state interest in limiting campaign contributions. Id. at 390. The fact that Missouri did not present empirical evidence proving that the limits would prevent corruption was not fatal to their case because the influence of large donations on candidates had been established in Buckley. Id. at 390-93. The Shrink PAC Court then stated that a contribution limit would be considered an unconstitutional abridgement of the contributor's speech only when the limit was so low as to "render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." Id. at 397. Although the Shrink PAC Court concluded that there was no reason that Buckley should not control state-level contribution limits, the actual dollar amounts of the limits in Buckley were not controlling. Id. at 397-98.
27. See infra notes 270-300 and accompanying text (discussing different suggestions in Shrink PAC).
gested a fundamental departure from the Supreme Court's previous approach to regulations of campaign finance activity. 28 He declared that the Buckley Court's reliance on the First Amendment was misplaced. 29 "Money is property," he wrote, "it is not speech." 30 Justice Stevens concluded that because the Court should view political contributions as property, the Court should review such restrictions under the due process clause. 31 To illustrate his point, he drew a distinction between a candidate who speaks for himself and a candidate who hires someone to speak for him. 32 Justice Stevens noted that although both activities deserve constitutional protection, "bought" speech deserves less protection than does the right to speak for oneself. 33 This "money is property, not speech" argument would permit a more lenient level of scrutiny for campaign reform measures than the Buckley standard. 34 Thus, a reform that would assert a significant interest other than the prevention of corruption could survive Justice Stevens's standard. 35

On the other hand, Justice Breyer, joined by Justice Ginsburg, found that the basic speech framework of Buckley was appropriate, but questioned the Court's application of Buckley. 36 Justice Breyer claimed that Buckley was flexible enough for the legislative and executive branches to enact and to enforce more stringent campaign finance measures. 37 He envisioned the Court as "balanc[ing] interests" and "defer[ring] to empirical legislative judgments" when evaluating campaign finance reforms. 38 Although Justice Breyer believed that the Buckley opinion allowed for this kind of balancing test, he declared that if Buckley did not allow for such a test, the Constitution required a reconsideration of Buckley. 39 Thus, a reform that would assert a significant

28. See Shrink PAC, 528 U.S. at 398-99 (Stevens, J., concurring) (suggesting that Court should look at campaign finance as money, not speech).
29. See id. at 398 (Stevens, J., concurring) (declaring that money is not speech).
30. Id. (Stevens, J., concurring).
31. See id. at 398-99 (Stevens, J., concurring) (explaining that money is property and that property rights are not afforded same level of protection as pure speech).
32. See id. at 399 (Stevens, J., concurring) (differentiating "speech by proxy" from "the right to say what one pleases").
33. See id. at 398-99 (Stevens, J., concurring) (stating that inspiring volunteers with words deserves more protection than inspiring people to do same work through money).
34. See id. at 399 (Stevens, J., concurring) (asserting that property rights "are not entitled to the same protection" as speech rights).
35. Id. (Stevens, J., concurring).
36. See id. at 402-03 (Breyer, J., concurring) (asserting that when law implicates multiple constitutional interests, Court should balance interests).
37. See id. at 404 (Breyer, J., concurring) (explaining that Buckley Court left room for additional restrictions on campaign financing).
38. Id. at 402 (Breyer, J., concurring).
39. See id. at 405 (Breyer, J., concurring) (announcing that "the Constitution would require
interest other than the prevention of corruption could survive Justice Breyer’s standard.40

A fourth Justice in Shrink PAC, Justice Kennedy, also voiced his uneasiness about the system created in Buckley.41 In his dissent, Justice Kennedy contended that the Buckley framework protected the worst kinds of political speech – soft money and issue ads – and drowned out the speech that should be most protected – contributions of individuals.42 He concluded that by relying on Buckley, the Supreme Court created a campaign finance system that was more offensive to the First Amendment than the system the Court rejected in Buckley.43 He would require close scrutiny for provisions such as the one at issue in Shrink PAC, a provision that restricted the amount of direct contributions to candidates.44 Overall, Justice Kennedy believed that although the First Amendment protected a system of direct contributions, it did not necessarily protect the "covert speech" that Buckley allowed.45 Thus, a reform that would prevent a significant interest other than quid pro quo corruption could also survive Justice Kennedy’s standard.

Finally, Justice Thomas, joined by Justice Scalia, contended that the majority’s application of Buckley "balance[d] away First Amendment freedoms."46 Justice Thomas would apply strict scrutiny to all campaign finance measures, requiring narrowly tailored means to promote a compelling government interest.47 Thus, even those reforms which would prevent quid pro quo corruption would not necessarily be safe under Justice Thomas’s proposal.

[the Court to reconsider Buckley" if Buckley did not allow "the political branches sufficient leeway to enact comprehensive solutions" to campaign reform problems).

40. See infra notes 276-86 and accompanying text (evaluating fate of current campaign finance reform proposals under Justice Breyer's framework).

41. See Shrink PAC, at 405-10 (Kennedy, J., dissenting) (declaring that majority in Shrink PAC "perpetuates and compounds a serious distortion of the First Amendment resulting from [the Supreme Court]'s own intervention in Buckley").

42. See id. at 406-07 (Kennedy, J., dissenting) (lamenting system that allows unlimited "covert speech" like soft money and issue ads, while limiting financial contributions to candidates that are subject to full disclosure).

43. See id. at 408 (Kennedy, J., dissenting) (asserting that "[o]ur First Amendment principles surely tell us that an interest thought to be the compelling reason for enacting a law is cast into grave doubt when a worse evil surfaces in the law's actual operation").

44. See id. at 406 (Kennedy, J., dissenting) (decrying how Court has "abandon[ed] the rigors of [the Court]'s traditional First Amendment structure").

45. See id. at 408 (Kennedy, J., dissenting) (concluding that "the law before [the Shrink PAC Court] cannot pass any serious standard of First Amendment review"). Justice Kennedy concluded that "Buckley has not worked" and that any limitations on direct campaign contributions and expenditures present constitutional problems. Id. at 408-09.

46. Id. at 410 (Thomas, J., dissenting).

47. See id. at 427 (Thomas, J., dissenting) (defining standard that he believed should be applied to evaluate limits at issue in Shrink PAC).
Given all of these competing frameworks, what should be the proper standard for evaluating restrictions on campaign financing? What kind of campaign finance proposals will survive constitutional analysis? This Note will explore these questions. Part II of this Note reviews the current state of the law regarding campaign finance reform. More specifically, it examines the law that produced the decision in Buckley, the way in which Buckley actually defined the outer limits of campaign contributions, and how the Supreme Court has narrowed Buckley to reject all campaign finance proposals that do not advance the interests of preventing corruption or preventing the appearance of corruption. Part III discusses the current campaign finance reform proposals and how they attempt to fix the perceived problems. Part IV looks at how the reforms would fare under the current constitutional standard and evaluates the fate of the proposed reforms under the different standards suggested by the Justices in Shrink PAC. This Part also re-examines what the Court said in Buckley and suggests that Buckley may be more flexible than indicated by its current application. Finally, Part V concludes that the opinion in Buckley, the objections made by Justice White as to its subsequent application, and the Court’s action in Shrink PAC prove that campaign finance reform and the First Amendment are not mutually exclusive. More specifically, this Note concludes that preventing quid pro quo corruption need not be the only government interest promoted by a reform in order for that reform to pass constitutional scrutiny.

II. The Current Standard: Exacting Scrutiny and the Prevention of Corruption

Under current campaign finance jurisprudence, courts analyze restrictions on campaign contributions and expenditures as potential restrictions on

48. See infra Part II (outlining current test for evaluating campaign finance proposals).
49. See infra notes 141-63 and accompanying text (explaining how standard that applies to campaign finance measures evolved).
50. See infra Part III (examining soft money and issue advertisement provisions of current Congressional proposals).
51. See infra Part IV (considering effect of different constitutional standards on validity of current reform proposals).
52. See infra notes 301-21 and accompanying text (questioning whether corruption and prevention of corruption are only interests that could justify restrictions on campaign finance).
53. See infra Part V (looking at ability of Court to allow campaign finance reforms without ignoring First Amendment implications of such reforms).
54. See infra Part V (concluding that Buckley did not restrict significant interests to only prevention of corruption).
55. For purposes of this Note, preventing corruption also includes the interest in preventing the appearance of corruption.
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the freedoms of speech and association under the First Amendment. The United States Supreme Court first articulated this framework in Buckley v. Valeo. The Court has continued to view cases restricting campaign finance primarily as speech cases. It is this framework, first announced in Buckley, that the Justices called into question in Shrink PAC.

A. The Federal Election Campaign Act

The modern federal campaign finance system began when Congress passed the Federal Election Campaign Act of 1971 (FECA). Overall, FECA regulated media communications, limited the amount candidates could contribute to their own campaigns, and established a disclosure system. In 1974, Congress expanded the system created in FECA. The 1974 amendments to FECA broadened the contribution requirements, placed expenditure limitations on individuals, campaigns and candidates, established the public financing system for presidential elections, and created the Federal Election Commission.

56. See infra notes 72-163 and accompanying text (discussing speech framework as established in Buckley and its progeny).
57. 424 U.S. 1 (1976) (per curiam); see infra notes 72-140 and accompanying text (examining Court's opinion in Buckley).
58. See infra notes 141-63 and accompanying text (describing how Court has analyzed campaign finance cases).
59. See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (limiting contributions to federal political campaigns from personal funds or immediate family and requiring disclosure from candidates and political committees).
60. See id. (creating new campaign finance system). More specifically, the Act limited the amount of money that a candidate could spend on communications media. Id. § 104 (prohibiting candidates from spending more than greater of $50,000 or $.10 multiplied by voting age population in geographic area in which election was held). FECA also required broadcasters to give political advertisers their lowest unit rate. See id. § 103(b)(1) (requiring broadcasters to charge candidates "the lowest unit charge of the station for the same class and amount of time for the same period" for advertising time 60 days before general election or 45 days before primary election). The Act limited the amount of money a candidate could receive or spend from his or her personal funds or from members of the candidate's immediate family. See id. § 203 (prohibiting candidates from using personal funds in excess of $50,000 if candidate for President, $35,000 if candidate for Senate, and $25,000 if candidate for House of Representatives). FECA established rules defining political committees and requiring disclosure of campaign and committee contributions and expenditures. See id. §§ 301-11 (establishing reporting and disclosure system that required political committees and candidate committees to disclose information on amount of money received and spent by such committees).
62. See id. (expanding campaign finance system). The amendments expanded the contribution requirements to apply to all federal campaign donors. See id. § 101 (placing limita-
FECA, as amended, also limited expenditures in several different contexts. The amendments created a formula that limited the amount of money a candidate could spend on his own campaign based on the voting age population of the candidate's district. FECA placed similar restrictions on expenditures of political parties by limiting their expenditures to an amount based on the voting age population for the district in which the party was acting. The amendments also limited any expenditures made by individuals and groups, "relative to a clearly identified candidate," to $1,000 per year per candidate.

Additionally, the Act expanded the disclosure and reporting requirements. To administer the new requirements, the amendments created the Federal Election Commission. The Commission was created to be the repository of all campaign finance disclosures and the body that enforced the provisions of the Act. Finally, FECA provided for a system of public funding for presidential nominating conventions and presidential campaigns. The Court decided the constitutionality of FECA in Buckley v. Valeo.

