M. CAMPAIGN FINANCE LAWS

1. Modern Foundations

Campaign finance reform has been in the news in recent years. Those who favor reform claim that a flood of money tends to corrupt and undermine the political process. Others claim that various proposed reforms unduly impinge on speech and associational rights. Since the mid-1970s, a number of important decisions have been rendered, and many have been controversial.

The modern foundation. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court considered a challenge to provisions of the Federal Election Campaign Act of 1971 (FECA) and related 1974 amendments. FECA prohibited individuals from contributing more than $25,000 in a single year or more than $1,000 to any single candidate for an election campaign and from spending more than $1,000 a year "relative to a clearly identified candidate." Other provisions restricted a candidate's use of personal and family resources in his or her campaign and limited the overall amount that could be spent by a candidate in campaigning for federal office.

Distinguishing contributions from expenditures. The *Buckley* Court began with a recognition that contribution and expenditure limitations "operate in an area of the most fundamental First Amendment activities" because "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." Indeed, the Court recognized that "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." As a result, the Court refused to treat campaign expenditures as "conduct," or to apply a lesser standard of review such as the *O'Brien* test. The Court also refused to view the restrictions as "reasonable time, place, and manner regulations." Regarding FECA's expenditure limitations, the Court concluded that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." Moreover, given the cost of modern communications, the Court concluded that the $1,000 ceiling on spending "relative to a clearly identified candidate" would "appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication."

By contrast, the Court viewed FECA's contribution limitations as involving "only a marginal restriction upon the contributor's ability to engage in free communication." Even though a "contribution serves as a general expression of support for the candidate and his views," it "does not communicate the underlying basis for the support." Moreover, the "quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." Nevertheless, the Court expressed concern that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." But the Court did not view FECA's contribution limitations as having such a dire impact. The Court also expressed concern that FECA might impinge on associational freedoms. Campaign contributions allow individuals to pool their money and affiliate with a candidate.

Contribution limitations. In applying these principles, the Court upheld FECA's prohibition against making "contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000." The Court concluded that the right of association by contribution was not absolute, and that even a "significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." The Court found such an interest in the Act's goal of limiting the "actuality and appearance of corruption resulting from large individual financial contributions." The Court noted: "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined[.] Of almost equal concern [is] the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." The Court found that bribery laws were insufficient to serve this objective because they "deal with only the most blatant and specific attempts of those with money to influence governmental action." In addition, the Court found that FECA's "contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." In order to prevent evasion of the $1,000 contribution limit, the Court also upheld an overall $25,000 limitation on total contributions by an individual during any calendar year.

Expenditure limitations. By contrast, the Court found that FECA's expenditure ceilings impose direct and substantial restraints on the quantity of political speech. The Court found that the limitations restrict political expression "at the core of our electoral process and of the First Amendment freedoms." In particular, the Court found that the $1,000 limit on expenditures "relative to a clearly identified candidate" effectively precluded:

> all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations, from voicing their views "relative to a clearly identified candidate" through means that entail aggregate expenditures of more than $1,000 during a calendar year. The provision, for example, would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement "relative to a clearly identified candidate" in a major metropolitan newspaper.

The Court found that the governmental interest in preventing corruption and the appearance of corruption was inadequate to justify the restriction. The Court noted that so "long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." The Court concluded that the "absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." The Court flatly rejected the notion that the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" justifies the limitation. The "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."

The Court also struck down FECA's limitations on the amount that a candidate could spend "from his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year." Not only did the Court find that the limitation imposed a substantial restraint on free expression, but the Court also emphasized that the "candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and

vigorously and tirelessly to advocate his own election[.]" The Court noted that "it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." The Court found that the governmental interest in preventing actual or apparent corruption was ill served because "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed."

The Court also invalidated overall campaign expenditures by candidates seeking nomination for election and election to federal office. The Court found that the governmental interest in "alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by §608(c)'s campaign expenditure ceilings." In addition, the Court again found that the "interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns."

Reporting and disclosure requirements. The FECA statute also imposes reporting and disclosure requirements related to campaign expenditures. The Court was concerned that disclosure of campaign contributions and expenditures might be used to harm associational interests. Indeed, the Court concluded that the "strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." Nevertheless, the Court concluded that various governmental interests were sufficiently important to outweigh any possible associational infringements:

> The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories. First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. [The] sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office. Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. [A] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return. Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

Thus, even though the Court concluded that "public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute" and might "even expose contributors to harassment or retaliation," the Court found that the "[d]isclosure requirements [appear] to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist[.]" In response to minor party arguments that the disclosure requirements would be especially harmful to their associational interests, the Court concluded that it would not assume that courts would be insensitive if a sufficient showing of harm were made.

The Court also upheld a reporting requirement demanding that "[e]very person (other than a political committee or candidate) who makes contributions or expenditures" aggregating over $100 in a calendar year "other than by contribution to a political committee or candidate" file a statement with the commission. Relying on *NAACP v. Alabama*, the Court again applied strict scrutiny and again upheld the standard.

Financing of presidential election campaigns. Finally, the Court upheld the Presidential Election Campaign Fund, which financed: (1) party nominating conventions, (2) general election campaigns, and (3) primary campaigns. The Act awarded differing amounts to "major" and "minor" parties based on their performance in the most recent presidential election. "New" parties received no funding. To be eligible for funds, major party candidates must pledge not to incur expenses in excess of the entitlement and not to accept private contributions except to the extent that the fund is insufficient to provide the full entitlement. The Court upheld the fund, noting that "public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest."

Buckley *dissents*. Only Justice White argued in dissent for upholding the expenditure limitations because they would "help eradicate the hazard of corruption." By contrast, Chief Justice Burger and Justice Blackmun favored the invalidation of both the contribution and expenditure limits. Justice Burger also opposed the required disclosure of "modest contributions that are the prime support of new, unpopular, or unfashionable political causes," and he would have invalidated the presidential campaign finance system because of the disadvantage it imposed on a candidate who has a poor constituency. Justice Marshall agreed with Justice White's dissenting position that favored limits on personal spending by candidates, because such limits would "help to assure that only individuals with a modicum of support from others will be viable candidates."

Notes

1. *Invalid Contribution Limits*. The Court upheld the validity of contribution limits in cases after *Buckley*, while noting that very low limits might not be constitutional. In Randall v. Sorrell, 548 U.S. 230 (2003), the Court invalidated a Vermont statute that allowed contributions of $200 to a candidate for state representative, $300 to a candidate for state senator, and $400 to a candidate for governor and other statewide offices. These limits applied to individuals, political action committees, and political parties. Chief Justice Roberts, joined by Justices Breyer and Alito, found that these low limits were not "closely drawn" under *Buckley* to serve the state's interest in preventing corruption and the appearance of corruption. The plurality relied on five factors: (1) the limits would significantly restrict the amount of funding available for challengers to run competitive campaigns, (2) they posed a threat of harm to the right to associate in a political party, (3) they did not exclude expenses incurred by volunteers in the course of campaign activities; (4) they were not adjusted for inflation, and (5) it was unlikely that higher contributions (such as $250, $350, and $450) would be a corruptive force. Justices Thomas and Scalia concurred, arguing that *Buckley*'s doctrine should be modified to require strict scrutiny for contribution limits, and reasoning that the Vermont limits would fail that scrutiny. Justice Kennedy concurred in the result. Justices Souter, Stevens, and Ginsburg dissented.

2. *Millionaire Amendment*. There is no public funding for candidates for the U.S. House of Representatives. Individual donors may contribute only $2,300 to a candidate, while national or state political party committees are limited to $40,900 for general election coordinated expenditures for a candidate. As part of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended the FECA statute, Congress enacted the "Millionaire's Amendment," so that when one "self-financing" candidate made expenditures that exceeded $350,000 from personal finances, that candidate's opponent could receive individual contributions at three times the statutory limit ($6,900) and also receive unlimited coordinated party expenditures. In *Davis v. Federal Election Commission*, 554 U.S. 724 (2008), the Court invalidated this provision under *Buckley*, reasoning that it impermissibly burdened a self-financing candidate's "unfettered right to make personal expenditures." This right was abridged in *Davis* because the self-financing candidate was required to "abide by a limit on personal expenditures or endure the burden" caused by the "activation of a scheme of discriminatory contribution limits." As in *Buckley*, this

burden could not be justified by the government interest in eliminating corruption or the perception of corruption because reliance on personal funds reduces the threat of corruption. The *Davis* Court also rejected the legitimacy of two other proffered government interests, in leveling "electoral opportunities of different personal wealth" and in mitigating the contribution limits that make it harder for nonwealthy candidates to raise funds. Justices Stevens, Souter, Ginsburg, and Breyer dissented.

3. *Restriction of Coordinated Expenditures by Parties*. The Federal Election Campaign Act of 1971 (FECA) provides that limitations on campaign "contributions" apply to "expenditures made by any person in cooperation, consultation, or concert, with . . . a candidate." In upholding the constitutionality of the Act's contribution limitations applying to individuals and nonparty groups, the *Buckley* Court validated the Act's definition of "contributions" as including so-called "coordinated" expenditures, and it struck down the Act's expenditure limitations applying to independent expenditures by individuals and nonparty groups. However, *Buckley* did not address the Act's expenditure limitations on national and state political parties with respect to federal elections. After *Buckley*, the FEC originally took the position that any expenditure by a political party in connection with a federal election should be presumed to be *coordinated* with the party's candidate and, therefore, that the Act's expenditure limits on parties should be viewed as constitutional contribution limits. The Court rejected this broad view in *Colorado Republican Federal Campaign Committee v. Federal Election Commission* (*Colorado I*), 518 U.S. 604 (1996), holding that the Act's "Party Expenditure Provision" relating to senatorial campaigns could not be applied constitutionally to *independent* expenditures of the party, and finding that expenditures qualified as independent when the party spent the money before selecting its own senatorial candidate and without any arrangement with potential nominees. In *Colorado I*, the Court left open the broader question whether the Act's limits on a party's coordinated expenditures might be facially unconstitutional under *Buckley*. This issue was resolved when the Court upheld those limits in *Federal Election Commission v. Colorado Republican Federal Campaign Committee* (*Colorado II*), 533 U.S. 431 (2001). The Court reasoned that this limitation was "closely drawn" to advance the "sufficiently important" government interest in combating political corruption, because the Act's contribution limits would be eroded if a party could accept unlimited donations that could be used for coordinated expenditures.

Problems

1. *Campaign Funding and the Justifications for Protecting Speech.* Does campaign speech, and more specifically the funding of that speech, meet any of the justifications for protecting speech presented at the beginning of this chapter? In other words, does it provide a safety valve, does it promote self-fulfillment or the marketplace of ideas, or is it related to the democratic process? Explain.

2. *The Right to Receive Campaign Contributions*. Assume that a Connecticut statute establishes very low contribution limits that violate the First Amendment under *Buckley* and *Randall*. A losing candidate for attorney general decides to file a suit for damages, claiming that the prior enforcement of the statute deprived her of "needed financing for her campaign from otherwise willing supporters" and violated her "First Amendment right to receive campaign contributions." Do the Court's decisions in *Buckley* or *Randall* establish such a right? *See Dean v. Blumenthal*, 577 F.3d 60 (2d Cir. 2009).

3. *The Future of Public Financing.* During the 2008 Presidential campaign, John McCain accepted public financing and received $84 million for his campaign. By contrast, Barack Obama was the first candidate to eschew public financing and he was able to raise and spend nearly $700 million. During the 2012 presidential campaign, neither of the major party candidates accepted public financing, and no candidates applied for public financing in the 2016 presidential campaign. In 1977, 29 percent of taxpayers contributed $3 each from their taxes to the public financing system. In 2015, only 5.4 percent of taxpayers checked the box on their tax form to provide a donation and $288 million remains in the

fund until it is reappropriated by Congress. *See* Josh Israel, *The $288 Million in Campaign Funds That Candidates Aren't Using*, thinkprogress.org, October 21, 2015, http://thinkprogress.org/justice/2015/10/21/3713676/public-finance-three-dollar-checkoff/. Explain why the public financing system was successful for so long, and the reasons why it has failed. Then explain whether it should it be revived and why it could be too late.

2. Corporate Speech

Citizens United v. Federal Election Commission

558 U.S. 310 (2010)

Justice KENNEDY delivered the opinion of the Court.

Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. Limits on electioneering communications were upheld in McConnell v. Federal Election Commn., 540 U.S. 93, 203-209 (2003). The holding of *McConnell* rested to a large extent on an earlier case*,* Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)[.]

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*[,] [and we] hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. We turn now to the case before us.

I

Citizens United is a nonprofit corporation [with] an annual budget of about $12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.

In January 2008, Citizens United released a film entitled *Hillary: The Movie* [*Hillary*]. It is a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Hillary* [depicts] interviews with political commentators and other persons, most of them quite critical of Senator Clinton. *Hillary* was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available through video-on-demand.

[In] December 2007, a cable company offered, for a payment of $1.2 million, to make *Hillary* available on a video-on-demand channel called "Elections '08." [To] implement the proposal, Citizens United was prepared to pay for the video-on-demand; [it] produced two 10-second ads and one 30-second ad [to] promote the video-on-demand offering by running advertisements on broadcast and cable television.

Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited—and still does prohibit—corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. [Then] BCRA §203 amended [2 U.S.C.] §441b to prohibit any "electioneering communication" [which] is defined as "any broadcast, cable or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election. [Corporations] and

unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a "separate segregated fund" (known as a political action committee, or PAC) for these purposes. The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union.

Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by §441b's ban on corporate funded independent expenditures, thus subjecting the corporation to civil and criminal penalties[.] In December 2007, Citizens United sought declaratory and injunctive relief[,] argu[ing] that (1) §441b is unconstitutional as applied to *Hillary*; and (2) BCRA's disclaimer and disclosure requirements [in] §§201 and 311 [are] unconstitutional as applied to *Hillary* and to the three ads for the movie. [The three-judge District Court rejected these arguments and granted the Federal Election Commission (FEC) motion for summary judgment. Citizens United appealed, and the Supreme Court heard oral argument in March 2009.]

[The] case was reargued [after] the Court asked the parties [in June 2009] to file supplemental briefs addressing whether we should overrule either or both *Austin* and the part of *McConnell* which addresses the facial validity of 2 U.S.C. §441b.

II

Before considering whether *Austin* should be overruled, we first address whether Citizens United's claim that §441b cannot be applied to *Hillary* may be resolved on other, narrower grounds[.]

Citizens United [argues] that §441b may not be applied to *Hillary* under the approach taken in *WRTL* [Federal Election Commn. v. Wisconsin Right to Life, Inc., 551 U.S. 449, 469-470 (2007)]. [*WRTL*] found an unconstitutional application of §441b where the speech was not "express advocacy or its functional equivalent." 551 U.S. at 481. [This] test is objective: "a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Under this test, *Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency[.]

Citizens United argues that *Hillary* is just "a documentary film that examines certain historical events." We disagree. The movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for President. The narrator begins by asking, "Could [Senator Clinton] become the first female President in the history of the United States?" And the narrator reiterates the movie's message in his closing line: "Finally, before America decides on our next president, voters should need no reminders of . . . what's at stake—the well being and prosperity of our nation.[']

[Citizens United's other,] narrower arguments are not sustainable under a fair reading of the statute. In the exercise of its judicial responsibility, it is necessary then for the Court to consider the facial validity of §441b. Any other course of decision would prolong the substantial, nation-wide chilling effect caused by §441b's prohibitions on corporate expenditures[.]

III

[The] law before us is an outright ban, backed by criminal sanctions. [The] following acts would all be felonies under §441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate association from the corporation. So the PAC exemption from §441b's expenditure ban does not allow corporations to speak. [T]he option to form PACs does not alleviate the First Amendment problems with §441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations[.] [This] might explain why fewer than 2,000 of the millions of corporations in this country have PACs[.]

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. If §441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a pre-condition to enlightened self-government and a necessary means to protect it. The First Amendment " 'has its fullest and most urgent application' to speech uttered during a campaign for political office." Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989).

[Laws] that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL*, 551 U.S. at 464[.]

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. *See* First Nat. Bank of Boston v. Bellotti, 435 U.S. 765 (1978). As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

[By] taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

[It] is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes. At least before *Austin*, the Court had not allowed the exclusion of a class of speakers from the general public dialogue.

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.

A

[In] *Buckley*, the Court addressed various challenges to the Federal Election Campaign Act of 1971 (FECA), as amended in 1974. These amendments created 18 U.S.C. §608(e), an independent expenditure ban separate from §610 that applied to individuals as well as corporations and labor unions.

