ELECTION LAW

CASES AND MATERIALS

SECOND EDITION

2004 Supplement (January)

Daniel Hays Lowenstein
Professor of Law
University of California, Los Angeles
School of Law
mailto:lowenstein@law.ucla.edu

Richard L. Hasen
Professor of Law and William M. Rains Fellow
Loyola Law School,
Los Angeles, California
mailto:Rick.Hasen@lls.edu

Carolina Academic Press
Durham, North Carolina

This Supplement is available for download at:
http://www.lls.edu/academics/faculty/pubs/electionlaw-2004update.pdf

The editors thank Grant Davis Denny and Eugene Rome for research assistance in connection with the 2002 Update, Landon Bailey, Peter Bartle, Matt Richardson, and Jesse Saivar for research assistance in connection with the 2003 Supplement, and Amber Star Healy and Tamara H. McCrossen in connection with the 2004 Supplement (January).

Chapter 1. Introductory Readings

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 24:

No doubt some of the growth of the election law field reflects the attention that the United States Supreme Court has paid to the topic in recent decades. According to one study, from the period 1901-1960, the Court decided an average of 10.3 election law cases per decade with a written opinion. From 1961-2000, that figure jumped to 60 per decade. The trend also appears when one considers the percentage of election law cases on the Supreme Court's docket. In the earlier period, election law cases made up 0.7% of the cases the Court decided by written opinion; in the latter period, that percentage increased seven and one-half times to an average 5.3% of cases. Richard L. Hasen, THE SUPREME COURT AND ELECTION LAW, JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 1 (2003).

Chapter 2. The Right to Vote and Its Exercise

ADD THE FOLLOWING TO THE END OF PART 3 ON PAGE 33:

See also Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 NEW YORK UNIVERSITY LAW REVIEW 1456 (2001).

ADD THE FOLLOWING NOTE AFTER NOTE 3 ON PAGE 58:

4. For an exploration of Latino voter turnout issues, see Benjamin Highton and Arthur L. Burris, *New Perspectives on Latino Voter Turnout in the United States*, 30 AMERICAN POLITICS RESEARCH 285 (2002).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 63:

For a defense of compulsory voting, see Lisa Hill, *On the Reasonableness of Compelling Citizens to 'Vote': the Australian Case*, 50 POLITICAL STUDIES 80 (2002).

Chapter 3. Election Administration: The Case of Florida 2000

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 70:

For a careful consideration of this issue, see Steven J. Mulroy, *Right Without a Remedy? The "Butterfly Ballot" Case and Court-Ordered Federal Election "Revotes,"* 10 GEORGE MASON LAW REVIEW 215 (2001); Steven J. Mulroy, *Substantial Noncompliance and Reasonable Doubt: How the Florida Courts Got it Wrong in the Butterfly Ballot Case*, 14 STANFORD LAW & POLICY REVIEW 203 (2003).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 104:

Posner has expanded his crisis rationale in a book, Richard A. Posner, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001). Posner's crisis rationale is criticized in Richard L. Hasen*, A "Tincture of Justice": Judge Posner's Failed Rehabilitation of* Bush v. Gore, 80 TEXAS LAW REVIEW 137 (2001).

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 104:

For additional explorations of the legitimacy question, see *BUSH V. GORE*: THE QUESTION OF LEGITIMACY (Bruce Ackerman, ed. 2002). For a review of the Ackerman anthology, see Robert J. Pushaw, *Politics, Ideology and the Academic Assault on* Bush v. Gore, 2 ELECTION LAW JOURNAL 97 (2003).

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 104:

Article I, Section 4 of the Constitution says that the "times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof," subject to the power of Congress to alter state regulations. In *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002), a three-judge District Court enjoined the state from using a congressional redistricting plan adopted by a state court after the legislature had failed to adopt a plan following the 2000 census. The federal court instead imposed its own districting plan for election of Mississippi's House members. One basis for the District Court's ruling was that the state court was not authorized by the Mississippi legislature to adopt a districting plan and that therefore the state court's doing so violated Article I, Section 4.[1] (The District Court did not stop to reflect that neither was *it* authorized by the Mississippi legislature to adopt a districting plan. Is the District Court's implicit holding, that Article I, Section 4 prevents state courts but not federal courts from drawing remedial congressional plans, defensible?)

[1] A somewhat similar theory was rejected by the Pennsylvania Supreme Court in *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002). In that case, a congressional districting plan was challenged as violative of the Pennsylvania Constitution. The state defended on the ground that the legislature had plenary power under Article I, Section 4 to draw the district lines for House elections and could not be restricted in its exercise of that power by the state constitution. The court rejected that argument, though it upheld the districting plan on the merits.

In *Branch v. Smith*, 123 S. Ct. 1429 (2003), the Supreme Court decided on other grounds that the District Court was correct to enjoin the state from using the congressional districting plan adopted by the state court. As to the Article I, Section 4 issue, the Supreme Court expressly declined to address the issue and declared: "The District Court's alternative holding is not to be regarded as supporting the injunction we have affirmed on the principal ground, or as binding upon state and federal officials should Mississippi seek in the future to administer a redistricting plan adopted by the Chancery Court." *Id*. at 1437.

The Supreme Court also ducked the Article I, Section 4 issue in a case arising out of the 2002 New Jersey election for United States Senate. When Senator Robert G. Torricelli withdrew as the Democratic candidate for Senator shortly before the election, Democrats sought a court order to require elections officials to place the name of a replacement candidate on the ballot. A New Jersey statute provided for filling such a vacancy that occurred no later than 51 days before the election (see N.J.S.A. 19:13-20), but the Torricelli vacancy occurred fewer than 51 days before the election.

The New Jersey Supreme Court held that the Democrats could nonetheless replace Torricelli's name on the ballot. *New Jersey Democratic Party v. Samson*, 814 A. 2d 1025 (N.J. 2002). The Republican candidate for Senate, Douglas Forrester, sought a stay of the New Jersey court order from the United States Supreme Court, arguing that the New Jersey court order violated Article I, Section 4 of the Constitution by usurping the power of the New Jersey Legislature to set the conditions for elections for United States Senator. The Supreme Court denied the stay without comment, *Forrester v. New Jersey Democratic Party*, 123 S. Ct. 67 (2002), and denied certiorari a few months later, 123 S. Ct. 673 (2002). Frank Lautenberg, a former United States Senator from New Jersey, defeated Forrester in the general election and became a United States Senator once again.

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 104:

Not surprisingly, the academic and non-academic literature on the Florida controversy has grown considerably. One of the most valuable academic sources for varied perspectives on the case is THE VOTE: BUSH, GORE, AND THE SUPREME COURT (Cass R. Sunstein & Richard A. Epstein eds. 2001). The book features articles by Richard Epstein, Elizabeth Garrett, Samuel Issacharoff, Pamela S. Karlan, Michael W. McConnell, Frank I. Michelman, Richard H. Pildes, Richard A. Posner, David A. Strauss, Cass R. Sunstein, and John C. Yoo. Another valuable resource is the symposium in Volume 29, Number 2 of the FLORIDA STATE UNIVERSITY LAW REVIEW (2001), featuring articles by Steve Bickerstaff, Richard Briffault, Luiz Fuentes-Rohwer & Guy-Uriel Charles, Richard D. Friedman, James A. Gardner, Elizabeth Garrett, Heather K. Gerken, Steven G. Gey, Richard L. Hasen, Pamela S. Karlan, Harold J. Krent, Sanford Levinson & Ernest A. Young, William P. Marshall, John O. McGinnis, Spencer Overton, Richard H. Pildes, Richard A. Posner, Robert J. Pushaw, Jr., Robert A. Schapiro, Peter M. Shane, and Hayward H. Smith. A readable survey of the legal issues appears in Howard Gillman,

THE VOTES THAT COUNTED: HOW THE SUPREME COURT DECIDED THE 2000 PRESIDENTIAL ELECTION (2001). Ronald Dworkin recently edited an anthology entitled: A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT AND AMERICAN DEMOCRACY (2003). Bruce Cain reviews the Dworkin anthology in Volume 2, Issue 4 of the *Election Law Journal* (forthcoming October 2003).