B. Buckley v. Valeo

In Buckley, candidates, office holders, contributors, and political committees challenged the constitutionality of FECA, as amended by the 1974 Act. Among other objections, they contended that the limits on contributions to federal campaigns and the limits on expenditures of such campaigns

63. See id. § 101(e), (e), (f) (creating limits on overall campaign expenditures).
64. Id. § 101(e). For example, a candidate for the House of Representatives (from a state that was allotted more than one member in the House) could spend no more than the greater of $100,000 or $.08 multiplied by the voting age population. Id.
65. Id. § 101(f). For example, a national party committee could spend no more than $.02 times the voting age population of the United States on any expenditure in connection with a candidate for the Presidency. Id. Likewise, a national party committee could spend no more than $.02 times the population of the state toward the election of a Senator from that state. Id.
66. Id. § 101(e). For example, an individual who wished to produce their own ad about a candidate or campaign could spend only $1,000 on such communication. Id.
67. Id. § 201.
68. Id. § 208.
69. See id. § 209 (defining duties of Commission).
70. Id. §§ 406, 408.
72. Id.
73. See id. at 6-12 (describing plaintiffs and their claims).
violated First Amendment speech and association rights. The Court concluded that FECA implicated First Amendment interests in political expression and association by regulating the amount of money candidates could spend and how much contributors could donate. The regulations on contributing and spending money triggered the First Amendment because to be effective, modern communication requires money. Therefore, the Supreme Court examined FECA's provisions as potential infringements of the freedoms of speech and association under the First Amendment. Ultimately, the Court found the limits on the amount that a donor could contribute constitutional, but found the expenditure limits unconstitutional.

1. Contribution Limits

FECA's contribution limits survived constitutional scrutiny because they served the government's significant interests in preventing corruption and preventing the appearance of corruption. The Court emphasized that corruption referred to the potential for quid pro quo between donors and candidates. On the other side of the balance, the Court recognized that the contribution limits inhibited the First Amendment rights of the appellants. The Buckley Court emphasized that the expenditure of some amount of money is required for almost all types of communication. However, the Justices con-
cluded that the limitations did not materially alter the ability of the public to discuss political issues. The Court further reasoned that the contribution limits were narrowly tailored because they restricted only the donor’s rights to contribute to individual candidates, the context in which the possibility for corruption is the greatest. The contribution limits themselves left open other means of communicating political messages; individuals and groups were free to engage in political communication independent of the candidates. Applying this reasoning, the Buckley Court upheld all of the contribution limits.

2. Expenditure Limits

The Court’s rationale for upholding the contribution limits required the invalidation of the various limits on expenditures. Expenditure limits, unlike limits on contributions, "impose[d] direct and substantial restraints on the quantity of political speech." FECA contained the following three different expenditure limits: a $1,000 limitation on expenditures by individuals or organizations other than candidates and political parties "relative to a clearly identified candidate," limits on the amount a candidate could spend of his own money, and limits on how much a federal campaign itself could spend. Ultimately, the Court struck down all of FECA’s expenditure limits.

necessarily reduces the quantity of expression . . . . This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.

83. See id. at 29 (concluding that potential for "robust and effective discussion of candidates and campaign issues" was not substantially altered by contribution restrictions).

84. See id. at 28 (finding that contribution limitations focused on problem of large donations, but left open ability of individuals to engage in "independent political expression").

85. See id. at 28-29 & n.31 (explaining that contribution limits did not prevent individuals from giving larger donations to candidates by joining together in special interest groups, communicating political ideas themselves, and volunteering their time).

86. See id. at 23-38 (upholding $1,000 limit on individual contributions to any one candidate, $5,000 limit on political committee contributions to any one candidate, limitations on volunteer’s incidental expenses, and $25,000 aggregate limit on total contributions to federal candidates in election cycle).

87. See id. at 39-59 (discussing constitutionality of FECA’s expenditure limits).

88. See id. at 39 (concluding that effect of restriction was to limit amount of political speech). The Court noted that "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." Id. at 19 n.18.

89. See FECA Amendments of 1974, supra note 61, § 101(e)(1) (limiting expenditures "relative to a clearly identified candidate" to $1,000).

90. See FECA Amendments of 1974, supra note 61, § 608 (a)(1) (restricting amount of money candidate could spend out of personal funds for candidacy).

91. See FECA Amendments of 1974, supra note 61, § 101(c) (prohibiting campaign itself from spending unlimited amounts on campaign).

92. See Buckley v. Valeo, 424 U.S. 1, 58 (1976) (per curiam) (concluding that First Amendment requires invalidation of expenditure limits).
The Court first examined the $1,000 limit on expenditures "relative to a clearly identified candidate." The Court construed that language to restrict only those advertisements that contained words of express advocacy such as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" Advertisements that used these "magic words" were considered "express advocacy" and were subject to the contribution limits upheld by the Court. However, ads that did not use these "magic words" were "issue ads," which did not employ express advocacy and, thus, did not fall within the scope of FECA.

Even when interpreted in this restrictive manner, the Court found the expenditure limitation unconstitutional. The governmental interest in preventing corruption was not sufficiently compelling to justify the restrictions on the speaker/spender's First Amendment right to engage in political advocacy. In defending the limitation, the government also urged that an interest in equalizing the ability of various groups and individuals to influence campaigns warranted the expenditure restrictions. The Court, however, rejected this contention, stating that "[t]he First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."

Second, the Court struck down the limitation on expenditures from a candidate's own personal or family wealth. The Justices concluded that there

93. See id. at 39-51 (evaluating constitutionality of FECA provision that limits contribution to expenditures "relative to a clearly identified candidate").
94. Id. at n.52. This construction was necessary to avoid a vagueness challenge. See id. at 40-44 (determining that vagueness challenge could only be overcome by concluding that limitation only refers to communications that include "explicit words of advocacy").
96. See id. (same).
98. See id. at 45-48 (dismissing government's argument that prevention of corruption justified limits on independent expenditures). The Court concluded that there was not as great a possibility for corruption in the case of independent expenditures as there was in direct contributions. Id. at 46. Independent expenditures, by definition, are not controlled by the campaigns. Id. Therefore, the possibility of quid pro quo is diminished because the candidate is not actually receiving anything from the communicator. Even if the communications advocate in favor of the candidate, the ad may be counterproductive to the candidate's message. Id. at 47; see also supra note 20 (citing articles discussing this situation).
100. Id. at 49 (citing Eastern R. Conf. v. Noerr Motors, 365 U.S. 127, 136 (1961)).
101. See Buckley, 424 U.S. at 51-54 (discussing constitutionality of FECA's provisions limiting amount candidate may spend of his own money, or his immediate family's money, on his own campaign).
was no possibility of corruption from the use of personal funds. In fact, the Court postulated that the use of personal funds allowed candidates to rely less on the contribution of others and, therefore, protected such candidates from the type of corruptive forces that justified the contribution limitations. 

Again, the government tried to justify the limitation in the interest of equalizing the financial resources of candidates for office, but the Court rejected this argument as well. Ultimately, the Court concluded that the First Amendment did not tolerate the restriction on a candidate's ability to speak on his own behalf.

Third, the Court struck down the limitations on aggregate campaign expenditures by federal campaigns. This provision limited the amount any federal campaign could spend on its own efforts. In invalidating the limitations, the Court determined that the only danger associated with increasing campaign costs was the danger of dependence on large contributors. Thus, the Court concluded that the aggregate expenditure provision was unnecessary because the contribution limits adequately dealt with the danger of corruption from large contributions.

102. See id. at 53 (asserting that candidate's use of personal wealth actually keeps candidates from needing, and therefore from being influenced by, outside donors).

103. See id. (explaining that prevention of corruption is not sufficient justification to curtail candidate's right to communicate his ideas because no possibility of outside pressure from contributors exists when contributor is candidate himself).

104. See id. at 54 (concluding that government could not limit candidate's freedom to speak on behalf of his own candidacy because of desire to equalize resources of candidates). The Court added that there was no guarantee that a candidate who spent his or her own money would not be outspent by a candidate with fewer personal resources, but more productive fundraising. See id. (deciding that personal expenditure limitation "may fail to promote financial equality among candidates").

105. Id.

106. See id. at 54-58 (discussing FECA's limitations on overall campaign expenditures and concluding that they were unconstitutional).

107. See Buckley, 424 U.S. 54-55 (describing limitations that restricted amount candidate's campaign committee was allowed to spend depending on what office candidate sought).

108. See id. at 55 (stating that "major evil" associated with large campaign costs is candidate's reliance on large donors).

109. See id. at 55-56 (reasoning that mere growth of campaign costs is not adequate basis for limiting quantity of speech). The Court again rejected the argument that there was an interest in equalizing financial resources of candidates:

Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidates' support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.

Id. at 56. However, the Court did uphold the voluntary limits on presidential campaigns
3. Other Provisions

The Buckley Court also looked at the following three constitutionally suspect parts of FECA: the reporting and disclosure requirements, the public financing system, and the creation of the Federal Election Commission (FEC or the Commission).[^110] First, the Court examined the reporting and disclosure provisions that required candidates, political committees, and donors to report campaign contributions and expenditures to the FEC.[^111] The Court reviewed the disclosure requirements under the test established in *NAACP v. Alabama*,[^112] which required that the governmental interests survive "exacting scrutiny."[^113] Although the Court acknowledged that the disclosure requirements may cause some donors not to contribute, the Court concluded that the governmental interests in providing information to the voting public, the interest in preventing corruption, and the interest in gathering information to detect violations of the contribution limits all justified the requirements.[^114] Second, the Court examined the constitutionality of the public financing of presidential campaigns.[^115] The Court upheld this provision, rejecting claims that the system discriminated against candidates that did not meet the Act’s

[^110]: See id. at 85-109 (emphasis added) (upholding voluntary expenditure limits).

[^111]: See id. at 60-143 (evaluating provisions of FECA relating to reporting and disclosure, public financing, and Commission).

[^112]: 357 U.S. 449 (1958). In *NAACP v. Alabama*, the State of Alabama brought suit against the local chapter of the NAACP for not complying with the state’s requirements for filing a corporate charter. *NAACP v. Ala.*, 357 U.S. 449, 451 (1958). As part of the litigation, the NAACP was required to disclose its membership lists. *Id.* at 454. The NAACP refused and was held in contempt. *Id.* at 455. The organization appealed, claiming that such disclosure violated the members’ fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 460. The NAACP argued that the rights of members to join associations to promote common beliefs would be violated if they were required to produce the membership lists. *Id.* The Court recognized the importance of the right of association declaring, "[i]t is beyond debate that 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." *Id.* The Court concluded that, given the NAACP’s showing that their members had been subject to harassment based on their membership, the disclosure of the membership list could dissuade members from joining and thus limit the effectiveness of the organization. *Id.* at 462-63. Alabama’s interest in obtaining the list for litigation was not sufficient to overcome the right of association. *Id.* at 465-66.

[^113]: See *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) (explaining that government cannot compel disclosure by "mere showing of some governmental interest" (citations omitted)).

[^114]: See id. at 66-68, 84 (listing proffered governmental interests and concluding that those interests justified disclosure).

[^115]: See id. at 93-108 (evaluating constitutionality of public financing system).
Finally, the Court invalidated the provision creating the Commission because it allowed the legislature to appoint executive officers in violation of the Appointment Clause of the Constitution.

4. Separate Opinions

Several Justices wrote separate concurring and dissenting opinions. Justice White wrote a separate opinion, concurring in part and dissenting in part, arguing that the expenditure limits should be upheld. He pointed out that campaign funds were not always used for speech purposes and that the Court had no facts on which to conclude that the limits would restrict the communication of the candidates. He also criticized the Court's equation of money and speech by stating that "the argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much." Justice White advocated using a different standard than the "exact scrutiny" described in the Court's opinion. He described the inquiry in the following manner: "[S]o long as the purposes [that the expenditure limits] serve are legitimate and sufficiently substantial" there is "no sound basis for invalidating [them]." Under this standard, Justice White would have upheld the expenditure limits because they reinforced the contribution limits and because they might have prevented "unethical practices."

