

MCCONNELL V. FEDERAL ELECTION COMMISSION

540 U.S. 93, 124 S.Ct. 619 (2003)

[The Bipartisan Campaign Reform Act of 2002 (BCRA) amended the Federal Election Campaign Act of 1971 (FECA). In enacting BCRA, Congress sought to address three important developments since *Buckley v. Valeo*: (1) the increased importance of "soft money," (2) the proliferation of "issue ads," and (3) the disturbing findings of a Senate investigation into campaign practices related to the 1996 federal elections.

Prior to BCRA, FECA's disclosure requirements and source and amount limitations extended only to so-called "hard money" contributions made for the purpose of influencing an election for federal office. Political parties and candidates were able to circumvent FECA's limitations by contributing "soft money"--money as yet unregulated under FECA--to be used for activities intended to influence state or local elections; for mixed-purpose activities such as get-out-the-vote (GOTV) drives and generic party advertising; and for legislative advocacy advertisements, even if they mentioned a federal candidate's name, so long as the ads did not expressly advocate the candidate's election or defeat.

Parties and candidates also circumvented FECA by using "issue ads" that were specifically intended to affect election results, but did not contain "magic words," such as "Vote Against Jane Doe," which would have subjected the ads to FECA's restrictions. A 1998 Senate Committee Report summarizing an investigation into the 1996 federal elections concluded that the soft-money loophole had led to a meltdown of the campaign finance system; and discussed potential reforms, including a soft-money ban and restrictions on sham issue advocacy by nonparty groups.

Congress enacted many of the committee's proposals in BCRA: Title I regulates the use of soft money by political parties, officeholders, and candidates; Title II primarily prohibits corporations and unions from using general treasury funds for communications that are intended to, or have the effect of, influencing federal election outcomes; and Titles III, IV, and V set out other requirements.

The Supreme Court upheld most of the limitations on soft money and limitations on corporation and union electioneering communications.

Justice Stevens and Justice O'Connor, delivered a joint opinion of the Court, joined by Souter, Ginsburg, and Breyer, JJ., with respect to Titles I and II of BCRA, relating to the regulation of soft money and corporate and labor union use of general treasury funds for election-related communications.]

STEVENS and O'CONNOR, JJ:

The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections.

In *Buckley* we construed FECA's disclosure and reporting requirements, as well as its expenditure limitations, "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." As a result of that strict reading of the statute, the use or omission of "magic words" such as "Elect John Smith" or "Vote Against Jane Doe" marked a bright statutory line separating "express advocacy" from "issue advocacy." Express advocacy was subject to FECA's limitations and could be financed only using hard money. The political parties, in other words, could not use soft money to sponsor ads that used any magic words, and corporations and unions could not fund such ads out of their general treasuries. So-called issue ads, on the other hand, not only could be financed with soft money, but could be aired without disclosing the identity of, or any other information about, their sponsors.

While the distinction between "issue" and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words. Little difference existed, for example, between an ad that urged viewers to "vote against Jane Doe" and one that condemned Jane Doe's record on a particular issue before exhorting viewers to "call Jane Doe and tell her what you think." Indeed, campaign professionals testified that the most effective campaign ads, like the most effective commercials for products such as Coca-Cola, should, and did, avoid the use of the magic words. Moreover, the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election. Corporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads, and those expenditures, like soft-money donations to the political parties, were unregulated under FECA. Indeed, the ads were attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money.

Because FECA's disclosure requirements did not apply to so-called issue ads, sponsors of such ads often used misleading names to conceal their identity. "Citizens for Better Medicare," for instance, was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers. And "Republicans for Clean Air," which ran ads in the 2000 Republican Presidential primary, was actually an organization consisting of just two individuals--brothers who together spent \$25 million on ads supporting their favored candidate.

While the public may not have been fully informed about the sponsorship of so-called issue ads, the record indicates that candidates and officeholders often were. A former Senator confirmed that candidates and officials knew who their friends were and "sometimes suggest[ed] that

corporations or individuals make donations to interest groups that run 'issue ads.' " As with soft-money contributions, political parties and candidates used the availability of so-called issue ads to circumvent FECA's limitations, asking donors who contributed their permitted quota of hard money to give money to nonprofit corporations to spend on "issue" advocacy.

In 1998 the Senate Committee on Governmental Affairs issued a six-volume report summarizing the results of an extensive investigation into the campaign practices in the 1996 federal elections. The report gave particular attention to the effect of soft money on the American political system, including elected officials' practice of granting special access in return for political contributions. . . . The report was critical of both parties' methods of raising soft money, as well as their use of those funds. It concluded that both parties promised and provided special access to candidates and senior Government officials in exchange for large soft-money contributions. . . .

BCRA's central provisions are designed to address Congress' concerns about the increasing use of soft money and issue advertising to influence federal elections. Title I regulates the use of soft money by political parties, officeholders, and candidates. Title II primarily prohibits corporations and labor unions from using general treasury funds for communications that are intended to, or have the effect of, influencing the outcome of federal elections. . . .

Title I is Congress' effort to plug the soft-money loophole. The cornerstone of Title I is new FECA §323(a), which prohibits national party committees and their agents from soliciting, receiving, directing, or spending any soft money. 2 U. S. C. A. §441i(a) (Supp. 2003). In short, §323(a) takes national parties out of the soft-money business.

. . . .

In *Buckley* and subsequent cases, we have subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions. In these cases we have recognized that contribution limits, unlike limits on expenditures, "entai[l] only a marginal restriction upon the contributor's ability to engage in free communication." . . .

Because the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients, we have said that contribution limits impose serious burdens on free speech only if they are so low as to "preven[t] candidates and political committees from amassing the resources necessary for effective advocacy."

We have recognized that contribution limits may bear "more heavily on the associational right than on freedom to speak," since contributions serve "to affiliate a person with a candidate" and "enabl[e] like-minded persons to pool their resources," Unlike expenditure limits, however, which "preclud[e] most associations from effectively amplifying the voice of their adherents," contribution limits both "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates," and allow associations "to aggregate large sums of money to promote effective advocacy." The "overall effect" of dollar limits on contributions is "merely to require candidates and political

committees to raise funds from a greater number of persons." Thus, a contribution limit involving even " 'significant interference' " with associational rights is nevertheless valid if it satisfies the "lesser demand" of being " 'closely drawn' " to match a " 'sufficiently important interest.' "

Our treatment of contribution restrictions reflects more than the limited burdens they impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits--interests in preventing "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." We have said that these interests directly implicate " 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process.' " Because the electoral process is the very "means through which a free society democratically translates political speech into concrete governmental action," contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate. For that reason, when reviewing Congress' decision to enact contribution limits, "there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.' " The less rigorous standard of review we have applied to contribution limits (*Buckley's* "closely drawn" scrutiny) shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.

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Like the contribution limits we upheld in *Buckley*, §323's restrictions have only a marginal impact on the ability of contributors, candidates, officeholders, and parties to engage in effective political speech. Complex as its provisions may be, §323, in the main, does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders.

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The core of Title I is new FECA §323(a), which provides that "national committee[s] of a political party ... may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U. S. C. A. §441i(a)(1) (Supp. 2003). The prohibition extends to "any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, or maintained, or controlled by such a national committee." §441(a)(2).

The main goal of §323(a) is modest. In large part, it simply effects a return to the scheme that was approved in *Buckley* and that was subverted by the creation of the FEC's allocation regime, which permitted the political parties to fund federal electioneering efforts with a combination of

hard and soft money. Under that allocation regime, national parties were able to use vast amounts of soft money in their efforts to elect federal candidates. Consequently, as long as they directed the money to the political parties, donors could contribute large amounts of soft money for use in activities designed to influence federal elections. New §323(a) is designed to put a stop to that practice.

....

The Government defends §323(a)'s ban on national parties' involvement with soft money as necessary to prevent the actual and apparent corruption of federal candidates and officeholders. Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits. We have not limited that interest to the elimination of cash-for-votes exchanges. In *Buckley*, we expressly rejected the argument that antibribery laws provided a less restrictive alternative to FECA's contribution limits, noting that such laws "deal[t] with only the most blatant and specific attempts of those with money to influence government action." Thus, "[i]n speaking of 'improper influence' and 'opportunities for abuse' in addition to 'quid pro quo arrangements,' we [have] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."

Of "almost equal" importance has been the Government's interest in combating the appearance or perception of corruption engendered by large campaign contributions. Take away Congress' authority to regulate the appearance of undue influence and "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." And because the First Amendment does not require Congress to ignore the fact that "candidates, donors, and parties test the limits of the current law," these interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits.

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty or the plausibility of the justification raised." The idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible. For nearly 30 years, FECA has placed strict dollar limits and source restrictions on contributions that individuals and other entities can give to national, state, and local party committees for the purpose of influencing a federal election. The premise behind these restrictions has been, and continues to be, that contributions to a federal candidate's party in aid of that candidate's campaign threaten to create--no less than would a direct contribution to the candidate--a sense of obligation. This is particularly true of contributions to national parties, with which federal candidates and officeholders enjoy a special relationship and unity of interest. This close affiliation has placed national parties in a unique position, "whether they like it or not," to serve as "agents for spending on behalf of those who seek to produce obligated officeholders." As discussed below, rather than resist that role, the national parties have actively embraced it.

The question for present purposes is whether large soft-money contributions to national party committees have a corrupting influence or give rise to the appearance of corruption. Both common sense and the ample record in these cases confirm Congress' belief that they do. . . . Under this system, corporate, union, and wealthy individual donors have been free to contribute substantial sums of soft money to the national parties, which the parties can spend for the specific purpose of influencing a particular candidate's federal election. It is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude.

The evidence in the record shows that candidates and donors alike have . . . exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries. Thus, despite FECA's hard-money limits on direct contributions to candidates, federal officeholders have commonly asked donors to make soft-money donations to national and state committees "solely in order to assist federal campaigns," including the officeholder's own. . . .

For their part, lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials.