[*Buckley*] first upheld §608(b), FECA's limits on direct contributions to candidates. The *Buckley* Court recognized a "sufficiently important" governmental interest in "the prevention of corruption and the appearance of corruption." This followed from the Court's concern that large contributions could be given "to secure a political *quid pro quo*." [424 U.S. at 25.]

The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that "the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," because "[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley* invalidated §608(e)'s restrictions on independent expenditures[.]

Buckley did not consider §610's separate ban on corporate and union independent expenditures[.] Had §610 been challenged in the wake of *Buckley*, however, it could not have been squared with the reasoning and analysis of that precedent. The expenditure ban invalidated in *Buckley*, §608(e), applied to corporations and unions, and some of the prevailing plaintiffs in *Buckley* were corporations[.]

Notwithstanding this precedent, Congress recodified §610's corporate and union expenditure ban at 2 U.S.C. §441b four months after *Buckley* was decided. Section 441b is the independent expenditure restriction challenged here.

Less than two years after *Buckley*, *Bellotti* reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity. [*Bellotti*] struck down a state-law prohibition on corporate independent expenditures related to referenda issues: "[In] the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about what persons may speak and the speakers who may address a public issue." [435 U.S.] at 784-785.

It is important to note that the reasoning and holding of *Bellotti* did not rest on the existence of a viewpoint-discriminatory statute. It rested on the principle that the Government lacks the power to ban corporations from speaking.

Bellotti did not address the constitutionality of the State's ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under *Bellotti*'s central principle: that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity.

Thus the law stood until *Austin*. *Austin* "uph[eld] a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court's] history." 494 U.S. at 695 (Kennedy, J., dissenting). There, the Michigan Chamber of Commerce sought to use general treasury funds to run a newspaper ad supporting a specific candidate. Michigan law, however, prohibited corporate independent expenditures that supported or opposed any candidate for state office. A violation of the law was punishable as a felony. The Court sustained the speech prohibition.

To bypass *Buckley* and *Bellotti*, the *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest. *Austin* found a compelling governmental interest in preventing "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." 494 U.S. at 660.

B

The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them. No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity[.]

In its defense of the corporate-speech restrictions in §441b, the Government notes the antidistortion rationale on which *Austin* and its progeny rest in part, yet it all but abandons reliance upon it. It argues instead that two other compelling interests support *Austin*'s holding that corporate expenditure restrictions are constitutional: an anticorruption interest, and a shareholder-protection interest. We consider the three points in turn.

1

[The] Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. [This] troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.

[*Austin*] sought to defend the antidistortion rationale as a means to prevent corporations from obtaining "an unfair advantage in the political marketplace" by using "resources amassed in the economic marketplace." But *Buckley* rejected the premise that the Government has an interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections." *Buckley* was specific in stating that "the skyrocketing cost of political campaigns" could not sustain the governmental prohibition. The First Amendment's protections do not depend on the speaker's "financial ability to engage in public discussion."

The Court reaffirmed these conclusions when it invalidated the BCRA provision that increased the cap on contributions to one candidate if the opponent made certain expenditures from personal funds. *See* Davis v. Federal Election Commn., 555 U.S. 724 (2008). The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.

[T]he *Austin* majority undertook to distinguish wealthy individuals from corporations on the ground that "[s]tate law grants corporations special advantages such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." This does not suffice, however, to allow laws prohibiting speech. "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."

It is irrelevant for purposes of the First Amendment that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." [*Austin*, 494 U.S.] at 660 (majority opinion). All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's

ideas.

Austin's antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations. [They] are now exempt from §441b's ban on corporate expenditures. Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have "immense aggregations of wealth," and the views expressed by media corporations often "have little or no correlation to the public's support" for those views. *Austin*, 494 U.S. at 660. Thus, under the Government's reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment.

The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. [With] the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.

The [media] exemption results in a further, separate reason for finding this law invalid: [the] exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news. [So] the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. [S]ome other corporation, with [no] media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment[.]

[*Austin*] interferes with the "open marketplace" of ideas protected by the First Amendment. It permits the Government to ban the political speech of millions of associations of citizens. Most of these are small corporations without large amounts of wealth. This fact belies the Government's argument that the statute is justified on the ground that it prevents the "distorting effects of immense aggregations of wealth." It is not even aimed at amassed wealth[.]

[The] purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public. This makes *Austin*'s antidistortion rationale all the more an aberration. [Corporate] executives and employees counsel Members of Congress and Presidential administrations on many issues, as a matter of routine and often in private. [When] that phenomenon is coupled with §441b, the result is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government. That cooperation may be voluntary or it may be at the demand of a Government official who uses his or her authority, influence, and power to threaten corporations to support the Government's policies. Those kinds of interactions are often unknown and unseen. The speech that §441b forbids, though, is public, and all can judge its content and purpose. References to massive corporate treasuries should not mask the real operation of the law. Rhetoric ought not obscure reality.

Even if §441b's expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although smaller corporations may not have the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech[.]

2

[The] Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. In *Buckley*, the Court found this interest "sufficiently important" to allow limits on contributions but did not extend that reasoning to expenditure limits. When *Buckley* examined an expenditure ban, it found "that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures." [424 U.S. at 25, 45.]

With regard to large direct contributions, *Buckley* reasoned that they could be given "to secure a political *quid pro quo*," and that "the scope of such pernicious practices can never be reliably ascertained." The practices *Buckley* noted would be covered by bribery laws if a *quid pro quo* arrangement were proved. The Court, in consequence, has noted that restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here.

"The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." 424 U.S. at 47. Limits on independent expenditures, such as §441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States.

[When] *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt. [Reliance] on a "generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." [*McConnell*, 540 U.S. at 296 (opinion of Kennedy, J.).]

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse " 'to take part in democratic governance' " because of additional political speech made by a corporation or any other speaker. *McConnell*, [540 U.S.] at 144.

The *McConnell* record was "over 100,000 pages" long, yet it "does not have any direct examples of votes being exchanged for . . . expenditures." This confirms *Buckley*'s reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption. The BCRA record establishes that certain donations to political parties, called "soft money," were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money. When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. [An] outright ban on corporate political speech during the critical preelection period is not a permissible remedy[.]

3

The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest, like *Austin*'s antidistortion rationale, would allow the Government to ban the political speech even of media corporations. Assume, for example, that a shareholder of a corporation that owns a newspaper disagrees with the political views the newspaper expresses. Under the Government's view, that potential disagreement could give the Government the authority to restrict the media corporation's political speech. [There] is, furthermore, little evidence of abuse that cannot be corrected by shareholders "through the procedures of corporate democracy." *Bellotti*, 435 U.S. at 794.

Those reasons are sufficient to reject this shareholder-protection interest; and, moreover, the statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time. As to the second, the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders. As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment[.]

C

Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error. "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisian*a, 129 S.Ct. 2079 (2009). We have also examined whether "experience has pointed up the precedent's shortcomings," Pearson v. Callahan, 555 U.S. 223 (2009).

These considerations counsel in favor of rejecting *Austin*, which itself contravened this Court's earlier precedents in *Buckley* and *Bellotti*. [I]t must be concluded that *Austin* was not well-reasoned. The Government defends *Austin*, relying almost entirely on "the *quid pro quo* interest, the corruption interest or the shareholder interest," and not *Austin*'s expressed antidistortion rationale. When neither party defends the reasoning of a precedent, the principle of adherence to that precedent through *stare decisis* is diminished[.]

Austin is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws. Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.

Rapid changes in technology and the creative dynamic inherent in the concept of free expression counsel against upholding a law that restricts political speech in certain media or by certain speakers. Today, 30-second television ads may be the most effective way to convey a political message. Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues. Yet, §441b would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds[.]

No serious reliance interests are at stake. [Legislatures] may have enacted bans on corporate expenditures believing that those bans were constitutional. This is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty "to say what the law is." Marbury v. Madison, 1 Cranch 137, 177 (1803).

Due consideration leads to this conclusion: *Austin* should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

D

Austin is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures. As the Government appears to concede, overruling *Austin* "effectively invalidate[s] not only BCRA §203, but also §441b's prohibition on the use of corporate treasury funds for express advocacy." Section §441b's restrictions on corporate independent expenditures are therefore invalid and cannot be applied to *Hillary*.

Given our conclusion we are further required to overrule the part of *McConnell* that upheld BCRA §203's extension of §441b's restrictions on corporate independent expenditures. The *McConnell* Court relied on the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin*, and we have found this interest unconvincing and insufficient. This part of *McConnell* is now overruled.

IV[25]

A

Citizens United next challenges BCRA's disclaimer and disclosure provisions as applied to *Hillary* and the three advertisements for the movie. Under BCRA §311, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that "is responsible for the content of this advertising." The required statement must be made in a "clearly spoken manner," and displayed on the screen in a "clearly readable manner" for at least four seconds. It must state that the communication "is not authorized by any candidate or candidate's committee"; it must also display the name and address (or Web site address) of the person or group that funded the advertisement. Under BCRA §201, any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC. That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors.

Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," *Buckley*, 424 U.S. at 64, and "do not prevent anyone from speaking," *McConnell*, [540 U.S.] at 201. The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. *Buckley*, [424 U.S.] at 64.

In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in

[25] Justices STEVENS, GINSBURG, BREYER, and SOTOMAYOR joined in Part IV of the Court's opinion. Justice THOMAS joined in all but Part IV of the Court's opinion and dissented from Part IV.

"provid[ing] the electorate with information" about the sources of election related spending. 424 U.S. at 66. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§201 and 311. There was evidence in the record that independent groups were running election-related advertisements "while hiding behind dubious and misleading names." The Court therefore upheld BCRA §§201 and 311 on the ground that they would help citizens "make informed choices in the political marketplace." 540 U.S. at 197.

Although both provisions were facially upheld, the Court acknowledged that as-applied challenges would be available if a group could show a " 'reasonable probability' " that disclosure of its contributors' names "will subject them to threats, harassment, or reprisals from either Government officials or private parties.' " *Id.* at 198 (quoting *Buckley*, *supra*, at 74).

For the reasons stated below, we find the statute valid as applied to the ads for the movie and to the movie itself.

B

Citizens United sought to broadcast one 30-second and two 10-second ads to promote *Hillary*. Under FEC regulations, a communication that "[p]roposes a commercial transaction" was not subject to §441b's restrictions on corporate or union funding of electioneering communications. The regulations, however, do not exempt those communications from the disclaimer and disclosure requirements in BCRA §§201 and 311.

Citizens United argues that the disclaimer requirements in §311 are unconstitutional as applied to its ads. It contends that the governmental interest in providing information to the electorate does not justify [these] requirements. We disagree. The ads fall within BCRA's definition of an "electioneering communication": They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy. The disclaimers "provid[e] the electorate with information," *McConnell*, *supra,* at 196, and "insure that the voters are fully informed" about the person or group who is speaking. *Buckley*, *supra,* at 76. At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.

Citizens United argues that §311 is underinclusive because it requires disclaimers for broadcast advertisements but not for print or Internet advertising. It asserts that §311 decreases both the quantity and effectiveness of the group's speech by forcing it to devote four seconds of each advertisement to the spoken disclaimer. We rejected these arguments in *McConnell*. And we now adhere to that decision as it pertains to the disclosure provisions[.]

[Citizens United] also disputes that an informational interest justifies the application of [the disclosure requirements in] §201 to its ads, which only attempt to persuade viewers to see the film. Even if it disclosed the funding sources for the ads, Citizens United says, the information would not help viewers make informed choices in the political marketplace[.] [But, even] if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election. [T]he informational interest alone is sufficient to justify application of §201 to these ads[.]

Last, Citizens United argues that disclosure requirements can chill donations to an organization by exposing donors to retaliation. [In] *McConnell*, the Court recognized that §201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed. [Citizens United] has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens

United has been disclosing its donors for years and has identified no instance of harassment or retaliation.

Shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative. A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. [The] First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages. [The application of BCRA §§201 and 311 to *Hillary* is affirmed for the same reasons that justify their application to the ads.]

V

When word concerning the plot of the movie *Mr. Smith Goes to Washington* reached the circles of Government, some officials sought, by persuasion, to discourage its distribution. Under *Austin*, though, officials could have done more than discourage its distribution—they could have banned the film. After all, it, like *Hillary*, was speech funded by a corporation that was critical of Members of Congress. *Mr. Smith Goes to Washington* may be fiction and caricature, but fiction and caricature can be a powerful force.

Modern day movies, television comedies, or skits on YouTube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the [expenditure of anything of value] in order to engage in political speech. Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design.

Some members of the public might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation's course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. These choices and assessments, however, are not for the Government to make. "The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it." *McConnell*, *supra,* at 341 (opinion of Kennedy, J.).

The judgment of the District Court is reversed with respect to the constitutionality of 2 U.S.C. §441b's restrictions on corporate independent expenditures. The judgment is affirmed with respect to BCRA's disclaimer and disclosure requirements. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice ROBERTS, with whom Justice ALITO joins, concurring.

[I] join [the Court's] opinion in full. The First Amendment protects more than just the individual

on a soapbox and the lonely pamphleteer. I write separately to address the important principles of judicial restraint and *stare decisis* implicated in this case[.]

[If] adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect [is] diminished. This can happen in a number of circumstances, such as when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake.

These considerations weigh against retaining our decision in *Austin*. First, as the majority explains, that decision was an "aberration" insofar as it departed from the robust protections we had granted political speech in our earlier cases[.] Second, the validity of *Austin*'s rationale [has] proved to be the consistent subject of dispute among Members of this Court[.] Third, the *Austin* decision is uniquely destabilizing because it threatens to subvert our Court's decisions even outside the particular context of corporate express advocacy. The First Amendment theory underlying *Austin*'s holding is extraordinarily broad. *Austin*'s logic would authorize government prohibition of political speech by a category of speakers in the name of equality[.]

[The] Court in *Austin* nowhere relied upon the only arguments the Government now raises to support that decision. In fact, the only opinion in *Austin* endorsing the Government's argument based on the threat of *quid pro quo* corruption was Justice Stevens's concurrence. [Nowhere] did *Austin* suggest that the goal of protecting shareholders is itself a compelling interest authorizing restrictions on First Amendment rights.

To the extent that the Government's case for reaffirming *Austin* depends on radically reconceptualizing its reasoning, that argument is at odds with itself. *Stare decisis* is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones. There is therefore no basis for the Court to give precedential sway to reasoning that it has never accepted[.]

[We] have had two rounds of briefing in this case, two oral arguments, and 54 amicus briefs to help us carry out our obligation to decide the necessary constitutional questions according to law. We have also had the benefit of a comprehensive dissent that has helped ensure that the Court has considered all the relevant issues. This careful consideration convinces me that Congress violates the First Amendment when it decrees that some speakers may not engage in political speech at election time, when it matters most.

Justice SCALIA, with whom Justice ALITO joins, *concurring*.

I join the opinion of the Court. I write separately to address [the] discussion [in] the dissent [that] purports to show that today's decision is not supported by the original understanding of the First Amendment. The dissent attempts this demonstration [in] splendid isolation from the text of the First Amendment. It never shows why "the freedom of speech" that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form[.]

[Most] of the Founders' resentment towards corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed. Modern corporations do not have such privileges, and would probably have been favored by most of our enterprising Founders[.] Moreover, if the Founders' specific intent with respect to corporations is what matters, why does the

dissent ignore the Founders' views about other legal entities that have more in common with modern business corporations than the founding-era corporations? At the time of the founding, religious, educational, and literary corporations were incorporated under general incorporation statutes, much as business corporations are today. There were also small unincorporated business associations, which some have argued were the "true progenitors" of today's business corporations. Were all of these silently excluded from the protections of the First Amendment?

The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak. To the contrary, colleges, towns and cities, religious institutions, and guilds had long been organized as corporations at common law [and] [b]oth corporations and voluntary associations actively petitioned the Government and expressed their views in newspapers and pamphlets[.]

[The] freedom of "the press" was widely understood to protect the publishing activities of individual editors and printers. But these individuals often acted through newspapers, which (much like corporations) had their own names, outlived the individuals who had founded them, could be bought and sold, were sometimes owned by more than one person, and were operated for profit. Their activities were not stripped of First Amendment protections simply because they were carried out under the banner of an artificial legal entity[.]

The dissent says that when the Framers "constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind." That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak in association with other individual persons. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of "an individual American." It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not "an individual American."