116. See id. (concluding that provisions requiring candidates to gain certain percentage of votes before becoming eligible for federal finding did not invidiously discriminate against minor, new, and non-party candidates).

117. See id. at 109-43 (rejecting creation of FEC because it allowed legislative branch to appoint executive officers).

118. See infra notes 119-36 and accompanying text (outlining separate opinions in Buckley).

119. See Buckley v. Valeo, 424 U.S. 1, 257-66 (1976) (White, J., concurring in part and dissenting in part) (arguing that expenditure limits in FECA should be upheld because such limitations are neutral and are not motivated by fear of consequences of political speech, and because interest in preventing corruption is substantial).

120. See id. at 263 (White, J., concurring in part and dissenting in part) (noting that "[t]he record before us no more supports the conclusion that the communicative efforts of congressional and Presidential candidates will be crippled by the expenditure limitations than it supports the contrary").

121. See id. at 262 (White, J., concurring in part and dissenting in part) (contending that amount of money political campaign has does not necessarily correspond to speech activity).

122. See id. at 263-64 (White, J., concurring in part and dissenting in part) (stating that Court should not strike down expenditure limits if they serve a "legitimate and sufficiently substantial" purpose).

123. Id. at 264 (White, J., concurring in part and dissenting in part).

124. See id. at 264-65 (White, J., concurring in part and dissenting in part) (reasoning that expenditure limits could further two substantial goals — limiting pressure on candidates to raise
Justice White also criticized the Court’s disregard for the reasoned judgment of Congress.\textsuperscript{125} He contended that the legislators, who themselves had run for office, knew best what is and what is not corrupting.\textsuperscript{126} He argued that the Court should respect the judgement of Congress.\textsuperscript{127} In cases after \textit{Buckley}, Justice White continued to object to the Court’s application of the First Amendment to campaign finance, not only because he disagreed with the Court in \textit{Buckley}, but also because he believed that the Court, in subsequent cases, interpreted the per curiam opinion incorrectly.\textsuperscript{128}

Four other Justices wrote separate opinions as well.\textsuperscript{129} Justice Burger wrote separately because he believed that the disclosure for small donations, the contribution limits, and the public financing system should not have been upheld.\textsuperscript{130} Justice Marshall believed that the limits on a candidate’s expenditures of personal or family funds should have been upheld.\textsuperscript{131} Justice Blackmun simply stated that he did not agree with the Court’s distinction between large sums of money and preventing possibility of campaigns having so much money that candidates devise illegal ways of spending it.

\textsuperscript{125} See id. at 258 (White, J., concurring in part and dissenting in part) (stating that Congress believed that both contribution and expenditure limits were required to fully prevent corruption); id. at 260 (commenting that Congress determined that limitation on independent expenditures was necessary); id. at 263 (concluding that Congress believed candidate would be able to communicate his message under expenditure limits); id. at 266 (declaring that "[n]othing in the First Amendment stands in the way" of Congress’s determination that amount of personal wealth ought to play less important role in political campaigns).

\textsuperscript{126} See id. at 261 (White, J., concurring in part and dissenting in part) (pointing out that "the Court strikes down [the expenditure limit] provision, strangely enough claiming more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed this bill and the President who signed it").

\textsuperscript{127} See id. at 263 (White, J., concurring in part and dissenting in part) (concluding that Congress believed candidate would be able to communicate his message under expenditure limits).

\textsuperscript{128} See infra notes 148-50 (discussing Justice White’s objections to Court’s application of \textit{Buckley}).

\textsuperscript{129} Buckley v. Valeo, 424 U.S. 1, 235-57 (1976) (Burger, C.J., concurring in part and dissenting in part); id. at 286-90 (Marshall, J., concurring in part and dissenting in part); id at 290 (Blackmun, J., concurring in part and dissenting in part); id. at 290-94 (Rehnquist, J., concurring in part and dissenting in part).

\textsuperscript{130} See id. at 235-57 (Burger, C.J., concurring in part and dissenting in part) (concluding that disclosure of small contributions did not further interest of preventing corruption, that contribution limits were as offensive to First Amendment as expenditure limits, and that public financing was "an impermissible intrusion by the Government into the traditionally private political process").

\textsuperscript{131} See id. at 286-90 (Marshall, J., concurring in part and dissenting in part) (arguing that limits on personal expenditures should be upheld in light of twin goals of promoting access to ballot and reinforcing contribution limits).
contributions and expenditures. Finally, Justice Rehnquist objected to portions of the public financing system because it impermissibly discriminated against minor party candidates.

Since Buckley, courts have applied the speech framework in their review of campaign finance regulations. These cases have defined the outer limits of current campaign finance law. The most significant development is that the Court asserts the prevention of corruption as the only government interest significant enough to justify regulation on campaign finance.

5. Summary

Overall, the Buckley Court upheld portions of FECA, while rejecting others. The Court upheld the contribution limits, citing the prevention of corruption as the significant government interest. The Court also upheld the disclosure requirements and the public financing system. On the other hand, the Court rejected all of the expenditure limits (independent expenditures by individuals, expenditures by candidates of personal money, and expenditures by campaigns) and the creation of the Commission.

C. Campaign Finance Law Since Buckley: Preventing Corruption as the Only Significant Government Interest

Understanding the current state of election law requires a brief examination of Buckley's progeny. Since Buckley, courts have upheld limitations

132. See id. at 290 (Blackmun, J., concurring in part and dissenting in part) (stating that he was "not persuaded that the Court makes, or indeed is able to make, a principled constitutional distinction between the contribution limitations... and the expenditure limitations").

133. See id. at 290-94 (Rehnquist, J., concurring in part and dissenting in part) (determining that Congress "enshrined the Republican and Democratic Parties in a permanently preferred position").

134. See infra notes 141-61 and accompanying text (examining how Supreme Court has applied framework established in Buckley).

135. See infra notes 141-63 and accompanying text (detailing how test for campaign reform proposals has emerged).

136. See infra notes 141-63 and accompanying text (observing how Supreme Court has narrowed scope of Buckley to allow restrictions on campaign finance only when there is interest in preventing possibility of quid pro quo between candidate and donor).

137. Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam) (summarizing Court's findings).

138. Id. at 26, 143.

139. Id. at 143.

140. Id.

141. See infra notes 143-63 and accompanying text (outlining major campaign finance cases after Buckley).
on campaign financing only when the state's interest in preventing corruption is significant. In First National Bank of Boston v. Bellotti and in Citizens Against Rent Control v. City of Berkeley, the Supreme Court extended this
reasoning to restrictions on contributions and expenditures for ballot initiative campaigns. Because ballot initiatives do not involve giving money to a potential officeholder, the Court reasoned, the concerns for corruption that are present when the donee is a candidate do not exist. The Court insisted that Buckley identified prevention of corruption as the only interest able to overcome the exacting scrutiny applied to campaign finance regulations.

As he did in Buckley, Justice White dissent in both Bellotti and Citizens Against Rent Control, disagreeing with the Court's application of the First Amendment to restrictions on political contributions. Justice White contended that the Buckley Court did not require corruption to be proved to the exclusion of any other compelling state interest. In Citizens Against Rent Control, 454 U.S. at 300 (declaring that limits on contributions to groups advocating or opposing ballot initiatives violate First Amendment rights of potential contributors).

ability of the committees to spend. Id. Thus, the limit "operat[ed] as a direct restraint on freedom of expression of a group or committee . . . ." Id. The majority concluded that the contribution limits violated the First Amendment by infringing both the right of association and the individual and collective rights of expression. Id. at 300.

145. See Bellotti, 435 U.S. at 765 (invalidating statute that prohibited corporations from making contributions or expenditures to influence question submitted to voters because First Amendment does not disfavor communication simply because it is effective); Citizens Against Rent Control, 454 U.S. at 300 (declaring that limits on contributions to groups advocating or opposing ballot initiatives violate First Amendment rights of potential contributors).

146. See Bellotti, 435 U.S. at 790 (asserting that "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue").

147. See Citizens Against Rent Control, 454 U.S. at 296-97 (concluding that "Buckley identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment . . . [t]he perception of undue influence of large contributors to a candidate"); see also Let's Help Fla. v. McCrory, 621 F.2d 195, 199 (5th Cir. 1980) (holding that "[t]he sole governmental interest the Supreme Court recognized as a justification for restricting contributions was the prevention of a quid pro quo corruption between a contributor and a candidate").

148. See Bellotti, 435 U.S. at 802-22 (White, J., dissenting) (determining that preventing corporate domination of public issues which do not materially affect business is sufficient justification for limiting ability of those corporations to spend money to influence such public choices); Citizens Against Rent Control, 454 U.S. at 303 (White, J., dissenting) (arguing that limits on contributions do not control content of speech and do not even limit single group speech, unlike restrictions in Bellotti).

149. See Citizens Against Rent Control, 454 U.S. at 306 (White, J., dissenting) (pointing out that Buckley Court concluded that discussion of any state interest other than prevention of corruption was unnecessary in that particular case, not that there would never be any other compelling state interest). Justice White also asserted that the Court should adopt an entirely different standard. See id. at 310 (White, J., dissenting) (stating that "[w]hen the infringement is as slight and ephemeral as it is here, the requisite state interest to justify the regulation need not be so high"). He argued that the regulations at issue were content neutral and, therefore, did not demand the level of scrutiny required by the Court. Id. at 309-10 (White, J., dissenting). Justice White would allow legislators to regulate those things preventing corporate domination of public issues when the issue in question does not affect the business of the corporation. See Bellotti, 435 U.S. at 812-13 (White, J., dissenting) (concluding that interest in preventing corporate management from using corporate funds to promote ideas that do not affect business is sufficiently compelling to allow regulation to stand).
Rent Control, he pointed out that the Court had listed permissible interests other than prevention of corruption in Bellotti. Both the language in Buckley and the Court's own admission in Bellotti, that there were other possible interests, undermine the conclusion that the prevention of corruption is the only interest that can overcome the First Amendment.

More recently, the Supreme Court has examined the constitutionality of various state-level reforms. Again, the prevention of corruption continues to be the only acceptable reason for restricting political contributions or expenditures. In Buckley v. American Constitutional Law Foundation, the Court examined Colorado's laws regarding the ballot initiative process. The Court applied Buckley's exacting scrutiny to requirements that groups

150. See Citizens Against Rent Control, 454 U.S. at 306-07 (White, J., dissenting) (noting that Bellotti Court concluded that "[p]reserving the integrity of the electoral process" and promoting "the individual citizen's confidence in government" were interests "of the highest importance").


152. See infra notes 153-54 and accompanying text (describing Supreme Court's application of Buckley).

153. 525 U.S. 182 (1999). In ACLF, the Supreme Court considered Colorado's regulation of the state initiative/petition process. Id. at 186-87. First, the ACLF Court upheld the age requirement for collectors, the six month limit on circulation, and the requirement that all circulators sign an affidavit stating personal information, such as name and address, as measures that protected the integrity of the initiative process and did not place undue burdens on political communication. Id. at 191. The ACLF Court then threw out the requirement that petition collectors be residents and registered voters of the state because it reduced the number of people available to circulate petitions and, therefore, decreased the number of people that could be reached with the group's message. Id. at 193-97. The ACLF Court also struck down the requirement that petition circulators wear name badges because the state's interest in identifying the circulators was accomplished by affidavit. Id. at 197-200. The ACLF Court found that the requirement that the petition circulators wear name badges discouraged people from collecting signatures because of the threat of personal retaliation or harassment. Id. at 198-200. This was similar to a restriction against distributing anonymous handbills that the Court had previously overturned. Id. The ACLF Court applied "exacting scrutiny" to the disclosure of how much each circulator was paid. Id. at 201-04. The requirement that the initiative supporters report how much they spent per signature was upheld as necessary to deter corruption through the exposure of large expenditures. Id. at 202.