Other academic articles that readers may wish to consult include: Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE LAW JOURNAL 1407 (2001); Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME LAW REVIEW 1093 (2001); Michael C. Dorf and Samuel Issacharoff, *Can Process Theory Constrain the Courts*?, 72 UNIVERSITY OF COLORADO LAW REVIEW 923 (2001); Bradley W. Joondeph, Bush v. Gore*, Federalism, and the Distrust of Politics*, 62 OHIO STATE LAW JOURNAL 1781 (2001); Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CALIFORNIA LAW REVIEW 1721 (2001); Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO LAW REVIEW 1219 (2002); Spencer Overton, *Rules, Standards, and* Bush v. Gore*: Form and the Law of Democracy*, 37 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 65 (2002); George Priest, *Reanalyzing* Bush v. Gore*: Democratic Accountability and Judicial Overreaching*, 72 UNIVERSITY OF COLORADO LAW REVIEW 953 (2001); Laurence H. Tribe, Erog v. Hsub *and Its Disguises: Freeing* Bush v. Gore *From Its Hall of Mirrors*, 115 HARVARD LAW REVIEW 170 (2001); and Mark Tushnet, *Renormalizing* Bush v. Gore: *An Anticipatory Intellectual History*, 90 GEORGETOWN LAW JOURNAL 113 (2001). Much of the academic commentary has remained critical of the Court's decision. The leading articles defending the Court's decision (though not necessarily its reasoning) are by Richard Epstein and Michael McConnell (both in THE VOTE) and the Posner book cited above. Lund takes a rare position defending both the opinion's reasoning and its remedy. Of course, most legal academics are Democrats. There appears to be a very strong correlation between partisan preferences and evaluations of *Bush v. Gore* among academics.

For an analysis of the constitutionality of the Electoral Count Act, that provided a basis for the Supreme Court's decision on the remedy in the case, see Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 NORTH CAROLINA LAW REVIEW 1653 (2002).

7. The Florida controversy has created impetus for many states to enact laws reforming their methods for casting votes and conducting recounts. One of the first states to act, unsurprisingly, was Florida. For Governor Jeb Bush's perspective on the Florida election changes, see Jeb Bush, *Election Reform in Florida: Meeting the Challenge*, 1 ELECTION LAW JOURNAL 311 (2002). Volume 1, Number 4 of the ELECTION LAW JOURNAL (September 2002), features additional perspectives from California, Indiana, and Pennsylvania.

After two years of effort, Congress finally passed federal election reform legislation, the "Help America Vote Act of 2002," Public Law 107-252 (Oct. 29, 2002) (text of the Act available at this link: http://www.electionline.org/site/docs/pdf/hr3295.pl107252.final.pdf). The Act, now

commonly known as HAVA, provides certain uniform standards for voting procedures and voting machines, and includes federal money for states to upgrade their voting technology. The website Electionline.org offers a section-by-section analysis of HAVA at this link: http://www.electionline.org/site/docs/pdf/hr3295.final.section.by.section.pdf, and an update on state-by-state implementation of HAVA mandates at this link: http://www.electionline.org/site/docs/pdf/hava_information_central.pdf.

8. Both the states and federal government have relied upon the work of social scientists examining the reliability of various voting methods. Perhaps the most influential study is the July 2001 Report of the Caltech-MIT Voting Technology Project, *Voting – What Is, What Could Be*, available for download at: http://vote.caltech.edu/Reports/july01/July01_VTP_Voting_Report_Entire.pdf. Among many other findings, the authors of the report conclude that hand-counted and optically scanned paper have had the lowest rates of unmarked, uncounted, and spoiled ballots in presidential, Senate and governor elections over the last 12 years. See also Stephen Ansolabehere, *Voting Machines, Race, and Equal Protection*, 1 ELECTION LAW JOURNAL 61 (2002). Links to other reports and studies may be found at the Stanford Law Library's website described on page 104, note 6.

9. Who *really* won the Florida vote? The election results are certainly final, but that has not stopped news organizations from attempting to recount the votes. Relying upon an extensive manual categorization of Florida ballots by the National Organization for Research at the University of Chicago (NORC), news organizations drew their own conclusions. The *Wall Street Journal* reported that Bush would have won Florida by 493 votes if the counting ordered by the Florida Supreme Court had continued, and by 225 votes if hand recounts had been conducted in the four counties picked by Gore. Jackie Calmes and Edward P. Foldessy, *Florida Revisited: In Election Review, Bush Wins Without Supreme Court Help*, WALL STREET JOURNAL, Nov. 12, 2001, at p. A1. The *Washington Post* reported the same conclusion, and added that if Gore had found a way to trigger a statewide recount of all disputed ballots, or if the courts had required it, the election may have gone to Gore by "the narrowest of margins." Dan Keating and Dan Balz, *Florida Recounts Would Have Favored Bush; but Study Finds Gore Might Have Won Statewide Tally of All Uncounted Ballots*, WASHINGTON POST, Nov. 12, 2001, p. A01. The *New York Times* also reached similar conclusions, but noted that the review found statistical support for the claims of many voters, particularly elderly Democrats in Palm Beach County, that the confused ballot design there may have led them to spoil their votes by voting for more than one candidate. Ford Fessenden and John M. Broder, *Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, NEW YORK TIMES, Nov. 12, 2001, at p. A1.

The *Times* also made reference to an earlier study the newspaper conducted showing that 680 of the late-arriving absentee ballots did not meet Florida's standards yet were still counted. A vast majority of those flawed ballots were accepted in counties that favored Bush. *See* David Barstow and Don Van Natta, Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, NEW YORK TIMES, July 15, 2001, at p. A1.

To perform your own analysis of the data, visit the *Times*' interactive site at: http://www.nytimes.com/images/2001/11/12/politics/recount/index.html. If you want the raw data, go to the NORC website at: http://www.norc.uchicago.edu/fl/index.asp.

Chapter 4. Voting and Representation

ADD THE FOLLOWING AFTER THE SECOND PARAGRAPH IN SECTION II ON PAGE 113:

Baker v. Carr: *A Commemorative Symposium*, 80 NORTH CAROLINA LAW REVIEW 1103 (2002), recently marked the 40th anniversary of the celebrated case. Contributions are by Guy-Uriel E. Charles; Robert L. Pushaw, Jr.; Mark Tushnet; James A. Gardner; Sanford Levinson; Nathaniel A. Persily, Thad Kousser & Patrick Egan; Heather K. Gerken; Luis Fuentes-Rohwer; Richard L. Hasen; and Roy A. Schotland.

ADD THE FOLLOWING TO NOTE 4 ON PAGE 120:

The paper cited in Note 4 is now published. Stephen Ansolabehere, Alan Gerber, & James Snyder, *Equal Votes, Equal Money: Court-Ordered Redistricting and Public Expenditures in the American States*, 96 AMERICAN POLITICAL SCIENCE REVIEW 767 (2002).

ADD THE FOLLOWING TO FOOTNOTE "b" ON PAGE 121:

Some lower courts in the present decade have followed the approach of *Daly v. Hunt*. In *Hulme v. Madison County*, 188 F. Supp. 2d 1041 (S.D. Ill. 2001), the Court found that a county redistricting plan with a maximum deviation of under ten percent had been adopted in an arbitrary and discriminatory manner (the discrimination, apparently, was against Republicans), and for that reason struck down the plan on population grounds. In *Montiel v. Davis*, 215 F. Supp. 2d 1279 (S.D. Ala. 2002), the court applied the same test to a state senate plan with a similar population deviation, but upheld the plan.

ADD THE FOLLOWING AFTER THE SECOND FULL PARAGRAPH ON PAGE 122, IN NOTE 8:

As mentioned in the description of *Karcher v. Daggett* in the Casebook, the Court refused to set a level below which any population inequality in a congressional plan would be regarded as *de minimis*. Does that mean *any* inequality, no matter how trivial, constitutes a prima facie constitutional violation? Apparently so, according to *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672 (M.D. Pa. 2002). In that case, Democrats successfully challenged a Republican-drawn plan, whose maximum population deviation consisted of nineteen people. The largest district had a population of 646,380 while the population of the smallest district was 646,361.[2]

In *Graham v. Thornburgh*, 207 F. Supp. 2d 1280 (D. Kans. 2002), the court upheld a congressional plan with a maximum deviation of 33 people. It was shown that the legislature could have adopted a plan with perfect equality (defined as permitting a deviation of one person, because the number of districts in the state did not divide equally

[2] These figures are taken from an earlier decision in the same litigation, *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 535 (M.D. Pa. 2002). As is described in the following chapter of this Supplement, the *Vieth* litigation is being heard by the Supreme Court during the 2003-04 term.

into the total population), which put the burden on the state to show that the deviation was justifiable. However, the court believed the plan was reasonably designed to meet a set of criteria the legislature had established, especially in light of the small size of the deviation. The existence of alternative plans that achieved perfect equality was not decisive when those plans were not demonstrably superior when measured against the legislature's stated criteria.