For example, a former lobbyist and partner at a lobbying firm in Washington, D. C., stated in his declaration:

" 'You are doing a favor for somebody by making a large [soft-money] donation and they appreciate it. Ordinarily, people feel inclined to reciprocate favors. Do a bigger favor for someone--that is, write a larger check--and they feel even more compelled to reciprocate. In my experience, overt words are rarely exchanged about contributions, but people do have understandings.' "

Particularly telling is the fact that, in 1996 and 2000, more than half of the top 50 soft-money donors gave substantial sums to both major national parties, leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology.

Plaintiffs argue that without concrete evidence of an instance in which a federal officeholder has actually switched a vote (or, presumably, evidence of a specific instance where the public believes a vote was switched), Congress has not shown that there exists real or apparent corruption. But the record is to the contrary. The evidence connects soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation. To claim that such actions do not change legislative outcomes surely misunderstands the legislative process.

More importantly, plaintiffs conceive of corruption too narrowly. Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes

corruption to curbing "undue influence on an officeholder's judgment, and the appearance of such influence." Many of the "deeply disturbing examples" of corruption cited by this Court in *Buckley* to justify FECA's contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. Even if that access did not secure actual influence, it certainly gave the "appearance of such influence."

The record in the present case is replete with similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations. . . . Despite this evidence and the close ties that candidates and officeholders have with their parties, Justice Kennedy would limit Congress' regulatory interest only to the prevention of the actual or apparent quid pro quo corruption "inherent in" contributions made directly to, contributions made at the express behest of, and expenditures made in coordination with, a federal officeholder or candidate. Regulation of any other donation or expenditure--regardless of its size, the recipient's relationship to the candidate or officeholder, its potential impact on a candidate's election, its value to the candidate, or its unabashed and explicit intent to purchase influence--would, according to Justice Kennedy, simply be out of bounds. This crabbed view of corruption, and particularly of the appearance of corruption, ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation.

Justice Kennedy's interpretation of the First Amendment would render Congress powerless to address more subtle but equally dispiriting forms of corruption. Just as troubling to a functioning democracy as classic quid pro quo corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation.

Justice Kennedy likewise takes too narrow a view of the appearance of corruption. He asserts that only those transactions with "inherent corruption potential," which he again limits to contributions directly to candidates, justify the inference "that regulating the conduct will stem the appearance of real corruption." In our view, however, Congress is not required to ignore historical evidence regarding a particular practice or to view conduct in isolation from its context. To be sure, mere political favoritism or opportunity for influence alone is insufficient to justify regulation. As the record demonstrates, it is the manner in which parties have sold access to federal candidates and officeholders that has given rise to the appearance of undue influence. Implicit (and, as the record shows, sometimes explicit) in the sale of access is the suggestion that money buys influence. It is no surprise then that purchasers of such access unabashedly admit that they are seeking to purchase just such influence. It was not unwarranted for Congress to conclude that the selling of access gives rise to the appearance of corruption.

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In constructing a coherent scheme of campaign finance regulation, Congress recognized that, given the close ties between federal candidates and state party committees, BCRA's restrictions on national committee activity would rapidly become ineffective if state and local committees remained available as a conduit for soft-money donations. Section 323(b) is designed to foreclose wholesale evasion of §323(a)'s anticorruption measures by sharply curbing state committees' ability to use large soft-money contributions to influence federal elections. The core of §323(b) is a straightforward contribution regulation: It prevents donors from contributing nonfederal funds to state and local party committees to help finance "Federal election activity." 2 U. S. C A. §441i(b)(1) (Supp. 2003). The term "Federal election activity" encompasses four distinct categories of electioneering: (1) voter registration activity during the 120 days preceding a regularly scheduled federal election; (2) voter identification, get-out-the-vote (GOTV), and generic campaign activity that is "conducted in connection with an election in which a candidate for Federal office appears on the ballot"; (3) any "public communication" that "refers to a clearly identified candidate for Federal office" and "promotes," "supports," "attacks," or "opposes" a candidate for that office; and (4) the services provided by a state committee employee who dedicates more than 25% of his or her time to "activities in connection with a Federal election." §431(20)(A)(i)-(iv). The Act explicitly excludes several categories of activity from this definition: public communications that refer solely to nonfederal candidates; contributions to nonfederal candidates; state and local political conventions; and the cost of grassroots campaign materials like bumper stickers that refer only to state candidates. §431(20)(B). All activities that fall within the statutory definition must be funded with hard money. §441i(b)(1).

....

[I]n addressing the problem of soft-money contributions to state committees, Congress both drew a conclusion and made a prediction. Its conclusion, based on the evidence before it, was that the corrupting influence of soft money does not insinuate itself into the political process solely through national party committees. Rather, state committees function as an alternate avenue for precisely the same corrupting forces. Indeed, both candidates and parties already ask donors who have reached the limit on their direct contributions to donate to state committees.

....

Congress also made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to §323(a) by scrambling to find another way to purchase influence. It was "neither novel nor implausible," for Congress to conclude that political parties would react to §323(a) by directing soft-money contributors to the state committees, and that federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties. We "must accord substantial deference to the predictive judgments of Congress," particularly when, as here, those predictions are so firmly rooted in relevant history and common sense. Preventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest.

....

It is true that §323(b) captures some activities that affect state campaigns for nonfederal offices. But these are the same sorts of activities that already were covered by the FEC's pre-BCRA allocation rules, and thus had to be funded in part by hard money, because they affect federal as well as state elections.

... Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption. Section 323(b) is a reasonable response to that risk. Its contribution limitations are focused on the subset of voter registration activity that is most likely to affect the election prospects of federal candidates: activity that occurs within 120 days before a federal election. And if the voter registration drive does not specifically mention a federal candidate, state committees can take advantage of the Levin Amendment's higher contribution limits and relaxed source restrictions. 2 U. S. C. A. §§441i(b)(2)(B)(i)-(ii) (Supp. 2003). Similarly, the contribution limits applicable to §301(20)(A)(ii) activities target only those voter identification, GOTV, and generic campaign efforts that occur "in connection with an election in which a candidate for a Federal office appears on the ballot." 2 U. S. C. A. §431(20)(A)(ii). Appropriately, in implementing this subsection, the FEC has categorically excluded all activity that takes place during the run-up to elections when no federal office is at stake.⁶³ Furthermore, state committees can take advantage of the Levin Amendment's higher contribution limits to fund any §301(A)(20)(i) and §301(A)(20)(ii) activities that do not specifically mention a federal candidate. 2 U. S. C. A. §§441i(b)(2)(B)(i)-(ii). The prohibition on the use of soft money in connection with these activities is therefore closely drawn to meet the sufficiently important governmental interests of avoiding corruption and its appearance.

[The Court also upheld §323(d) which prohibits political parties from soliciting and donating funds to tax-exempt organizations that engage in electioneering activities, §323(e), which restricts federal candidates and officeholders from receiving, spending or soliciting soft money in connection with federal elections and limits their ability to do so in connection with state and local elections, and §323(f), which prohibits state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates.]

[The Court then considered the requirements of Title II:]

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The first section of Title II, §201, . . . coins a new term, "electioneering communication," to replace the narrowing construction of FECA's . . . provisions adopted by this Court in *Buckley*. [T]hat construction limited the coverage of FECA's disclosure requirement to communications expressly advocating the election or defeat of particular candidates. By contrast, the term "electioneering communication" is not so limited, but is defined to encompass any "broadcast, cable, or satellite communication" that

"(I) refers to a clearly identified candidate for Federal office;

"(II) is made within--

"(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

"(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

"(III) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate." 2 U. S. C. A. §434(f)(3)(A)(i) (Supp. 2003).73

New FECA §304(f)(3)(C) further provides that a communication is " 'targeted to the relevant electorate' " if it "can be received by 50,000 or more persons" in the district or State the candidate seeks to represent. 2 U. S. C. A. §434(f)(3)(C).

. . . . BCRA's amendments to FECA §304 specify significant disclosure requirements for persons who fund electioneering communications. [Moreover,] [a] later section of the Act (BCRA §203 . . .) restricts corporations' and labor unions' funding of electioneering communications. Plaintiffs challenge the constitutionality of the new term as it applies in both the disclosure and the expenditure contexts.

The major premise of plaintiffs' challenge to BCRA's use of the term "electioneering communication" is that *Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech. . . . That position misapprehends our prior decisions, for the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law. In *Buckley* we [considered a] restrict[ion on] expenditures " 'relative to a clearly identified candidate,' " and we found that the phrase " 'relative to' " was impermissibly vague. We concluded that the vagueness deficiencies could "be avoided only by reading [the restriction] as limited to communications that include explicit words of advocacy of election or defeat of a candidate." We provided examples of words of express advocacy, such as " 'vote for,' 'elect,' 'support,' ... 'defeat,' [and] 'reject,' " and those examples eventually gave rise to what is now known as the "magic words" requirement. [Similarly] [w]e . . . considered FECA's disclosure provisions, . . . which defined " 'expenditur[e]' " [subject to the disclosure provisions] to include the use of money or other assets " 'for the purpose of ... influencing' " a federal election. . . . "To insure that the reach" of the disclosure requirement was "not impermissibly broad, we construe[d] 'expenditure' for purposes of that section in the same way . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."

Thus, a plain reading of *Buckley* makes clear that the express advocacy limitation, in both the

expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command. In narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.

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Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. Indeed, the unmistakable lesson from the record in this litigation, . . . is that *Buckley's* magic-words requirement is functionally meaningless. Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. *Buckley's* express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system.

Finally we observe that new FECA §304(f)(3)'s definition of "electioneering communication" raises none of the vagueness concerns that drove our analysis in *Buckley*. The term "electioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable. Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here.

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Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law. The ability to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy. That has been this Court's unanimous view, and it is not challenged in this litigation.

Section 203 of BCRA . . . extend[s] this rule, which previously applied only to express advocacy, to all "electioneering communications" . . . Thus, under BCRA, corporations and unions may not use their general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose. Because corporations can still fund electioneering communications with PAC money, it is "simply wrong" to view the provision as a "complete ban" on expression rather than a regulation. As we explained in *Beaumont*: "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with

the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure, without jeopardizing the associational rights of advocacy organizations' members."