The requirement that the initiative supporters disclose the amounts paid to individual circulators, however, was invalidated for two reasons. Id. at 203-04. First, the risk of corruption was found to be lower during a petition drive than it is in a candidate election. Id. at 203. Second, the assumption that a paid professional circulator, who has a professional reputation to maintain, would be more likely than a passionate volunteer to produce false signatures was unsubstantiated. Id. at 203-04.

soliciting signatures for petitions disclose the amount paid or owed to each circulator.\textsuperscript{155} Because the Court found that the possibility of quid pro quo was not as likely in an initiative as it was in elections for office,\textsuperscript{156} the Court invalidated the regulation for its failure to prevent corruption.\textsuperscript{157}

One of the most recent Supreme Court cases involving restrictions on campaign activities was \textit{Nixon v. Shrink Missouri Government PAC}\.\textsuperscript{158} The Court reiterated \textit{Buckley}’s distinction between limitations on contributions and limitations on expenditures.\textsuperscript{159} Citing \textit{Buckley}, the \textit{Shrink PAC} Court declared that "a contribution limit involving ‘significant interference’ with associational rights . . . could survive if the government demonstrated that contribution regulation was ‘closely drawn’ to match a ‘sufficiently important interest.’"\textsuperscript{160} The prevention of corruption was the only interest cited as meeting this standard.\textsuperscript{161}

Since \textit{Buckley}, the standard for upholding campaign finance reforms turns solely on whether the reform prevents corruption.\textsuperscript{162} Therefore, any future campaign finance reform measure must prevent corruption in order to survive current constitutional review.\textsuperscript{163} Examination of current campaign reform proposals shows why this standard may be problematic.

\textbf{III. The Reformers: Perceived Problems and Proposed Solutions}

Before analyzing the constitutionality of the reforms, one must first understand their content. While there are many different reform proposals, this Note

\textsuperscript{155} See id. at 201-04 (examining Tenth Circuit’s application of \textit{Buckley} to uphold some, but to reject other, disclosure provisions).

\textsuperscript{156} Id. at 203.

\textsuperscript{157} See id. (explaining that corruption or appearance of corruption is less likely in ballot initiatives than it is in candidate elections).

\textsuperscript{158} Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377 (2000); see supra note 26 (discussing facts of \textit{Shrink PAC}).

\textsuperscript{159} \textit{Shrink PAC}, 528 U.S. at 386-87 (stating that limits on expenditures were restrictions on direct speech while limits on contributions were not).

\textsuperscript{160} Id. at 388-89 (citing \textit{Buckley v. Valeo}, 424 U.S. 1, 25 (1976) (per curiam)). The statement of the test is a reminder that the \textit{Buckley} Court itself did not limit the possible governmental interests to the prevention of corruption. \textit{Buckley v. Valeo}, 424 U.S. 1, 25 (1976) (per curiam).

\textsuperscript{161} See \textit{Shrink PAC}, 528 U.S. at 398 (citing string of cases in which restrictions were upheld because they furthered government interest in prevention of corruption).

\textsuperscript{162} See supra notes 141-61 and accompanying text (chronicling campaign reform cases that came after \textit{Buckley}).

\textsuperscript{163} See supra notes 141-62 and accompanying text (explaining current standard for upholding campaign finance reforms).
will focus on proposals that ban soft money and restrict issue ads. As representative examples of such reforms, this Note will discuss the soft money ban and issue ad limits in the McCain-Feingold and Shays-Meehan bills.

A. The Perceived Problems

McCain and his supporters seek to ban soft money and certain forms of issue advocacy. Both of these campaign finance mechanisms are creations of the post-Buckley era. Soft money and issue advocacy thrive because the current standard of review gives these campaign finance methods a First Amendment shield.

1. Soft Money

The term "soft money" refers to money raised and spent outside the scope of FECA. It is money that FECA prohibits, either because of source or amount, when contributed directly to a candidate, but that is allowed for other purposes beyond the scope of FECA, such as state elections. FECA created

164. See infra notes 168-95 and accompanying text (discussing perceived problems in campaign finance system).
167. See infra notes 196-222 and accompanying text (examining provisions of McCain-Feingold and Shays-Meehan campaign finance reform bills).
168. This Note will refer to those legislators and their supporters who advocate these changes as "the reformers."
170. See infra notes 172-95 and accompanying text (describing rise of soft money and issue ads).
171. See infra notes 229-67 and accompanying text (evaluating effect of current constitutional standard on proposed reforms).
172. See L. PAGE WHITAKER, CONGRESSIONAL RESEARCH SERVICE, CAMPAIGN FINANCE: CONSTITUTIONAL AND LEGAL ISSUES OF SOFT MONEY, ISSUE BRIEF 98025, at 1 (2001) (citing Memorandum from Lawrence M. Nobel, General Counsel, FEC, to the Commissioners of the FEC (June 6, 1997)) (defining soft money as funds prohibited by FECA because soft money comes from prohibited source and exceeds contribution limits).
173. Soft money is money that is prohibited by FECA, such as donations from individuals in excess of the aggregate limit for the election cycle and donations from corporations or unions. Id. at 2. An example of soft money is money donated to a political party. Id. While FECA restricts individual donors to $25,000 per year per political party, an individual can actually give unlimited amounts to political parties, which the parties then can use for transfers to state and local parties and other activities that are exempt from FECA's requirements. See id. (discussing political party soft money).
soft money as we know it today in a 1979 advisory opinion. The opinion allowed a political party committee to spend money on get-out-the-vote (GOTV) and voter registration drives without attributing the money against the party’s contribution limits for any named federal candidates. After the Commission denied a public interest group’s petition for rulemaking on soft money, the public interest group, Common Cause, filed suit for judicial review of the denial. The district court required the Commission to promulgate regulations that are now the basis of the current soft money system.

The regulations provide for an elaborate system of allocating money for certain committee expenses between federal and non-federal money. Election activities paid for through this system are exempt party-building activities that affect both federal and non-federal activity and, therefore, can be paid for with a mixture of federal and non-federal money. Expenses that can be paid for with soft money include the following: overhead expenses, generic voter registration and GOTV drives, issue advertising, and fundraising. The soft
money system allows party committees who participate in both federal and non-federal activities to raise money outside the normal limits of FECA for the portion of the "exempt" expenses that can be financed with non-federal dollars.181 For example, the allocation for national party committees permits the party committees to pay for exempt activities on a formula that allows for 60% of the funds to come from federal accounts in non-presidential years and 65% in presidential election years.182 For state and local parties, the allocation is based on the "ballot composition method," which takes into account how many federal versus non-federal candidates are on the ballot in a given election year.183 This formula allows states with few state-level candidates in a given year to pay for more of their exempt activities with federal money than a state that has the same number of federal candidates but more state candidates.184 The reformers object to soft money because the expenses that can be paid for with unlimited non-federal money can often be used to indirectly influence federal elections.185 One way parties frequently spend soft money is on issue advertisements.186

2. Issue Ads

In Buckley, the Supreme Court narrowly defined the kind of ads that constituted "express advocacy" and, therefore, fell within the purview of

181. See generally id. § 106.5 (outlining system for allocating non-federal dollars to combined federal/non-federal activity).
182. Id. § 106.5(b)(2)(i)-(ii).
183. See id. (explaining that state party federal versus non-federal allocation should be "based on the ratio of federal offices expected on the ballot to total federal and non-federal offices expected on the ballot in the next general election to be held in the committee's state or geographic area").
184. For example, in their October quarterly reports to the FEC, the Republican Party of Virginia and the Republican Party of Kentucky reportedly used 46% and 25% of federal dollars, respectively. Republican Party of Virginia, Report of Receipts and Disbursements, October 15 Quarterly Report, available at http://herndon1.srdce.com/cgi-bin/fecimg/?20036254013+0 (Oct. 13, 2000); Republican Party of Kentucky, Report of Receipts and Disbursements, October 15 Quarterly Report, available at http://herndon1.srdce.com/cgi-bin/fecimg/?20036192344+0 (Oct. 13, 2000). This difference, based on the ballot make-up in the two states, is accounted for in the formula set out in the regulations. See generally 11 C.F.R. § 106.5 (2001) (detailing formula for amount of federal and non-federal spending allowed).
185. 145 CONG. REC. H8181 (daily ed. Sept. 14, 1999) (statement of Rep. Shays) (stating that although it is unlawful for corporations, unions, and foreign nationals to contribute to federal campaigns, it happens because of use of soft money).
186. In the 2000 election cycle, the national committees of the two major political parties spent almost $162 million on issue ads. Jamieson, supra note 4, at 4. Party-spending accounted for 32% of the total issue ad spending in 2000. Id.
FECA. The Buckley Court created a bright-line test – the ad must expressly advocate the election or defeat of an identifiable candidate before it would be subject to the limitations of FECA. However, the Supreme Court did extend "express advocacy" to include a newsletter that encouraged readers to "vote pro-life" and then listed which candidates were considered pro-life candidates because it was an "explicit directive" to vote for specific candidates. Because advertisers can easily avoid the list of specific "magic words" set out in Buckley, party committees, wealthy interest groups, and others can pay for advertisements that talk about a candidate for federal office with money that is not subject to the limits in FECA.

In 1995, the FEC promulgated regulations defining "express advocacy." These regulations included the magic words from Buckley, as well as other specific phrases, such as, "support the Democratic nominee," "reject the incumbent," ",[name of candidate] in '94," "vote Pro-life" or "vote Pro-choice" when accompanied by a list of candidates, or the use of a candidate's campaign slogan. The regulations went on to include communications that "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)." However, the proposition behind this regulation has been challenged. The predominating view among the courts is that communications must contain words of express advocacy in order to be regulated under FECA.

187. See Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976) (per curiam) (listing "magic words"); see also supra notes 94-95 and accompanying text (discussing "magic words" given in Buckley).

188. See Buckley, 424 U.S. at 44 n.52 (listing words that should appear in advertisements in order for FECA to apply); see also supra notes 93-96 and accompanying text (discussing Buckley Court's construction of communication "relative to a clearly identified candidate").


190. See Thomas & Bowman, supra note 95, at 33, 37-43 (discussing five different ads that discussed specific candidates but were deemed issue speech because they did not contain any "magic words").

191. 11 C.F.R. § 100.22 (2001).

192. Id. § 100.22(a).

193. Id. § 100.22(b).


B. The Reform Proposals

To combat the loopholes that the Court created in Buckley, the reformers have proposed the Bipartisan Campaign Reform Act of 2001 in the Senate and the Bipartisan Campaign Finance Reform Act of 2001 in the House. The major goals of these proposals are to ban soft money and to limit issue ads. To accomplish these goals, the bills limit the ability of the parties to raise money outside the limits of FECA, require increased disclosure for independent expenditures, and redefine "express advocacy."

1. Soft Money

In order to limit the ability of the parties to raise soft money, both bills require that the national political parties only raise and spend money that comes under the restraints of FECA. The proposals completely bar all national party committees from raising or spending any money that does not fall under FECA, regardless of whether the money is used for federal or non-federal activity. The bills also expand the definition of "federal election activity" to include many activities carried on by state and local party committees that are currently paid for in part by non-federal money. Under these


197. See S. 27, § 101 (amending FECA to prohibit use of soft money by political parties); H.R. 380, § 101 (same); S. 27, § 201 (amending FECA to provide for increased disclosure requirement for election-related communications); H.R. 380, § 201(b) (amending FECA to redefine "express advocacy" to include many communications that are now considered issue ads).