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 161:

Lawsuits along the lines of hypothetical "a" challenging punch card voting have been filed in California, Florida, Georgia and Illinois. The Illinois litigation has led to the first district court decision applying *Bush v. Gore*'s equal protection holding to the use of punch card voting machines. In rejecting the state's motion to dismiss a lawsuit challenging the use of punch card voting as violating equal protection under *Bush II*, the Court held:

> That people in different counties have significantly different probabilities of having their votes counted, solely because of the nature of the system used in their jurisdiction is the heart of the problem. Whether the counter is a human being looking for hanging chads in a recount, or a machine trying to read ballots in a first count, the lack of a uniform standard of voting results in voters being treated arbitrarily in the likelihood of their votes being counted. The State, through the selection and allowance of voting systems with greatly varying accuracy rates "value[s] one person's vote over that of another," *Bush II*, even if it does not know the faces of those people whose votes get valued less. This system does not afford the "equal dignity owed to each voter." *Id.* When the allegedly arbitrary system also results in a greater negative impact on groups defined by traditionally suspect criteria, there is cause for serious concern.
>
> The Court is certainly mindful of the limited holding of *Bush II*. However, we believe that situation presented by this case is sufficiently related to the situation presented in *Bush II* that the holding should be the same. This holding is also consistent with the overarching theme of voting rights cases decided by the Supreme Court—that theme being, of course, "one man, one vote." Any voting system that arbitrarily and unnecessarily values some votes over others cannot be constitutional. Even without a suspect classification or invidious discrimination, "[t]he right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*. Therefore, Plaintiffs have sufficiently stated a claim against the Defendants for violation of equal protection.

Black v. McGuffage, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002).

The issue reached national prominence in fall 2003, when the American Civil Liberties Union filed a lawsuit challenging the use of punch card voting in six California counties for the recall of California Governor Gray Davis and the selection of his successor. A three-judge panel of the United States Court of Appeals for the Ninth Circuit issued an order delaying the recall election on grounds that the selective use of punch card voting violated the equal protection rights of voters in counties using punch cards. An eleven-judge *en banc* panel of the Ninth Circuit reversed the three-judge panel and allowed the election to go forward. See *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 882 (9th Cir.), *rev'd en banc* 344 F.3d 914 (9th. Cir. 2003). In the election, Governor Davis was recalled (the first governor recalled in any state since 1921) and actor Arnold Schwarzenegger was elected as his successor.

Litigants have also attempted in vain to use *Bush v. Gore* to advance more novel arguments. See *Ways v. City of Lincoln*, 2002 WL 1742664 (D. Neb. 2002) (rejecting argument that *Bush v. Gore* prohibits states from outlawing strip clubs); *People v. Warren*, 2002 WL 307579 (Cal. App. 2002) (rejecting argument that *Bush v. Gore* changes meaning of "reasonable doubt" in criminal cases).

1.5. Rather than looking to *Reynolds* or *Harper* as precedent for the Court's equal protection holding, Pamela Karlan has looked to a very different equal protection case, *Shaw v. Reno*, 509 U.S. 630 (1993). *Shaw* is a controversial case establishing the constitutional injury of a "racial gerrymander," and is discussed in detail in chapter 7. According to Karlan, both cases show the Court moving away from a focus on individual rights and toward a more systemic view of equal protection: "Whatever interest the Supreme Court's opinion [in *Bush v. Gore*] vindicated, it was not the interest of an identifiable individual voter. Rather, it was a perceived systemic interest in having recounts conducted according to a uniform standard or not at all. It was structural equal protection, just as the *Shaw* cases have been." Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 NORTH CAROLINA LAW REVIEW 1345, 1364 (2001). For a further exploration of this idea, see Heather K. Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on* Bush v. Gore, 29 FSU LAW REVIEW 407, 410 (2001) (under the structural view, *Bush* contains "a claim about how to order a well-functioning democracy, not a suit about individual rights.").

Richard L. Hasen, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 138-56 (2003), sees connections between the Supreme Court's "structural equal protection" jurisprudence and the "political markets approach" of Professors Issacharoff and Pildes described on pages 555-56 in the Casebook. Hasen finds both "symptomatic of a belief in unlimited judicial wisdom." Hasen, *supra*, at 155.

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 162:

For a defense of the Supreme Court's decision on federalism grounds, see Bradley W. Joondeph, Bush v. Gore*, Federalism, and the Distrust of Politics*, 62 OHIO STATE LAW JOURNAL 1781 (2001).

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 162:

For an argument that scholars have misapplied (or simply ignored) the due process issues in the case, see Roy Schotland, *In* Bush v. Gore: *Whatever Happened to the Due Process Ground?*, 34 LOYOLA UNIVERSITY OF CHICAGO LAW JOURNAL 211 (2002); see also Leslie Friedman Goldstein, *Between the Tiers: the New(est) Equal Protection and* Bush v. Gore, 4 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 372, 391 (2002) (the per curiam opinion "showed no evidence that it felt any obligation…to delineate why the due process 'remedy' that it chose was preferable to the state (supreme court) policy it displaced, in terms of due process for the fundamental right to have one's vote fully counted.").

Chapter 5. Legislative Districting

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 173:

In *Smith v. Clark*, 189 F. Supp. 2d 503 (S.D. Miss. 2002), and subsequent orders in the same case reported in the same volume of F. Supp. 2d at pages 529 and 548, a three-judge District Court enjoined the state from implementing a congressional districting plan that had been adopted by a state court after the Mississippi legislature failed to adopt a plan following the 2000 census. The *state* court action had been brought by Democratic plaintiffs, who intervened in the *federal* action that was initiated by Republican plaintiffs. The plan adopted by the state court was drawn by the Democratic plaintiffs in that action. The federal court rejected the plan offered to it by the Republican plaintiffs, but the Republicans did not object to the plan the federal court adopted. The Democrats did object.

The three-judge court gave three reasons for rejecting the state court's plan, notwithstanding the Supreme Court's decisions in *Scott v. Germano* and *Growe v. Emison*. First, the state court plan was adopted by a single judge after being drafted by a partisan group of plaintiffs, and therefore could not be said to reflect state policy. Second, it had not been precleared under Section 5 of the Voting Rights Act. Third, the state court was not authorized to adopt a plan by the Mississippi legislature, which had the exclusive power to redistrict (aside from Congress) under Article I, Section 4 of the Constitution.

In *Branch v. Smith*, 123 S. Ct. 1429 (2003), the Supreme Court, relying on the second of these reasons, affirmed the displacement of the state court's plan with the District Court's plan.[3] Does this decision reflect a retreat from the *Scott-Growe* protection of state autonomy? Recall that plans drawn by a state court in a covered jurisdiction, but not plans drawn by a federal court, are subject to preclearance. For analysis of the issues in *Branch*, written before the Supreme Court ruled, see Jonathan H. Steinberg & Aimee Dudovitz, Branch v. Smith—*Election Law Federalism After* Bush v. Gore*: Are State Courts Unconstitutional Interlopers in Congressional Redistricting?*, 2 ELECTION LAW JOURNAL 91 (2003).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 177:

Another formal criterion that is usually much less controversial than compactness is contiguity. Although some state constitutions call for compact districts, more call for contiguity, which is ordinarily understood to be a requirement whether or not it is specified. "Contiguous" is usually understood to mean, in the words of one dictionary definition, "touching or connected throughout in an unbroken sequence." Questions about contiguity, so understood, typically arise when those drawing a plan choose or are required to cross a body of water. Crossing water is required in the case of an island. It will be accepted without question in many situations, such as crossing a river, which may

[3] The Court ignored the District Court's first reason and pointedly declined to affirm the second. See this Supplement for Chapter 3.

be necessary, for example, to avoid dividing a city. But what about a district that crosses a bay or lake without including the land in between? For example, would a district be contiguous if it included parts of San Francisco and Oakland but excluded the land around the northern and southern ends of San Francisco Bay?