[The] Amendment is written in terms of "speech," not speakers. Its text offers no foothold for excluding any category of speaker[.] We are therefore simply left with the question whether the speech at issue in this case is "speech" covered by the First Amendment. No one says otherwise. A documentary film critical of a potential Presidential candidate is core political speech, and its nature as such does not change simply because it was funded by a corporation. Nor does the character of that funding produce any reduction whatever in the "inherent worth of the speech" and "its capacity for informing the public." First Nat. Bank of Boston v. Bellotti, 435 U.S. 765 (1978). Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.

Justice STEVENS, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, concurring in part and dissenting in part.

[The] basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. [The] conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case[.]

The majority's approach to corporate electioneering marks a dramatic break from our past. [The]

Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)[.]

[Although] I concur in the Court's decision to sustain BCRA's disclosure provisions and join Part IV of its opinion, I emphatically dissent from its principal holding[.]

II

[Today's] decision takes away a power that we have long permitted the [elected] branches to exercise. State legislatures have relied on their authority to regulate corporate electioneering, confirmed in *Austin*, for more than a century. The Federal Congress has relied on this authority for a comparable stretch of time, and it specifically relied on *Austin* throughout the years it spent developing and debating BCRA. [Pulling] out the rug beneath Congress after affirming the constitutionality of §203 six years ago shows great disrespect for a coequal branch.

By removing one of its central components, today's ruling makes a hash out of BCRA's "delicate and interconnected regulatory scheme." *McConnell*, 540 U.S. at 172. Consider just one example of the distortions that will follow: Political parties are barred under BCRA from soliciting or spending "soft money," funds that are not subject to the statute's disclosure requirements or its source and amount limitations. Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates, whereas national parties will not be able to spend a dime of soft money on ads of any kind. The Court's ruling thus dramatically enhances the role of corporations and unions—and the narrow interests they represent—vis-a-vis the role of political parties—and the broad coalitions they represent—in determining who will hold public office.

[*Austin*] has been on the books for two decades, and many of the statutes called into question by today's opinion have been on the books for a half-century or more. The Court points to no intervening change in circumstances that warrants revisiting *Austin* [and] the Court gives no reason to think that *Austin* and *McConnell* are unworkable.

In fact, no one has argued to us that *Austin*'s rule has proved impracticable, and not a single for-profit corporation, union, or State has asked us to overrule it. Quite to the contrary, leading groups representing the business community, organized labor, and the nonprofit sector, together with more than half of the States, urge that we preserve *Austin*[.]

In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court[.]

III

The novelty of the Court's [approach] to *stare decisis* is matched by the novelty of its ruling on the merits. The ruling rests on several premises. First, the Court claims that *Austin* and *McConnell* have "banned" corporate speech. Second, it claims that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corporation. Third, it claims that *Austin* and *McConnell* were radical outliers in our First Amendment tradition and our campaign finance jurisprudence. Each of these claims is wrong[.]

[In] many ways, [§203] functions as a source restriction or a time, place, and manner restriction. It

applies in a viewpoint-neutral fashion to a narrow subset of advocacy messages about clearly identified candidates for federal office, made during discrete time periods through discrete channels. In the case at hand, all Citizens United needed to do to broadcast *Hillary* right before the primary was to abjure business contributions or use the funds in its PAC, which by its own account is "one of the most active conservative PACs in America."

So let us be clear: Neither *Austin* nor *McConnell* held or implied that corporations may be silenced; the FEC is not a "censor"; and in the years since these cases were decided, corporations have continued to play a major role in the national dialogue. Laws such as §203 target a class of communications that is especially likely to corrupt the political process, that is at least one degree removed from the views of individual citizens, and that may not even reflect the views of those who pay for it. Such laws burden political speech, and that is always a serious matter, demanding careful scrutiny. But the majority's incessant talk of a "ban" aims at a straw man[.]

[The] Framers and their contemporaries [held] very different views about the nature of the First Amendment right and the role of corporations in society. Those few corporations that existed at the founding were authorized by grant of a special legislative charter. [Corporations] were created, supervised, and conceptualized as quasi-public entities[.]

[The] Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. [They] had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind. While individuals might join together to exercise their speech rights, business corporations, at least, were plainly not seen as facilitating such associational or expressive ends. [It seems] implausible that the Framers believed "the freedom of speech" would extend equally to all corporate speakers, much less that it would preclude legislatures from taking limited measures to guard against corporate capture of elections[.]

[Although] Justice Scalia makes a perfectly sensible argument that an individual's right to speak entails a right to speak with others for a common cause, he does not explain why those two rights must be precisely identical, or why that principle applies to electioneering by corporations that serve no "common cause." Nothing in his account dislodges my basic point that members of the founding generation held a cautious view of corporate power and a narrow view of corporate rights[,] and that they conceptualized speech in individualistic terms. If no prominent Framer bothered to articulate that corporate speech would have lesser status than individual speech, that may well be because the contrary proposition—if not also the very notion of "corporate speech" —was inconceivable[.]

[The] truth is we cannot be certain how a law such as BCRA §203 meshes with the original meaning of the First Amendment[.] [In] fairness, our campaign finance jurisprudence has never attended very closely to the views of the Framers, whose political universe differed profoundly from that of today. [We] have long since held that corporations are covered by the First Amendment[.] [But] in light of the Court's effort to cast itself as guardian of ancient values, it pays to remember that nothing in our constitutional history dictates today's outcome[.]

A century of more recent history puts to rest any notion that today's ruling is faithful to our First Amendment tradition. At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, banning all corporate contributions to candidates[.]

[Over] the years, the limitations on corporate political spending have been modified in a number of ways, as Congress responded to changes in the American economy and political practices that

threatened to displace the commonweal. [In the] Taft-Hartley Act of 1947[,] Congress extended the prohibition on corporate support of candidates to cover not only direct contributions, but independent expenditures as well. The bar on contributions "was being so narrowly construed" that corporations were easily able to defeat the purposes of the Act by supporting candidates through other means. *WRTL*, 551 U.S. at 511[.]

[By] the time Congress passed FECA in 1971, the bar on corporate contributions and expenditures had become such an accepted part of federal campaign finance regulation that when a large number of plaintiffs, including several nonprofit corporations, challenged virtually every aspect of the Act in *Buckley*, 424 U.S. 1 [(1976)], no one even bothered to argue that the bar as such was unconstitutional. *Buckley* famously (or infamously) distinguished direct contributions from independent expenditures, but its silence on corporations only reinforced the understanding that corporate expenditures could be treated differently from individual expenditures[.]

[Congress] crafted §203 in response to a problem created by *Buckley*. The *Buckley* Court had construed FECA's definition of prohibited "expenditures" narrowly to avoid any problems of constitutional vagueness, holding it applicable only to "communications that expressly advocate the election or defeat of a clearly identified candidate," 424 U.S. at 80, i.e., statements containing so-called "magic words" like " 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat' [or] 'reject,' " *id.* at 43-44. After *Buckley*, corporations and unions figured out how to circumvent the limits on express advocacy by using sham "issue ads" that "eschewed the use of magic words" but nonetheless "advocate[d] the election or defeat of clearly identified federal candidates." *McConnell*, 540 U.S. at 126. [Congress] passed §203 to address this circumvention, prohibiting corporations and unions from using general treasury funds for electioneering communications that "refe[r] to a clearly identified candidate," whether or not those communications use the magic words.

When we asked in *McConnell* "whether a compelling governmental interest justifie[d]" §203, we found the question "easily answered" [based on *Austin*][.]

The majority emphasizes *Buckley*'s statement that "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." [424 U.S. at 48-49.] But this elegant phrase cannot bear the weight that our colleagues have placed on it[.]

[When] we made this statement in *Buckley*, we could not have been casting doubt on the restriction on corporate expenditures in candidate elections, which had not been challenged[.] *Buckley*'s independent expenditure analysis was focused on a very different statutory provision. It is implausible to think, as the majority suggests, that *Buckley* covertly invalidated FECA's separate corporate and union campaign expenditure restriction, §610 (now codified at 2 U.S.C. §441b), even though that restriction had been on the books for decades before *Buckley* and would remain on the books, undisturbed, for decades after[.]

The *Bellotti* Court confronted a dramatically different factual situation from the one that confronts us in this case: a state statute that barred [a] business corporation "from making contributions or expenditures 'for the purpose of . . . influencing or affecting the vote' on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation," and [also] provide[d] that referenda related to income taxation would not "be deemed materially to affect the property, business or assets of the corporation." [The] statute was a transparent attempt to prevent corporations from spending money to defeat [a taxation referendum], which was favored by a majority of legislators but had been repeatedly rejected by the voters. We said that "where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an

advantage in expressing its views to the people, the First Amendment is plainly offended." [435 U.S.] at 785-786[.]

[We] acknowledged in *Bellotti* that numerous "interests of the highest importance" can justify campaign finance regulation. But we found no evidence that these interests were served by [the] law. We left open the possibility that our decision might have been different if there had been "record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests." *Id.* at 789.

Austin and *McConnell*, then, sit perfectly well with *Bellotti*. [The] statute in *Bellotti* smacked of viewpoint discrimination, targeted one class of corporations, and provided no PAC option; and the State has a greater interest in regulating independent corporate expenditures on candidate elections than on referenda, because in a functioning democracy the public must have faith that its representatives owe their positions to the people, not to the corporations with the deepest pockets[.]

IV

[The] majority recognizes that *Austin* and *McConnell* may be defended on anticorruption, antidistortion, and shareholder protection rationales. It badly errs both in explaining the nature of these rationales, which overlap and complement each other, and in applying them to the case at hand.

Undergirding the majority's approach to the merits is the claim that the only "sufficiently important governmental interest in preventing corruption or the appearance of corruption" is one that is "limited to *quid pro quo* corruption.["] [But] [c]orruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA[.]

[The] legislative and judicial proceedings relating to BCRA generated a substantial body of evidence suggesting that, as corporations grew more and more adept at crafting "issue ads" to help or harm a particular candidate, these nominally independent expenditures began to corrupt the political process in a very direct sense. The sponsors of these ads were routinely granted special access after the campaign was over. [Many] corporate independent expenditures [had] become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements. In an age in which money and television ads are the coin of the campaign realm, it is hardly surprising that corporations deployed these ads to curry favor with, and to gain influence over, public officials.

The majority appears to think it decisive that the BCRA record does not contain "direct examples of votes being exchanged for . . . expenditures." It would have been quite remarkable if Congress had created a record detailing such behavior by its own Members. Proving that a specific vote was exchanged for a specific expenditure has always been next to impossible: Elected officials have diverse motivations, and no one will acknowledge that he sold a vote. Yet, even if "[i]ngratiation and access . . . are not corruption" themselves, they are necessary prerequisites to it; they can create both the opportunity for, and the appearance of, *quid pro quo* arrangements. The influx of unlimited corporate money into the electoral realm also creates new opportunities for the mirror image of *quid pro quo* deals: threats, both explicit and implicit[.]

[The] majority fails to appreciate that *Austin*'s antidistortion rationale is itself an anticorruption rationale, tied to the special concerns raised by corporations. Understood properly, "antidistortion" is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process. It is manifestly not just an "equalizing" idea in

disguise.

The fact that corporations are different from human beings might seem to need no elaboration, [and] *Austin* set forth some of the basic differences. Unlike natural persons, corporations have "limited liability" for their owners and managers, "perpetual life," separation of ownership and control, "and favorable treatment of the accumulation and distribution of assets . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments." Unlike voters in U.S. elections, corporations may be foreign controlled. "[The] resources in the treasury of a business corporation . . . may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas." 494 U.S. at [658-659][.]

[These] basic points help explain [not only] why corporate electioneering is [] more likely to impair compelling governmental interests, but also why restrictions on that electioneering are less likely to encroach upon First Amendment freedoms. One fundamental concern of the First Amendment is to "protec[t] the individual's interest in self-expression." Freedom of speech helps "make men free to develop their faculties," it respects their "dignity and choice," and it facilitates the value of "individual self-realization." Martin Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 594 (1982). Corporate speech, however, is derivative speech, speech by proxy. A regulation such as BCRA §203 may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice[.]

It is an interesting question "who" is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. [Some] individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation's electoral message will conflict with their personal convictions. Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least[.]

[The] Court places primary emphasis not on the corporation's right to electioneer, but rather on the listener's interest in hearing what every possible speaker may have to say. The Court's central argument is that laws such as §203 have "deprived [the electorate] of information, knowledge and option vital to its function," and this, in turn, "interferes with the 'open marketplace' of ideas protected by the First Amendment."

There are many flaws in this argument. If the overriding concern depends on the interests of the audience, surely the public's perception of the value of corporate speech should be given important weight. [It] is only certain Members of this Court, not the listeners themselves, who have agitated for more corporate electioneering.

Austin recognized that there are substantial reasons why a legislature might conclude that unregulated general treasury expenditures will give corporations "unfai[r] influence" in the electoral process, and distort public debate in ways that undermine rather than advance the interests of listeners. [When] corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears "little or no correlation" to the ideas of natural persons or to any broader notion of the public good. 494 U.S. at 660. The opinions of real people may be marginalized[.]

[In] critiquing *Austin*'s antidistortion rationale[,] our colleagues place tremendous weight on the example of media corporations. [Citizens United] is not a media corporation. There would be absolutely no need to consider the issue of media corporations if the majority did [not] invent the

theory that legislature must eschew all "identity"-based distinctions and treat a local nonprofit news outlet exactly the same as General Motors[.]

[Interwoven] with *Austin*'s concern to protect the integrity of the electoral process is a concern to protect the rights of shareholders from a kind of coerced speech: electioneering expenditures that do not "reflec[t] [their] support.["] [A] rule that privileges the use of PACs thus does more than facilitate the political speech of like-minded shareholders; it also curbs [the] behavior of executives and respects the views of dissenters[.]

[The] Court dismisses this interest on the ground that abuses of shareholder money can be corrected "through the procedures of corporate democracy," [and] through Internet-based disclosures. [By] "corporate democracy," presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that "these rights are so limited as to be almost nonexistent," given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule. [Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 Va. L. Rev. 247, 320 (1999).]

[Recognizing] the limits of the shareholder protection rationale, the *Austin* Court did not hold it out as an adequate and independent ground for sustaining the statute in question. Rather, the Court applied it to reinforce the antidistortion rationale[.] [The] shareholder protection rationale [bolsters] the conclusion that restrictions on corporate electioneering can serve both speakers' and listeners' interests, as well as the anticorruption interest. And it supplies yet another reason why corporate expenditures merit less protection than individual expenditures.

V

[In] a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. [At] bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

I would affirm the judgment of the District Court.

Notes

1. *Rejecting the Montana Supreme Court's Rejection of* Citizens United. A statute in Montana provides that "a corporation may not make [an] expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party." The Montana Supreme Court upheld the statute against a First Amendment challenge, reasoning that the factual record showed that the government met the burden of establishing a compelling interest, which distinguished the case from *Citizens United*. The Supreme Court summarily reversed in a brief *per curiam* opinion, noting that "[t]here can be no serious doubt" that "the holding of *Citizens United* applies to the Montana state law," and that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." *See America Tradition Partnership, Inc. v. Bullock*, 363 Mont. 220, 271 P.3d 1 (2011), *rev'd*, 564 U.S. 721 (2012). The dissenters in *Citizens United* joined Justice Breyer's dissent in the Montana case, reasoning as follows:

> In *Citizens United*[,] the Court concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of

> corruption." [But] [a]s Justice Stevens explained [in his *Citizens United* dissent], "technically independent expenditures can be corrupting in much the same way as direct contributions." Indeed, Justice Stevens recounted a "substantial body of evidence" suggesting that "[m]any corporate independent expenditures . . . had become essentially interchangeable with direct contributions in their capacity to generate quid pro quo arrangements." Moreover, [this] Court's legal conclusion [in *Citizens United*] should not bar the Montana Supreme Court's finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana. Given the history and political landscape in Montana, that court concluded that the State had a compelling interest in limiting independent expenditures by corporations. Thus, Montana's experience, like considerable experience elsewhere since the Court's decision in *Citizens United*, casts grave doubt on the Court's supposition that independent expenditures do not corrupt or appear to do so.