198. See S. 27, § 101(a) (prohibiting any national committees of political party from soliciting, spending or transferring any funds that are not subject to limits in FECA); H.R. 380, § 101 (same); see also infra notes 201-09 and accompanying text (discussing provisions of McCain-Feingold and Shays-Meehan bills that limit contributions and use of soft money).

199. See S. 27, § 201 (discussing disclosure requirements for campaign related advertisements); see also infra notes 210-21 and accompanying text (examining McCain-Feingold bill’s provisions with respect to issue ads).

200. See H.R 380, § 201(b) (expanding definition of express advocacy); see also infra notes 216-21 and accompanying text (outlining definition of express advocacy in Shays-Meehan bill).

201. See S. 27, § 101(a) (prohibiting national party committees from soliciting, spending or transferring any funds that are not subject to limits in FECA); H.R. 380, § 101 (same).

202. S. 27, 107th Cong. § 101(a) (2001); H.R. 380, 107th Cong. § 101 (2001). This means that the status of a national committee as such determines the restrictions placed upon it, as opposed to the current system, which defines restrictions based on the type of funded activity.

203. See S. 27, § 101(b) (requiring use of federal money for following activities: voter registration drives held 120 days or less before any federal election; voter identification, GOTV drives or any activity promoting political party for any election when federal office appears on
bills, "excluded activity" would include only campaign activities by a state or local political committee on behalf of state or local candidates, contributions to state and local candidates, the costs of local political conventions, the cost of campaign materials such as signs and bumper stickers that contain only names of state or local candidates, and the costs of office construction or purchase. These provisions restrict the ability of state and local political parties to raise or spend money outside FECA’s limits, even on communications that do not affect federal elections.

The bills limit the ability of political parties to pay for fundraising activities using soft money. The proposals prohibit the use of soft money to pay for any fundraising activity by any party committee that raises funds to be used for federal election activity. The reforms would also prohibit parties from making contributions to tax exempt organizations, other than political committees that are subject to the provisions of FECA. Finally, the bills would prohibit candidates for federal office, officeholders, or entities controlled by such candidates or officeholders from raising or spending soft money in connection with federal, state or local elections.

2. Issue Ads

Although the two bills have an identical approach to soft money, they have very different approaches to issue ads. The McCain-Feingold bill increases the disclosure requirements for electioneering communications.

204. S. 27, § 101(b); H.R. 380, § 101.
205. See S. 27, § 101(b) (limiting use of federal money); H.R. 380, § 101 (same); see also supra notes 93-96 and accompanying text (discussing Buckley Court’s conclusion that only expenditures that could be limited were expenditures on ads containing "magic words").
206. See S. 27, § 101(a) (requiring fundraising costs be paid with hard dollars unless money raised will be used exclusively for non-federal activities); H.R. 380, § 101 (same).
208. See S. 27, § 101(a) (prohibiting party committees at all levels from donating to § 501(c) or § 527 organizations); H.R. 380, § 101 (same).
209. See S. 27, § 101(a) (restricting ability of candidates running for federal office or federal officeholders from raising or contributing soft money to candidates, campaigns or committees); H.R. 380, § 101 (same).
210. See S. 27, § 201 (increasing disclosure); H.R. 380, § 201(b) (redefining express advocacy); see also infra notes 211-21 and accompanying text (describing how McCain-Feingold requires disclosure while Shays-Meehan redefines issue advocacy).
211. See S. 27, 107th Cong. § 201 (2001) (increasing disclosure requirements for electioneering communications).
The bill defines "electioneering communications" as any broadcast, cable or satellite communication that (1) refers to a "clearly identified" federal candidate, (2) is made within sixty days before a general election for federal office or within thirty days of a primary election, convention or caucus, and (3) is made to an audience that includes potential voters. The bill also requires any person or group that spends more than $10,000 on such communication to file a special disclosure statement with the FEC within twenty-four hours of the communication. McCain-Feingold prohibits the expenditure of labor union or corporation treasury funds for electioneering communications. Furthermore, the bill requires that any organizations that accept contributions from corporations or labor unions keep segregated accounts for individual and corporate donations; electioneering communications can only be paid for out of the individual donor account.

Shays-Meehan takes a very different approach to the problem of issue ads. Instead of merely requiring disclosure of issue ads, Shays-Meehan redefines "express advocacy." Thus, the bill reclassifies many advertisements that are now defined as issue advocacy and defines them as express advocacy. This change in classification effectively requires advertisements that can currently be paid for with soft money to be paid for with money raised under the contribution limits of FECA.

212. Id. The bill provides an exception for communications that are independent or coordinated expenditures under FECA or news communications. Id.

213. See id. (directing people or groups, including political committees, who make more than $10,000 worth of electioneering communications per calendar year to file disclosures about their communications with FEC). The statement must include the following: the name of the person or group making the disbursements and any other entity with control over the disbursement; the principal place of business of such person or group; the amount of each distribution by that person or group that exceeds $200 and the identification of the recipient of the distribution; the election to which the communication pertains and the candidates in that election; and the names and addresses of all contributors who contributed over $1,000 to the individual or group. Id.

214. See id. § 203 (prohibiting corporations and labor unions from paying for electioneering communications out of corporation’s or union’s treasury funds). For purposes of § 203, organizations that are organized under 26 U.S.C. § 501(c)(4) and receive funds from "business activities" are treated like corporations and cannot use treasury funds for electioneering communications. Id.

215. See id. (restricting ability of non-profit organizations to use money contributed to them by corporations or labor unions for electioneering communications).

216. See H.R. 380, 107th Cong. § 201(b) (2001) (redefining express advocacy to include more than just Buckley "magic words").

217. Id.

218. See WHITAKER, supra note 195 (explaining that language in Shays-Meehan would require any ads falling within bill’s definition of express advocacy to be subject to FECA’s limitations).
ing three ways a communication can expressly advocate a position: (1) by containing specific phrases like the Buckley magic words, such as, "[name of candidate] for Congress," "re-elect [candidate]," or by including any saying that "can have no reasonable meaning other than to advocate the election or defeat of... clearly identified candidates;" (2) by referring to any candidate in a paid radio or television advertisement within sixty days of an election; or (3) by opposition to a candidate. From this definition, the bill exempts "voting guides," which are defined as communications in print form (or on the Internet) that discuss the voting record of a candidate without expressing clear support or opposition of such candidate. The effect of this definition is that virtually all communications that mention a federal candidate must be paid for by money raised under the FECA contribution limits. Notwithstanding whether or not one believes that either of these bills provide an accurate solution to the loopholes in the current campaign finance system, the proposals have one major problem. Under the standard articulated in Buckley, and narrowed by its progeny, the bills may be unconstitutional. Even if passed by Congress, the fate of McCain-Feingold or Shays-Meehan will ultimately be determined by the test applied by the Supreme Court.

IV. The Fate of the Reform Proposals

Although campaign finance reform has faced difficulties in Congress, passing a reform bill may actually be the easy part. Because of the current standard of review, any reform proposal must prevent corruption in order to be upheld. This Part addresses three issues. First, subpart A discusses how the reforms would likely be struck down under the current standard. Second, subpart B suggests how the current reforms might fare under the different frameworks set out by the Justices in Shrink PAC. Finally, subpart C proposes that the Buckley Court did not hold that the only interest that could

219. H.R. 380, § 201(b).
220. Id.
221. See Weitaker, supra note 195 (explaining that Shays-Meehan definition of express advocacy would require any ads falling within bill's definition of express advocacy to be subject to FECA's limitations).
222. See infra notes 231-67 and accompanying text (examining constitutional problems of reforms under Buckley).
223. See infra notes 231-67 and accompanying text (describing how purpose of reforms may not meet prevention of corruption standard).
224. See supra notes 141-63 and accompanying text (detailing how prevention of corruption has become only interest able to justify restrictions on campaign finance).
225. See infra Part IV.A (discussing reforms under current constitutional standard).
226. See infra Part IV.B (questioning how reforms would fare under different frameworks laid out in Shrink PAC).
justify restrictions on campaign finance was the prevention of corruption.\textsuperscript{227} Subpart C then examines the interests that would pass the test articulated in \textit{Buckley} and further determines which interests of those advanced by current reforms will pass scrutiny under the \textit{Buckley} standard.\textsuperscript{228}

\textbf{A. The Current Standard: Only the Prevention of Corruption}

Because the prevention of corruption is the only possible interest that allows a reform to pass constitutional scrutiny, the proposed reforms must explain what corruption the reform is fighting.\textsuperscript{229} The Supreme Court has thus far upheld the practice of using soft money for party-building and issue ads and has also upheld the bright line "magic word" issue ad test over contentions that restrictions would prevent corruption.\textsuperscript{230} However, evaluating the constitutionality of the proposed reforms may not be an easy task.

\textbf{1. Soft Money}

The constitutionality of a soft money ban has been the subject of much academic debate.\textsuperscript{231} The argument in favor of constitutionality is that contributions to parties should be viewed like contributions to candidates, which could be restricted under \textit{Buckley}.\textsuperscript{232} For this argument to work, the Court must find that limiting soft money prevents corruption in a way similar to the prevention of corruption that justified the limitations on direct contributions to candidates.\textsuperscript{233} The argument against constitutionality focuses on how the reforms do not fall into the narrow definition of preventing corruption.\textsuperscript{234}

\textsuperscript{227} See infra Part IV.C (asserting that \textit{Buckley} Court did not require that all reforms prevent corruption).

\textsuperscript{228} See infra Part IV.C (looking at other "significant" interests).

\textsuperscript{229} See infra notes 141-63 and accompanying text (discussing how restrictions on campaign finance must prevent corruption in order to pass constitutional scrutiny).

\textsuperscript{230} See supra notes 141-63 and accompanying text (describing how Supreme Court has narrowed \textit{Buckley} test to make prevention of corruption only governmental interest able to overcome challenges to campaign finance reforms).

\textsuperscript{231} See infra notes 232-49 and accompanying text (chronicling major arguments for and against constitutionality of reforms). Because the constitutionality of the proposed reforms is not the focus of this Note, it will not examine all scholarship on the subject.

\textsuperscript{232} See Richard Briffault, \textit{The Political Parties and Campaign Finance Reform}, 100 COLUM. L. REV. 620, 657-59 (2000) (concluding that "dangers of undue influence" are found in soft money as well as in direct contributions).

\textsuperscript{233} See supra notes 141-63 and accompanying text (describing how Supreme Court required that reforms prevent corruption in order to be constitutional).

\textsuperscript{234} See infra notes 245-49 and accompanying text (outlining arguments against constitutionality).
Commentators who believe the reforms are constitutional have found the requisite corruption in various ways. Some focus on the nature of soft money, concluding that there are "dangers of undue influence implicit in the process by which the soft money... is raised." Others try to analogize soft money to other types of restrictions that the Supreme Court has deemed unconstitutional. The most important of these assertions of constitutionality is contained in a letter written by Professors Ronald Dworkin and Burt Neuborne and signed by 126 legal scholars (the "letter").

The letter argues that the Supreme Court's opinion in *Austin v. Michigan Chamber of Commerce*, in which the Court held that the state of Michigan could prevent political contributions and expenditures from corporate treasuries, supports the proposition that the ban on soft money would be upheld. The letter concludes the following:

235. See infra notes 236-44 and accompanying text (examining how proponents of constitutionality of reforms find requisite government interest).