A different conception of contiguity was suggested in *Wilkins v. West*, 571 S.E.2d 100 (Va. 2002). The lower court had invalidated a plan, not simply because the district crossed water, but because there was no publicly available transportation between the parts of the district without going through another district. The Supreme Court of Virginia reversed, explaining its position as follows:

> While ease of travel within a district is a factor to consider when resolving issues of compactness and contiguity, resting the constitutional test of contiguity solely on physical access within the district imposes an artificial requirement which reflects neither the actual need of the residents of the district nor the panoply of factors which must be considered by the General Assembly in the design of a district. Short of an intervening land mass totally severing two sections of an electoral district, there is no *per se* test for the constitutional requirement of contiguity. Each district must be examined separately.

How would you advise the legislative leadership of Virginia regarding the requirement of contiguity in the state constitution?

ADD THE FOLLOWING TO THE THIRD PARAGRAPH OF NOTE 5 ON PAGE 179:

In 2001, the tables turned again and the Democrats won the lottery. Republicans brought a constitutional challenge to the whole system (sour grapes?), but the lottery procedure was upheld against substantive due process and equal protection challenges in *Winters v. Illinois State Board of Elections*, 197 F. Supp. 2d 1110 (N.D. Ill. 2001), *summarily aff'd.* 535 U.S. 967 (2002).

ADD THE FOLLOWING AFTER THE FIRST PARAGRAPH OF NOTE 7 ON PAGE 181:

Following the redistricting around the country in 2001 and 2002, many observers have called this the decade of "incumbent gerrymanders," referring to districting plans in which neither party obtains major gains but the incumbents of both parties have their districts strengthened. This is an easy goal for a legislature to pursue: technically, because exchange of Republican areas for Democratic areas in adjacent districts can benefit the incumbents of both parties, and politically, because incumbents of both parties will find such an arrangement attractive. A good example is California. In the 1980s, when the Democrats controlled the legislature and the governorship, the partisan plans they passed, especially for the House of Representatives, led to a political and legal debate that lasted nearly the entire decade. The Democrats again controlled the legislature and the governorship in 2001-02, but passed a plan that drew wide support from Republican as well as Democratic legislators.

For a provocative exchange on how courts ought to regard incumbent gerrymanders, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARVARD LAW REVIEW 593 (2002); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARVARD LAW REVIEW 649 (2002); Samuel Issacharoff, *Surreply: Why Elections?*, 116 HARVARD LAW REVIEW 684 (2002). A lawyer who has represented the Democrats in numerous redistricting controversies this decade argues that although most states have indeed adopted incumbency oriented plans, four major states—Florida, Michigan, Ohio and Pennsylvania—adopted Republican gerrymanders, with the result that in the nation as a whole, the Republicans start off with a head start in the fierce competition to control the House of Representatives. Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION LAW JOURNAL 179 (2003). Hirsch calls for more aggressive judicial supervision of partisan gerrymanders, a subject considered in the next section of the Casebook. There is irony in such a prominent Democrat taking the position that his Republican counterparts were taking twenty years ago, when the shoe was on the other foot.

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 196:

Additional impetus to the last interpretation was provided, temporarily at least, in *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532 (M.D. Pa. 2002), a case that the Supreme Court is currently considering. *Vieth v. Jubelirer*, 123 S.Ct. 2652 (*probable jurisdiction noted* June 27, 2003).[4] The court stated that a plaintiff seeking to show discriminatory effects under *Bandemer* must satisfy two requirements. "First, Plaintiffs must prove an actual or projected history of disproportionate election results. Second, Plaintiffs must prove that 'the electoral system is arranged in a manner that will consistently degrade a voter's, or group of voters', influence on the political process as a whole.'"[5]

In *Vieth*, Democrats challenged a congressional districting plan that was projected to produce 13 Republican House members out of 19 from Pennsylvania, a state that was evenly divided between the parties.[6] The court was willing to assume that plaintiffs could thereby satisfy the first requirement, but dismissed the complaint because the allegations were insufficient to satisfy the second. The court thus rejected the interpretation of *Bandemer* proposed by the *Harvard Law Review*'s Note (see Casebook, Note 3, Page 195), first because the court indicated willingness to find disproportionality based on projected rather than actual elections, and second because a finding of disproportionality was held to be insufficient to establish an equal protection claim.

---

[4] The Pennsylvania litigation went through additional stages before getting to the Supreme Court, and the appeal is from *Vieth v. Pennsylvania*, 241 F. Supp 2d 478 (M.D. Pa. 2003). However, the substance of what the Court will review is set forth in the opinion described in the text.

[5] *O'Lear v. Miller*, 222 F. Supp. 2d 850 (E.D. Mich. 2002), reaches a similar result. *O'Lear* was summarily affirmed by the Supreme Court, 537 U.S. 997 (2002), with Justices Stevens and Breyer indicating they would have noted probable jurisdiction and set the case for argument. Since the issues presented in Michigan and Pennsylvania were similar, there is no apparent explanation why the Court affirmed the Michigan case and set the Pennsylvania case for argument.

[6] In fact, the Republicans won 12 of the 19 seats.

The court, regarding *Badham's* reasoning as well as its result "entitled to substantial deference," dismissed the partisan gerrymandering claim despite an allegation that the plan "essentially shuts . . Democratic voters out of the political process." That allegation was too conclusory, when unaccompanied by more specific allegations "that anyone has ever prevented, or will ever prevent, Plaintiffs from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern.' *See Badham*. [The redistricting plan] simply does not address such issues."

To say the least, it would be the rare case when a major political party could make and substantiate allegations of the sort that the *Vieth* court seems to require.[7] And *Vieth* is in line with other lower court decisions applying *Bandemer*, in this and previous decades. Whether the Supreme Court intends to change this situation or put it in cement should be answered soon. The Court held oral argument on December 10, 2003. A transcript of the argument is available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1580.pdf.

[7] In *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002), the Supreme Court of Pennsylvania rejected a partisan gerrymandering claim against the same plan, brought under the state constitution. The court ruled that the standards for a partisan gerrymandering claim under the state constitution were identical to those set forth in *Bandemer* interpreting the Equal Protection Clause. Applying these standards, the court reached the same result as the *Vieth* federal court, following an essentially identical analysis.

Chapter 6. Minority Vote Dilution

ADD THE FOLLOWING AFTER THE BUTLER QUOTE IN NOTE 3 ON PAGE 205:

Georgia v. Ashcroft, 195 F. Supp. 2d 25 (D.D.C. 2002), was one of the rare cases in which a state sought preclearance from the D.C. District Court without trying the Justice Department first. Georgia sought preclearance for its congressional, state Senate, and state House plans. Because Georgia went directly to court, the Justice Department had no occasion to take a position on the plans until the action had been filed. Eventually, the Justice Department opposed preclearance on the state Senate plan but not on the other two plans. However, intervenors objected to all three plans. Georgia argued that the court should automatically grant preclearance on the two plans to which DOJ did not object. When a state applies for preclearance to DOJ, the Department's granting of the application is final. Georgia argued that the same principle, that preclearance should be denied only when DOJ finds a plan objectionable, should apply in a court proceeding. The court rejected Georgia's view, holding that once the state elected the judicial avenue to preclearance, the court had the final word. *Id.* at 72. In the end, however, the court granted preclearance on the merits for the congressional and state House plans. In *Georgia v. Ashcroft*, 2003 WL 21467204 (2003), the Supreme Court affirmed the District Court's permitting intervention, without addressing the question whether the intervenors could challenge the plans to which the DOJ did not object. In an opinion reproduced below in this Supplement, the Court overruled the District Court on the merits.

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 217:

In 2001, the Justice Department adopted regulations setting forth, among other things, how it would approach the question of retrogression in preclearance proceedings. 66 Fed.Reg. 5411-14, available at http://www.usdoj.gov/crt/voting/sec_5/fedregvoting.htm. The Department's general approach is described in the regulations as follows:

> A proposed plan is retrogressive under the Section 5 "effect" prong if its net effect would be to reduce minority voters' "effective exercise of the electoral franchise" when compared with the benchmark plan [which is usually the plan in effect when the new redistricting plan is adopted]. *See Beer*. The effective exercise of the electoral franchise usually is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice. The presence of racially polarized voting is an important factor considered by the Department of Justice in assessing minority voting strength. A proposed redistricting plan ordinarily will occasion an objection by the Department of Justice if the plan reduces minority voting strength relative to the benchmark plan and a fairly-drawn alternative plan could ameliorate or prevent that retrogression.