Rather than arguing that the prohibition on the use of general treasury funds is a complete ban that operates as a prior restraint, plaintiffs instead challenge the expanded regulation on the grounds that it is both overbroad and underinclusive. . . . We have repeatedly sustained legislation aimed at "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." . . . In light of our precedents, plaintiffs do not contest that the Government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office. Nor do they contend that the speech involved in so-called issue advocacy is any more core political speech than are words of express advocacy. After all, "the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office," and "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." Rather, plaintiffs argue that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications.

This argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect. . . . Moreover, . . . in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund. . . . Even if we assumed that BCRA will inhibit some constitutionally protected corporate and union speech, that assumption would not "justify prohibiting all enforcement" of the law unless its application to protected speech is substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." Far from establishing that BCRA's application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion.

Plaintiffs also argue that FECA §316(b)(2)'s segregated-fund requirement for electioneering communications is underinclusive because it does not apply to advertising in the print media or on the Internet. The records developed in this litigation and by the Senate Committee adequately explain the reasons for this legislative choice. Congress found that corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections, and that remedial legislation was needed to stanch that flow of money. As we held in *Buckley*, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." One might just as well argue that the electioneering communication definition is underinclusive because it leaves

advertising 61 days in advance of an election entirely unregulated. The record amply justifies Congress' line drawing.

In addition to arguing that §316(b)(2)'s segregated-fund requirement is underinclusive, some plaintiffs contend that it unconstitutionally discriminates in favor of media companies. FECA §304(f)(3)(B)(i) excludes from the definition of electioneering communications any "communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U. S. C. A. §434(f)(3)(B)(i) (Supp. 2003). Plaintiffs argue this provision gives free rein to media companies to engage in speech without resort to PAC money. Section 304(f)(3)(B)(i)'s effect, however, is much narrower than plaintiffs suggest. The provision excepts news items and commentary only; it does not afford carte blanche to media companies generally to ignore FECA's provisions. The statute's narrow exception is wholly consistent with First Amendment principles. "A valid distinction ... exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public." *Austin*. Numerous federal statutes have drawn this distinction to ensure that the law "does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events." [S]ee, e.g., 47 U. S. C. §315(a) (excepting newscasts, news interviews, and news documentaries from the requirement that broadcasters provide equal time to candidates for public office).

....

Section 204 of BCRA, which adds FECA §316(c)(6), applies the prohibition on the use of general treasury funds to pay for electioneering communications to not-for-profit corporations. Prior to the enactment of BCRA, FECA required such corporations, like business corporations, to pay for their express advocacy from segregated funds rather than from their general treasuries. Our recent decision in *Federal Election Comm'n v. Beaumont*, confirmed that the requirement was valid except insofar as it applied to a sub-category of corporations described as "*MCFL* organizations," as defined by our decision in [*Federal Election Comm'n v. Massachusetts Citizens for Life, Inc. [MCFL]*], 479 U. S. 238 (1986). The constitutional objection to applying FECA's segregated-fund requirement to so-called *MCFL* organizations necessarily applies with equal force to FECA §316(c)(6).

Our decision in *MCFL* related to a carefully defined category of entities. We identified three features of the organization at issue in that case that were central to our holding:

"First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. Third, *MCFL* was not established by a business corporation or a labor union, and it is its policy not to

accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace."

That FECA §316(c)(6) does not, on its face, exempt *MCFL* organizations from its prohibition is not a sufficient reason to invalidate the entire section. If a reasonable limiting construction "has been or could be placed on the challenged statute" to avoid constitutional concerns, we should embrace it. Because our decision in the *MCFL* case was on the books for many years before BCRA was enacted, we presume that the legislators who drafted §316(c)(6) were fully aware that the provision could not validly apply to *MCFL*-type entities. Indeed, the Government itself concedes that §316(c)(6) does not apply to *MCFL* organizations. As so construed, the provision is plainly valid.

....

Ever since our decision in *Buckley*, it has been settled that expenditures by a noncandidate that are "controlled by or coordinated with the candidate and his campaign" may be treated as indirect contributions subject to FECA's source and amount limitations. 424 U. S., at 46. Thus, FECA §315(a)(7)(B)(i) long has provided that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U. S. C. A. §441a(a)(7)(B)(i) (Supp. 2003). Section 214(a) of BCRA creates a new FECA §315(a)(7)(B)(ii) that applies the same rule to expenditures coordinated with "a national, State, or local committee of a political party." 2 U. S. C. A. §441a(a)(7)(B)(ii). Sections 214(b) and (c) direct the FEC to repeal its current regulations and to promulgate new regulations dealing with "coordinated communications" paid for by persons other than candidates or their parties. Subsection (c) provides that the new "regulations shall not require agreement or formal collaboration to establish coordination." 2 U. S. C. A. §441a(a) note.

Plaintiffs do not dispute that Congress may apply the same coordination rules to parties as to candidates. They argue instead that new FECA §315(a)(7)(B)(ii) and its implementing regulations are overbroad and unconstitutionally vague because they permit a finding of coordination even in the absence of an agreement. Plaintiffs point out that political supporters may be subjected to criminal liability if they exceed the contribution limits with expenditures that ultimately are deemed coordinated. . . . As plaintiffs readily admit, that argument reaches beyond BCRA, calling into question FECA's pre-existing provisions governing expenditures coordinated with candidates.

We are not persuaded that the presence of an agreement marks the dividing line between expenditures that are coordinated--and therefore may be regulated as indirect contributions--and expenditures that truly are independent. We repeatedly have struck down limitations on expenditures "made totally independently of the candidate and his campaign," *Buckley*, on the ground that such limitations "impose far greater restraints on the freedom of speech and association" than do limits on contributions and coordinated expenditures, while "fail[ing] to serve any substantial governmental interest in stemming the reality or appearance of corruption

in the electoral process," We explained in *Buckley*:

"Unlike contributions, ... independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. 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."

Thus, the rationale for affording special protection to wholly independent expenditures has nothing to do with the absence of an agreement and everything to do with the functional consequences of different types of expenditures. Independent expenditures "are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view." By contrast, expenditures made after a "wink or nod" often will be "as useful to the candidate as cash." For that reason, Congress has always treated expenditures made "at the request or suggestion of" a candidate as coordinated. A supporter easily could comply with a candidate's request or suggestion without first agreeing to do so, and the resulting expenditure would be " 'virtually indistinguishable from [a] simple contributio[n],' " Therefore, we cannot agree with the submission that new FECA §315(a)(7)(B)(ii) is overbroad because it permits a finding of coordination or cooperation notwithstanding the absence of a pre-existing agreement.

Nor are we persuaded that the absence of an agreement requirement renders §315(a)(7)(B)(ii) unconstitutionally vague. An agreement has never been required to support a finding of coordination with a candidate under §315(a)(7)(B)(i), which refers to expenditures made "in cooperation, consultation, or concer[t] with, or at the request or suggestion of" a candidate. Congress used precisely the same language in new §315(a)(7)(B)(ii) to address expenditures coordinated with parties. FECA's longstanding definition of coordination "delineates its reach in words of common understanding." Not surprisingly, therefore, the relevant statutory language has survived without constitutional challenge for almost three decades. Although that fact does not insulate the definition from constitutional scrutiny, it does undermine plaintiffs' claim that the language of §315(a)(7)(B)(ii) is intolerably vague. Plaintiffs do not present any evidence that the definition has chilled political speech, whether between candidates and their supporters or by the supporters to the general public. And, although plaintiffs speculate that the FEC could engage in intrusive and politically motivated investigations into alleged coordination, they do not even attempt to explain why an agreement requirement would solve that problem. . . . We conclude that FECA's definition of coordination gives "fair notice to those to whom [it] is directed," and is not unconstitutionally vague.

[Chief Justice Rhenquist delivered the opinion of the Court with respect to §318 of BCRA, which "prohibits individuals `17 years old or younger' from making contributions to candidates and contributions or donations to political parties." The Court struck down the provision:]

Minors enjoy the protection of the First Amendment. . . . The Government asserts that the provision protects against corruption by conduit; that is, donations by parents through their minor children to circumvent contribution limits applicable to the parents. But the Government

offers scant evidence of this form of evasion. Perhaps the Government's slim evidence results from sufficient deterrence of such activities by §320 of FECA, which prohibits any person from "mak[ing] a contribution in the name of another person" or "knowingly accept[ing] a contribution made by one person in the name of another," 2 U. S. C. §441f. Absent a more convincing case of the claimed evil, this interest is simply too attenuated for §318 to withstand heightened scrutiny.

Even assuming, arguendo, the Government advances an important interest, the provision is overinclusive. The States have adopted a variety of more tailored approaches--e.g., counting contributions by minors against the total permitted for a parent or family unit, imposing a lower cap on contributions by minors, and prohibiting contributions by very young children. Without deciding whether any of these alternatives is sufficiently tailored, we hold that the provision here sweeps too broadly. We therefore affirm the District Court's decision striking down §318 as unconstitutional.

SCALIA, J., concurring in part and dissenting in part:

This is a sad day for the freedom of speech. Who could have imagined that the same Court which, within the past four years, has sternly disapproved of restrictions upon such inconsequential forms of expression as virtual child pornography, *Ashcroft v. Free Speech Coalition*, 535 U. S. 234 (2002), tobacco advertising, *Lorillard Tobacco Co. v. Reilly*, 533 U. S. 525 (2001), dissemination of illegally intercepted communications, *Bartnicki v. Vopper*, 532 U. S. 514 (2001), and sexually explicit cable programming, *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803 (2000), would smile with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government. For that is what the most offensive provisions of this legislation are all about. We are governed by Congress, and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations, both of the commercial and the not-for-profit sort. It forbids pre-election criticism of incumbents by corporations, even not-for-profit corporations, by use of their general funds; and forbids national-party use of "soft" money to fund "issue ads" that incumbents find so offensive.

To be sure, the legislation is evenhanded: It similarly prohibits criticism of the candidates who oppose Members of Congress in their reelection bids. But as everyone knows, this is an area in which evenhandedness is not fairness. If all electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quantity of electioneering, incumbents are favored. In other words, any restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.