236. Briffault, supra note 232, at 659.

237. See Daniel M. Yarmish, Note, The Constitutional Basis for a Ban on Soft Money, 67 FORDHAM L. REV. 1257, 1273-76 (1998) (arguing that soft money could be banned). For example, Yarmish argues that upholding limits on soft money is analogous to the contribution limitations on political committees. Id. at 1274. However, the limits upheld by the Court in *Buckley* are limits that disallow an individual from contributing more than $5,000 to a political party for federal campaign activity. *Buckley v. Valeo*, 424 U.S. 1, 35-37 (1976) (per curiam). Unlike direct contributions, soft money is not being contributed expressly for the purpose of influencing a federal campaign. See supra notes 172-86 and accompanying text (describing definition and uses of soft money). When the money is instead going to a voter registration drive, which may incidentally promote a federal candidate along with other candidates, the Court has not allowed restrictions on contributions for the non-federal allocation. See supra notes 170-84 and accompanying text (describing way soft money is used as opposed to hard money).

Another analogy made is one between soft money and corporate funds. See Yarmish, supra, at 1274-75 (stating that Court's decision to uphold state ban on corporate funds in elections is evidence that soft money contributions can also be limited); see also Letter from Professors Ronald Dworkin & Burt Neuborne, to Senators John McCain & Russell Feingold (Sept. 22, 1997), available at http://www.brennancenter.org/resources/downloads/softmoney.pdf [hereinafter Dworkin & Neuborne, Letter] (arguing that ability to limit contributions to candidates must mean contributions to parties may also be limited). The Court has upheld complete bans on corporate funds; however, the Court was clear that these determinations were made because of the historical attitude that money from corporations to candidates, rather than to parties for non-federal uses, was potentially corrupting. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (looking at Court's determination that historical view of corporate donations to candidates was corrupting).


240. See Dworkin & Neuborne, Letter, supra note 237, at 2 (concluding that *Austin* allows Congress to restrict "source and size" of contributions to parties). In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court considered the constitutionality of a Michigan
[s]urely, the law cannot be that Congress has the power to prevent corporations from giving money directly to a candidate, or from expending money on behalf of a candidate, but lacks the power to prevent them from pouring unlimited funds into a candidate's political party in order to buy preferred access to him after the election. 241

The letter also notes that Congress's ability to limit donations from corporations and unions to candidates supports its ability to limit contributions to parties as well. 242 The problem with Dworkin's and Neubome's analogy, however, is that the funds at issue in Austin were for contributions and expenditures by a corporation that expressly advocated a candidate. 243 Soft money, on the other hand, does not pay for direct contributions, but for general campaign activity, which has been distinguished from direct contributions. 244

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statute that prohibited corporations from using treasury funds for contributions or independent expenditures in support of, or in opposition to, a candidate for state office. Id. at 655. The Michigan Chamber of Commerce (Chamber), a not-for-profit corporation, wished to purchase a newspaper advertisement in support of a specific candidate. Id. at 656. Although the Chamber had a segregated account for political funds, the Chamber wished to pay for the ads out of its general treasury. Id. Because the Michigan statute at issue made such an act a felony, the Chamber challenged the constitutionality of the statute under the First and Fourteenth Amendments. Id. The Court determined that the statute restricted the corporations ability to use its funds for political activity. Id. at 658. The government's interest in preventing corruption or the appearance of corruption, however, justified this restriction on the corporation's speech. Id. at 659-60. The Court concluded that the special nature of the corporate form justified the restrictions. Id. at 660.

The Court also determined that the statute was narrowly tailored because it eliminated the evil of money from corporate treasuries while still allowing corporations to participate in elections through segregated funds. Id. at 660-61. Next, the Court decided that the statute could be constitutionally applied to the Chamber because, although it was a non-profit, its purpose was not tied to political goals and it was easily influenced by business corporations. Id. at 661-65. The Court rejected the contention that the statute was underinclusive because it did not include unincorporated labor unions. Id. at 655-66. The Court reasoned that the state's justification in including only corporations was based on the special benefits given to the corporate form and, therefore, the exclusion of unincorporated groups was acceptable. Id.

The Court also rejected a Fourteenth Amendment challenge to the statute's exemption for media corporations. Id. at 666-68. The exemption, the Court concluded, was necessary to ensure that the media served the public by reporting political activities. Id. at 668. Finally, the Court held that the Michigan statute was constitutional. Id. at 668-69.


242. See id. (stating that "closing the loophole for soft money contributions is in line with the longstanding and constitutional ban on corporate and union contributions in federal elections").

243. See Austin, 494 U.S. at 655 (stating that Michigan law at issue prohibited corporations from using treasury funds for contributions and independent expenditures).

244. See supra notes 172-86 and accompanying text (describing differences between soft money, which pays for general activity, and hard money, which can pay for express advocacy).
Thus, *Austin* does not speak directly to the issue of soft money because soft money is frequently used to pay for issue ads and similar communications that do not contain express advocacy.

Those who believe that soft money would be deemed unconstitutional under the *Buckley* framework criticize the letter.245 One of the leading critics of the soft money ban, FEC Commissioner Bradley Smith, asserts that the letter incorrectly "focus[ed] only on the sources and not the uses of soft money."246 Smith argues that the ability of parties to raise soft money to spend on such things as issue ads cannot be unconstitutional because the contribution is made not to the candidates – who are officeholders and are therefore able to be corrupted – but to the parties.247 As for the proposition that *Austin* supports a soft money ban, Smith notes that *Austin* only addresses the context of express advocacy, on which the Supreme Court previously allowed limitations.248 No matter the position of the commentator, all agree that the applicable standard is whether or not the restriction prevents corruption.249

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245. See infra notes 246-48 (discussing why soft money ban may not be constitutional); see also Arthur N. Eisenberg, *Civic Discourse, Campaign Finance Reform and the Virtues of Moderation*, 12 CARDOZO STUD. L. & LITERATURE 141 (2000) (describing how ban on soft money would not be constitutional under *Buckley*).


247. See id. at 197 (wondering, "[b]ut what does it mean to say that a party is corrupted?"). Smith rejects the idea that contributions could be banned because a candidate may feel an obligation to his or her political party. See id. (declaring that limiting contributions to parties because candidates may feel that they have obligation to their party "would be to undercut the entire rationale behind *Buckley* and its progeny").

248. See id. at 197-98 (pointing out that both *Austin* and *Bellotti* concerned ban on use of corporate general funds, but ban on spending such funds on express advocacy in *Austin* was upheld, while Court struck down ban on issue ads in *Bellotti*). Smith does concede, however, that it may be constitutional to ban soft money for voter registration drives and GOTV activities if the communications include advocacy of specific candidates. See id. at 199-200 (noting that such activity could probably be banned because it engages in express activity; however, "it may be hard to classify a voter registration or get-out-the-vote drive as 'express advocacy,' if it is done without any urging to vote in a specific manner").

249. See id. at 184 (declaring that *Buckley* held that "only the compelling state interest in preventing quid pro quo corruption of officeholders and candidates could justify" regulation of campaign contributions and expenditures); Briffault, supra note 232, at 657-58 (observing that "soft money can be regulated if it presents a danger of corruption or the appearance of corruption"); Dworkin & Neuborne, Letter, supra note 237, at 2 (concluding that *Buckley* "held that the government has a compelling interest in combating the appearance and reality of corruption, an interest that justifies restricting large campaign contributions in federal elections"); Yarmish, supra note 237, at 1271 (asserting that "the Court has held that preventing corruption or its appearance are the only justifications for limiting election-related contributions").
2. Issue Ads

Although the case for banning soft money may have some hope of passing constitutional review under the Buckley regime, the case for banning issue advocacy is not as encouraging. As discussed above, the McCain-Feingold and Shays-Meehan bills take different approaches to the problem of issue advocacy. The Shays-Meehan solution is to redefine express advocacy to include many ads that are now considered issue ads, thereby subjecting them to the requirements of FECA.

The academic community also has discussed the constitutionality of a ban on issue ads. The general consensus is that any attempt to restrict issue ads faces major constitutional problems under the Buckley regime and that the Court would not uphold an outright ban. The solution that is most likely to

250. See infra notes 253-66 and accompanying text (describing opinions of commentators about constitutionality of ban on issue advocacy).
251. See supra notes 210-21 and accompanying text (discussing differences between McCain-Feingold and Shays-Meehan provisions for issue ads).
252. See supra notes 216-21 and accompanying text (explaining how Shays-Meehan redefines issue advocacy).
253. See infra notes 254-66 and accompanying text (looking at commentary on constitutionality of issue ad ban).
254. See Lilian R. BeVier, The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis, 85 VA. L. REV. 1761, 1773-74 (1999) (defining Buckley's holding as "that the First Amendment unequivocally protects the right to make unrestricted, unlimited, and even unwise expenditures on other kinds of political advocacy, including the right to mention candidates by name and even clearly if implicitly to endorse their election or urge their defeat"); Lilian R. BeVier, Mandatory Disclosure, "Sham Issue Advocacy," and Buckley v. Valeo: A Response to Professor Hasen, 48 UCLA L. REV. 285, 297 (2000) [hereinafter BeVier, A Response to Professor Hasen] (concluding that "[t]he only distinction the Court explicitly drew in Buckley v. Valeo was that between a narrow category of independent expenditures on express, 'magic word' advocacy . . . and independent expenditures on other types of political, election-related speech, which could neither be limited in amount nor subjected to disclosure requirements"); Richard A. Davey, Jr., Note, "Buckleying" the System: Is Meaningful Campaign Finance Reform Possible Under Reining First Amendment Jurisprudence?, 34 GONZ. L. REV. 509, 523-24 (1999) (declaring that "[u]ltimately . . . current proposed reforms are likely to fail. Any attempt for meaningful legislation necessarily requires the restriction of issue advocacy which would almost certainly be ruled unconstitutional"); Richard L. Hasen, The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy, 48 UCLA L. REV. 265, 268 (2000) (stating that "[d]isclosure laws have the best chance of passing constitutional muster if they contain clear standards for disclosure that are not overly burdensome. Even such laws, however, run a risk of unconstitutionality on overbreadth grounds because they regulate some speech that is not unambiguously related to the election."). For arguments that Buckley itself was wrongly decided and that reforms should be upheld under a different standard, see Cass R. Sunstein, Political Equality and Unintended Consequences, 94 COLUM. L. REV. 1390, 1413 (1994) (arguing that Buckley "is the modern analogue to Lochner v. New York, offering an adventurous interpretation of the Constitution so as to invalidate a redistributive measure having and deserving broad democratic support").
pass constitutional scrutiny, according to commentators, is a disclosure provision, like the one in McCain-Feingold.\textsuperscript{255} However, there is disagreement about whether Congress can even require disclosure.\textsuperscript{256}

One commentator contends that the two major obstacles preventing disclosure of issue advocacy are vagueness and overbreadth.\textsuperscript{257} Professor Hasen argues that a statute can be narrowly written to avoid the vagueness problem, but that it is difficult to draft a statute that overcomes the overbreadth problem.\textsuperscript{258} He concludes that a disclosure law may be constitutional if it has a sufficiently short period for reporting and a high monetary threshold.\textsuperscript{259} This conclusion follows from the assumption that the likelihood of an advertisement, at a high monetary threshold, that mentions a candidate in a limited time period right before an election and does not seek to influence the election, is small and that expenditures that seek to influence an election can be regulated.\textsuperscript{260} Thus, the disclosure requirements of McCain-Feingold may be upheld because of the high monetary threshold for disclosure.\textsuperscript{261}