In *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002), a three-judge District Court refused to grant preclearance to a state Senate plan adopted by the Georgia legislature. In *Georgia*, the courts were spared the possible problem of competing minority groups described in Note 3 of the Casebook, because the only large minority group in question was African-Americans. The legislature's plan preserved about the same number of majority-minority districts as the previous Georgia Senate plan but reduced the black population of a few of the districts to very close to 50 percent. According to the District Court, the mere fact that the number of majority-minority districts arguably had been maintained or even increased was not sufficient to warrant preclearance, but neither would a finding that the number had been reduced be sufficient reason for denying preclearance.[8]

> While courts have frequently considered the number of "majority-minority" districts as indicative of minority voting strength, the parties in this matter apparently agree that Section 5 is not an absolute mandate for maintenance of such districts. This agreement is entirely proper.

Instead, the court said a fact-intensive inquiry was required, centering on the extent of polarized voting.

The state presented expert testimony that given voting patterns in Georgia, a congressional distinct in which 44.3 percent of the voting age population was black had a 50 percent chance of electing the candidate preferred by black voters. The districts giving rise to contention were districts in which the black voting age population of the district (BVAP) was reduced to about 50 percent, meaning that blacks had more than an even chance of electing the candidate of their choice according to the state's expert. The state argued that so long as the number of such districts is not reduced from the number in the benchmark plan, the plan should be precleared. The court rejected this argument on the ground that the test under Section 5 is not whether a minority group has a sufficient number of "equal opportunity" districts, but whether the new plan reduces the minority group's electoral strength. If the level of racially polarized voting is such that even at 50 percent of BVAP, blacks are less likely to elect the candidate of their choice than at the higher levels of BVAP in the benchmark plan, then preclearance should be denied.

[8] There was some question as to exactly how many majority-minority districts were in the plan. The court regarded black voting age population as a percentage of total voting age population ("BVAP" and "VAP" in the parlance of redistricters) as more relevant than total population figures. But Georgia and the Justice Department offered different figures for BVAP, depending on how one counts individuals who identify themselves as both black and of some other racial or ethnic group on the census form. The court also considered the percentage of blacks among registered voters. There were thus three percentages of blacks that could be considered. These percentages varied by only small margins, but the legislature had drawn some of the districts so close to 50-50 that the different methods led to slightly different results on the total of majority-minority districts. As is explained in the text, the court did not regard the number of majority-minority districts as dispositive. Therefore the court was not called upon to endorse one method over the others.

The court acknowledged that the great majority of blacks in the legislature had voted for the plan. While it conceded that this support was strong evidence that the plan had no retrogressive *intent*, black legislative support was less probative that the plan had no retrogressive *effect*. But why would the blacks in the legislature support a plan that the court found to have a retrogressive effect? The answer is that the plan was intended to strengthen the Democrats' chances of maintaining control of the state Senate. All the black members of the legislature were Democrats, and their committee chairmanships and other leadership positions depended on maintaining their party's majority. They were therefore willing to strengthen Democratic prospects in adjacent districts by moving some black voters into those districts, even at the cost of slightly increasing black legislators' electoral jeopardy in a few instances. The court acknowledged this motivation, but said that "it does not follow that anything that is good for the Democratic Party is good for African-American voters—at least within the context of this court's Section 5 inquiry."

Does application of the Voting Rights Act in this manner promote the Act's purposes? In the following decision, a 5-4 majority on the Supreme Court overruled the District Court on the merits. Is the Supreme Court's approach more in accord with the Act's purposes? (Hint: These are not intended as rhetorical questions.)

Georgia v. Ashcroft

123 S. Ct. 2498 (2003)

Justice O'CONNOR delivered the opinion of the Court.

In this case, we decide whether Georgia's State Senate redistricting plan should have been precleared under § 5 of the Voting Rights Act of 1965…. We therefore must decide whether Georgia's State Senate redistricting plan is retrogressive as compared to its previous, benchmark districting plan.

I

A

[Preclearance problems, litigation, and legislative action caused Georgia to use several different redistricting plans during the 1990s. The final plan for the State Senate was adopted by the legislature in 1997.]

All parties here concede that the 1997 plan is the benchmark plan for this litigation because it was in effect at the time of the 2001 redistricting effort. The 1997 plan drew 56 districts, 11 of them with a total black population of over 50%, and 10 of them with a black voting age population of over 50%. The 2000 census revealed that these numbers had increased so that 13 districts had a black population of at least 50%, with the black voting age population exceeding 50% in 12 of those districts.

After the 2000 census, the Georgia General Assembly began the process of redistricting the Senate once again. No party contests that a substantial majority of black voters in Georgia vote Democratic, or that all elected black representatives in the General Assembly are Democrats. The goal of the Democratic leadership—black and white—was to maintain the number of majority-minority districts and also increase the number of Democratic Senate seats….

The Vice Chairman of the Senate Reapportionment Committee, Senator Robert Brown, also testified about the goals of the redistricting effort. Senator Brown, who is black, chaired the subcommittee that developed the Senate plan at issue here. Senator Brown believed when he designed the Senate plan that as the black voting age population in a district increased beyond what was necessary, it would "pus[h] the whole thing more towards [the] Republican[s]." And "correspondingly," Senator Brown stated, "the more you diminish the power of African-Americans overall."…

The plan as designed by Senator Brown's committee kept true to the dual goals of maintaining at least as many majority-minority districts while also attempting to increase Democratic strength in the Senate. Part of the Democrats' strategy was not only to maintain the number of majority-minority districts, but to increase the number of so-called "influence" districts, where black voters would be able to exert a significant—if not decisive—force in the election process….

The plan as designed by the Senate "unpacked" the most heavily concentrated majority-minority districts in the benchmark plan, and created a number of new influence districts. The new plan drew 13 districts with a majority-black voting age population, 13 additional districts with a black voting age population of between 30% and 50%, and 4 other districts with a black voting age population of between 25% and 30%. According to the 2000 census, as compared to the benchmark plan, the new plan reduced by five the number of districts with a black voting age population in excess of 60%. Yet it increased the number of majority-black voting age population districts by one, and it increased the number of districts with a black voting age population of between 25% and 50% by four. As compared to the benchmark plan enacted in 1997, the difference is even larger. Under the old census figures, Georgia had 10 Senate districts with a majority-black voting age population, and 8 Senate districts with a black voting age population of between 30% and 50%. The new plan thus increased the number of districts with a majority black voting age population by three, and increased the number of districts with a black voting age population of between 30% and 50% by another five.

The Senate adopted its new districting plan on August 10, 2001, by a vote of 29 to 26. Ten of the eleven black Senators voted for the plan. The Georgia House of Representatives passed the Senate plan by a vote of 101 to 71. Thirty-three of the thirty-four black Representatives voted for the plan. No Republican in either the House or the Senate voted for the plan, making the votes of the black legislators necessary for passage. The Governor signed the Senate plan into law on August 24, 2001, and Georgia subsequently sought to obtain preclearance.

B

Pursuant to § 5 of the Voting Rights Act, a covered jurisdiction like Georgia has the option of either seeking administrative preclearance through the Attorney General of the United States or seeking judicial preclearance by instituting an action in the United States District Court for the District of Columbia for a declaratory judgment that the voting change comports with § 5. Georgia chose the latter method, filing suit seeking a declaratory judgment that the State Senate plan does not violate § 5.

Georgia, which bears the burden of proof in this action, see *Pleasant Grove v. United States,* 479 U.S. 462 (1987), attempted to prove that its Senate plan was not retrogressive either in intent or in effect. [The Attorney General opposed preclearance, objecting in particular to Districts 2, 12 and 26. In these districts, the black voting age population (BVAP), dropped respectively from 60.58% to 50.31%, 55.34% to 50.66%, and 62.45% to 50.80%. In each of these districts, the percentage of black registered voters dropped to just under 50%. The three-judge District Court denied preclearance.]

After the District Court refused to preclear the plan, Georgia enacted another plan, largely similar to the one at issue here, except that it added black voters to Districts 2, 12, and 26. The District Court precleared this plan. No party has contested the propriety of the District Court's preclearance of the Senate plan as amended. Georgia asserts that it will use the plan as originally enacted if it receives preclearance.

We noted probable jurisdiction to consider whether the District Court should have precleared the plan as originally enacted by Georgia in 2001 and now vacate the judgment below….