Beyond that, however, the present legislation targets for prohibition certain categories of campaign speech that are particularly harmful to incumbents. Is it accidental, do you think, that incumbents raise about three times as much "hard money"--the sort of funding generally not restricted by this legislation--as do their challengers? Or that lobbyists (who seek the favor of

incumbents) give 92 percent of their money in "hard" contributions? Is it an oversight, do you suppose, that the so-called "millionaire provisions" raise the contribution limit for a candidate running against an individual who devotes to the campaign (as challengers often do) great personal wealth, but do not raise the limit for a candidate running against an individual who devotes to the campaign (as incumbents often do) a massive election "war chest"? See BCRA §§304, 316, and 319. And is it mere happenstance, do you estimate, that national-party funding, which is severely limited by the Act, is more likely to assist cash-strapped challengers than flush-with-hard-money incumbents? Was it unintended, by any chance, that incumbents are free personally to receive some soft money and even to solicit it for other organizations, while national parties are not? See new FECA §§323(a) and (e).

I wish to address three fallacious propositions that might be thought to justify some or all of the provisions of this legislation--only the last of which is explicitly embraced by the principal opinion for the Court, but all of which underlie, I think, its approach to these cases.

(a) Money is Not Speech

It was said by congressional proponents of this legislation, . . . that since this legislation regulates nothing but the expenditure of money for speech, as opposed to speech itself, the burden it imposes is not subject to full First Amendment scrutiny; the government may regulate the raising and spending of campaign funds just as it regulates other forms of conduct, such as burning draft cards, see *United States v. O'Brien*, 391 U. S. 367 (1968), or camping out on the National Mall, see *Clark v. Community for Creative Non-Violence*, 468 U. S. 288 (1984). That proposition has been endorsed by one of the two authors of today's principal opinion: "The right to use one's own money to hire gladiators, [and] to fund 'speech by proxy,' ... [are] property rights . . . not entitled to the same protection as the right to say what one pleases." *Nixon v. Shrink Missouri Government PAC*, 528 U. S. 377, 399 (2000) (Stevens, J., concurring). Until today, however, that view has been categorically rejected by our jurisprudence. As we said in *Buckley*, 424 U. S., at 16, "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."

Our traditional view was correct, and today's cavalier attitude toward regulating the financing of speech (the "exacting scrutiny" test of *Buckley*, see *ibid.*, is not uttered in any majority opinion, and is not observed in the ones from which I dissent) frustrates the fundamental purpose of the First Amendment. In any economy operated on even the most rudimentary principles of division of labor, effective public communication requires the speaker to make use of the services of others. An author may write a novel, but he will seldom publish and distribute it himself. A freelance reporter may write a story, but he will rarely edit, print, and deliver it to subscribers. To a government bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them. Predictably, repressive regimes have exploited these principles by attacking all levels of the production and dissemination of ideas. See, e.g., Printing Act of 1662, 14 Car. II, c.

33, §§1, 4, 7 (punishing printers, importers, and booksellers); Printing Act of 1649, 2 Acts and Ordinances of the Interregnum 245, 246, 250 (punishing authors, printers, booksellers, importers, and buyers). In response to this threat, we have interpreted the First Amendment broadly. See, e.g., *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 65, n. 6 (1963) ("The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication ...").

Division of labor requires a means of mediating exchange, and in a commercial society, that means is supplied by money. The publisher pays the author for the right to sell his book; it pays its staff who print and assemble the book; it demands payments from booksellers who bring the book to market. This, too, presents opportunities for repression: Instead of regulating the various parties to the enterprise individually, the government can suppress their ability to coordinate by regulating their use of money. What good is the right to print books without a right to buy works from authors? Or the right to publish newspapers without the right to pay deliverymen? The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.

This is not to say that any regulation of money is a regulation of speech. The government may apply general commercial regulations to those who use money for speech if it applies them evenhandedly to those who use money for other purposes. But where the government singles out money used to fund speech as its legislative object, it is acting against speech as such, no less than if it had targeted the paper on which a book was printed or the trucks that deliver it to the bookstore.

History and jurisprudence bear this out. The best early examples derive from the British efforts to tax the press after the lapse of licensing statutes by which the press was first regulated. The Stamp Act of 1712 imposed levies on all newspapers, including an additional tax for each advertisement. 10 Anne, c. 18, §113. It was a response to unfavorable war coverage, "obvious[ly] ... designed to check the publication of those newspapers and pamphlets which depended for their sale on their cheapness and sensationalism." F. Siebert, *Freedom of the Press in England, 1476-1776*, pp. 309-310 (1952). It succeeded in killing off approximately half the newspapers in England in its first year. *Id.*, at 312. In 1765, Parliament applied a similar Act to the Colonies. 5 Geo. III, c. 12, §1. The colonial Act likewise placed exactions on sales and advertising revenue, the latter at 2s. per advertisement, which was "by any standard . . . excessive, since the publisher himself received only from 3 to 5s. and still less for repeated insertions." A. Schlesinger, *Prelude to Independence: The Newspaper War on Britain, 1764-1776*, p. 68 (1958). The founding generation saw these taxes as grievous incursions on the freedom of the press. See, e.g., 1 D. Ramsay, *History of the American Revolution* 61-62 (L. Cohen ed. 1990); J. Adams, *A Dissertation on the Canon and Feudal Law* (1765), reprinted in 3 *Life and Works of John Adams* 445, 464 (C. Adams ed. 1851). See generally *Grosjean v. American Press Co.*, 297 U. S. 233, 245-249 (1936); Schlesinger, *supra*, at 67-84.

We have kept faith with the Founders' tradition by prohibiting the selective taxation of the press. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983) (ink

and paper tax); Grosjean, supra (advertisement tax). And we have done so whether the tax was the product of illicit motive or not. See *Minneapolis Star & Tribune Co.*, supra, at 592. These press-taxation cases belie the claim that regulation of money used to fund speech is not regulation of speech itself. A tax on a newspaper's advertising revenue does not prohibit anyone from saying anything; it merely appropriates part of the revenue that a speaker would otherwise obtain. That is even a step short of totally prohibiting advertising revenue-- which would be analogous to the total prohibition of certain campaign-speech contributions in the present cases. Yet it is unquestionably a violation of the First Amendment.

Many other cases exemplify the same principle that an attack upon the funding of speech is an attack upon speech itself. In *Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620 (1980), we struck down an ordinance limiting the amount charities could pay their solicitors. In *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105 (1991), we held unconstitutional a state statute that appropriated the proceeds of criminals' biographies for payment to the victims. And in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), we held unconstitutional a university's discrimination in the disbursement of funds to speakers on the basis of viewpoint. Most notable, perhaps, is our famous opinion in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), holding that paid advertisements in a newspaper were entitled to full First Amendment protection:

"Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities--who wish to exercise their freedom of speech even though they are not members of the press. The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' "

This passage was relied on in *Buckley* for the point that restrictions on the expenditure of money for speech are equivalent to restrictions on speech itself. That reliance was appropriate. If denying protection to paid-for speech would "shackle the First Amendment," so also does forbidding or limiting the right to pay for speech.

It should be obvious, then, that a law limiting the amount a person can spend to broadcast his political views is a direct restriction on speech. That is no different from a law limiting the amount a newspaper can pay its editorial staff or the amount a charity can pay its leafletters. It is equally clear that a limit on the amount a candidate can raise from any one individual for the purpose of speaking is also a direct limitation on speech. That is no different from a law limiting the amount a publisher can accept from any one shareholder or lender, or the amount a newspaper can charge any one advertiser or customer.

(b) Pooling Money is Not Speech

Another proposition which could explain at least some of the results of today's opinion is that the

First Amendment right to spend money for speech does not include the right to combine with others in spending money for speech. . . . The freedom to associate with others for the dissemination of ideas--not just by singing or speaking in unison, but by pooling financial resources for expressive purposes--is part of the freedom of speech.

"Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *NAACP v. Button*, 371 U. S. 415, 431 (1963) (internal quotation marks omitted).

"The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama*, 357 U. S. 449, 460 (1958), stemmed from the Court's recognition that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.' Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee 'freedom to associate with others for the common advancement of political beliefs and ideas,' '... .' *Buckley*, *supra*, at 15.

We have said that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U. S. 609, 622 (1984). That "right to associate . . . in pursuit" includes the right to pool financial resources.

If it were otherwise, Congress would be empowered to enact legislation requiring newspapers to be sole proprietorships, banning their use of partnership or corporate form. That sort of restriction would be an obvious violation of the First Amendment, and it is incomprehensible why the conclusion should change when what is at issue is the pooling of funds for the most important (and most perennially threatened) category of speech: electoral speech. The principle that such financial association does not enjoy full First Amendment protection threatens the existence of all political parties.

(c) Speech by Corporations Can Be Abridged

The last proposition that might explain at least some of today's casual abridgment of free-speech rights is this: that the particular form of association known as a corporation does not enjoy full First Amendment protection. Of course the text of the First Amendment does not limit its application in this fashion, even though "[b]y the end of the eighteenth century the corporation was a familiar figure in American economic life." *C. Cooke, Corporation, Trust and Company* 92 (1951). Nor is there any basis in reason why First Amendment rights should not attach to corporate associations--and we have said so. In *First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765 (1978), we held unconstitutional a state prohibition of corporate speech designed to

influence the vote on referendum proposals. We said:

"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."

In *NAACP v. Button*, we held that the NAACP could assert First Amendment rights "on its own behalf, . . . though a corporation," and that the activities of the corporation were "modes of expression and association protected by the First and Fourteenth Amendments." In *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U. S. 1, 8 (1986), we held unconstitutional a state effort to compel corporate speech. "The identity of the speaker," we said, "is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." And in *Buckley*, we held unconstitutional FECA's limitation upon independent corporate expenditures.

The Court changed course in *Austin v. Michigan Chamber of Commerce*, 494 U. S. 652 (1990), upholding a state prohibition of an independent corporate expenditure in support of a candidate for state office. I dissented in that case, and remain of the view that it was error. In the modern world, giving the government power to exclude corporations from the political debate enables it effectively to muffle the voices that best represent the most significant segments of the economy and the most passionately held social and political views. People who associate--who pool their financial resources--for purposes of economic enterprise overwhelmingly do so in the corporate form; and with increasing frequency, incorporation is chosen by those who associate to defend and promote particular ideas--such as the American Civil Liberties Union and the National Rifle Association, parties to these cases. Imagine, then, a government that wished to suppress nuclear power--or oil and gas exploration, or automobile manufacturing, or gun ownership, or civil liberties--and that had the power to prohibit corporate advertising against its proposals. To be sure, the individuals involved in, or benefited by, those industries, or interested in those causes, could (given enough time) form political action committees or other associations to make their case. But the organizational form in which those enterprises already exist, and in which they can most quickly and most effectively get their message across, is the corporate form. The First Amendment does not in my view permit the restriction of that political speech. And the same holds true for corporate electoral speech: A candidate should not be insulated from the most effective speech that the major participants in the economy and major incorporated interest groups can generate.