Other commentators assert that not even disclosure provisions would be allowed under Buckley.\textsuperscript{262} This view rejects the assumption that the Court would allow regulation of ads with the purpose of effecting a federal election.\textsuperscript{263} Proponents of the notion that required disclosure is unconstitutional contend that the Court will allow regulation only for those ads that implicate the interest in preventing corruption; ads that are not coordinated with the candidate cannot implicate that interest.\textsuperscript{264}

\begin{itemize}
\item \textsuperscript{255} See Hasen, supra note 254, at 268 (noting that disclosure law is type of regulation that is most likely to withstand constitutional scrutiny).
\item \textsuperscript{256} See infra notes 257-64 and accompanying text (presenting arguments for and against constitutionality of disclosure).
\item \textsuperscript{257} See Hasen, supra note 254, at 268-69 (stating that to overcome Buckley, regulations must "contain clear standards for disclosure that are not overly burdensome" and "minimize the overbreadth problem").
\item \textsuperscript{258} See id. at 269 (concluding that narrow statutes still may have overbreadth problems).
\item \textsuperscript{259} Id. at 283.
\item \textsuperscript{260} See id. at 281-82 (observing that "[i]t is hard to think of prominent real world examples of such speech").
\item \textsuperscript{261} See id. at 282-83 (deciding that high monetary threshold makes McCain-Feingold "stand [] a greater chance of surviving constitutional scrutiny"). McCain-Feingold only requires disclosure of expenditures over $10,000. S. 27, 107th Cong. § 210 (2001).
\item \textsuperscript{262} See BeVier, A Response to Professor Hasen, supra note 254, at 304 (concluding that Buckley "simply did not hold that the First Amendment offers less protection to election-related speech than to other political speech").
\item \textsuperscript{263} See id. at 290 (asserting that "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally") (quoting Buckley v. Valeo, 424 U.S. 1, 28 (1976) (per curiam)).
\item \textsuperscript{264} See id. at 295-96 (noting that Court intended that only campaign-related speech, meaning speech that is made in coordination with particular campaign, could be regulated).
\end{itemize}
Whether or not mere disclosure would be unconstitutional, it is clear that the current standard would not allow for the Shays-Meehan approach.\footnote{See supra note 254 (reciting views of commentators stating that ban on issue ads is unconstitutional).} As explained above, Shays-Meehan redefines express advocacy to require all ads that mention a candidate within sixty days before an election be paid for with hard dollars.\footnote{See supra notes 216-21 and accompanying text (discussing provisions of Shays-Meehan).} Given the current standard set out in Buckley and its progeny, that the prevention of corruption is the only interest that would justify restriction of election-related contributions and expenditures, the outlook for the current reforms seems bleak.\footnote{See supra notes 231-66 and accompanying text (explaining why current reform proposals may be held unconstitutional).} However, this grim prediction only applies if the Supreme Court reviews the reforms under the current standard. If the Court should decide that preventing corruption is not the only interest sufficient to overcome constitutional scrutiny, there may be some hope for the current reforms.

B. A New Standard: Suggestions from Shrink PAC

This Note contends that preventing quid pro quo corruption is not the only government interest significant enough to allow campaign finance reform. The current Court’s frustration with Buckley, as interpreted by its progeny, supports this contention.\footnote{See infra notes 270-300 and accompanying text (examining suggested frameworks in Shrink PAC and discussing how each framework would treat interests other than prevention of corruption).} This subpart discusses the alternative frameworks discussed in Shrink PAC and how each might treat the reform proposals.\footnote{See infra notes 270-300 and accompanying text (discussing opinions in Shrink PAC).}

1. Money Is Not Speech – Justice Stevens’s Approach

Justice Stevens suggested that restrictions on the amount of money contributed to or spent on election activities should not be classified as restrictions on speech, but rather as restrictions on the use of property.\footnote{See Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 337, 398 (2000) (Stevens, J., concurring) (stating that “[m]oney is property, it is not speech”); see also supra notes 28-35 and accompanying text (outlining Justice Stevens’s dissent).} He stated that the Constitution protects people against government regulation pertaining to the use of their property, but that those protections are unrelated to the First Amendment.\footnote{See id. at 399 (Stevens, J., concurring) (“Telling a grandmother that she may not use her own property to provide shelter to a grandchild — or to hire mercenaries to work in that}
approval of the reform proposals. Although Justice Stevens did not explain exactly what standard would apply, he did point out that the expenditure limits struck down in *Buckley* would likewise fail a property analysis.\textsuperscript{272} If the contribution/expenditure distinction remains under a property regime, it is possible that issue advocacy cannot be regulated because it is an expenditure as opposed to a contribution.\textsuperscript{273} However, soft money is a contribution; therefore, the Court may uphold a soft money ban under Justice Stevens’s framework because the due process regime may allow for the advancement of other governmental interests. Because the prevention of corruption would not be the sole governmental interest allowing for regulation, reforms such as a soft money ban are more likely to survive the Court’s scrutiny.\textsuperscript{274} The likelihood of survival is increased because the government would be able to advance other interests, such as the interest in equalizing the ability of individuals and groups to influence campaigns, which was rejected on First Amendment grounds in *Buckley*.\textsuperscript{275} Thus, Justice Stevens would not require reforms to serve the prevention of corruption interest in order to survive constitutional review.

2. Balance and Defer -- Justice Breyer’s Approach

Justice Breyer suggested that the review of campaign finance restrictions implicates two protected interests that require balancing.\textsuperscript{276} He believed that

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\textsuperscript{272} See id. (Stevens, J., concurring) (noting that because he did not participate in *Buckley*, he was unable to suggest that property and liberty concerns implicated by restrictions on property would allow for invalidation of expenditure limits).

\textsuperscript{273} See id. (arguing that *Buckley* Court could have justified striking down expenditure limits based on due process arguments).

\textsuperscript{274} See supra notes 231-67 and accompanying text (describing how prevention of corruption standard may prevent reforms from being constitutional).

\textsuperscript{275} See supra notes 231-67 and accompanying text (discussing how reforms may not be possible because they do not directly prevent quid pro quo corruption). However, this approach may not be the best analytic fit for regulations of campaign finance. Although it is true that money is being restricted, it is difficult to ignore the speech and association interests that are implicated in the action of donating and spending money for political communication. A purely property-based analysis would ignore the special character of political money, in that the very expenditure of such money is an act that implicates some First Amendment rights. See *Buckley* v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (asserting that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities"). For a more detailed analysis of the property versus speech question, see generally Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235 (2000) (arguing that political money has many characteristics of property as well as of speech, and that appropriate test for campaign finance reforms would embody principals from both speech and property analyses).

\textsuperscript{276} See *Nixon* v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concur-
the Court should weigh both the interest in protecting speech and the interest in protecting the integrity of elections. Justice Breyer criticized those Justices who believed that restrictions on campaign finance should be subject to strict scrutiny. He likened the application of strict scrutiny to a presumption against the constitutionality of campaign finance restrictions. Given the competing interests, he concluded that such a presumption was "out of place."

Instead, Justice Breyer proposed asking "whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others." To assist the Court in balancing the interests at stake, Justice Breyer advocated deferring to legislative judgment. However, he quickly explained that the Court should still carefully review campaign finance provisions for other "constitutional evils," such as provisions that may unfairly protect incumbents.

To apply Breyer's framework to a soft money ban, the Court would need to balance the rights of the parties and contributors against the government's interest in preserving the integrity of elections. The interest in preserving the integrity of elections is a broader interest than the current prevention of corruption standard and implicates more than just quid pro quo situations. If there were legislative findings that a soft money ban would protect the integrity of elections, Justice Breyer's test would allow such a ban to stand. The same may be said for issue advocacy. Although the speech implications may be greater in the context of issue ads, the broader interest of assuring integrity may overcome the major problem inherent in the Buckley framework.

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277. See id. (Breyer, J., concurring) (declaring that "this is a case where constitutionally protected interests lie on both sides of the legal equation"); see also supra notes 36-40 (discussing Breyer's concurring opinion).
278. See id. at 399 (Breyer, J., concurring) (denying that failure to adopt strict scrutiny standard disregards First Amendment rights).
279. Id. at 400 (Breyer, J., concurring).
280. Id. at 401 (Breyer, J., concurring).
281. Id. at 402 (Breyer, J., concurring).
282. See id. (Breyer, J., concurring) (opining that legislature has more expertise than Court to determine what actions threaten integrity of elections).
283. Id. at 402 (Breyer, J., concurring).
284. See id. at 401 (Breyer, J., concurring) (referring to safeguarding of electoral process rather than to prevention of corruption of individual candidates).
285. See id. at 402 (arguing that courts should defer to legislature's judgment in matters like "the field of election regulation" where legislators have "significantly greater institutional expertise" than courts).
work, that where there is no direct quid pro quo, the government cannot regu-
late. Thus, Justice Breyer’s balancing standard may also uphold reforms
that do not explicitly serve the prevention of corruption interest.

3. Strict Scrutiny – Justice Kennedy’s and Justice Thomas’s Approach

Rather than propose tests that would allow for more restrictions on cam-
paign finance, Justices Kennedy and Thomas advocated strengthening the
standard to protect the First Amendment rights implicated by such restric-
tions. Justice Kennedy did not precisely define the applicable standard of
review, but he claimed that the contribution limit at issue in Shrink PAC did not ‘come even close to passing any serious scrutiny.’ He said there may be room for Congress to reform the system in a different way than in FECA, but he questioned whether any restriction on direct contributions and expendi-
tures could be so limited. Finally, Justice Kennedy conceded that at the end
of the day he would likely side with Justice Thomas, who supported strict
scrutiny of restrictions on campaign financing.

Justice Thomas, joined by Justice Scalia, contended that "[p]olitical
speech is the primary object of First Amendment protection" and that con-
tribution limits directly burdened this most fundamental right. He argued
that Buckley discounted the rights of both candidates and contributors by allowing
restrictions on campaign contributions. Because Buckley restricted the
First Amendment rights of candidates and contributors, he would overrule it. He believed that such restrictions must be reviewed under strict scrutiny. Justice Thomas rejected the notion that the prevention of corruption will

286. See Buckley v. Valeo, 424 U.S. 1, 26-27 (per curiam) (discussing interest in preventing corruption in terms of preventing quid pro quo arrangements).
287. See Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting) (declaring that contribution limits should be "met with the utmost skepticism and should receive the strictest scrutiny"); see also supra notes 41-47 and accompanying text (describing standards offered by Justices Kennedy and Thomas).
288. Id. at 410 (Kennedy, J., dissenting).
289. Id. at 409-10 (Kennedy, J., dissenting) (declaring that he would "overrule Buckley and then free Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it is possible to do so").
290. Id. at 409 (Kennedy, J., dissenting).
291. Id. at 410 (Thomas, J., dissenting).
292. See id. at 412 (Thomas, J., dissenting) (announcing that "contribution caps, which place a direct and substantial limit on core speech, should be met with the upmost skepticism and should receive the strictest scrutiny").
293. Id. at 418 (Thomas, J., dissenting).
294. Id. at 410 (Thomas, J., dissenting).
295. Id. at 412 (Thomas, J., dissenting).
always be a sufficient interest to overcome constitutional review. Applying this standard to the current reform proposals, few would survive strict scrutiny. If a donor's ability to make unrestricted contributions to candidates could not be limited, then donations that are one step removed from the candidate, like soft money, surely would be allowed. The same could be said for issue advocacy. If giving an unlimited amount of money to a candidate would be permitted, it seems unlikely that Justice Thomas would restrict an individual's ability to spend money on advertisements that do not even expressly advocate the election of that same candidate. If an advertisement does not advocate the election or defeat of a candidate, even if it has the purpose of doing so, then this action is still far removed from giving the same amount of money to a candidate, which would be legal under Justice Thomas's standard.