III

A

… Georgia argues that a plan should be precleared under § 5 if the plan would satisfy § 2 of the Voting Rights Act of 1965. We have, however, "consistently understood" § 2 to "combat different evils and, accordingly, to impose very different duties upon the States." *Reno v. Bossier Parish School Bd.,* 520 U.S. 471 (1997) (*Bossier Parish I*).[a] For example, while § 5 is limited to particular covered jurisdictions, § 2 applies to all States….

In *Bossier Parish I,* we specifically held that a violation of § 2 is not an independent reason to deny preclearance under § 5. The reason for this holding was straightforward: "[R]ecognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2."

Georgia here makes the flip side of the argument that failed in *Bossier Parish I*—

[a] The decision that appears at page 220 of the Casebook is *Bossier Parish II*, a later decision in the same litigation.

compliance with § 2 suffices for preclearance under § 5. Yet the argument fails here for the same reasons the argument failed in *Bossier Parish I.* We refuse to equate a § 2 vote dilution inquiry with the § 5 retrogression standard. Georgia's argument, like the argument in *Bossier Parish I,* would "shift the focus of § 5 from nonretrogression to vote dilution, and [would] change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." Instead of showing that the Senate plan is nondilutive under § 2, Georgia must prove that its plan is nonretrogressive under § 5.

B

Georgia argues that even if compliance with § 2 does not automatically result in preclearance under § 5, its State Senate plan should be precleared because it does not lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*.

While we have never determined the meaning of "effective exercise of the electoral franchise," this case requires us to do so in some detail. First, the United States and the District Court correctly acknowledge that in examining whether the new plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole. Thus, while the diminution of a minority group's effective exercise of the electoral franchise in one or two districts may be sufficient to show a violation of § 5, it is only sufficient if the covered jurisdiction cannot show that the gains in the plan as a whole offset the loss in a particular district.

Second, any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan. See, *e.g., Johnson v. De Grandy,* 512 U.S. 997 (1994); *Richmond v. United States,* 422 U.S. 358 (1975); *Thornburg v. Gingles,* 478 U.S. 30 (1986) (O'CONNOR, J., concurring in judgment). "No single statistic provides courts with a shortcut to determine whether" a voting change retrogresses from the benchmark. *Johnson v. De Grandy*.

In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice. While this factor is an important one in the § 5 retrogression inquiry, it cannot be dispositive or exclusive. The standard in § 5 is simple—whether the new plan "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*.

The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine. In order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. See *Thornburg* (O'CONNOR, J., concurring in judgment). Alternatively, a State

may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.

Section 5 does not dictate that a State must pick one of these methods of redistricting over another. Either option "will present the minority group with its own array of electoral risks and benefits," and presents "hard choices about what would truly 'maximize' minority electoral success." *Thornburg* (O'CONNOR, J., concurring in judgment). On one hand, a smaller number of safe majority-minority districts may virtually guarantee the election of a minority group's preferred candidate in those districts. Yet even if this concentration of minority voters in a few districts does not constitute the unlawful packing of minority voters, see *Voinovich v. Quilter,* 507 U.S. 146 (1993), such a plan risks isolating minority voters from the rest of the state, and risks narrowing political influence to only a fraction of political districts. And while such districts may result in more "descriptive representation" because the representatives of choice are more likely to mirror the race of the majority of voters in that district, the representation may be limited to fewer areas.

On the other hand, spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice. Such a strategy has the potential to increase "substantive representation" in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group. It also, however, creates the risk that the minority group's preferred candidate may lose. Yet as we stated in *Johnson v. De Grandy*:

> [T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

Section 5 gives States the flexibility to choose one theory of effective representation over the other.

In addition to the comparative ability of a minority group to elect a candidate of its choice, the other highly relevant factor in a retrogression inquiry is the extent to which a new plan changes the minority group's opportunity to participate in the political process….

Thus, a court must examine whether a new plan adds or subtracts "influence districts"—where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process. In assessing the

comparative weight of these influence districts, it is important to consider "the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account." *Thornburg* (O'CONNOR, J., concurring in judgment). In fact, various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts.

Section 5 leaves room for States to use these types of influence and coalitional districts. Indeed, the State's choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable. The State may choose, consistent with § 5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters.

In addition to influence districts, one other method of assessing the minority group's opportunity to participate in the political process is to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts. A legislator, no less than a voter, is "not immune from the obligation to pull, haul, and trade to find common political ground." *Johnson v. De Grandy.* Indeed, in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power. A lawmaker with more legislative influence has more potential to set the agenda, to participate in closed-door meetings, to negotiate from a stronger position, and to shake hands on a deal. Maintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under § 5.

And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan. The District Court held that the support of legislators from benchmark majority-minority districts may show retrogressive purpose, but it is not relevant in assessing retrogressive effect. But we think this evidence is also relevant for retrogressive effect. As the dissent recognizes, the retrogression inquiry asks how "voters will probably act in the circumstances in which they live." The representatives of districts created to ensure continued minority participation in the political process have some knowledge about how "voters will probably act" and whether the proposed change will decrease minority voters' effective exercise of the electoral franchise.

The dissent maintains that standards for determining nonretrogression under § 5 that we announce today create a situation where "[i]t is very hard to see anything left of" § 5. But the dissent ignores that the ability of a minority group to elect a candidate of choice remains an integral feature in any § 5 analysis. And the dissent agrees that the addition or subtraction of coalitional districts is relevant to the § 5 inquiry. Yet assessing whether a plan with coalitional districts is retrogressive is just as fact-intensive as whether a plan with both influence and coalitional districts is retrogressive. As Justice SOUTER recognized for the Court in the § 2 context, a court or the Department of Justice

should assess the totality of circumstances in determining retrogression under § 5. See *Johnson v. De Grandy*. And it is of course true that evidence of racial polarization is one of many factors relevant in assessing whether a minority group is able to elect a candidate of choice or to exert a significant influence in a particular district.

The dissent nevertheless asserts that it "cannot be right" that the § 5 inquiry goes beyond assessing whether a minority group can elect a candidate of its choice. But except for the general statement of retrogression in *Beer,* the dissent cites no law to support its contention that retrogression should focus solely on the ability of a minority group to elect a candidate of choice. As Justice SOUTER himself, writing for the Court in *Johnson v. De Grandy*, has recognized, the "extent of the opportunities minority voters enjoy to participate in the political processes" is an important factor to consider in assessing a § 2 vote-dilution inquiry. In determining how the new districting plan differs from the benchmark plan, the same standard should apply to § 5.

C

The District Court failed to consider all the relevant factors when it examined whether Georgia's Senate plan resulted in a retrogression of black voters' effective exercise of the electoral franchise. First, while the District Court acknowledged the importance of assessing the statewide plan as a whole, the court focused too narrowly on proposed Senate Districts 2, 12, and 26. It did not examine the increases in the black voting age population that occurred in many of the other districts. Second, the District Court did not explore in any meaningful depth any other factor beyond the comparative ability of black voters in the majority-minority districts to elect a candidate of their choice. In doing so, it paid inadequate attention to the support of legislators representing the benchmark majority-minority districts and the maintenance of the legislative influence of those representatives.

The District Court correctly recognized that the increase in districts with a substantial minority of black voters is an important factor in the retrogression inquiry. Nevertheless, it did not adequately apply this consideration to the facts of this case. The District Court ignored the evidence of numerous other districts showing an increase in black voting age population, as well as the other evidence that Georgia decided that a way to increase black voting strength was to adopt a plan that "unpacked" the high concentration of minority voters in the majority-minority districts…. Like the dissent, we accept the District Court's findings that the reductions in black voting age population in proposed Districts 2, 12, and 26 to just over 50% make it marginally less likely that minority voters can elect a candidate of their choice in those districts, although we note that Georgia introduced evidence showing that approximately one-third of white voters would support a black candidate in those districts and that the United States' own expert admitted that the results of statewide elections in Georgia show that "there would be a 'very good chance' that ... African American candidates would win election in the reconstituted districts." Nevertheless, regardless of any racially polarized voting or diminished opportunity for black voters to elect a candidate of their choice in proposed Districts 2, 12, and 26, the District Court's inquiry was too narrow.