But what about the danger to the political system posed by "amassed wealth"? The most direct threat from that source comes in the form of undisclosed favors and payoffs to elected

officials--which have already been criminalized, and will be rendered no more discoverable by the legislation at issue here. The use of corporate wealth (like individual wealth) to speak to the electorate is unlikely to "distort" elections--especially if disclosure requirements tell the people where the speech is coming from. The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth. Given the premises of democracy, there is no such thing as too much speech.

But, it is argued, quite apart from its effect upon the electorate, corporate speech in the form of contributions to the candidate's campaign, or even in the form of independent expenditures supporting the candidate, engenders an obligation which is later paid in the form of greater access to the officeholder, or indeed in the form of votes on particular bills. Any quid-pro-quo agreement for votes would of course violate criminal law, see 18 U. S. C. §201, and actual payoff votes have not even been claimed by those favoring the restrictions on corporate speech. It cannot be denied, however, that corporate (like noncorporate) allies will have greater access to the officeholder, and that he will tend to favor the same causes as those who support him (which is usually why they supported him). That is the nature of politics--if not indeed human nature--and how this can properly be considered "corruption" (or "the appearance of corruption") with regard to corporate allies and not with regard to other allies is beyond me. If the Bill of Rights had intended an exception to the freedom of speech in order to combat this malign proclivity of the officeholder to agree with those who agree with him, and to speak more with his supporters than his opponents, it would surely have said so. It did not do so, I think, because the juice is not worth the squeeze. Evil corporate (and private affluent) influences are well enough checked (so long as adequate campaign-expenditure disclosure rules exist) by the politician's fear of being portrayed as "in the pocket" of so-called moneyed interests. The incremental benefit obtained by muzzling corporate speech is more than offset by loss of the information and persuasion that corporate speech can contain. That, at least, is the assumption of a constitutional guarantee which prescribes that Congress shall make no law abridging the freedom of speech.

But let us not be deceived. While the Government's briefs and arguments before this Court focused on the horrible "appearance of corruption," the most passionate floor statements during the debates on this legislation pertained to so-called attack ads, which the Constitution surely protects, but which Members of Congress analogized to "crack cocaine," 144 Cong. Rec. S868 (Feb. 24, 1998) (remarks of Sen. Daschle), "drive-by shooting[s]," *id.*, at S879 (remarks of Sen. Durbin), and "air pollution," 143 Cong. Rec. 20505 (1997) (remarks of Sen. Dorgan). There is good reason to believe that the ending of negative campaign ads was the principal attraction of the legislation. A Senate sponsor said, "I hope that we will not allow our attention to be distracted from the real issues at hand--how to raise the tenor of the debate in our elections and give people real choices. No one benefits from negative ads. They don't aid our Nation's political dialog." *Id.*, at 20521-20522 (remarks of Sen. McCain). He assured the body that "[y]ou cut off the soft money, you are going to see a lot less of that [attack ads]. Prohibit unions and corporations, and you will see a lot less of that. If you demand full disclosure for those who pay for those ads, you are going to see a lot less of that" 147 Cong. Rec. S3116 (Mar. 29, 2001)

(remarks of Sen. McCain). See also, e.g., 148 Cong. Rec. S2117 (Mar. 20, 2002) (remarks of Sen. Cantwell) ("This bill is about slowing the ad war. . . . It is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves"); 143 Cong. Rec. 20746 (1997) (remarks of Sen. Boxer) ("These so-called issues ads are not regulated at all and mention candidates by name. They directly attack candidates without any accountability. It is brutal... . We have an opportunity in the McCain-Feingold bill to stop that . . ."); 145 Cong. Rec. S12606-S12607 (Oct. 14, 1999) (remarks of Sen. Wellstone) ("I think these issue advocacy ads are a nightmare. I think all of us should hate them... . [By passing the legislation], [w]e could get some of this poison politics off television").

Another theme prominent in the legislative debates was the notion that there is too much money spent on elections. The first principle of "reform" was that "there should be less money in politics." 147 Cong. Rec. S3236 (Apr. 2, 2001) (remarks of Sen. Murray). "The enormous amounts of special interest money that flood our political system have become a cancer in our democracy." 148 Cong. Rec. S2151 (Mar. 20, 2002) (remarks of Sen. Kennedy). "[L]arge sums of money drown out the voice of the average voter." 148 Cong. Rec. H373 (Feb. 13, 2002) (remarks of Rep. Langevin). The system of campaign finance is "drowning in money." *Id.*, at H404 (remarks of Rep. Menendez). And most expansively:

"Despite the ever-increasing sums spent on campaigns, we have not seen an improvement in campaign discourse, issue discussion or voter education. More money does not mean more ideas, more substance or more depth. Instead, it means more of what voters complain about most. More 30-second spots, more negativity and an increasingly longer campaign period." 148 Cong. Rec. S2150 (Mar. 20, 2002) (remarks of Sen. Kerry).

Perhaps voters do detest these 30-second spots--though I suspect they detest even more hour-long campaign-debate interruptions of their favorite entertainment programming. Evidently, however, these ads do persuade voters, or else they would not be so routinely used by sophisticated politicians of all parties. The point, in any event, is that it is not the proper role of those who govern us to judge which campaign speech has "substance" and "depth" (do you think it might be that which is least damaging to incumbents?) and to abridge the rest.

And what exactly are these outrageous sums frittered away in determining who will govern us? A report prepared for Congress concluded that the total amount, in hard and soft money, spent on the 2000 federal elections was between \$2.4 and \$2.5 billion. J. Cantor, CRS Report for Congress, Campaign Finance in the 2000 Federal Elections: Overview and Estimates of the Flow of Money (2001). All campaign spending in the United States, including state elections, ballot initiatives, and judicial elections, has been estimated at \$3.9 billion for 2000, Nelson, Spending in the 2000 Elections, in *Financing the 2000 Election* 24, Tbl. 2-1 (D. Magleby ed. 2002), which was a year that "shattered spending and contribution records," *id.*, at 22. Even taking this last, larger figure as the benchmark, it means that Americans spent about half as much electing all their Nation's officials, state and federal, as they spent on movie tickets (\$7.8 billion); about a fifth as much as they spent on cosmetics and perfume (\$18.8 billion); and about a sixth as much

as they spent on pork (the nongovernmental sort) (\$22.8 billion). See U. S. Dept. of Commerce, Bureau of Economic Analysis, Tbl. 2.6U (Col. AS; Rows 356, 214, and 139), <http://www.bea.doc.gov/bea/dn/206u.csv>. If our democracy is drowning from this much spending, it cannot swim.

* * *

Which brings me back to where I began: This litigation is about preventing criticism of the government. I cannot say for certain that many, or some, or even any, of the Members of Congress who voted for this legislation did so not to produce "fairer" campaigns, but to mute criticism of their records and facilitate reelection. Indeed, I will stipulate that all those who voted for the Act believed they were acting for the good of the country. There remains the problem of the Charlie Wilson Phenomenon, named after Charles Wilson, former president of General Motors, who is supposed to have said during the Senate hearing on his nomination as Secretary of Defense that "what's good for General Motors is good for the country."** Those in power, even giving them the benefit of the greatest good will, are inclined to believe that what is good for them is good for the country. . . . The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech. We have witnessed merely the second scene of Act I of what promises to be a lengthy tragedy. In scene 3 the Court, having abandoned most of the First Amendment weaponry that *Buckley* left intact, will be even less equipped to resist the incumbents' writing of the rules of political debate. The federal election campaign laws, which are already (as today's opinions show) so voluminous, so detailed, so complex, that no ordinary citizen dare run for office, or even contribute a significant sum, without hiring an expert advisor in the field, can be expected to grow more voluminous, more detailed, and more complex in the years to come--and always, always, with the objective of reducing the excessive amount of speech.

CHIEF JUSTICE RHENQUIST, joined by Scalia and Kennedy, JJ., dissenting in part:

The issue presented by Title I is not, as the Court implies, whether Congress can permissibly regulate campaign contributions to candidates, de facto or otherwise, or seek to eliminate corruption in the political process. Rather, the issue is whether Congress can permissibly regulate much speech that has no plausible connection to candidate contributions or corruption to achieve those goals.

....

Certainly "infusions of money into [candidates'] campaigns," can be regulated, but §323(a) does not regulate only donations given to influence a particular federal election; it regulates all donations to national political committees, no matter the use to which the funds are put. . . . The Court attempts to sidestep the unprecedented breadth of this regulation by stating that the "close relationship between federal officeholders and the national parties" makes all donations to the national parties "suspect." But a close association with others, especially in the realm of political speech, is not a surrogate for corruption; it is one of our most treasured First

Amendment rights. The Court's willingness to impute corruption on the basis of a relationship greatly infringes associational rights and expands Congress' ability to regulate political speech. And there is nothing in the Court's analysis that limits congressional regulation to national political parties. In fact, the Court relies in part on this closeness rationale to regulate nonprofit organizations. Who knows what association will be deemed too close to federal officeholders next. When a donation to an organization has no potential to corrupt a federal officeholder, the relationship between the officeholder and the organization is simply irrelevant.

The Court fails to recognize that the national political parties are exemplars of political speech at all levels of government, in addition to effective fundraisers for federal candidates and officeholders. For sure, national political party committees exist in large part to elect federal candidates, but . . . they also promote coordinated political messages and participate in public policy debates unrelated to federal elections, promote, even in off-year elections, state and local candidates and seek to influence policy at those levels, and increase public participation in the electoral process. . . . As these activities illustrate, political parties often foster speech crucial to a healthy democracy, and fulfill the need for like-minded individuals to band together and promote a political philosophy. When political parties engage in pure political speech that has little or no potential to corrupt their federal candidates and officeholders, the government cannot constitutionally burden their speech any more than it could burden the speech of individuals engaging in these same activities. Notwithstanding the Court's citation to the numerous abuses of FECA, under any definition of "exacting scrutiny," the means chosen by Congress, restricting all donations to national parties no matter the purpose for which they are given or are used, are not "closely drawn to avoid unnecessary abridgment of associational freedoms."