However, because Justice Thomas believed that disclosure was a less restrictive means of preventing corruption, the disclosure provisions may still stand under his strict scrutiny analysis. Nevertheless, under Justice Thomas's standard, the interest in preventing corruption may be overcome by the interest of the speaker if the means chosen by the government are not narrowly tailored. He reasoned that the donation is not for a candidate and, therefore, does not pose as great a threat as direct contributions to candidates. Thus, Justice Thomas's framework may restrict the ability for virtually any reform, even those that prevent corruption, from passing constitutional scrutiny.

C. A New Standard: Buckley Revisited

The Buckley Court did not hold that the only interest that could justify restrictions on campaign finance was the prevention of corruption. Justice White argued this point in the cases following Buckley and this Note argues

296. See id. at 429 (Thomas, J., dissenting) (asserting that "when it comes to a significant infringement on our fundamental liberties, that some undesirable conduct may not be deterred is an insufficient justification to sweep in vast amounts of protected political speech"). Justice Thomas offers the example of bribery statutes as provisions that precisely address the interest in preventing quid pro quo corruption. Id. at 428 (Thomas, J., dissenting).

297. See id. at 412 (Thomas, J., dissenting) (asserting that "[w]hat remains of Buckley fails to provide an adequate justification for limiting individual contributions to political candidates").

298. Id. at 428 (Thomas, J., dissenting).

299. See id. (Thomas, J., dissenting) (asserting that disclosure laws are effective means for deterring corruption).

300. See id. at 427 (Thomas, J., dissenting) (explaining that limitations must advance compelling governmental interest and be narrowly tailored to pass strict scrutiny).

301. See Buckley v. Valeo, 424 U.S. 1, 26 (1976) (per curiam) (asserting merely that it was "unnecessary" to look at other interests in Buckley because that was primary interest of FECA).
it now. Admittedly, the Supreme Court, as well as lower courts, frequently assert that Buckley stood for the fact that preventing corruption is the only significant interest. However, the Court in Buckley did not claim to create such a rigid standard. The Buckley Court merely stated that it was "unnecessary to look beyond the Act's primary purpose," which was prevention of corruption. The standard established in Buckley was one of "exact scrutiny." Although the Buckley Court did not spell out exactly what this "exact scrutiny" required, in discussing the contribution limits, the Court stated that the government must "demonstrate[] a sufficiently important interest" and "closely drawn" means. The Justices never asserted that the prevention of corruption was the only interest that would allow restrictions on campaign finance. As noted above, the idea that Buckley stood for the principle that the only available interest to justify campaign finance reforms is the prevention of corruption was an idea advocated only after Buckley.

As Justice White correctly pointed out, the Supreme Court narrowed the ability of campaign finance reforms to pass constitutional scrutiny by limiting the available interests that a government can promote with such restrictions. In emphasizing quid pro quo corruption, the Court disallowed reforms when the purpose was more general, such as preserving the integrity of elections.

302. See Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 306 (1981) (White, J., dissenting) (explaining that Court in Buckley did not think it necessary to consider other interests in that case, not that Buckley Court believed that other interests were precluded).

303. See supra notes 141-62 and accompanying text (discussing cases asserting that Buckley required reforms to prevent corruption).

304. See Buckley, 424 U.S. at 26 (stating simply that "[i]t is unnecessary" to look at interests other than prevention of corruption to uphold restrictions on contributions).

305. See Citizens Against Rent Control, 454 U.S. 290 at 306 (White, J., dissenting) (quoting Buckley, 424 U.S. at 26).

306. See Buckley, 424 U.S. at 16 (describing how First Amendment requires "exact scrutiny"); id. at 44-45 (stating that expenditure limitations must survive "exact scrutiny applicable to limitations on core First Amendment rights of political expression"); id. at 64 (asserting that limits on First Amendment rights implicated by disclosure provisions must survive "exact scrutiny").


308. See id. at 26 (finding it unnecessary to consider interests other than prevention of corruption). However, the Court did explicitly reject some interests as not satisfying the standard of exact scrutiny. See supra notes 97-100 and accompanying text (noting Court's rejection of other asserted interests in expenditure limits).

309. See supra notes 141-63 and accompanying text (describing how subsequent cases narrowed Buckley's holding).

310. See supra notes 141-63 and accompanying text (discussing how subsequent cases narrowed Buckley's holding).

311. See supra notes 141-63 and accompanying text (noting how subsequent cases narrowed Buckley's holding).
While the Court's stated concern in upholding this narrow construction of the available interests was the First Amendment protection of political speech, the unintended consequence of this determination may be the inability of legislators to prevent more general harms to the electoral system. If the Court were to apply the test for campaign finance reforms as broadly as originally stated in *Buckley*, the reforms would have a better chance of passing constitutional scrutiny. For example, if the Court recognizes a more general interest in protecting the integrity of elections, campaign finance reform proposals could restrict activities that do not implicate a direct quid pro quo situation, but nonetheless influence the election of federal candidates.

As explained, *Buckley* requires a sufficiently important interest including, but not limited to, the prevention of corruption. However, this interest does not encompass the desire to equalize speakers economically. In the context of the disclosure provisions, the Court concluded that three different interests survived "strict scrutiny." The Court could evaluate a ban on soft money and restrictions on issue ads under the "exacting scrutiny" standard from *Buckley*, while allowing the government to assert more interests than just prevention of corruption. The government interest in preventing the impression in the minds of voters that offices are being bought is certainly a "sufficiently important government interest." All of the reforms further this interest. A soft money ban, for example, could prevent the perception that corporations, unions, and wealthy individuals can "buy" elections by preventing them from giving unlimited amounts of money to political parties. However, a significant interest alone is not enough. The reform must also accomplish

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313. See supra notes 11-12 and accompanying text (describing test laid out in *Buckley*).

314. See *Buckley v. Valco*, 424 U.S. 1, 66, 68-69 (per curiam) (describing interest in providing electorate with information about money going in and out of campaigns in order to better evaluate candidates, interest in preventing corruption, and interest in gathering information that may uncover violations of election law).

315. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403-04 (2000) (Kennedy, J., dissenting) (concluding that Court should "defer to [the legislature's] political judgement that unlimited spending threatens the integrity of the electoral process"). The *Austin* Court quietly endorsed this interest. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659-60 (1990) (concluding that "[r]egardless of whether this danger of 'financial quid pro quo' corruption, [citations omitted], may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas").

316. See *Buckley*, 424 U.S. at 25 (requiring that means be "closely drawn").
its goal by "closely drawn means." In this case, one could argue that the reform is closely drawn because although it restricts soft money, the perceived evil, it does not completely ban contributions to political parties. This view looks like a balancing test – weighing the speaker/donor’s strong interest in First Amendment rights against the governmental interest in eliminating the perception that public offices are for sale. The Court would then determine whether the reform burdened either interest more than necessary.

The current Court does not seem completely opposed to such a standard. Although Shrink PAC was decided under Buckley, the plethora of frameworks offered in the separate opinions suggests that several Justices are unhappy with the prevention of corruption standard. The majority, Justices Souter, Rehnquist, Stevens, O’Connor, Ginsburg, and Breyer, shied away from the strict quid pro quo definition of corruption. They claimed that the interest in preventing corruption was larger than the bribery context and extended to a more general concern with the influence of money on governmental action. Although the Buckley Court intended to allow restrictions that encompassed more than outright bribery, the Court mentioned only quid pro quo situations. This hint of the Shrink PAC majority’s dissatisfaction may be an indication that given the right facts, the Court will "lower" the standard to uphold regulations furthering different, although significant, government interests. A lower standard would allow regulation of soft money and issue ads

317. Id.
318. See supra notes 270-300 and accompanying text (discussing separate opinions in Shrink PAC).
319. See Shrink PAC, 528 U.S. at 389 (asserting that in addition to quid pro quo corruption, Buckley "recognized a concern not confined to bribery of public officials"). Furthermore, in FEC v. Colorado Republican Federal Campaign Committee, 121 S. Ct. 2351 (2001), the Court (with the same majority as in Shrink PAC) defines corruptions as "being understood not only as quid pro quo arrangements, but also as undue influence on an officeholder’s judgment, and the appearance of such influence." Id. at 2357 (citing Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 388-89 (2000)). The case turns on whether the coordinated expenditures have the potential to corrupt and whether the limitations placed on such expenditures were tailored sufficiently to prevent corruption. See id. at 2376-80 (Thomas, J., dissenting) (arguing that even under standards established in Shrink PAC, limitations on coordinated expenditures were not unconstitutional because there was no evidence that limiting expenditures prevented corruption).
320. See id. (referring to contention in Buckley that government could regulate acts that were "less ‘blatant and specific’ than bribery").
321. See Buckley v. Valeo, 424 U.S. 1, 26-27 (1976) (per curiam) (asserting that interest in prevention of corruption was adequate to allow contribution limits because possibility and actuality of quid pro quo agreements undermined integrity of elections); Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 422 (2000) (Thomas, J., dissenting) (maintaining that Buckley Court gave prevention of corruption interest very narrow meaning encompassing only quid pro quo situations).
that, because of their nature, could not pass the corruption standard. Although this approach would upset a great deal of campaign finance precedent, it is consistent with *Buckley*.

V. Conclusion:
Recognizing Speech Interests While Allowing for Reform

The American public distrusts the modern campaign finance system. However, the current constitutional standard stands in the way of popular solutions. The standard, as first articulated in *Buckley v. Valeo*, requires that any restrictions on campaign financing survive "exacting scrutiny;" any restriction must promote a significant government interest by closely drawn means. Cases subsequent to *Buckley* claimed that the only governmental interest able to justify restrictions on campaign spending was the prevention of corruption. The Court frequently has interpreted prevention of corruption to mean only the prevention of quid pro quo between candidates and donors. This interpretation disallows restrictions on issue ads and soft money that are not directly contributed to a candidate, thereby eliminating the concern about a quid pro quo. However, the current Supreme Court is unhappy with the system set up in *Buckley* and is willing to go beyond the quid pro quo definition of corruption. Furthermore, a more accurate reading of *Buckley* reveals that the Court does not state that the sole governmental interest must be the prevention of corruption. Such a reading would allow the Court to uphold reason-


323. See supra notes 229-66 and accompanying text (describing how current constitutional standard may stand in the way of real campaign finance reform).

324. See *Buckley*, 424 U.S. at 25 (describing test Court used to uphold contribution limits).

325. See supra notes 141-66 and accompanying text (recounting how test for campaign finance reforms was narrowed to allow only for those regulations preventing corruption to survive).

326. See supra notes 141-66 and accompanying text (recounting how test for campaign finance reforms was narrowed to allow only for those regulations preventing corruption to survive).

327. See supra notes 79-80 (noting Court's definition of corruption); see also FEC v. Colo. Republican Fed. Campaign Comm., 121 S. Ct. 235, 2357 (2001) (defining corruption "not only as quid pro quo arrangements, but also as undue influence on an officeholder's judgment, and the appearance of such influence").

328. See supra notes 26-48, 268-300 and accompanying text (outlining opinions in *Shrink PAC* that indicated frustration with *Buckley*).

329. See *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam) (asserting only that it was "unnecessary to look beyond [FECA]'s primary purpose – to limit the actuality and appearance
able restrictions on campaign finance while still protecting the important First Amendment rights implicated by the donating and spending of money in politics. Therefore, a balancing test based on the "exact scrutiny" standard in Buckley would adequately protect the First Amendment rights of candidates and donors while allowing reasonable reform.

of corruption resulting from large individual financial contributions -- in order to find a constitutionally sufficient justification for the ... contribution limitation[2]).

330. See supra notes 301-21 and accompanying text (arguing that more liberal reading of Buckley would allow for more reform proposals to stand).