In the face of Georgia's evidence that the Senate plan as a whole is not retrogressive, the United States introduced nothing apart from the evidence that it would be more difficult for minority voters to elect their candidate of choice in Districts 2, 12, and 26. As the District Court stated, the United States did not introduce any evidence to rebut Georgia's evidence that the increase in black voting age population in the other districts offsets any decrease in black voting age population in the three contested districts….

Given the evidence submitted in this case, we find that Georgia likely met its burden of showing nonretrogression. The increase in black voting age population in the other districts likely offsets any marginal decrease in the black voting age population in the three districts that the District Court found retrogressive. Using the overlay of the 2000 census numbers, Georgia's strategy of "unpacking" minority voters in some districts to create more influence and coalitional districts is apparent. Under the 2000 census numbers, the number of majority black voting age population districts in the new plan increases by one, the number of districts with a black voting age population of between 30% and 50% increases by two, and the number of districts with a black voting age population of between 25% and 30% increases by another 2.

Using the census numbers in effect at the time the benchmark plan was enacted to assess the benchmark plan, the difference is even more striking. Under those figures, the new plan increases from 10 to 13 the number of districts with a majority-black voting age population and increases from 8 to 13 the number of districts with a black voting age population of between 30% and 50%. Thus, the new plan creates 8 new districts—out of 56—where black voters as a group can play a substantial or decisive role in the electoral process. Indeed, under the census figures in use at the time Georgia enacted its benchmark plan, the black voting age population in Districts 2, 12, and 26 does not decrease to the extent indicated by the District Court. District 2 drops from 59.27% black voting age population to 50.31%. District 26 drops from 53.45% black voting age population to 50.80%. And District 12 actually *increases,* from 46.50% black voting age population to 50.66%.[2] And regardless of any potential retrogression in some districts, § 5 permits Georgia to offset the decline in those districts with an increase in the black voting age population in other districts. The testimony from those who designed the Senate plan confirms what the statistics suggest—that Georgia's goal was to "unpack" the minority voters from a few districts to increase blacks' effective exercise of the electoral franchise in more districts.

Other evidence supports the implausibility of finding retrogression here. An examination of black voters' opportunities to participate in the political process shows, if anything, an increase in the effective exercise of the electoral franchise. It certainly does not indicate retrogression. The 34 districts in the proposed plan with a black voting age population of above 20% consist almost entirely of districts that have an overall

[2] The dissent summarily rejects any inquiry into the benchmark plan using the census numbers in effect at the time the redistricting plan was passed. Yet we think it is relevant to examine how the new plan differs from the benchmark plan as originally enacted by the legislature. The § 5 inquiry, after all, revolves around the change from the previous plan. The 1990 census numbers are far from "irrelevant."…

percentage of Democratic votes of above 50%.... These statistics make it more likely as a matter of fact that black voters will constitute an effective voting bloc, even if they cannot always elect the candidate of their choice. These statistics also buttress the testimony of the designers of the plan such as Senator Brown, who stated that the goal of the plan was to maintain or increase black voting strength and relatedly to increase the prospects of Democratic victory.

The testimony of Congressman John Lewis is not so easily dismissed. Congressman Lewis is not a member of the State Senate and thus has less at stake personally in the outcome of this litigation. Congressman Lewis testified that "giving real power to black voters comes from the kind of redistricting efforts the State of Georgia has made," and that the Senate plan "will give real meaning to voting for African Americans" because "you have a greater chance of putting in office people that are going to be responsive." Section 5 gives States the flexibility to implement the type of plan that Georgia has submitted for preclearance—a plan that increases the number of districts with a majority-black voting age population, even if it means that in some of those districts, minority voters will face a somewhat reduced opportunity to elect a candidate of their choice.

The dissent's analysis presumes that we are deciding that Georgia's Senate plan is not retrogressive. To the contrary, we hold only that the District Court did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts. While the District Court engaged in a thorough analysis of the issue, we must remand the case to the District Court to examine the facts using the standard that we announce today. We leave it for the District Court to determine whether Georgia has indeed met its burden of proof. The dissent justifies its conclusion here on the ground that the District Court did not clearly err in its factual determination. But the dissent does not appear to dispute that if the District Court's legal standard was incorrect, the decision below should be vacated.

The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race….While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life.

IV

The District Court is in a better position to reweigh all the facts in the record in the first instance in light of our explication of retrogression. The judgment of the District Court for the District of Columbia, accordingly, is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[Short concurring opinions by Justices Kennedy and Thomas are omitted.]

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

I

I agree with the Court that reducing the number of majority-minority districts within a State would not necessarily amount to retrogression barring preclearance under § 5 of the Voting Rights Act of 1965. The prudential objective of § 5 is hardly betrayed if a State can show that a new districting plan shifts from supermajority districts, in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by predictably supportive nonminority voters.

Before a State shifts from majority-minority to coalition districts, however, the State bears the burden of proving that nonminority voters will reliably vote along with the minority. It must show not merely that minority voters in new districts may have some influence, but that minority voters will have effective influence translatable into probable election results comparable to what they enjoyed under the existing district scheme. And to demonstrate this, a State must do more than produce reports of minority voting age percentages; it must show that the probable voting behavior of nonminority voters will make coalitions with minorities a real prospect. If the State's evidence fails to convince a factfinder that high racial polarization in voting is unlikely, or that high white crossover voting is likely, or that other political and demographic facts point to probable minority effectiveness, a reduction in supermajority districts must be treated as potentially and fatally retrogressive, the burden of persuasion always being on the State.

The District Court majority perfectly well understood all this and committed no error. Error enters this case here in this Court, whose majority unmoors § 5 from any practical and administrable conception of minority influence that would rule out retrogression in a transition from majority-minority districts, and mistakes the significance of the evidence supporting the District Court's decision.

II

The Court goes beyond recognizing the possibility of coalition districts as nonretrogressive alternatives to those with majorities of minority voters when it redefines effective voting power in § 5 analysis without the anchoring reference to electing a

candidate of choice. It does this by alternatively suggesting that a potentially retrogressive redistricting plan could satisfy § 5 if a sufficient number of so-called "influence districts," in addition to "coalitio[n] districts" were created, or if the new plan provided minority groups with an opportunity to elect a particularly powerful candidate. On either alternative, the § 5 requirement that voting changes be nonretrogressive is substantially diminished and left practically unadministrable.

A

The Court holds that a State can carry its burden to show a nonretrogressive degree of minority "influence" by demonstrating that "'candidates elected without decisive minority support would be willing to take the minority's interests into account.'"

The history of § 5 demonstrates that it addresses changes in state law intended to perpetuate the exclusion of minority voters from the exercise of political power. When this Court held that a State must show that any change in voting procedure is free of retrogression it meant that changes must not leave minority voters with less chance to be effective in electing preferred candidates than they were before the change. "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*. In addressing the burden to show no retrogression, therefore, "influence" must mean an opportunity to exercise power effectively.

The Court, however, says that influence may be adequate to avoid retrogression from majority-minority districts when it consists not of decisive minority voting power but of sentiment on the part of politicians: influence may be sufficient when it reflects a willingness on the part of politicians to consider the interests of minority voters, even when they do not need the minority votes to be elected. The Court holds, in other words, that there would be no retrogression when the power of a voting majority of minority voters is eliminated, so long as elected politicians can be expected to give some consideration to minority interests.

The power to elect a candidate of choice has been forgotten; voting power has been forgotten. It is very hard to see anything left of the standard of nonretrogression….

Indeed, to see the trouble ahead, one need only ask how on the Court's new understanding, state legislators or federal preclearance reviewers under § 5 are supposed to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the § 5 touchstone. Is the test purely *ad hominem,* looking merely to the apparent sentiments of incumbents who might run in the new districts? Would it be enough for a State to show that an incumbent had previously promised to consider minority interests before voting on legislative measures? Whatever one looks to, however, how does one put a value on influence that falls short of decisive influence through coalition? Nondecisive influence is worth less than majority-minority control, but how much less? Would two influence districts offset the loss of one majority-minority district? Would it take three? Or four? The Court gives no guidance for

measuring influence that falls short of the voting strength of a coalition member, let alone a majority of minority voters. Nor do I see how the Court could possibly give any such guidance. The Court's "influence" is simply not functional in the political and judicial worlds.