....

BCRA's overinclusiveness is not limited to national political parties. To prevent the circumvention of the ban on the national parties' use of nonfederal funds, BCRA extensively regulates state parties, primarily state elections, and state candidates. For example, new FECA §323(b), by reference to new FECA §§301(20)(A)(i)-(ii), prohibits state parties from using nonfederal funds¹ for general partybuilding activities such as voter registration, voter identification, and get out the vote for state candidates even if federal candidates are not mentioned. See 2 U. S. C. A. §§441i(b), 431(20)(A)(i)-(ii) (Supp. 2003). New FECA §323(d) prohibits state and local political party committees, like their national counterparts, from soliciting and donating "any funds" to nonprofit organizations such as the National Rifle Association or the National Association for the Advancement of Colored People (NAACP). See 2 U. S. C. A. §441i(d). And, new FECA §323(f) requires a state gubernatorial candidate to abide by federal funding restrictions when airing a television ad that tells voters that, if elected, he would oppose the President's policy of increased oil and gas exploration within the State because it would harm the environment. See 2 U. S. C. A. §§441i(f), 431(20)(A)(iii) (regulating "public communication[s] that refe[r] to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that ... attacks or opposes a candidate for that office").

Although these provisions are more focused on activities that may affect federal elections, there is scant evidence in the record to indicate that federal candidates or officeholders are corrupted or would appear corrupted by donations for these activities. Nonetheless, the Court concludes that because these activities benefit federal candidates and officeholders, or prevent the circumvention of pre-existing or contemporaneously enacted restrictions, it must defer to the "predictive judgments of Congress,"

Yet the Court cannot truly mean what it says. Newspaper editorials and political talk shows benefit federal candidates and officeholders every bit as much as a generic voter registration drive conducted by a state party; there is little doubt that the endorsement of a major newspaper affects federal elections, and federal candidates and officeholders are surely "grateful," for positive media coverage. I doubt, however, the Court would seriously contend that we must defer to Congress' judgment if it chose to reduce the influence of political endorsements in federal elections.

It is also true that any circumvention rationale ultimately must rest on the circumvention itself leading to the corruption of federal candidates and officeholders. All political speech that is not sifted through federal regulation circumvents the regulatory scheme to some degree or another, and thus by the Court's standard would be a "loophole" in the current system. Unless the Court would uphold federal regulation of all funding of political speech, a rationale dependent on circumvention alone will not do. By untethering its inquiry from corruption or the appearance of corruption, the Court has removed the touchstone of our campaign finance precedent and has failed to replace it with any logical limiting principle.

But such an untethering is necessary to the Court's analysis. Only by using amorphous language to conclude a federal interest, however vaguely defined, exists can the Court avoid the obvious fact that new FECA §§323(a), (b), (d), and (f) are vastly overinclusive. Any campaign finance law aimed at reducing corruption will almost surely affect federal elections or prohibit the circumvention of federal law, and if broad enough, most laws will generally reduce some appearance of corruption. Indeed, it is precisely because broad laws are likely to nominally further a legitimate interest that we require Congress to tailor its restrictions; requiring all federal candidates to self-finance their campaigns would surely reduce the appearance of donor corruption, but it would hardly be constitutional. In allowing Congress to rely on general principles such as affecting a federal election or prohibiting the circumvention of existing law, the Court all but eliminates the "closely drawn" tailoring requirement and meaningful judicial review.

KENNEDY, J., joined in part by Rehnquist, C.J., and Scalia and Thomas, JJ., concurring in part and dissenting in part:

Today's decision upholding these laws purports simply to follow *Buckley v. Valeo*; but the majority, to make its decision work, must abridge free speech where *Buckley* did not. *Buckley* did not authorize Congress to decide what shapes and forms the national political dialogue is to take. To reach today's decision, the Court surpasses *Buckley's* limits and expands Congress'

regulatory power. In so doing, it replaces discrete and respected First Amendment principles with new, amorphous, and unsound rules, rules which dismantle basic protections for speech.

A few examples show how BCRA reorders speech rights and codifies the Government's own preferences for certain speakers. BCRA would have imposed felony punishment on Ross Perot's 1996 efforts to build the Reform Party. Compare Federal Election Campaign Act of 1971 (FECA) §§309(d)(1)(A), 315(a)(1)(B), and 323(a)(1) (prohibiting, by up to five years' imprisonment, any individual from giving over \$25,000 annually to a national party), with Spending By Perot, *The Houston Chronicle*, Dec. 13, 1996, p. 43 (reporting Perot's \$8 million founding contribution to the Reform Party). BCRA makes it a felony for an environmental group to broadcast an ad, within 60 days of an election, exhorting the public to protest a Congressman's impending vote to permit logging in national forests. See BCRA §203. BCRA escalates Congress' discrimination in favor of the speech rights of giant media corporations and against the speech rights of other corporations, both profit and nonprofit.

To the majority, all this is not only valid under the First Amendment but also is part of Congress' "steady improvement of the national election laws." Ante, at 6. We should make no mistake. It is neither. It is the codification of an assumption that the mainstream media alone can protect freedom of speech. It is an effort by Congress to ensure that civic discourse takes place only through the modes of its choosing. . . . Our precedents teach, above all, that Government cannot be trusted to moderate its own rules for suppression of speech. The dangers posed by speech regulations have led the Court to insist upon principled constitutional lines and a rigorous standard of review. The majority now abandons these distinctions and limitations.

....

In *Buckley*, the Court held that one, and only one, interest justified the significant burden on the right of association involved there: eliminating, or preventing, actual corruption or the appearance of corruption stemming from contributions to candidates.

....

Buckley made clear, by its express language and its context, that the corruption interest only justifies regulating candidates' and officeholders' receipt of what we can call the "quids" in the quid pro quo formulation. The Court rested its decision on the principle that campaign finance regulation that restricts speech without requiring proof of particular corrupt action withstands constitutional challenge only if it regulates conduct posing a demonstrable quid pro quo danger.

....

The Court ignores these constitutional bounds and in effect interprets the anticorruption rationale to allow regulation not just of "actual or apparent quid pro quo arrangements," *ibid.*, but of any conduct that wins goodwill from or influences a Member of Congress. It is not that there is any quarrel between this opinion and the majority that the inquiry since *Buckley* has been whether

certain conduct creates "undue influence." See ante, at 40-41. On that we agree. The very aim of *Buckley's* standard, however, was to define undue influence by reference to the presence of quid pro quo involving the officeholder. The Court, in contrast, concludes that access, without more, proves influence is undue. Access, in the Court's view, has the same legal ramifications as actual or apparent corruption of officeholders. This new definition of corruption sweeps away all protections for speech that lie in its path.

....

Access in itself, however, shows only that in a general sense an officeholder favors someone or that someone has influence on the officeholder. There is no basis, in law or in fact, to say favoritism or influence in general is the same as corrupt favoritism or influence in particular. By equating vague and generic claims of favoritism or influence with actual or apparent corruption, the Court adopts a definition of corruption that dismantles basic First Amendment rules, permits Congress to suppress speech in the absence of a quid pro quo threat, and moves beyond the rationale that is *Buckley's* very foundation.

The generic favoritism or influence theory articulated by the Court is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle. Any given action might be favored by any given person, so by the Court's reasoning political loyalty of the purest sort can be prohibited. There is no remaining principled method for inquiring whether a campaign finance regulation does in fact regulate corruption in a serious and meaningful way. We are left to defer to a congressional conclusion that certain conduct creates favoritism or influence.

Though the majority cites common sense as the foundation for its definition of corruption, in the context of the real world only a single definition of corruption has been found to identify political corruption successfully and to distinguish good political responsiveness from bad--that is quid pro quo. Favoritism and influence are not, as the Government's theory suggests, avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness. Quid pro quo corruption has been, until now, the only agreed upon conduct that represents the bad form of responsiveness and presents a justiciable standard with a relatively clear limiting principle: Bad responsiveness may be demonstrated by pointing to a relationship between an official and a quid.

The majority attempts to mask its extension of *Buckley* under claims that BCRA prevents the appearance of corruption, even if it does not prevent actual corruption, since some assert that any donation of money to a political party is suspect. Under *Buckley's* holding that Congress has a valid "interest in stemming the reality or appearance of corruption," however, the inquiry does not turn on whether some persons assert that an appearance of corruption exists. Rather, the

inquiry turns on whether the Legislature has established that the regulated conduct has inherent corruption potential, thus justifying the inference that regulating the conduct will stem the appearance of real corruption. *Buckley* was guided and constrained by this analysis. In striking down expenditure limits the Court in *Buckley* did not ask whether people thought large election expenditures corrupt, because clearly at that time many persons, including a majority of Congress and the President, did. Instead, the Court asked whether the Government had proved that the regulated conduct, the expenditures, posed inherent quid pro quo corruption potential. . . . [T]he Court today should not ask, as it does, whether some persons, even Members of Congress, conclusorily assert that the regulated conduct appears corrupt to them. Following *Buckley*, it should instead inquire whether the conduct now prohibited inherently poses a real or substantive quid pro quo danger, so that its regulation will stem the appearance of quid pro quo corruption.

....

The majority permits a new and serious intrusion on speech when it upholds §203, the key provision in Title II that prohibits corporations and labor unions from using money from their general treasury to fund electioneering communications. The majority compounds the error made in *Austin v. Michigan Chamber of Commerce*, 494 U. S. 652 (1990), and silences political speech central to the civic discourse that sustains and informs our democratic processes. Unions and corporations, including nonprofit corporations, now face severe criminal penalties for broadcasting advocacy messages that "refe[r] to a clearly identified candidate," 2 U. S. C. A. §431(20)(A)(iii) (Supp. 2003), in an election season. Instead of extending *Austin* to suppress new and vibrant voices, I would overrule it and return our campaign finance jurisprudence to principles consistent with the First Amendment.