2. *Ban on Corporate Contributions*. In *Federal Elections Commission v. Beaumont*, 539 U.S. 146 (2003), the Court upheld the constitutionality of a provision in the Federal Election Campaign Act (FECA) that prohibits *direct* corporate contributions in connection with federal elections, while allowing a corporation to establish a PAC that is authorized to make contributions. The *Beaumont* Court reasoned that this provision was closely drawn to match a sufficiently important state interest, and that strict scrutiny was not appropriate because contributions "lie closer to the edges than to the core of political expression," and therefore restrictions on contributions "have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review." The Court noted that the prohibition in FECA has existed in federal law since 1907, and that three government interests support the prohibition: (1) the prevention of corruption or the appearance of corruption; (2) the protection of individuals who have paid money into a corporation or union for other purposes," from "having their money used to support political candidates to whom they may be opposed"; and (3) the need for a hedge "against use of a corporation as conduit for circumventing" contribution limits for individuals. The Court also emphasized that "congressional judgment to regulate corporate political involvement warrants considerable deference and reflects a permissible assessment of the dangers that corporations pose to the electoral process." These dangers may be posed by "for-profit corporations," by "nonprofit advocacy corporations that may be able to amass substantial political war chests," and even by "nonprofit corporations without great financial resources," for all of them are susceptible "to misuse as conduits for circumventing the contribution limits imposed on individuals."

3. McConnell*'s Validation of Soft Money Limitations*. The *Citizens United* Court did not address the validity of *McConnell*'s rejection of a facial challenge to BCRA's limits on "soft money" contributions to political parties. Before BCRA was enacted, national political parties could accept unlimited contributions to fund issue ads, state and local election activities, and get-out-the-vote and voter registration drives. These activities may influence federal elections, even though they do not expressly advocate the election or defeat of a particular candidate. Therefore, Congress enacted BCRA §323 in order to prevent parties and candidates from using so-called "soft money" to evade the "hard money" limits that apply to contributions made in connection with federal elections. Section 323 prohibits national parties from receiving or spending more than $30,400 annually from an individual donor, and prohibits state and local parties from using any contributions over $10,000 from an individual donor in a calendar year for any federal election activity. After the Republican National Committee (RNC) brought an as-applied challenge to BCRA §323, the Court decided *Citizens United*. That decision provided the RNC with a new basis for arguing that *McConnell*'s support for BCRA §323 has been undermined, and that "no viable theory of corruption" justifies the limits of §323 on contributions to political parties. The federal district court expressed sympathy for the RNC's arguments, but declined

to endorse them because of ambiguities in the *McConnell* opinion, observing: "As a lower court, [we] do not believe we possess authority to clarify or refine *McConnell* [or] to otherwise get ahead of the Supreme Court." *See Republican National Committee v. Federal Election Commission*, 698 F. Supp. 2d 150 (D.D.C. 2010), *aff'd*, 130 S.Ct. 3544 (2010).

4. *FEC Soft Money Regulations for Nonprofits*. During the 2004 election season, there was widespread criticism of nonprofit entities that received large contributions to support their political activities. Some critics urged the FEC to ban large donations to nonprofits in the same way that Congress banned large contributions to political parties in BCRA. Instead, the FEC issued regulations that restricted the ability of nonprofits to make independent expenditures for activities such as issue ads, get-out-the-vote efforts, and voter registration drives. The court held that these FEC regulations violated the First Amendment in *Emily's List v. Federal Election Commission*, 581 F.3d 1 (D.C. Cir. 2009), reasoning that, unlike political parties, nonprofit entities should be treated like individuals who have the right to spend unlimited money to support their preferred candidates or parties. The court emphasized that nonprofits "offer an opportunity for ordinary citizens to band together to speak on the issue or issues most important to them" and noted that there was "no evidence that nonprofit entities have sold access to federal candidates and officeholders in exchange for large contributions." The court also rejected the FEC's proffered interest in equalizing the voices of participants in the political process, because this interest was declared to be illegitimate in *Davis* and *Buckley*. *Compare North Carolina Right to Life Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008).

5. *Disclosure Requirements*. In *Doe #1 v. Reed*, 561 U.S. 186 (2010), the Court held that "as a general matter," the mandatory public disclosure of "referendum petitions," as required by a Washington statute and the laws of other states, does not violate the First Amendment rights of the signers, whose names and addresses are required to appear on such petitions. However, the Court also recognized that the signature of a person who signs a referendum petition constitutes expression that "implicates a First Amendment right." In the electoral context, disclosure laws must satisfy two requirements: the existence of a "substantial relation between the disclosure requirement" and a "sufficiently important government interest"; and the strength of that interest must justify "the actual burden on First Amendment rights." On the facts of *Doe #1*, the first element was met because the state asserted an interest in "preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability." The Court noted that the job of verifying the validity of petition signatures was "large and difficult," so that the Secretary of State could ordinarily check only between three and five percent of such signatures, and could not "catch all invalid signatures" that are the product of fraud or mistake. Thus, disclosure "promotes transparency and accountability in the electoral process." The second element was met because "only modest burdens attend to the disclosure of a typical petition." The Court noted that if the petition signers in *Doe #1* could show "a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties," then they could prevail in their claim to resist disclosure. Justice Sotomayor's concurring opinion for three Justices advocated a "heavy burden" for any party challenging disclosure because of the "minimal impact" of disclosure on their speech and associational rights. Justice Scalia's concurrence argued that a "long history of practice shows that the First Amendment does not prohibit public disclosure," so that case-specific relief should be available only if a state "selectively applies a facially neutral petition disclosure rule" in a discriminatory manner. By contrast, Justice Alito's concurrence advocated that signers should be able to obtain as-applied disclosure exemptions quickly and without an "overly burdensome showing." Justice Thomas dissented, arguing that the mandatory disclosure law was unconstitutional "because there will always be a less restrictive means" for vindicating the state's interest "in preserving the integrity of its referendum process."

6. *Undoing* Citizens United *by Constitutional Amendment*. In 2014, when the Democrats controlled the Senate, the Senate Judiciary Committee voted for a resolution, S.J. Res. 19, regarding a proposal to amend the Constitution. It passed on a party-line vote and was reported to the Senate. The resolution went no further in the Senate before the 2014 elections occurred and the Republicans took control in 2015. The resolution read as follows:

> Section 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.
>
> Section 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.
>
> Section 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.

The same resolution was introduced as S.J. Res. 5 in January 2015 and given a "2% chance of being enacted or passed." *See* https://www.govtrack.us/congress/bills/114/sjres5.

Problems

1. *Contributions to Nonprofits*. SpeechNow is an unincorporated nonprofit association that intends to engage in express advocacy supporting candidates for federal office who support First Amendment rights. The members of SpeechNow plan to acquire funds solely from donations by individuals and to operate exclusively through "independent expenditures." For example, SpeechNow will spend money to purchase ads that are not coordinated with candidate campaigns but that support or oppose particular candidates for federal office. Under BCRA §441a, an individual's contribution to an entity like SpeechNow is limited to $5,000 per year, but SpeechNow's president wants to accept larger contributions. When SpeechNow files a federal suit to challenge the §441a contribution limit as a violation of the First Amendment, the defendant FEC argues that: (1) under *Buckley*, contributions directly to candidates may be limited; and (2) the reasoning of *Citizens United* is not relevant because that case involved an expenditure limit, not a contribution limit. How can the court justify a ruling in favor of SpeechNow under *Citizens United*? *See SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

2. *Disclaimer Requirement for Advertisements*. Under a Hawaii statute, a disclaimer rule provides that an advertisement must include a notice "in a prominent location" that the advertisement either "has the approval and authority of the candidate" or "has not been approved by the candidate." The statute defines an "advertisement" as "print and broadcast communications that: (1) identify a candidate or ballot issue directly or by implication and (2) advocate or support the nomination, opposition, or election of the candidate, or advocate the passage or defeat of the issue or question on the ballot." Thus, the statutory requirement serves to advise voters whether an advertisement is coordinated with or independent from a candidate for elected office." Plaintiff ABC is a for-profit corporation that files suit to challenge the Hawaii statute. ABC seeks to place advertisements that (1) mention a candidate by name; (2) run in close proximity to an election; and (3) include language stating that particular candidates "are representatives who do not listen to the people," "do not understand the importance of the values that made our nation great," or "do not show the aloha spirit." ABC argues that the

disclaimer requirement violates the First Amendment as a content-based regulation of speech. How should the court rule? *Compare Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015).

McCutcheon v. Federal Election Commission

132 S. Ct. 1434 (2010)

Chief Justice ROBERTS announced the judgment of the Court and delivered an opinion, in which JUSTICE SCALIA, JUSTICE KENNEDY and JUSTICE ALITO join.

In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. "Ingratiation and access are not corruption." *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 360 (2010). They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns. Any regulation must instead target what we have called "*quid pro quo*" corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money. "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Federal Election Comm'n v. National Conservative Political Action Comm.,* 470 U.S. 480, 497 (1985). Campaign finance restrictions that pursue other objectives impermissibly inject the Government "into the debate over who should govern." Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 750 (2011). And those who govern should be the *last* people to help decide who *should* govern.

The statute at issue in this case imposes two types of limits on campaign contributions. The first, called base limits, restricts how much money a donor may contribute to a particular candidate or committee. The second, called aggregate limits, restricts how much money a donor may contribute in total to all candidates or committees. This case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible objective of combating corruption. The Government contends that the aggregate limits also serve that objective, by preventing circumvention of the base limits. We conclude, however, that the aggregate limits do little, if anything, to address that concern, while seriously restricting participation in the democratic process. The aggregate limits are therefore invalid under the First Amendment.

For the 2013–2014 election cycle, the base limits in the Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), permit an individual to contribute up to $2,600 per election to a candidate ($5,200 total for the primary and general elections); $32,400 per year to a national party committee; $10,000 per year to a state or local party committee; and $5,000 per year to a political action committee, or "PAC."[1] A national committee, state or local party committee, or multicandidate PAC may in turn contribute up to $5,000 per election to a candidate.[2]

[1]A PAC is a business, labor, or interest group that raises or spends money in connection with a federal election, in some cases by contributing to candidates. A so-called "Super PAC" is a PAC that makes only independent expenditures and cannot contribute to candidates. The base and aggregate limits govern contributions to traditional PACs, but not to independent expenditure PACs.

[2]A multicandidate PAC is a PAC with more than 50 contributors that has been registered for at least six months and has made contributions to five or more candidates for federal office. PACs that

The base limits apply with equal force to contributions that are "in any way earmarked or otherwise directed through an intermediary or conduit" to a candidate. If, for example, a donor gives money to a party committee but directs the party committee to pass the contribution along to a particular candidate, then the transaction is treated as a contribution from the original donor to the specified candidate.

For the 2013–2014 election cycle, the aggregate limits in BCRA permit an individual to contribute a total of $48,600 to federal candidates and a total of $74,600 to other political committees. Of that $74,600, only $48,600 may be contributed to state or local party committees and PACs, as opposed to national party committees. All told, an individual may contribute up to $123,200 to candidate and noncandidate committees during each two-year election cycle. The base limits thus restrict how much money a donor may contribute to any particular candidate or committee; the aggregate limits have the effect of restricting how many candidates or committees the donor may support, to the extent permitted by the base limits.

In the 2011–2012 election cycle, appellant Shaun McCutcheon contributed a total of $33,088 to 16 different federal candidates, in compliance with the base limits applicable to each. He alleges that he wished to contribute $1,776 to each of 12 additional candidates but was prevented from doing so by the aggregate limit on contributions to candidates. McCutcheon also contributed a total of $27,328 to several noncandidate political committees, in compliance with the base limits applicable to each. He alleges that he wished to contribute to various other political committees, including $25,000 to each of the three Republican national party committees, but was prevented from doing so by the aggregate limit on contributions to political committees. McCutcheon further alleges that he plans to make similar contributions in the future. In the 2013–2014 election cycle, he again wishes to contribute at least $60,000 to various candidates and $75,000 to non-candidate political committees. Appellant Republican National Committee is a national political party committee charged with the general management of the Republican Party. The RNC wishes to receive the contributions that McCutcheon and similarly situated individuals would like to make—contributions otherwise permissible under the base limits for national party committees but foreclosed by the aggregate limit on contributions to political committees.

In June 2012, McCutcheon and the RNC filed a complaint before a three-judge panel of the U.S. District Court for the District of Columbia. [They] asserted that the aggregate limits on contributions to candidates and to noncandidate political committees were unconstitutional under the First Amendment. The three-judge District Court denied appellants' motion for a preliminary injunction. McCutcheon and the RNC appealed directly to this Court, as authorized by law. We noted probable jurisdiction.

Buckley presented this Court with its first opportunity to evaluate the constitutionality of the original contribution and expenditure limits set forth in FECA. FECA imposed a $1,000 per election base limit on contributions from an individual to a federal candidate. It also imposed a $25,000 per year aggregate limit on all contributions from an individual to candidates or political committees. On the expenditures side, FECA imposed limits on both independent expenditures and candidates' overall campaign expenditures.

Buckley recognized that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." But it distinguished expenditure limits from contribution limits based on the degree to which each encroaches upon protected First Amendment interests. Expenditure limits, the Court explained, "necessarily reduce the quantity of expression by restricting the

do not qualify as multicandidate PACs must abide by the base limit applicable to individual contributions.

number of issues discussed, the depth of their exploration, and the size of the audience reached." The Court thus subjected expenditure limits to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest.

By contrast, the Court concluded that contribution limits impose a lesser restraint on political speech because they "permit the symbolic expression of support evidenced by a contribution but do not in any way infringe the contributor's freedom to discuss candidates and issues." As a result, the Court focused on the effect of the contribution limits on the freedom of political association and applied a lesser but still "rigorous standard of review." Under that standard, "even a 'significant interference' with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."

The primary purpose of FECA was to limit *quid pro quo* corruption and its appearance; that purpose satisfied the requirement of a "sufficiently important" governmental interest. As for the "closely drawn" component, *Buckley* concluded that the $1,000 base limit "focuses precisely on the problem of large campaign contributions while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." The Court therefore upheld the $1,000 base limit under the "closely drawn" test. The challengers argued that the base limit was fatally overbroad because most large donors do not seek improper influence over legislators' actions. Although the Court accepted that premise, it nevertheless rejected the overbreadth challenge for two reasons: First, it was too "difficult to isolate suspect contributions" based on a contributor's subjective intent. Second, "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated."

In one paragraph of its opinion, the Court turned to the $25,000 aggregate limit. It noted that the constitutionality of the aggregate limit "had not been separately addressed at length by the parties." Then, in three sentences, the Court disposed of any constitutional objections to the aggregate limit: "The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid."

We see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review. *Buckley* held that the Government's interest in preventing *quid pro quo* corruption or its appearance was "sufficiently important," we have elsewhere stated that the same interest may properly be labeled "compelling," see *National Conservative Political Action Comm.,* 470 U.S. at 496–497, so that the interest would satisfy even strict scrutiny. Moreover, regardless whether we apply strict scrutiny or *Buckley*'s "closely drawn" test, we must assess the fit between the stated governmental objective and the means selected to achieve that objective. Or to put it another way, if a law that restricts political speech does not "avoid unnecessary abridgement" of First Amendment rights, it cannot survive "rigorous" review. Because we find a substantial

mismatch between the Government's stated objective and the means selected to achieve it, the aggregate limits fail even under the "closely drawn" test. We therefore need not parse the differences between the two standards in this case.

Buckley treated the constitutionality of the $25,000 aggregate limit as contingent upon that limit's ability to prevent circumvention of the $1,000 base limit, describing the aggregate limit as "no more than a corollary" of the base limit. The Court determined that circumvention could occur when an individual legally contributes "massive amounts of money to a particular candidate through the use of unearmarked contributions" to entities that are themselves likely to contribute to the candidate. For that reason, the Court upheld the $25,000 aggregate limit. Although *Buckley* provides some guidance, we think that its ultimate conclusion does not control here. *Buckley* spent a total of three sentences analyzing that limit; in fact, the opinion pointed out that the constitutionality of the aggregate limit "had not been separately addressed at length by the parties." We are now asked to address appellants' direct challenge to the aggregate limits in place under BCRA. BCRA is a different statutory regime, and the aggregate limits it imposes operate against a distinct legal backdrop.

Statutory safeguards against circumvention have been considerably strengthened since *Buckley* was decided, through both statutory additions and the introduction of a comprehensive regulatory scheme. With more targeted anticircumvention measures in place today, the indiscriminate aggregate limits under BCRA appear particularly heavy-handed. The 1976 FECA Amendments, for example, added another layer of base contribution limits. The 1974 version of FECA had already capped contributions *from* political committees to candidates, but the 1976 version added limits on contributions *to* political committees. This change was enacted at least "in part to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*." *California Medical Assn. v. Federal Election Comm'n,* 453 U.S. 182, 197–198 (1981) (plurality opinion). Because a donor's contributions to a political committee are now limited, a donor cannot flood the committee with "huge" amounts of money so that each contribution the committee makes is perceived as a contribution from him. Rather, the donor may contribute only $5,000 to the committee, which hardly raises the specter of abuse that concerned the Court in *Buckley*. Limits on contributions to political committees consequently create an additional hurdle for a donor who seeks both to channel a large amount of money to a particular candidate and to ensure that he gets the credit for doing so.

The 1976 Amendments also added an antiproliferation rule prohibiting donors from creating or controlling multiple affiliated political committees. The Government acknowledges that this antiproliferation rule "forecloses what would otherwise be a particularly easy and effective means of circumventing the limits on contributions to any particular political committee." In effect, the rule eliminates a donor's ability to create and use his own political committees to direct funds in excess of the individual base limits. It thus blocks a straightforward method of achieving the circumvention that was the underlying concern in *Buckley*.

The intricate regulatory scheme that the Federal Election Commission has enacted since *Buckley* further limits the opportunities for circumvention of the base limits via "unearmarked contributions to political committees likely to contribute" to a particular candidate. Although the earmarking provision was in place when *Buckley* was decided, the FEC has since added regulations that define earmarking broadly. For example, the regulations construe earmarking to include any designation, "whether direct or indirect, express or implied, oral or written." The regulations specify that an individual who has contributed to a particular candidate may not also contribute to a single-candidate committee for that candidate. Nor may an individual who has contributed to a candidate also contribute to a political committee that has supported or anticipates supporting the same candidate, if the individual knows that

"a substantial portion [of his contribution] will be contributed to, or expended on behalf of," that candidate.

Appellants' challenge raises distinct legal arguments that *Buckley* did not consider. For example, presumably because of its cursory treatment of the $25,000 aggregate limit, *Buckley* did not separately address an overbreadth challenge with respect to that provision. The Court rejected such a challenge to the *base* limits because of the difficulty of isolating suspect contributions. The propriety of large contributions to individual candidates turned on the subjective intent of donors, and the Court concluded that there was no way to tell which donors sought improper influence over legislators' actions. The aggregate limit, on the other hand, was upheld as an anticircumvention measure, without considering whether it was possible to discern which donations might be used to circumvent the base limits. The Court never addressed overbreadth in the specific context of aggregate limits, where such an argument has far more force. Given the foregoing, we are confronted with a different statute and different legal arguments, at a different point in the development of campaign finance regulation. Appellants' substantial First Amendment challenge to the system of aggregate limits currently in place thus merits our plenary consideration.

The First Amendment "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." Cohen v. California*,* 403 U.S. 15, 24 (1971). As relevant here, the First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. When an individual contributes money to a candidate, he exercises both of those rights: The contribution "serves as a general expression of support for the candidate and his views" and "serves to affiliate a person with a candidate." Those First Amendment rights are important regardless whether the individual is, on the one hand, a "lone pamphleteer or street corner orator in the Tom Paine mold," or is, on the other, someone who spends "substantial amounts of money in order to communicate his political ideas through sophisticated" means. National Conservative Political Action Comm.*,* 470 U.S. at 493. Either way, he is participating in an electoral debate that we have recognized is "integral to the operation of the system of government established by our Constitution." *Buckley, supra,* at 14.

Buckley acknowledged that aggregate limits diminish an individual's right of political association. As the Court explained, the "overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." But the Court characterized that restriction as a "quite modest restraint upon protected political activity." We cannot agree. An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a "modest restraint" at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.

To put it in the simplest terms, the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates, even if all contributions fall within the base limits Congress views as adequate to protect against corruption. The individual may give up to $5,200 each to nine candidates, but the aggregate limits constitute an outright ban on further contributions to any other candidate (beyond the additional $1,800 that may be spent before reaching the $48,600 aggregate limit). At that point, the limits deny the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences. A donor must limit the number of candidates he supports, and may have to choose which of several policy concerns he will advance—clear First Amendment harms that the dissent never

acknowledges. It is no answer to say that the individual can simply contribute less money to more people. To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process. The Government may not penalize an individual for "robustly exercising" his First Amendment rights.

The First Amendment burden is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies. In the context of base contribution limits, *Buckley* observed that a supporter could vindicate his associational interests by personally volunteering his time and energy on behalf of a candidate. Such personal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes. Other effective methods of supporting preferred candidates or causes without contributing money are reserved for a select few, such as entertainers capable of raising hundreds of thousands of dollars in a single evening.

Our established First Amendment analysis already takes account of any "collective" interest that may justify restrictions on individual speech. Under that accepted analysis, such restrictions are measured against the asserted public interest (usually framed as an important or compelling governmental interest). We do not doubt the compelling nature of the "collective" interest in preventing corruption in the electoral process. But we permit Congress to pursue that interest only so long as it does not unnecessarily infringe an individual's right to freedom of speech; we do not truncate this tailoring test at the outset.

With the significant First Amendment costs for individual citizens in mind, we turn to the governmental interests asserted in this case. This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption. We have consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental objective to "level the playing field," or to "level electoral opportunities," or to "equalize the financial resources of candidates." *Bennett,* 131 S. Ct. at 2825–2826. The First Amendment prohibits such legislative attempts to "fine-tune" the electoral process, no matter how well intentioned. As we framed the relevant principle in *Buckley,* "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."

Moreover, while preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—"*quid pro quo* " corruption. As *Buckley* explained, Congress may permissibly seek to rein in "large contributions that are given to secure a political *quid pro quo* from current and potential office holders." In addition to "actual *quid pro quo* arrangements," Congress may permissibly limit "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" to particular candidates. Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner "influence over or access to" elected officials or political parties. Because the Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the Government may not seek to limit the appearance of mere influence or access.

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." United States v. Playboy Entertainment Group, Inc., 529 U.S. at 816. Here, the Government seeks to carry that burden by arguing that the aggregate limits further the permissible objective of preventing *quid pro quo* corruption. The difficulty is that once the aggregate

limits kick in, they ban all contributions of *any* amount. But Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption. If there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime. And if there is no risk that additional candidates will be corrupted by donations of up to $5,200, then the Government must defend the aggregate limits by demonstrating that they prevent circumvention of the base limits.

The problem is that they do not serve that function in any meaningful way. In light of the various statutes and regulations currently in effect, *Buckley*'s fear that an individual might "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions" to entities likely to support the candidate is far too speculative. And—importantly—we "have never accepted mere conjecture as adequate to carry a First Amendment burden." Nixon v. Shrink Missouri Government PAC*,* 528 U.S. 377, 392 (2000). There is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly. When an individual contributes to a candidate, a party committee, or a PAC, the individual must by law cede control over the funds. The Government admits that if the funds are subsequently re-routed to a particular candidate, such action occurs at the initial recipient's discretion—not the donor's. As a consequence, the chain of attribution grows longer, and any credit must be shared among the various actors along the way. For those reasons, the risk of *quid pro quo* corruption is generally applicable only to "the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder." *McConnell,* 540 U.S. at 310 (opinion of Kennedy, J.).

Buckley nonetheless focused on the possibility that "unearmarked contributions" could eventually find their way to a candidate's coffers. Even accepting the validity of *Buckley*'s circumvention theory, it is hard to see how a candidate today could receive a "massive amount of money" that could be traced back to a particular contributor uninhibited by the aggregate limits. The Government offers a series of scenarios in support of that possibility. But each is sufficiently implausible that the Government has not carried its burden of demonstrating that the aggregate limits further its anticircumvention interest.

The primary example of circumvention, in one form or another, envisions an individual donor who contributes the maximum amount under the base limits to a particular candidate, say, Representative Smith. Then the donor also channels "massive amounts of money" to Smith through a series of contributions to PACs that have stated their intention to support Smith. Various earmarking and antiproliferation rules disarm this example. Importantly, the donor may not contribute to the most obvious PACs: those that support only Smith. Nor may the donor contribute to the slightly less obvious PACs that he knows will route "a substantial portion" of his contribution to Smith. The donor must instead turn to other PACs that are likely to give to Smith. When he does so, however, he discovers that his contribution will be significantly diluted by all the contributions from others to the same PACs. After all, the donor cannot give more than $5,000 to a PAC and so cannot dominate the PAC's total receipts, as he could when *Buckley* was decided. He cannot retain control over his contribution, direct his money "in any way" to Smith, or even *imply* that he would like his money to be recontributed to Smith. His salience as a Smith supporter has been diminished, and with it the potential for corruption.

It is not clear how many candidates a PAC must support before our dedicated donor can avoid being tagged with the impermissible knowledge that "a substantial portion" of his contribution will go to Smith. But imagine that the donor is one of ten equal donors to a PAC that gives the highest

possible contribution to Smith.[3] The PAC may give no more than $2,600 per election to Smith. Of that sum, just $260 will be attributable to the donor intent on circumventing the base limits. Thus far he has hardly succeeded in funneling "massive amounts of money" to Smith.

But what if this donor does the same thing via, say, 100 different PACs? His $260 contribution will balloon to $26,000, ten times what he may contribute directly to Smith in any given election. This 100–PAC scenario is highly implausible. In the first instance, it is not true that the individual donor will necessarily have access to a sufficient number of PACs to effectuate such a scheme. For the 2012 election cycle, the FEC reported about 2,700 nonconnected PACs (excluding PACs that finance independent expenditures only). And not every PAC that supports Smith will work in this scheme: For our donor's pro rata share of a PAC's contribution to Smith to remain meaningful, the PAC must be funded by only a small handful of donors. The antiproliferation rules, which were not in effect when *Buckley* was decided, prohibit our donor from creating 100 pro-Smith PACs of his own, or collaborating with the nine other donors to do so. Moreover, if 100 PACs were to contribute to Smith and few other candidates, and if specific individuals like our ardent Smith supporter were to contribute to each, the FEC could weigh those "circumstantial factors" to determine whether to deem the PACs affiliated. The FEC's analysis could take account of a "common or overlapping membership" and "similar patterns of contributions or contributors," among other considerations. The FEC has in the past initiated enforcement proceedings against contributors with such suspicious patterns of PAC donations.

On a more basic level, it is hard to believe that a rational actor would engage in such machinations. In the example described, a dedicated donor spent $500,000—donating the full $5,000 to 100 different PACs—to add just $26,000 to Smith's campaign coffers. That same donor, meanwhile, could have spent unlimited funds on independent expenditures on behalf of Smith. Indeed, he could have spent his entire $500,000 advocating for Smith, without the risk that his selected PACs would choose not to give to Smith, or that he would have to share credit with other contributors to the PACs.

[In] the context of independent expenditures "the absence of prearrangement and coordination of an expenditure with the candidate or his agent undermines the value of the expenditure to the candidate." *Citizens United,* 558 U.S., at 357. But probably not by 95 percent. And at least from the *donor's* point of view, it strikes us as far more likely that he will want to see his full $500,000 spent on behalf of his favored candidate—even if it must be spent independently—rather than see it diluted to a small fraction so that it can be contributed directly by someone else.

[The] aggregate limits violate the First Amendment because they are not "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley,* 424 U.S. at 25. Even when the Court is not applying strict scrutiny, we still require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective." Board of Trustees of State Univ. of N.Y. v. Fox*,* 492 U.S. 469, 480 (1989) (quoting In re R.M.J.*,* 455 U.S. 191, 203 (1982)). Here, because the statute is poorly tailored to the Government's interest in preventing circumvention of the base limits, it impermissibly restricts participation in the political process.

The Government argues that the aggregate limits are justified because they prevent an individual from giving to too many initial recipients who might subsequently recontribute a donation. Yet all indications are that many types of recipients have scant interest in regifting donations they receive.

[3] Even those premises are generous because they assume that the donor contributes to non-multicandidate PACs, which are relatively rare. Multicandidate PACs [must] have more than 50 contributors. The more contributors, of course, the more the donor's share in any eventual contribution to Smith is diluted.

Experience suggests that the vast majority of contributions made in excess of the aggregate limits are likely to be retained and spent by their recipients rather than rerouted to candidates. In the 2012 election cycle, federal candidates, political parties, and PACs spent a total of $7 billion, according to the FEC. In particular, each national political party's spending ran in the hundreds of millions of dollars. The National Republican Senatorial Committee (NRSC), National Republican Congressional Committee (NRCC), Democratic Senatorial Campaign Committee (DSCC), and Democratic Congressional Campaign Committee (DCCC), however, spent less than $1 million each on direct candidate contributions and less than $10 million each on coordinated expenditures. Including both coordinated expenditures and direct candidate contributions, the NRSC and DSCC spent just 7% of their total funds on contributions to candidates and the NRCC and DCCC spent just 3%. In the 2012 election cycle, the Republican and Democratic state party committees in all 50 States (and the District of Columbia) contributed a paltry $17,750 to House and Senate candidates in other States. The state party committees spent over half a billion dollars over the same time period, of which the $17,750 in contributions to other States' candidates constituted just 0.003%.

As with national and state party committees, candidates contribute only a small fraction of their campaign funds to other candidates. Authorized candidate committees may support other candidates up to a $2,000 base limit. In the 2012 election, House candidates spent a total of $1.1 billion. Candidate-to-candidate contributions among House candidates totaled $3.65 million, making up just 0.3% of candidates' overall spending. The most that any one individual candidate received from all other candidates was around $100,000. The fact is that candidates who receive campaign contributions spend most of the money on themselves, rather than passing along donations to other candidates. In this arena at least, charity begins at home.[4]

Based on what we can discern from experience, the indiscriminate ban on all contributions above the aggregate limits is disproportionate to the Government's interest in preventing circumvention. The Government has not given us any reason to believe that parties or candidates would dramatically shift their priorities if the aggregate limits were lifted. Absent such a showing, we cannot conclude that the sweeping aggregate limits are appropriately tailored to guard against any contributions that might implicate the Government's anticircumvention interest.

[It] is worth keeping in mind that the *base limits* themselves are a prophylactic measure. "Restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United,* 558 U.S. at 357. The aggregate limits are then layered on top, ostensibly to prevent circumvention of the base limits. This "prophylaxis-upon-prophylaxis approach" requires that we be particularly diligent in scrutinizing the law's fit. *Wisconsin Right to Life,* 551 U.S. at 479 (opinion of Roberts, C.J.).

There are multiple alternatives available to Congress that would serve the Government's anticircumvention interest, while avoiding "unnecessary abridgment" of First Amendment rights. The most obvious might involve targeted restrictions on transfers among candidates and political committees. There are currently no such limits on transfers among party committees and from candidates to party committees. A central concern [has] been the ability of party committees to transfer money freely. If Congress agrees that this is problematic, it might tighten its permissive transfer rules. Doing so would impose a lesser burden on First Amendment rights, as compared to aggregate limits

[4] [The] percentage of contributions above the aggregate limits that even *could* be used for circumvention is limited by the fact that many of the modes of potential circumvention can be used only once each election. [If] one donor gives $2,600 to 100 candidates with safe House seats in the hopes that each candidate will reroute $2,000 to Representative Smith, a candidate in a contested district, no other donor can do the same, because the candidates in the safe seats will have exhausted their permissible contributions to Smith.

that flatly ban contributions beyond certain levels. While the Government has not conceded that transfer restrictions would be a perfect substitute for the aggregate limits, it has recognized that they would mitigate the risk of circumvention.

One possible option for restricting transfers would be to require contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients. Such a solution would address the same circumvention possibilities as the current aggregate limits, while not completely barring contributions beyond the aggregate levels. In addition (or as an alternative), if Congress believes that circumvention is especially likely to occur through creation of a joint fundraising committee, it could require that funds received through those committees be spent by their recipients (or perhaps it could simply limit the size of joint fundraising committees). Such alternatives [properly] refocus the inquiry on the delinquent actor: the recipient of a contribution within the base limits, who then routes the money in a manner that undermines those limits.

Indeed, Congress has adopted transfer restrictions, and the Court has upheld them, in the context of state party spending. So-called "Levin funds" are donations permissible under state law that may be spent on certain federal election activity—namely, voter registration and identification, get-out-the-vote efforts, or generic campaign activities. Levin funds are raised directly by the state or local party committee that ultimately spends them. That means that other party committees may not transfer Levin funds, solicit Levin funds on behalf of the particular state or local committee, or engage in joint fundraising of Levin funds. *McConnell* upheld those transfer restrictions as "justifiable anticircumvention measures," though it acknowledged that they posed some associational burdens. Here, a narrow transfer restriction on contributions that could otherwise be recontributed in excess of the base limits could rely on a similar justification.