The Government and the majority are right about one thing: The express-advocacy requirement, with its list of magic words, is easy to circumvent. The Government seizes on this observation to defend BCRA §203, arguing it will prevent what it calls "sham issue ads" that are really to the same effect as their more express counterparts. What the Court and the Government call sham, however, are the ads speakers find most effective. Unlike express ads that leave nothing to the imagination, the record shows that issues ads are preferred by almost all candidates, even though politicians, unlike corporations, can lawfully broadcast express ads if they so choose. It is a measure of the Government's disdain for protected speech that it would label as a sham the mode of communication sophisticated speakers choose because it is the most powerful.

The Government's use of the pejorative label should not obscure §203's practical effect: It prohibits a mass communication technique favored in the modern political process for the very reason that it is the most potent. That the Government would regulate it for this reason goes only to prove the illegitimacy of the Government's purpose. The majority's validation of it is not sustainable under accepted First Amendment principles. The problem is that the majority uses *Austin*, a decision itself unfaithful to our First Amendment precedents, to justify banning a far greater range of speech. This has it all backwards. If protected speech is being suppressed, that must be the end of the inquiry.

The majority's holding cannot be reconciled with *First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765 (1978), which invalidated a Massachusetts law prohibiting banks and business corporations from making expenditures "for the purpose of" influencing referendum votes on issues that do not "materially affect" their business interests. . . . *Austin* turned its back on this holding, not because the Bellotti Court had overlooked the Government's interest in combating quid pro quo corruption, but because a new majority decided to recognize "a different type of corruption," i.e., the same "corrosive and distorting effects of immense aggregations of wealth," *ibid.*, found insufficient to sustain a similar prohibition just a decade earlier. Unless certain narrow exceptions apply, see *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U. S. 238 (1986) (*MCFL*), the prohibition extends even to nonprofit corporations organized to promote a point of view. Aside from its disregard of precedents, the majority's ready willingness to equate corruption with all organizations adopting the corporate form is a grave insult to nonprofit and for-profit corporations alike, entities that have long enriched our civic dialogue.

Austin was the first and, until now, the only time our Court had allowed the Government to exercise the power to censor political speech based on the speaker's corporate identity. . . . I dissented in *Austin*, 494 U. S., at 695, and continue to believe that the case represents an indefensible departure from our tradition of free and robust debate. . . . To be sure, Bellotti concerns issue advocacy, whereas *Austin* is about express advocacy. . . . The distinction, however, between independent expenditures for commenting on issues, on the one hand, and supporting or opposing a candidate, on the other, has no First Amendment significance apart from *Austin*'s arbitrary line.

Austin was based on a faulty assumption. Contrary to Justice Stevens' proposal that there is "vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other," there is a general recognition now that discussions of candidates and issues are quite often intertwined in practical terms. See, e.g., Brief for Intervenor-Defendants Senator John McCain et al. in No. 02-1674 et al., p. 42 (" [The] legal ... wall between issue advocacy and political advocacy ... is built of the same sturdy material as the emperor's clothing. Everyone sees it. No one believes it' " (quoting the chair of the Political Action Committee (PAC) of the National Rifle Association (NRA))). To abide by *Austin*'s repudiation of Bellotti on the ground that Bellotti did not involve express advocacy is to adopt a fiction. Far from providing a rationale for expanding *Austin*, the evidence in these consolidated cases calls for its reexamination. Just as arguments about immense aggregations of corporate wealth and concerns about protecting shareholders and union members do not justify a ban on issue ads, they cannot sustain a ban on independent expenditures for express ads. In holding otherwise, *Austin* "forced a substantial amount of political speech underground" and created a species of covert speech incompatible with our free and open society.

The majority not only refuses to heed the lessons of experience but also perpetuates the conflict *Austin* created with fundamental First Amendment principles. *Buckley* foresaw that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." It recognized that " [p]ublic discussion of public issues which also are campaign issues readily and often unavoidably draws in

candidates and their positions, their voting records and other official conduct.' " Hence, "[d]iscussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.' " Ibid. In glossing over *Austin's* opposite--and false--assumption that express advocacy is different, the majority ignores reality and elevates a distinction rejected by *Buckley* in clear terms.

Even after *Buckley* construed the statute then before the Court to reach only express advocacy, it invalidated limits on independent expenditures, observing that "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Austin* defied this principle. It made the impermissible content-based judgment that commentary on candidates is less deserving of First Amendment protection than discussions of policy. In its haste to reaffirm *Austin* today, the majority refuses to confront this basic conflict between *Austin* and *Buckley*. It once more diminishes the First Amendment by ignoring its command that the Government has no power to dictate what topics its citizens may discuss.

Continued adherence to *Austin*, of course, cannot be justified by the corporate identity of the speaker. Not only does this argument fail to account for *Bellotti*, but *Buckley* itself warned that "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." The exemption for broadcast media companies, moreover, makes the First Amendment problems worse, not better. See *Austin*, 494 U. S., at 712 (Kennedy, J., dissenting) ("An independent ground for invalidating this statute is the blanket exemption for media corporations. . . . All corporations communicate with the public to some degree, whether it is their business or not; and communication is of particular importance for nonprofit corporations"); see also *id.*, at 690-691 (Scalia, J., dissenting) ("Amassed corporate wealth that regularly sits astride the ordinary channels of information is much more likely to produce the New Corruption (too much of one point of view) than amassed corporate wealth that is generally busy making money elsewhere"). In the end the majority can supply no principled basis to reason away *Austin's* anomaly. *Austin's* errors stand exposed, and it is our duty to say so.

I surmise that even the majority, along with the Government, appreciates these problems with *Austin*. That is why it invents a new justification. We are now told that "the government also has a compelling interest in insulating federal elections from the type of corruption arising from the real or apparent creation of political debts." "[E]lectioneering communications paid for with the general treasury funds of labor unions and corporations," the Government warns, "endea[r] those entities to elected officials in a way that could be perceived by the public as corrupting."

This rationale has no limiting principle. Were we to accept it, Congress would have the authority to outlaw even pure issue ads, because they, too, could endear their sponsors to candidates who adopt the favored positions. Taken to its logical conclusion, the alleged Government interest "in insulating federal elections from ... the real or apparent creation of political debts" also conflicts with *Buckley*. If a candidate feels grateful to a faceless, impersonal corporation for making independent expenditures, the gratitude cannot be any less when the money came from the

CEO's own pocket. *Buckley*, however, struck down limitations on independent expenditures and rejected the Government's corruption argument absent evidence of coordination. The Government's position would eviscerate the line between expenditures and contributions and subject both to the same "complaisant review under the First Amendment." *Federal Election Committee v. Beaumont*. Complaisant or otherwise, we cannot cede authority to the Legislature to do with the First Amendment as it pleases. Since *Austin* is inconsistent with the First Amendment, its extension diminishes the First Amendment even further. For this reason §203 should be held unconstitutional.

Even under *Austin*, BCRA §203 could not stand. All parties agree strict scrutiny applies; §203, however, is far from narrowly tailored.

The Government is unwilling to characterize §203 as a ban, citing the possibility of funding electioneering communications out of a separate segregated fund. This option, though, does not alter the categorical nature of the prohibition on the corporation. "[T]he corporation as a corporation is prohibited from speaking." What the law allows--permitting the corporation "to serve as the founder and treasurer of a different association of individuals that can endorse or oppose political candidates"--"is not speech by the corporation."

Our cases recognize the practical difficulties [including considerable and extensive record keeping and reporting requirements that] corporations face when they are limited to communicating through PACs. These regulations are more than minor clerical requirements. Rather, they create major disincentives for speech, with the effect falling most heavily on smaller entities that often have the most difficulty bearing the costs of compliance. Even worse, for an organization that has not yet set up a PAC, spontaneous speech that "refers to a clearly identified candidate for Federal office" becomes impossible, even if the group's vital interests are threatened by a piece of legislation pending before Congress on the eve of a federal election. Couple the litany of administrative burdens with the categorical restriction limiting PACs' solicitation activities to "members," and it is apparent that PACs are inadequate substitutes for corporations in their ability to engage in unfettered expression.

THOMAS, J., joined by Scalia, J., concurring in part and dissenting in part:

The defendants do not even attempt to defend Title I under [the traditional strict scrutiny] standard. . . . [I]t is unclear why "[b]ribery laws [that] bar precisely the quid pro quo arrangements that are targeted here" and "disclosure laws" are not "less restrictive means of addressing [the Government's] interest in curtailing corruption."

The joint opinion not only continues the errors of *Buckley v. Valeo*, by applying a low level of scrutiny to contribution ceilings, but also builds upon these errors by expanding the anticircumvention rationale beyond reason. Admittedly, exploitation of an anticircumvention concept has a long pedigree, going back at least to *Buckley* itself. *Buckley* upheld a \$1,000 contribution ceiling as a way to combat both the "actuality and appearance of corruption." The challengers in *Buckley* contended both that bribery laws represented "a less restrictive means of

dealing with 'proven and suspected quid pro quo arrangements,' " and that the \$1,000 contribution ceiling was overbroad as "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." The Court rejected the first argument on the grounds that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action," and rejected the second on the grounds that "it [is] difficult to isolate suspect contributions," But a broadly drawn bribery law would cover even subtle and general attempts to influence government officials corruptly, eliminating the Court's first concern. And, an effective bribery law would deter actual quid pro quos and would, in all likelihood, eliminate any appearance of corruption in the system.

Hence, at root, the *Buckley* Court was concerned that bribery laws could not be effectively enforced to prevent quid pro quos between donors and officeholders, and the only rational reading of *Buckley* is that it approved the \$1,000 contribution ceiling on this ground. The Court then, however, having at least in part concluded that individual contribution ceilings were necessary to prevent easy evasion of bribery laws, proceeded to uphold a separate contribution limitation, using, as the only justification, the "prevent[ion] [of] evasion of the \$1,000 contribution limitation." The need to prevent circumvention of a limitation that was itself an anticircumvention measure led to the upholding of another significant restriction on individuals' freedom of speech.

The joint opinion now repeats this process. New Federal Election Campaign Act of 1971 (FECA) §323(a), 2 U. S. C. A. §441i(a) (Supp. 2003), is intended to prevent easy circumvention of the (now) \$2,000 contribution ceiling. . . . The joint opinion upholds §323(a), in part, on the grounds that it had become too easy to circumvent the \$2,000 cap by using the national parties as go-betweens.