Other alternatives might focus on earmarking. Many of the scenarios [hypothesized] involve at least implicit agreements to circumvent the base limits—agreements that are already prohibited by the earmarking rules. The FEC might strengthen those rules [by] defining how many candidates a PAC must support in order to ensure that "a substantial portion" of a donor's contribution is not rerouted to a certain candidate. Congress might also consider a modified version of the aggregate limits, such as one that prohibits donors who have contributed the current maximum sums from further contributing to political committees that have indicated they will support candidates to whom the donor has already contributed. To be sure, the existing earmarking provision does not define "the outer limit of acceptable tailoring." *Colorado Republican Federal Campaign Comm.,* 533 U.S. at 462. But tighter rules could have a significant effect, especially when adopted in concert with other measures. We do not mean to opine on the validity of any particular proposal. The point is that there are numerous alternative approaches available to Congress to prevent circumvention of the base limits.

Finally, disclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part "justified based on a governmental interest in 'providing the electorate with information' about the sources of election-related spending." *Citizens United,* 558 U.S. at 367 (quoting *Buckley, supra,* at 66). They may also "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." Disclosure requirements burden speech, but—unlike the aggregate limits—they do not impose a ceiling on speech. For that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech. With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. In 1976, the Court observed that Congress could regard disclosure as "only a partial measure." *Buckley,* 424 U.S. at 28. That perception was understandable in a world in which information about campaign contributions was filed at FEC offices and was therefore virtually inaccessible to the average member of the public. Today, given the Internet, disclosure offers

much more robust protections against corruption. Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley,* or even *McConnell,* was decided.

The existing aggregate limits may in fact encourage the movement of money away from entities subject to disclosure. Because individuals' direct contributions are limited, would-be donors may turn to other avenues for political speech. Individuals can, for example, contribute unlimited amounts to 501(c) organizations, which are not required to publicly disclose their donors. Such organizations spent some $300 million on independent expenditures in the 2012 election cycle.

At oral argument, the Government shifted its focus from *Buckley*'s anticircumvention rationale to an argument that the aggregate limits deter corruption regardless of their ability to prevent circumvention of the base limits. The Government argued that there is an opportunity for corruption whenever a large check is given to a legislator, even if the check consists of contributions within the base limits to be appropriately divided among numerous candidates and committees. The aggregate limits, the argument goes, ensure that the check amount does not become too large. That new rationale for the aggregate limits [does] not wash. It dangerously broadens the circumscribed definition of *quid pro quo* corruption, [and] targets as corruption the general, broad-based support of a political party. In analyzing the base limits, *Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself. *Buckley*' s analysis of the aggregate limit under FECA was similarly confined. The Court noted that the aggregate limit guarded against an individual's funneling—through circumvention—"massive amounts of money to *a particular candidate*."

Of course a candidate would be pleased with a donor who contributed not only to the candidate himself, but also to other candidates from the same party, to party committees, and to PACs supporting the party. But there is a clear, administrable line between money beyond the base limits funneled in an identifiable way to a candidate—for which the candidate feels obligated—and money within the base limits given widely to a candidate's party—for which the candidate, like all other members of the party, feels grateful.

When donors furnish widely distributed support within all applicable base limits, all members of the party or supporters of the cause may benefit, and the leaders of the party or cause may feel particular gratitude. That gratitude stems from the basic nature of the party system, in which party members join together to further common political beliefs, and citizens can choose to support a party because they share some, most, or all of those beliefs. To recast such shared interest, standing alone, as an opportunity for *quid pro quo* corruption would dramatically expand government regulation of the political process.

The Government suggests that it is the *solicitation* of large contributions that poses the danger of corruption, but the aggregate limits are not limited to any direct solicitation by an officeholder or candidate. We have no occasion to consider a law that would specifically ban candidates from soliciting donations—within the base limits—that would go to many other candidates, and would add up to a large sum. For our purposes here, it is enough that the aggregate limits at issue are not directed specifically to candidate behavior.

For the past 40 years, our campaign finance jurisprudence has focused on the need to preserve authority for the Government to combat corruption, without at the same time compromising the political responsiveness at the heart of the democratic process, or allowing the Government to favor some participants in that process over others. As Edmund Burke explained in his famous speech to the electors of Bristol, a representative owes constituents the exercise of his "mature judgment," but judgment informed by "the strictest union, the closest correspondence, and the most unreserved

communication with his constituents." THE SPEECHES OF THE RIGHT HON. EDMUND BURKE 129–130 (J. Burke ed. 1867). Constituents have the right to support candidates who share their views and concerns. Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials.

The Government has a strong interest, no less critical to our democratic system, in combating corruption and its appearance. We have, however, held that this interest must be limited to a specific kind of corruption—*quid pro quo* corruption—in order to ensure that the Government's efforts do not have the effect of restricting the First Amendment right of citizens to choose who shall govern them. For the reasons set forth, we conclude that the aggregate limits on contributions do not further the only governmental interest this Court accepted as legitimate in *Buckley*. They instead intrude without justification on a citizen's ability to exercise "the most fundamental First Amendment activities." *Buckley,* 424 U.S. at 14.

The judgment of the District Court is reversed, and the case is remanded for further proceedings. *It is so ordered.*

JUSTICE THOMAS, concurring in the judgment.

Buckley denigrates core First Amendment speech and should be overruled. Political speech is "the primary object of First Amendment protection" and "the lifeblood of a self-governing people." *Colorado II, supra,* at 465–466 (Thomas, J., dissenting). Contributions to political campaigns, no less than direct expenditures, "generate essential political speech" by fostering discussion of public issues and candidate qualifications. *Shrink Missouri, supra,* at 412 (Thomas, J., dissenting). [I]nstead of treating political giving and political spending alike, *Buckley* distinguished the two, embracing a bifurcated standard of review under which contribution limits receive less rigorous scrutiny. [The] "analytic foundation of *Buckley* was tenuous from the very beginning and has only continued to erode in the intervening years." *Shrink Missouri, supra,* at 412 (Thomas, J., dissenting). *Buckley* relied on the premise that contributions are different in kind from direct expenditures. None of the Court's bases for that premise withstands careful review. The linchpin of the Court's analysis was its assertion that "while contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." But that "speech by proxy" rationale quickly breaks down, given that "even in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message—for instance, an advertising agency or a television station." *Colorado I, supra,* at 638–639 (opinion of Thomas, J.). [We] have since rejected the "proxy speech" approach as affording insufficient First Amendment protection to "the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985). The remaining justifications *Buckley* provided are also flawed. For example, *Buckley* claimed that contribution limits entail only a "marginal" speech restriction because "a contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." But this Court has never required a speaker to explain the reasons for his position in order to obtain full First Amendment protection. Instead, we have consistently held that speech is protected even "when the underlying basis for a position is not given." *Shrink Missouri, supra,* at 415, n. 3 (Thomas, J., dissenting).

Equally unpersuasive is *Buckley*'s suggestion that contribution limits warrant less stringent review because "the quantity of communication by the contributor does not increase perceptibly with the size of his contribution," and "at most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." Contributions do increase the quantity of

communication by "amplifying the voice of the candidate" and "helping to ensure the dissemination of the messages that the contributor wishes to convey." *Shrink Missouri, supra,* at 415 (Thomas, J., dissenting). They also serve as a quantifiable metric of the intensity of a particular contributor's support, as demonstrated by the frequent practice of giving different amounts to different candidates. *Buckley* simply failed to recognize that "we have accorded full First Amendment protection to expressions of intensity."

Among [the] justifications for the aggregate limits set forth in [BCRA] is that "an individual can engage in the 'symbolic act of contributing' to as many entities as he wishes." That is, the Government contends that aggregate limits are constitutional as long as an individual can still contribute some token amount (a dime, for example) to each of his preferred candidates. The plurality, quite correctly, rejects that argument, noting that "it is no answer to say that the individual can simply contribute less money to more people." That is so because "to require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process." What the plurality does not recognize is that the same logic also defeats the reasoning from *Buckley* on which the plurality purports to rely. In sum, what remains of *Buckley* is a rule without a rationale. This case represents yet another missed opportunity to right the course of our campaign finance jurisprudence by restoring a standard that is faithful to the First Amendment.

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

Nearly 40 years ago in *Buckley*, this Court considered the constitutionality of laws that imposed limits upon the overall amount a single person can contribute to all federal candidates, political parties, and committees taken together. The Court held that those limits did not violate the Constitution. Today a majority of the Court overrules this holding. It is wrong to do so. Its conclusion rests upon its own, not a record-based, view of the facts. It misconstrues the nature of the competing constitutional interests at stake. It understates the importance of protecting the political integrity of our governmental institutions. It creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate's campaign. Taken together with Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010), today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.

The plurality's first claim—that large aggregate contributions do not "give rise" to "corruption"—is plausible only because the plurality defines "corruption" too narrowly. The plurality describes the constitutionally permissible objective of campaign finance regulation as [a prohibition against] *'quid pro quo'* corruption." It then defines *quid pro quo* corruption to mean no more than "a direct exchange of an official act for money"—an act akin to bribery. [As] the history of campaign finance reform shows and as our earlier cases on the subject have recognized, the anticorruption interest that drives Congress to regulate campaign contributions is [an] interest in maintaining the integrity of our public governmental institutions. And it is an interest rooted in the Constitution and in the First Amendment itself. Speech does not exist in a vacuum. Rather, political communication seeks to secure government action. A politically oriented "marketplace of ideas" seeks to form a public opinion that can and will influence elected representatives. Accordingly, the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*.

Corruption breaks the constitutionally necessary "chain of communication" between the people and their representatives. Where enough money calls the tune, the general public will not be heard.

Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point. The "appearance of corruption" [can] lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest in political participation altogether.

The interests the Court has long described as preventing "corruption" or the "appearance of corruption" are more than ordinary factors to be weighed against the constitutional right to political speech. Rather, they are interests rooted in the First Amendment itself. They are rooted in the constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects. Given that end, we can and should understand campaign finance laws as resting upon a broader and more significant constitutional rationale than the plurality's limited definition of "corruption" suggests. We should see these laws as seeking in significant part to strengthen, rather than weaken, the First Amendment. To say this is not to deny the potential for conflict between (1) the need to permit contributions that pay for the diffusion of ideas, and (2) the need to limit payments in order to help maintain the integrity of the electoral process. But that conflict takes place within, not outside, the First Amendment's boundaries.

Since the kinds of corruption that can destroy the link between public opinion and governmental action extend well beyond those the plurality describes, the plurality's notion of corruption is flatly inconsistent with the basic constitutional rationale I have just described. Thus, it should surprise no one that this Court's case law (*Citizens United* excepted) insists upon a considerably broader definition. In *Buckley,* for instance, the Court said explicitly that aggregate limits were constitutional because they helped "prevent evasion [through] huge contributions to the candidate's political party." Moreover, *Buckley* upheld the base limits in significant part because they helped thwart "the appearance of corruption stemming from public awareness of the opportunities for abuse *inherent in a regime of large individual financial contributions.*" And it said that Congress could reasonably conclude that criminal laws forbidding "the giving and taking of bribes" did *not* adequately "deal with the reality or appearance of corruption." Bribery laws, the Court recognized, address "only the most blatant and specific attempts of those with money to influence governmental action." The concern with corruption extends further.

[In] *Beaumont,* the Court found constitutional a ban on direct contributions by corporations because of the need to prevent corruption, properly "understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment." Federal Election Comm'n v. Beaumont, 539 U.S. 146, 155–156 (2003). In Federal Election Comm'n v. Colorado Republican Federal Campaign Comm., 533 U.S. 431, 441, 457–460 (2001) (*Colorado II*), the Court upheld limits imposed upon coordinated expenditures among parties and candidates because it found they thwarted corruption and its appearance, again understood as including "undue influence" by wealthy donors.

[In] *McConnell,* this Court [upheld] new contribution restrictions under the First Amendment for the very reason the plurality today discounts or ignores. Namely, the Court found they thwarted a significant risk of corruption—understood not as *quid pro quo* bribery, but as privileged access to and pernicious influence upon elected representatives. *McConnell* relied upon a vast record [that] consisted of over 100,000 pages of material and included testimony from more than 200 witnesses. What it showed, in detail, was the web of relationships and understandings among parties, candidates, and large donors that underlies privileged access and influence. [No] one had identified a "single discrete instance of *quid pro quo* corruption" due to soft money. But what the record did demonstrate was that enormous soft money contributions, ranging between $1 million and $5 million among the largest donors, enabled wealthy contributors to gain disproportionate "access to federal lawmakers" and the ability to "influence legislation." There was an indisputable link between generous political donations and

opportunity after opportunity to make one's case directly to a Member of Congress. Testimony by elected officials supported this conclusion. Furthermore, testimony from party operatives showed that national political parties had created "major donor programs," through which they openly "offered greater access to federal office holders as the donations grew larger." We specifically rejected efforts to define "corruption" in ways similar to those the plurality today accepts.

The plurality invalidates the aggregate contribution limits for a second reason. It believes they are no longer needed to prevent contributors from circumventing federal limits on direct contributions to individuals, political parties, and political action committees. Other "campaign finance laws," combined with "experience" and "common sense," foreclose the various circumvention scenarios that the Government hypothesizes. Accordingly, the plurality concludes, the aggregate limits provide no added benefit. Here, as in *Buckley*, in the absence of limits on aggregate political contributions, donors can and likely will find ways to channel millions of dollars to parties and to individual candidates, producing precisely the kind of "corruption" or "appearance of corruption" that previously led the Court to hold aggregate limits constitutional. Those opportunities for circumvention will also produce the type of corruption that concerns the plurality today. The methods for using today's opinion to evade the law's individual contribution limits are complex, but they are well known, or will become well known, to party fundraisers.

Notes

1. *Fundraising for the 2008, 2012, and 2016 Campaigns*. In the 2008 campaign, all presidential candidates raised a total of $1.6 billion. In the 2012 election, the total was $2.1 billion. There are some predictions that $5 billion will be raised for the 2016 election. *See* Michelle Conlin & Emily Flitter, *U.S. Authorities Unlikely to Stop 2016 Election Fundraising Free-for-All*, Reuters, June 4, 2015, http://www.reuters.com/article/2015/06/04/us-usa-election-enforcement-idUSKBN0OK0CI20150604. In the 2008 campaign, 24 percent of Obama donors gave $200 or less, and that percentage rose to 28 percent in the 2012 campaign. In the 2008 campaign, 21 percent of McCain donors gave $200 or less, whereas 12 percent of Romney donors gave that amount in the 2012 campaign. *See* Campaign Finance Institute, *Campaign Finance Historical Data*, http://www.cfinst.org/pdf/federal/president/2012/Pres12_30G_Table4.pdf.

In the 2012 campaign, "[a]ccording to an analysis of congressional races, candidates who had the most money on their side (from their campaign and from outside sources) won 92.7 percent of House races, but only 63.6 percent of Senate races. In total, there were 460 winning candidates last night, but only 43 of them had less money on their side than their opponents." Communications, *Blue Team Aided by Small Donors, Big Bundlers; Huge Outside Spending Still Comes Up Short*, OpenSecrets.org, Open Secrets Blog, Nov. 7, 2012, http://www.opensecrets.org/news/2012/11/post-election.

As of early June 2016, all candidates in the presidential campaign had raised a total of $791 million and all super PACs had contributed a total of $462 million. Both Hillary Clinton and Bernie Sanders had received $200 million+ from candidate committees, and Clinton's $84 million from super PACs far exceeded the $610,000 from super PACs for Sanders. Donald Trump had received $57 million from candidate committees and $3 million from super PACs. *See* OpenSecrets.org, 2016 Presidential Race, https://www.opensecrets.org/pres16/index.php (viewed June 14, 2016). Notably, Trump's Republican rivals raised more money than Trump before dropping out of the race, with Jeb Bush, Ted Cruz, and Marco Rubio raising $160+, $150+, and 120+ million respectively. *See Which Candidates Are Winning the Money Race*, N.Y. TIMES, May 24, 2016, http://www.nytimes.com/interactive/2016/us/elections/election-2016-campaign-money-race.html

2. *Emergence of Super PACs in 2012 Campaign*. The so-called super PAC, or "independent-expenditure-only committee," emerged after the decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). The fundraising of the Republican-aligned super PACs exceeded that of the Democratic-aligned super PACs in the 2012 campaign. For total itemized contributions, the difference was $311 million (D) versus $752 million (R) (with all other super PACs at $20 million). For total independent expenditures, the difference was $185 million (D) versus $405 million (R) (with all other super PACs at $12 million). *See Fundraising and Spending by Political Leaning, 2011-2012*, Sunlight Foundation Reporting Group, http://reporting.sunlightfoundation.com/outside-spending-2012/by-affiliation.

The analysis of data from the FEC shows that "[o]utside spending organizations reported $1.28 billion in spending to the FEC through the end of Election Day 2012," and "[a]lmost half of all reported outside spending comes from Super PACs." (Note that "nearly one-quarter, or $298.9 million [of the $1.28 billion], was 'dark money' that cannot be traced back to an original source.") Of "the $656 million raised by Super PACs," 132 donors provided 60.4 percent or $396 million. The total "grassroots contributions" from 1,425,500 "small donors" to the major party presidential candidates was $285.2 million. The same amount was contributed by "just 61 large donors to Super PACs, giving an average of $4.7 million each." For example, "Sheldon and Miriam Adelson gave $52.2 million to Super PACs in the 2012 cycle," which "is just 0.21% of their net worth." *See* Adam Lioz & Blair Bowie, *Election*

Spending 2012: A Post-Election Analysis of Federal Election Commission Data, Nov. 9, 2012, http://www.demos.org/publication/election-spending-2012-post-election-analysis-federal-election--commission-data.

3. *Value of Free Media Coverage in 2016 Campaign*. The disparities among candidates in the value of free media coverage made headlines in 2016, with Donald Trump receiving an unprecedented share. As of March 2016, a study by the NEW YORK TIMES reported on calculations that Trump had received more than 2.5 times as much in value from free media coverage as Hillary Clinton, with Trump receiving $1.8 million, Clinton receiving $746 million, and Bernie Sanders receiving $321 million. The value received by Trump exceeded "the total value of media attention given to all of his Republican competitors combined." Dylan Byers, *Donald Trump Earned $2 Billion in Free Media Coverage, Study Shows*, CNN.Money, March 15, 2016, http://money.cnn.com/2016/03/15/media/trump-free-media-coverage/

4. *FEC Gridlock*. The chairwoman of the FEC "has largely given up hope of reining in abuses in the 2016 presidential campaign, which could generate a record $10 billion in spending." Her assessment "reflects a worsening stalemate among the agency's six commissioners. They are perpetually locked in 3-to-3 ties along party lines on key votes[.]" With "no consensus on which rules to enforce, the caseload against violators has plummeted." A Democratic commissioner said, "The few rules that are left, people feel free to ignore." Republican commissioners "defended their decisions to block many investigations, saying Democrats have pushed cases beyond what the law allows." With "the commission so often deadlocked, the major fines assessed by the commission dropped precipitously last year to $135,813 from $627,408 in 2013. According to a Republican commissioner, this decrease "could easily be read as a signal that people are following the law." The FEC Chairwoman responded: "What's really going on [is] that the Republican commissioners don't want to enforce the law, except in the most obvious cases. The rules aren't being followed, and that's destructive to the political process." *See* Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES, May 2, 2015, http://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse--commission-chief-says.html?_r=0.

5. *Predictions About the Impact of* McCutcheon. According to two specialists in campaign finance law, "the practical effect of *McCutcheon* is that individuals may now contribute the maximum amount to as many federal candidates, parties, and PACS as they please." There is "some truth to the contention" that the ruling "will further empower wealthy individuals and large corporations" who "already enjoy an outsized role." But *McCutcheon* is "unlikely to affect *who is financing* our campaigns as much as [it determines] *who is being financed* to wage those campaigns. And the big winner is likely to be the group that suffers most under today's regime: political parties." *See* Marc E. Elias & Jonathan S. Berkon, *After* McCutcheon, 127 HARV. L. REV. F. 373 (2014). A different prediction is that *McCutcheon* "probably will not have a dramatic effect on the campaign finance system," because there "are relatively few people who are rich enough to spend more on political contributions than the pre-*McCutcheon* limits allowed and who have the ideological motivation to do so." The "fundamental dynamic" of our system today "will remain largely undisturbed by *McCutcheon*," namely, "the legally enforced advantage that outside groups hold over political parties," which was a result of the *McCain-Feingold* statute upheld in *McConnell v. FEC*, 540 U.S. 93 (2003). For example, the two major parties "aired about two-thirds of all advertisements" for the 2000 election, "just over one-third" in 2004, "under one-fourth" in 2008, and only six percent in 2012. Thus, the "rising tide of unregulated outside group spending" is the "dominant drama in our campaign finance system," and "*McCutcheon* looks like a ripple on the campaign finance pond, not a tsunami." *See* Robert K. Kelner, *The Practical Consequences of* McCutcheon, 127 HARV. L. REV. F. 380 (2014).

Problems

1. *Contribution Ban for Federal Contractors*. A federal statute makes it unlawful for any person "who enters into any contract with the United States . . . directly or indirectly to make any contribution to any political party, committee, or candidate for public office." A suit is brought by federal contractors in order to challenge only the statutory ban on contributions to individual candidates or political parties. The two government interests proffered in support of the statute are: (1) protection against quid pro quo corruption and its appearance; and (2) protection against interference with merit-based public administration. Under *Buckley*'s "closely drawn" standard as applied in *McCutcheon*, does the statute violate the First Amendment? *Compare Wagner v. Federal Election Commission*, 793 F.3d 1 (D.C. Cir. 2015) (en banc).

2. *Committee of Five Neighbors*. A Mississippi statute imposes disclosure requirements for political committees that receive or spend money in connection with any amendment to the state constitution proposed by the requisite number of voters. A political committee that receives contributions or makes expenditures in excess of $200 must satisfy these requirements: (1) register as a committee by filling out a form that requires the identity of the campaign treasurer and the person appointing the treasurer, the ballot proposition that the committee supports or opposes, a description of how surplus funds will be distributed in the event of dissolution, and the name and address of anyone who works for the committee to perform ministerial functions; (2) file monthly reports with the Secretary of State that disclose contributions and expenditures, both monthly and cumulatively, and that itemize all contributions with the donor's name and address and the date and amount of donation. Notably, similar requirements also apply to any individual who will receive contributions or make expenditures in excess of $200. Five like-minded friends and neighbors want to pool their resources to oppose a particular amendment on the ballot, and they plan to spend no more than $250 on making posters, buying newspaper ads, and distributing flyers. They file suit and seek an injunction in a facial challenge to the statute so that they will not have to comply with its requirements. What standard of scrutiny should the court apply? How should the court resolve the case? *Justice v. Hosemann*, 771 F.3d 285 (5th Cir. 2014).

3. Judicial Elections

Williams-Yulee v. Florida Bar

135 S. Ct. 44 (2014)

Chief Justice ROBERTS delivered the opinion of the Court, except as to Part II.

In the early 1970s, four [elected] Florida Supreme Court justices resigned from office following corruption scandals. Florida voters responded by amending their Constitution[.] Under the system now in place, appellate judges are appointed by the Governor from a list of candidates proposed by a nominating committee — a process known as "merit selection." Then, every six years, voters decide whether to retain incumbent appellate judges for another term. Trial judges are still elected by popular vote, unless the local jurisdiction opts instead for merit selection.

Amid the corruption scandals of the 1970s, the Florida Supreme Court adopted a new Code of Judicial Conduct. Canon 7C(1) governs fundraising in judicial elections. The Canon, which is based on a provision in the American Bar Association's Model Code of Judicial Conduct, provides:

> A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not *personally solicit* campaign funds, or solicit attorneys for

publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law.

Judicial candidates can seek guidance about campaign ethics rules from the Florida Judicial Ethics Advisory Committee. The Committee has interpreted Canon 7 to allow a judicial candidate to serve as treasurer of his own campaign committee, learn the identity of campaign contributors, and send thank you notes to donors. Like Florida, most other States prohibit judicial candidates from soliciting campaign funds personally, but allow them to raise money through committees. According to the American Bar Association, 30 of the 39 States that elect trial or appellate judges have adopted restrictions similar to Canon 7C(1).

Lanell Williams-Yulee, who refers to herself as Yulee, has practiced law in Florida since 1991. In September 2009, she decided to run for a seat on the county court for Hillsborough County, a jurisdiction of about 1.3 million people that includes the city of Tampa. Shortly after filing paperwork to enter the race, Yulee drafted a letter announcing her candidacy. The letter described her experience and desire to "bring fresh ideas and positive solutions to the Judicial bench." The letter then stated:

"An early contribution of $25, $50, $100, $250, or $500, made payable to 'Lanell Williams-Yulee Campaign for County Judge,' will help raise the initial funds needed to launch the campaign and get our message out to the public. I ask for your support [i]n meeting the primary election fund raiser goals. Thank you in advance for your support."

Yulee signed the letter and mailed it to local voters. She also posted the letter on her campaign Web site.

[Yulee] lost the primary to the incumbent judge. [W]hen the Florida Bar filed a complaint against her [for violating Canon 7C(1),] she argued that the Bar could not discipline her for that conduct because the First Amendment protects a judicial candidate's right to solicit campaign funds in an election. The Florida Supreme Court appointed a referee, who held a hearing and recommended a finding of guilt. As a sanction, the referee recommended that Yulee be publicly reprimanded and ordered to pay the costs of the proceeding ($1,860). The Florida Supreme Court adopted the referee's recommendations. [The court] found it persuasive that every State Supreme Court that had considered similar fundraising provisions — along with several Federal Courts of Appeals — had upheld the laws against First Amendment challenges. We granted certiorari.

[In] our only prior case concerning speech restrictions on a candidate for judicial office, this Court and both parties assumed that strict scrutiny applied. Republican Party of Minnesota v. White, 536 U.S. 765, 774 (2002). [T]he Florida Bar [contends] that we should subject the Canon to a more permissive standard: that it be "closely drawn" to match a "sufficiently important interest." Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam). [That] standard is a poor fit for this case. [It was] adopted [in] *Buckley* to address a claim that campaign contribution limits violated a contributor's "freedom of political association." Here, Yulee does not claim that Canon 7C(1) violates her right to free association; she argues that it violates her right to free speech. [W]e hold today what we assumed in *White*: A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.

We have emphasized that "it is the rare case" in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. This [is] one of the rare cases in which a speech restriction withstands strict scrutiny. The Florida Supreme Court adopted Canon 7C(1) to

promote the State's interests in "protecting the integrity of the judiciary" and "maintaining the public's confidence in an impartial judiciary." The way the Canon advances those interests is intuitive: Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. Simply put, Florida and most other States have concluded that the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors.

As we explained in *White*, States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians. Politicians are expected to be appropriately responsive to the preferences of their supporters. The same is not true of judges. In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. The vast majority of elected judges in States that allow personal solicitation serve with fairness and honor. But "[e]ven if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public's confidence in the judiciary." *White*, 536 U.S. at 790 (O'Connor, J., concurring). In the eyes of the public, a judge's personal solicitation could result [in] "a possible temptation . . . which might lead him not to hold the balance nice, clear and true." Tumey v. Ohio, 273 U.S. 510, 532 (1927). That risk is especially pronounced because most donors are lawyers and litigants who may appear before the judge they are supporting.

The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling. Yulee acknowledges the State's compelling interest in judicial integrity. She argues, however, that the Canon's failure to restrict other speech equally damaging to judicial integrity and its appearance undercuts the Bar's position.

Although a law's underinclusivity raises a red flag, the First Amendment imposes no freestanding "underinclusiveness limitation." R.A.V. v. St. Paul, 505 U.S. 377, 387 (1992). A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws — even under strict scrutiny — that conceivably could have restricted even greater amounts of speech in service of their stated interests. Viewed in light of these principles, Canon 7C(1) raises no fatal underinclusivity concerns. The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates. The Canon applies evenhandedly to all judges and judicial candidates, regardless of their viewpoint or chosen means of solicitation. And unlike some laws that we have found impermissibly underinclusive, Canon 7C(1) is not riddled with exceptions.

Yulee relies heavily on the provision of Canon 7C(1) that allows solicitation by a candidate's campaign committee. But Florida, along with most other States, has reasonably concluded that solicitation by the candidate personally creates a categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee. When the judicial candidate himself asks for money, the stakes are higher for all involved. The candidate has personally invested his time and effort in the fundraising appeal; he has placed his name and reputation behind the request. The solicited individual knows that, and also knows that the solicitor might be in a position to singlehandedly make decisions of great weight: the same person who signed the fundraising letter might one day sign the judgment. This dynamic inevitably creates pressure for the recipient to comply, and it does so in a way that solicitation by a third party does not. Just as inevitably, the personal involvement of the candidate in the solicitation creates the public appearance that the candidate will remember who says yes, and who says no. However similar the two solicitations may be in substance, a State may conclude that they present markedly different appearances to the public. Florida's choice to allow

solicitation by campaign committees does not undermine its decision to ban solicitation by judges. Yulee argues that permitting thank you notes heightens the likelihood of actual bias by ensuring that judicial candidates know who supported their campaigns, and ensuring that the supporter knows that the candidate knows. Maybe so. But the State's compelling interest is implicated most directly by the candidate's personal solicitation itself. A failure to ban thank you notes for contributions not solicited by the candidate does not undercut the Bar's rationale.

After arguing that Canon 7C(1) violates the First Amendment because it restricts too little speech, Yulee argues that the Canon violates the First Amendment because it restricts too much. In her view, the Canon is not narrowly tailored to advance the State's compelling interest through the least restrictive means. By any measure, Canon 7C(1) restricts a narrow slice of speech. [I]n reality, Canon 7C(1) leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, "Please give me money." They can, however, direct their campaign committees to do so.

Indeed, Yulee concedes [that] Canon 7C(1) is valid in numerous applications. Yulee acknowledges that Florida can prohibit judges from soliciting money from lawyers and litigants appearing before them. In addition, she says the State "might" be able to ban "direct one-to-one solicitation of lawyers and individuals or businesses that could reasonably appear in the court for which the individual is a candidate." She also suggests that the Bar could forbid "in person" solicitation by judicial candidates. But Yulee argues that the Canon cannot constitutionally be applied to her chosen form of solicitation: a letter posted online and distributed via mass mailing. No one, she contends, will lose confidence in the integrity of the judiciary based on personal solicitation to such a broad audience. This argument misperceives the breadth of the compelling interest that underlies Canon 7C(1). Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but the interest remains whenever the public perceives the judge personally asking for money.

Moreover, the lines Yulee asks us to draw are unworkable. Even under her theory of the case, a mass mailing would create an appearance of impropriety if addressed to a list of all lawyers and litigants with pending cases. So would a speech soliciting contributions from the 100 most frequently appearing attorneys in the jurisdiction. Yulee says she might accept a ban on one-to-one solicitation, but is the public impression really any different if a judicial candidate tries to buttonhole not one prospective donor but two at a time? Ten? Yulee also agrees that in person solicitation creates a problem. But would the public's concern recede if the request for money came in a phone call or a text message?

We decline to wade into this swamp. The First Amendment requires that Canon 7C(1) be narrowly tailored, not that it be "perfectly tailored." The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary. [The] First Amendment does not confine a State to addressing evils in their most acute form. Here, Florida has concluded that all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern.

Finally, Yulee contends that Florida can accomplish its compelling interest through the less restrictive means of recusal rules and campaign contribution limits. We disagree. A rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. As for campaign contribution limits, Florida already applies them to judicial elections. [W]e have never held that adopting contribution limits precludes a State from pursuing its

compelling interests through additional means. And in any event, a State has compelling interests in regulating judicial elections that extend beyond its interests in regulating political elections, because judges are not politicians.

In sum, because Canon 7C(1) is narrowly tailored to serve a compelling government interest, the First Amendment poses no obstacle to its enforcement in this case. As a result of our decision, Florida may continue to prohibit judicial candidates from personally soliciting campaign funds, while allowing them to raise money through committees and to otherwise communicate their electoral messages in practically any way. The judgment of the Florida Supreme Court is *Affirmed*.

Justice GINSBURG, with whom Justice BREYER joins as to Part II, concurring in part and concurring in the judgment.

I join the Court's opinion save for Part II. As explained in my dissenting opinion in Republican Party of Minnesota v. White, 536 U.S. 765, 803, 805 (2002), I would not apply exacting scrutiny to a State's endeavor sensibly to "differentiate elections for political offices . . . , from elections designed to select those whose office it is to administer justice without respect to persons."