And the remaining provisions of new FECA §323 are upheld mostly as measures preventing circumvention of other contribution limits. [§323(f)] is a second-order anticircumvention measure. The joint opinion's handling of §323(f) is perhaps most telling, as it upholds §323(f) only because of "Congress' eminently reasonable prediction that ... state and local candidates and officeholders will become the next conduits for the soft-money funding of sham issue advertising." That is, this Court upholds a third-order anticircumvention measure based on Congress' anticipation of circumvention of these second-order anticircumvention measures that might possibly, at some point in the future, pose some problem.

It is not difficult to see where this leads. Every law has limits, and there will always be behavior not covered by the law but at its edges; behavior easily characterized as "circumventing" the law's prohibition. Hence, speech regulation will again expand to cover new forms of "circumvention," only to spur supposed circumvention of the new regulations, and so forth. Rather than permit this never-ending and self-justifying process, I would require that the Government explain why proposed speech restrictions are needed in light of actual Government interests, and, in particular, why the bribery laws are not sufficient.

....

Today's holding continues a disturbing trend: the steady decrease in the level of scrutiny applied to restrictions on core political speech. Although this trend is most obvious in the review of contribution limits, it has now reached what even this Court today would presumably recognize as a direct restriction on core political speech: limitations on independent expenditures.

Of course, by accepting Congress' expansion of what constitutes "coordination" for purposes of treating expenditures as limitations, the Court can pretend that it is, in fact, still only restricting primarily "contributions." . . . The particular language used, "expenditures made by any person ... in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party," BCRA §214(a)(2), captures expenditures with "no constitutional difference" from "a purely independent one." . . .

As for §§203 and 204, the Court rests its decision on another vast expansion of the First Amendment framework described in *Buckley*, this time of the Court's, rather than Congress', own making. In *Austin v. Michigan Chamber of Commerce*, 494 U. S. 652, 659-660 (1990), the Court recognized a "different type of corruption" from the " 'financial quid pro quo' ": 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." The only effect, however, that the "immense aggregations" of wealth will have (in the context of independent expenditures) on an election is that they might be used to fund communications to convince voters to select certain candidates over others. In other words, the "corrosive and distorting effects" described in *Austin* are that corporations, on behalf of their shareholders, will be able to convince voters of the correctness of their ideas. Apparently, winning in the marketplace of ideas is no longer a sign that "the ultimate good" has been "reached by free trade in ideas," or that the speaker has survived "the best test of truth" by having "the thought ... get itself accepted in the competition of the market." *Abrams*, 250 U. S., at 630 (Holmes, J., dissenting). It is now evidence of "corruption." This conclusion is antithetical to everything for which the First Amendment stands.

Because *Austin's* definition of "corruption" is incompatible with the First Amendment, I would overturn *Austin* and hold that the potential for corporations and unions to influence voters, via independent expenditures aimed at convincing these voters to adopt particular views, is not a form of corruption justifying any state regulation or suppression. Without *Austin's* peculiar variation of "corruption," §§203 and 204 are supported by no compelling government interest. The joint opinion does not even argue that these provisions address quid pro quo corruption. And the shareholder protection rationale is equally unavailing. The "shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason," *Bellotti*. Hence, no compelling interest can be found in protecting minority shareholders from the corporation's use of its general treasury, especially where, in other contexts, "equally important and controversial corporate decisions are made by management or by a predetermined percentage of the shareholders."

I must now address an issue on which I differ from all of my colleagues: the disclosure provisions in BCRA §201, now contained in new FECA §304(f). The "historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'" *McIntyre v. Ohio Elections Comm'n*, 514 U. S. 334, 361 (1995) (Thomas, J., concurring). Indeed, this Court has explicitly recognized that "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry," and thus that "an author's decision to remain anonymous ... is an aspect of the freedom of speech protected by the First Amendment." The Court now backs away from this principle, allowing the established right to anonymous speech to be stripped away based on the flimsiest of justifications.

The only plausible interest asserted by the defendants to justify the disclosure provisions is the interest in providing "information" about the speaker to the public. But we have already held that "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." Of course, *Buckley* upheld the disclosure requirement on expenditures for communications using words of express advocacy based on this informational interest. And admittedly, *McIntyre* purported to distinguish *Buckley*. *McIntyre*, supra, at 355-356. But the two ways *McIntyre* distinguished *Buckley*--one, that the disclosure of "an expenditure and its use, without more, reveals far less information [than a forced identification of the author of a pamphlet,]" and two, that in candidate elections, the "Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures," --are inherently implausible. The first is simply wrong. The revelation of one's political expenditures for independent communications about candidates can be just as revealing as the revelation of one's name on a pamphlet for a noncandidate election. The second was outright rejected in *Buckley* itself, where the Court concluded that independent expenditures did not create any substantial risk of real or apparent corruption. Hence, the only reading of *McIntyre* that remains consistent with the principles it contains is that it overturned *Buckley* to the extent that *Buckley* upheld a disclosure requirement solely based on the governmental interest in providing information to the voters.

The right to anonymous speech cannot be abridged based on the interests asserted by the defendants. I would thus hold that the disclosure requirements of BCRA §201 are unconstitutional. Because of this conclusion, the so-called advance disclosure requirement of §201 necessarily falls as well.

....

[E]ven under the joint opinion's framework, most of Title II is unconstitutional, as both the "primary definition" and "backup definition" of "electioneering communications" cover a significant number of communications that do not use words of express advocacy.

In *Buckley*, the Court [read] the ambiguous language " 'any expenditure ... relative to a clearly identified candidate.' " . . . to mean [any expenditure] "advocating the election or defeat of a

candidate." . . . The joint opinion argues that *Buckley* adopted this narrow reading only to avoid addressing a constitutional question. [But] [b]y deliberately adopting a strained and narrow reading of the statutory text and then striking down the provision in question for being too narrow, the Court made clear that regulation of nonexpress advocacy was strictly forbidden.

. . . .

The defendants' principal argument in response is that "it would be bizarre to conclude that the Constitution permits Congress to prohibit the use of corporate or union general treasury funds for electioneering advertisements, but that the only standard that it can constitutionally use (express advocacy) is one that misses the vast majority (88.6 percent) of advertisements that candidates themselves use for electioneering."

The joint opinion echoes this, stating that the express advocacy line "cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." First, the presence of the "magic words" does differentiate in a meaningful way between categories of speech. Speech containing the "magic words" is "unambiguously campaign related," while speech without these words is not. Second, it is far from bizarre to suggest that (potentially regulable) speech that is in practice impossible to differentiate from fully protected speech must be fully protected. . . . In fact, First Amendment protection was extended to that fundamental category of artistic and entertaining speech not for its own sake, but only because it was indistinguishable, practically, from speech intended to inform.

. . . .

Nor is this to say that speech with words of express advocacy is somehow less protected, as the joint opinion claims. The Court in *Buckley* recognized an informational interest that justified the imposition of a disclosure requirement on campaign-related speech. This interest is not implicated with regard to speech that is unrelated to an election campaign. Hence, it would be unconstitutional to impose such a disclosure requirement on non-election-related speech. And, as "the distinction between discussion of issues and candidates ... may often dissolve in practical application," the only way to prevent the unjustified burdening of nonelection speech is to impose the regulation only on speech that is "unambiguously campaign related," i.e., speech using words of express advocacy. Hence, speech that uses words of express advocacy is protected under the same standard, strict scrutiny, as all other forms of speech. The only difference is that, under *Buckley*, there is a governmental interest supporting some regulation of those using words of express advocacy not present in other forms of speech.

* * *

The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press. None of the rationales offered by the defendants, and none of the reasoning employed by the Court, exempts the press. "This is so because of the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from [nonmedia] corporations." *Bellotti*, 435 U. S., at 796 (Burger, C. J., concurring). Media companies can run procandidate editorials as easily as nonmedia corporations can pay for

advertisements. Candidates can be just as grateful to media companies as they can be to corporations and unions. In terms of "the corrosive and distorting effects" of wealth accumulated by corporations that has "little or no correlation to the public's support for the corporation's political ideas," *Austin*, there is no distinction between a media corporation and a nonmedia corporation. Media corporations are influential. There is little doubt that the editorials and commentary they run can affect elections. Nor is there any doubt that media companies often wish to influence elections. One would think that the New York Times fervently hopes that its endorsement of Presidential candidates will actually influence people. What is to stop a future Congress from determining that the press is "too influential," and that the "appearance of corruption" is significant when media organizations endorse candidates or run "slanted" or "biased" news stories in favor of candidates or parties? Or, even easier, what is to stop a future Congress from concluding that the availability of unregulated media corporations creates a loophole that allows for easy "circumvention" of the limitations of the current campaign finance laws?

Indeed, I believe that longstanding and heretofore unchallenged opinions such as *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974), are in peril. There, the Court noted that "[c]hains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events." Despite expressing some sympathy for those arguing for a legally created "right of access" to encourage diversity in viewpoints in the media, the Court struck down such laws, noting that these laws acted both to suppress speech and to "intru[de] into the function of editors" by interfering with "the exercise of editorial control and judgment." Now, supporters of such laws need only argue that the press' "capacity to manipulate popular opinion" gives rise to an "appearance of corruption," especially when this capacity is used to promote a particular candidate or party. After drumming up some evidence, laws regulating media outlets in their issuance of editorials would be upheld under the joint opinion's reasoning (a result considered so beyond the pale in *Miami Herald Publishing* that the Court there used it as a *reductio ad absurdum* against the right-of-access law being addressed. Nor is there anything in the joint opinion that would prevent Congress from imposing the Fairness Doctrine, not just on radio and television broadcasters, but on the entire media. See *Red Lion Broadcasting*, 395 U. S., at 369 (defining the "fairness doctrine" as a "requirement that discussion of public issues be presented ... and that each side of those issues must be given fair coverage").

Hence, "the freedom of the press," described as "one of the greatest bulwarks of liberty," could be next on the chopping block. Although today's opinion does not expressly strip the press of First Amendment protection, there is no principle of law or logic that would prevent the application of the Court's reasoning in that setting. The press now operates at the whim of Congress.