I write separately to reiterate the substantial latitude, in my view, States should possess to enact campaign-finance rules geared to judicial elections. When the political campaign-finance apparatus is applied to judicial elections, the distinction of judges from politicians dims. Donors, who gain audience and influence through contributions to political campaigns, anticipate that investment in campaigns for judicial office will yield similar returns. Elected judges understand this dynamic. As Ohio Supreme Court Justice Paul Pfeifer put it: "Whether they succeed or not," campaign contributors "mean to be buying a vote." Liptak & Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, pp. A1, A22.

In recent years, moreover, issue-oriented organizations and political action committees have spent millions of dollars opposing the reelection of judges whose decisions do not tow a party line or are alleged to be out of step with public opinion. Following the Iowa Supreme Court's 2009 invalidation of the State's same-sex marriage ban, for example, national organizations poured money into a successful campaign to remove three justices from that Court. Attack advertisements funded by issue or politically driven organizations portrayed the justices as political actors[.] Similarly portraying judges as belonging to another political branch, huge amounts have been spent on advertisements opposing retention of judges because they rendered unpopular decisions in favor of criminal defendants.

How does the electorate perceive outsized spending on judicial elections? Multiple surveys over the past 13 years indicate that voters overwhelmingly believe direct contributions to judges' campaigns have at least "some influence" on judicial decisionmaking. Disquieting as well, in response to a recent poll, 87% of voters stated that advertisements purchased by interest groups during judicial elections can have either "some" or "a great deal of influence" on an elected "judge's later decisions." Justice at Stake/Brennan Center National Poll 3, Question 9 (Oct. 22-24, 2013). States should not be put to the polar choices of either equating judicial elections to political elections, or else abandoning public participation in the selection of judges altogether. Instead, States should have leeway to "balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary." *White*, 536 U.S. at 821 (Ginsburg, J., dissenting).

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

I accept for the sake of argument that States have a compelling interest in ensuring that its judges are *seen* to be impartial. I will likewise assume that a judicial candidate's request to a litigant or attorney

presents a danger of coercion that a political candidate's request to a constituent does not. But [in] order to uphold Canon 7C(1) under strict scrutiny, Florida must do more than point to a vital public objective brooding overhead. The State must also meet a difficult burden of demonstrating that the speech restriction substantially advances the claimed objective. Neither the Court nor the State identifies the slightest evidence that banning requests for contributions will substantially improve public trust in judges. Many States allow judicial candidates to ask for contributions even today, but nobody suggests that public confidence in judges fares worse in these jurisdictions than elsewhere.

[Even if we accept] the premise that prohibiting solicitations will significantly improve the public reputation of judges[,] Florida must show that the ban restricts no more speech than necessary to achieve the objective. Canon 7C(1) falls miles short of satisfying this requirement. The State has not come up with a plausible explanation of how soliciting someone who has no chance of appearing in the candidate's court will diminish public confidence in judges.

No less important, Canon 7C(1) bans candidates from asking for contributions even in messages that do not target any listener in particular — mass-mailed letters, flyers posted on telephone poles, speeches to large gatherings, and Web sites addressed to the general public. Messages like these do not share the features that lead the Court to pronounce personal solicitations a menace to public confidence in the judiciary.

Perhaps sensing the fragility of the initial claim that *all* solicitations threaten public confidence in judges, the Court argues that "the lines Yulee asks [it] to draw are unworkable." In reality, the Court could have chosen from a whole spectrum of workable rules. It could have held that States may regulate no more than solicitation of participants in pending cases, or solicitation of people who are likely to appear in the candidate's court, or even solicitation of any lawyer or litigant. And it could have ruled that candidates have the right to make fundraising appeals that are not directed to any particular listener (like requests in mass-mailed letters), or at least fundraising appeals plainly directed to the general public (like requests placed online).

Consider the many real-world questions left open by today's decision. Does the First Amendment permit restricting a candidate's appearing at an event where somebody *else* asks for campaign funds on his behalf? Does it permit prohibiting the candidate's *family* from making personal solicitations? Does it allow prohibiting the candidate from participating in the creation of a Web site that solicits funds, even if the candidate's name does not appear next to the request?

[The] [S]tate ordinarily may not regulate one message because it harms a government interest yet refuse to regulate other messages that impair the interest in a comparable way. [But] Canon 7C(1) does not restrict *all* personal solicitations; it restricts only personal solicitations related to campaigns. [It] prevents Yulee from asking a lawyer for a few dollars to help her buy campaign pamphlets, it does not prevent her asking the same lawyer for a personal loan, access to his law firm's luxury suite at the local football stadium, or even a donation to help her fight the Florida Bar's charges. What could possibly justify these distinctions? Could anyone say with a straight face that it looks *worse* for a candidate to say "please give my campaign $25" than to say "please give *me* $25"?

The Court did not relax the Constitution's guarantee of freedom of speech when legislatures pursued [other] goals; it should not relax the guarantee when the Supreme Court of Florida pursues this one. I respectfully dissent.

Justice KENNEDY, dissenting.

Although States have a compelling interest in seeking to ensure the appearance and the reality of

an impartial judiciary, it does not follow that the State may alter basic First Amendment principles in pursuing that goal. [A] simple example can suffice to illustrate the dead weight its decision now ties to public debate. Assume a judge retires, and two honest lawyers, Doe and Roe, seek the vacant position. Doe is a respected, prominent lawyer who has been active in the community and is well known to business and civic leaders. Roe, a lawyer of extraordinary ability and high ethical standards, keeps a low profile. As soon as Doe announces his or her candidacy, a campaign committee organizes of its own accord and begins raising funds. But few know or hear about Roe's potential candidacy, and no one with resources or connections is available to assist in raising the funds necessary for even a modest plan to speak to the electorate. Today the Court says the State can censor Roe's speech, imposing a gag on his or her request for funds, no matter how close Roe is to the potential benefactor or donor. The result is that Roe's personal freedom, the right of speech, is cut off by the State. By cutting off one candidate's personal freedom to speak, the broader campaign debate that might have followed — a debate that might have been informed by new ideas and insights from both candidates — now is silenced. The First Amendment seeks to make the idea of discussion, open debate, and consensus-building a reality. But the Court decides otherwise. The Court locks the First Amendment out.

In addition to narrowing the First Amendment's reach, there is another flaw in the Court's analysis. That is its error in the application of strict scrutiny. The Court's evisceration of that judicial standard now risks long-term harm to what was once the Court's own preferred First Amendment test. This law comes nowhere close to being narrowly tailored. And by saying that it survives that vital First Amendment requirement, the Court now writes what is literally a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes. On these premises, and for the reasons explained in more detail by Justice Scalia, it is necessary for me to file this respectful dissent.

Justice ALITO, dissenting.

Florida has a compelling interest in making sure that its courts decide cases impartially and in accordance with the law and that its citizens have no good reason to lack confidence that its courts are performing their proper role. But the Florida rule is not narrowly tailored to serve that interest. Indeed, this rule is about as narrowly tailored as a burlap bag. It applies to all solicitations made in the name of a candidate for judicial office[.] If this rule can be characterized as narrowly tailored, then narrow tailoring has no meaning, and strict scrutiny, which is essential to the protection of free speech, is seriously impaired. I would reverse the judgment of the Florida Supreme Court.

Notes

1. *Judicial Elections*. In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), the Court identified the circumstances when recusal of a judge is required by due process because of a "serious risk of actual bias" based on "objective and reasonable perceptions." The Court held that the judge's failure to recuse himself on the "extreme facts" in *Caperton* violated the Due Process Clause because "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." The chairman of the defendant company in *Caperton* provided $3 million to help elect a candidate for the state supreme court, at a time when it was reasonably foreseeable that the court would consider the appeal of a judgment for $50 million against the company. The Court held that the due process inquiry "centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." The $3 million amount "eclipsed the total amount spent" by all other supporters of the candidate, and "exceeded by 300%" the amount spent by the candidate's campaign committee. The four Justices who dissented in *Caperton* argued that the new due process standard would lead to a flood of frivolous recusal motions because

of the lack of "clear, workable guidelines" to define a probability of bias in future cases.

2. *Campaign Speech of Candidates for Judicial Office*. In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Court invalidated a state supreme court's canon of judicial conduct, which prohibited a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues." The state argued that two interests were sufficiently compelling to justify the "announce clause," namely the preservation of: (1) the actual "impartiality" of the state judiciary, in order to protect the due process rights of litigants; and (2) the "appearance of impartiality," in order to maintain public confidence in the judiciary. The Court considered three possible definitions of the "impartiality" concept, and concluded that the clause could not satisfy strict scrutiny under any definition. First, the clause was not narrowly tailored to serve the interest of impartiality, defined as "a lack of bias for or against either party," because it restricted speech for or against issues but not for or against particular parties. Second, the Court viewed the interest of impartiality as not compelling when defined as "a lack of preconception" concerning "a particular legal view," because "avoiding judicial preconceptions on legal issues is neither possible nor desirable." Third, even though impartiality could be defined as the desirable attribute of "open-mindedness," the Court declined to consider whether that interest could be compelling. The clause was so underinclusive as to show that it was not adopted to advance that interest, because "statements in election campaigns are . . . an infinitesimal portion of the public commitments to legal positions" that judges undertake in many contexts. Finally, no "universal and long-established tradition" supported the campaign speech prohibition.

Problems

1. *Three Hypothetical Prohibitions*. Consider the potential answers to three of Justice Scalia's hypotheticals. Assume that the Florida Supreme Court adopts a new provision in the Code of Judicial Conduct, Canon 7D, which creates the following explicit limitations on fundraising in judicial elections: (1) a prohibition on a judicial candidate's appearance at an event where someone else asks for campaign funds on behalf of the candidate; (2) a prohibition on a judicial candidate's family from making personal solicitations on behalf of the candidate; and (3) a prohibition on the participation of a judicial candidate in the creation of a website that solicits funds on behalf of the candidate, even when the candidate's name does not appear next to the request. Explain the pro and con arguments that could be made by the Florida State Bar to defend each of these prohibitions as constitutional under the First Amendment after the *Williams-Yulee* decision.

2. *Public Endorsement or Opposition*. Assume that a Canon of a state code of judicial conduct states that "a judge or candidate for judicial office is prohibited from publicly endorsing or publicly opposing another candidate for public office, except that they may publicly oppose their own opponent for judicial office." Assume that Jenny is a candidate for judicial office who wishes to both publicly *endorse another* judicial candidate, James (not her opponent), who is running for a different judicial office, and to publicly *oppose* the incumbent judge Zeb who is running against James for the latter office. Jenny files suit to challenge the prohibition in the Canon. What pro and con arguments can be made regarding the question whether the Canon violates the First Amendment? *Compare Wersal v. Sexton*, 613 F.3d 821 (8th Cir. 2010).

3. *Reckless Commitment*. Assume that a Canon of a state code of judicial ethics provides: "A judge or candidate for election to judicial office . . . shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way in a case, controversy, or issue that is likely to come before the court." Is this Canon consistent with the First Amendment? *Compare Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010).

4. Public Financing

Initially, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court upheld the Presidential Election Campaign Fund, which provided federal financing for party nominating conventions, primary campaigns, and general election campaigns. However, candidates were required to pledge not to spend amounts that exceed the federal financing.

In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), the Court addressed a challenge to the Arizona Citizens Clean Elections Act, passed by initiative in 1998, which created a voluntary public financing system to fund the primary and general election campaigns of candidates for state office. Eligibility for state funding was contingent on the collection of a specified number of $5 contributions from Arizona voters, and the acceptance of certain campaign restrictions and obligations. Publicly funded candidates were required to agree, among other things, to limit their expenditure of personal funds to $500, participate in at least one public debate, adhere to an overall expenditure cap, and return all unspent public monies to the state. When certain conditions were met, publicly funded candidates were granted additional "equalizing" or matching funds. Such funds were granted when a privately financed candidate's expenditures, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceeded the primary election allotment of state funds to the publicly financed candidate. A privately financed candidate's expenditures of his personal funds were counted as contributions for purposes of calculating matching funds during a general election. Once matching funds were triggered, each additional dollar that a privately financed candidate spent during a primary resulted in one dollar in additional state funding to each of any of his publicly financed opponents (less a six percent reduction meant to account for fundraising expenses). During a general election, every dollar that a candidate receives in contributions results in roughly $1 in additional state funding to each of his publicly financed opponents. Matching funds topped out at two times the initial authorized grant of public funding to the publicly financed candidate. However, a privately financed candidate may raise and spend unlimited funds, subject to state-imposed contribution limits and disclosure requirements.

In *Bennett*, the Court struck down the Arizona law. The Court relied on *Davis v. Federal Election Commission*, 554 U.S. 724 (2008), which struck down the so-called "Millionaire's Amendment" of the Bipartisan Campaign Reform Act of 2002. The Court reasoned:

> [Once] a privately financed candidate has raised or spent more than the State's initial grant to a publicly financed candidate, each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent. That plainly forces the privately financed candidate to "shoulder a special and potentially significant burden" when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy. If the law at issue in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably does so as well.

The Court noted that the publicly financed candidate did not have to raise the additional funds, but instead was provided with additional public monies to finance his campaign. If there were two opponents, each of them received the additional funds.

In terms of constitutional analysis, the Court observed that "the Arizona matching funds provision imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups," and therefore it must be supported by a compelling state interest. As in prior cases, the Court rejected the idea that government has a "compelling" interest in equalizing the resources available to competing candidates. The Court noted that an attempt to equalize campaign resources "might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." Although the Court agreed with precedent that an effort to combat

corruption, or the appearance of corruption, would constitute a compelling governmental interest, the Court rejected the idea that "[b]urdening a candidate's expenditure of his own funds on his own campaign does not further the State's anticorruption interest." On the contrary, "reliance on personal funds *reduces* the threat of corruption." The Court emphasized that Arizona had already imposed severe campaign contribution limitations. The statute would encourage candidates to participate in the public financing system, but the Court held that "the fact that burdening constitutionally protected speech might indirectly serve the State's anticorruption interest, by encouraging candidates to take public financing, does not establish the constitutionality of the matching funds provision."

Justice Kagan, joined by three other Justices, emphasized that public financing of elections "has emerged as a potentially potent mechanism to preserve elected officials' independence." She went on to note that Arizona's matching funds provision "does not restrict, but instead subsidizes, speech." She further noted:

> [*Any*] system of public financing, including the lump-sum model upheld in *Buckley,* imposes a similar burden on privately funded candidates[.] A person relying on private resources might well choose not to enter a race at all, because he knows he will face an adequately funded opponent. And even if he decides to run, he likely will choose to speak in different ways—for example, by eschewing dubious, easy-to-answer charges—because his opponent has the ability to respond. Indeed, privately funded candidates may well find the lump-sum system *more* burdensome than Arizona's (assuming the lump is big enough)[.] Like a disclosure rule, the matching funds provision may occasionally deter, but "impose[s] no ceiling" on electoral expression. [*Citizens United*, 130 S. Ct. at 914.]

Impact in Arizona. According to one report, the "greatest beneficiaries of the state's Clean Elections Act have been conservatives," including "political neophytes" who "have steadily ousted incumbent Republicans in primaries" with the help of Clean Elections money. Although the law "has helped some populist liberals win Democratic seats," the law's "biggest effect" has been to empower "insurgent conservatives" because "the Republican Party dominates state politics" and "the winner of the GOP primary usually wins the election," especially in legislative races. After the *Bennett* decision, "conservatives are scrambling to come up with new ways" to finance challengers who do not have the ability "to go out and raise $30,000 [or] $40,000." Even though *Bennett* invalidated the matching funds provision, the decision "left the initial public financing intact," and business groups, such as the Arizona Chamber of Commerce, are supporting "an initiative for the 2010 ballot that would eliminate the entire Clean Elections Act." These groups "have had a sometimes acrimonious relationship with the new crop of Republicans in the GOP-run Legislature," as illustrated by disagreements over proposed legislation relating to immigration and temporary sale tax increases. *See* Nicholas Riccardi, *Arizona Conservatives Scramble After Campaign Finance Law's Defeat,* L.A. TIMES, July 5, 2011.

Public Financing of Presidential Elections. After the 2010 mid-term congressional elections, the House of Representatives in the 112th Congress passed budget legislation in the form of H.R. 1, the "Full-Year Continuing Appropriations Act of 2011." One amendment to that bill was passed on February 17, 2011, by a vote of 247 to 175, mostly along party lines, which would "prohibit the use of funds to administer or carry out any activities for the Presidential Election Campaign Fund." A bill with similar language, S. 194, was introduced in the Senate on January 26, 2011, and referred to the Committee on Finance.