B

Identical problems of comparability and administrability count at least as much against the Court's further gloss on nonretrogression, in its novel holding that a State may trade off minority voters' ability to elect a candidate of their choice against their ability to exert some undefined degree of influence over a candidate likely to occupy a position of official legislative power. The Court implies that one majority-minority district in which minority voters could elect a legislative leader could replace a larger number of majority-minority districts with ordinary candidates, without retrogression of overall minority voting strength. Under this approach to § 5, a State may value minority votes in a district in which a potential committee chairman might be elected differently from minority votes in a district with ordinary candidates.

It is impossible to believe that Congress could ever have imagined § 5 preclearance actually turning on any such distinctions. In any event, if the Court is going to allow a State to weigh minority votes by the ambitiousness of candidates the votes might be cast for, it is hard to see any stopping point. I suppose the Court would not go so far as to give extra points to an incumbent with the charisma to attract a legislative following, but would it value all committee chairmen equally? (The committee chairmen certainly would not.) And what about a legislator with a network of influence that has made him a proven dealmaker? Thus, again, the problem of measurement: is a shift from 10 majority-minority districts to 8 offset by a good chance that one of the 8 may elect a new Speaker of the House?

I do not fault the Court for having no answers to these questions, for there are no answers of any use under § 5. The fault is more fundamental, and the very fact that the Court's interpretation of nonretrogression under § 5 invites unanswerable questions points to the error of a § 5 preclearance regime that defies reviewable administration. We are left with little hope of determining practically whether a districting shift to one party's overall political advantage can be expected to offset a loss of majority-minority voting power in particular districts; there will simply be greater opportunity to reduce minority voting strength in the guise of obtaining party advantage.

One is left to ask who will suffer most from the Court's new and unquantifiable standard. If it should turn out that an actual, serious burden of persuasion remains on the States, States that rely on the new theory of influence should be guaranteed losers: nonretrogression cannot be demonstrated by districts with minority influence too amorphous for objective comparison. But that outcome is unlikely, and if in subsequent cases the Court allows the State's burden to be satisfied on the pretense that unquantifiable influence can be equated with majority-minority power, § 5 will simply drop out as a safeguard against the "unremitting and ingenious defiance of the Constitution" that required the procedure of preclearance in the first place. *South*

Carolina v. Katzenbach.

III

The District Court never reached the question the Court addresses, of what kind of influence districts (coalition or not) might demonstrate that a decrease in majority-minority districts was not retrogressive. It did not reach this question because it found that the State had not satisfied its burden of persuasion on an issue that should be crucial on any administrable theory: the State had not shown the possibility of actual coalitions in the affected districts that would allow any retreat from majority-minority districts without a retrogressive effect. This central evidentiary finding is invulnerable under the correct standard of review….

A

The District Court began with the acknowledgement (to which we would all assent) that the simple fact of a decrease in black voting age population (BVAP) in some districts is not alone dispositive about whether a proposed plan is retrogressive….

This indisputable recognition, that context determines the effect of decreasing minority numbers for purposes of the § 5 enquiry, points to the nub of this case, and the District Court's decision boils down to a judgment about what the evidence showed about that context. The District Court found that the United States had offered evidence of racial polarization in the contested districts, and it found that Georgia had failed to present anything relevant on that issue….

B

How is it, then, that the majority of this Court speaks of "Georgia's evidence that the Senate plan as a whole is not retrogressive," against which "the United States did not introduce any evidence [in] rebut[tal]"? The answer is that the Court is not engaging in review for clear error. Instead, it is reweighing evidence *de novo,* discovering what it thinks the District Court overlooked, and drawing evidentiary conclusions the District Court supposedly did not see. The Court is mistaken on all points.

1

Implicitly recognizing that evidence of voting behavior by majority voters is crucial to any showing of nonretrogression when minority numbers drop under a proposed plan, the Court tries to find evidence to fill the record's gap. It says, for example, that "Georgia introduced evidence showing that approximately one-third of white voters would support a black candidate in [the contested] districts." In support of this claim, however, the majority focuses on testimony offered by Georgia's expert relating to crossover voting in the pre-existing rather than proposed districts….

2

In another effort to revise the record, the Court faults the District Court, alleging that it "focused too narrowly on proposed Senate Districts 2, 12, and 26." In fact, however, it is Georgia that asked the District Court to consider only the contested districts and the District Court explicitly refused to limit its review in any such

fashion…..

3

In a further try to improve the record, the Court focuses on the testimony of certain lay witnesses, politicians presented by the State to support its claim that the Senate plan is not retrogressive. Georgia, indeed, relied heavily on the near unanimity of minority legislators' support for the plan. But the District Court did not overlook this evidence; it simply found it inadequate to carry the State's burden of showing nonretrogression. The District Court majority explained that the "legislators' support is, in the end, far more probative of a lack of retrogressive *purpose* than of an absence of retrogressive *effect*" (emphasis in original)…. The District Court was clearly within bounds in finding that (1) Georgia's proposed plan decreased BVAP in the relevant districts, (2) the United States offered evidence of significant racial polarization in those districts, and (3) Georgia offered no adequate response to this evidence….

As must be plain, in overturning the District Court's thoughtful consideration of the evidence before it, the majority of this Court is simply rejecting the District Court's evidentiary finding in favor of its own….

4

… Knowing whether the number of majority BVAP districts increases, decreases, or stays the same under a proposed plan does not alone allow any firm conclusion that minorities will have a better, or worse, or unvarying opportunity to elect their candidates of choice. Any such inference must depend not only on trends in BVAP levels, but on evidence of likely voter turnout among minority and majority groups, patterns of racial bloc voting, likelihood of white crossover voting, and so on. Indeed, the core holding of the Court today, with which I agree, that nonretrogression does not necessarily require maintenance of existing super-majority minority districts, turns on this very point; comparing the number of majority-minority districts under existing and proposed plans does not alone reliably indicate whether the new plan is retrogressive.

Lack of contextual evidence is not, however, the only flaw in the Court's numerical arguments. Thus, in its first example, the Court points out that under the proposed plan the number of districts with majority BVAP increases by one over the existing plan, but the Court does not mention that the number of districts with BVAP levels over 55% decreases by four. Similarly, the Court points to an increase of two in districts with BVAP in the 30% to 50% range, along with a further increase of two in the 25% to 30% range. It fails to mention, however, that Georgia's own expert argued that 44.3% was the critical threshold for BVAP levels, and the data on which the Court relies shows [*sic*] the number of districts with BVAP over 40% actually decreasing by one. My point is not that these figures conclusively demonstrate retrogression; I mean to say only that percentages tell us nothing in isolation, and that without contextual evidence the raw facts about population levels fail to get close to indicating that the State carried its burden to show no retrogression. They do not come close to showing clear error.

5

Nor could error, clear or otherwise, be shown by the Court's comparison of the proposed plan with the description of the State and its districts provided by the 1990 census. The 1990 census is irrelevant. We have the 2000 census, and precedent confirms in no uncertain terms that the issue for § 5 purposes in not whether Georgia's proposed plan would have had a retrogressive effect 13 years ago: the question is whether the proposed plan would be retrogressive now. The Court's assumption that a proper § 5 analysis may proceed on the basis of obsolete data from a superseded census is thus as puzzling as it is unprecedented. It is also an invitation to perverse results, for if a State could carry its burden under § 5 merely by showing no retrogression from the state of affairs 13 years ago, it could demand preclearance for a plan flatly diminishing minority voting strength under § 5.

6

The Court's final effort to demonstrate that Georgia's plan is nonretrogressive focuses on statistics about Georgia Democrats. The Court explains that almost all the districts in the proposed plan with a BVAP above 20% have a likely overall Democratic performance above 50%, and from this the Court concludes that "[t]hese statistics make it more likely as a matter of fact that black voters will constitute an effective voting bloc." But this is not so. The degree to which the statistics could support any judgment about the effect of black voting in State Senate elections is doubtful, and even on the Court's assumptions the statistics show no clear error by the District Court.

[E]ven if we assume the data on Democratic voting statewide can tell us something useful about Democratic voting in State Senate districts, the Court's argument does not hold up. It proceeds from the faulty premise that even with a low BVAP, if enough of the district is Democratic, the minority Democrats will necessarily have an effect on which candidates are elected. But if the proportion of nonminority Democrats is high enough, the minority group may well have no impact whatever on which Democratic candidate is selected to run and ultimately elected…. Even in a situation where a Democratic candidate needs a substantial fraction of minority voters to win (say the population is 25% minority and 30% nonminority Democrats), the Democratic candidate may still be able to ignore minority interests if there is such ideological polarization as between the major parties that the Republican candidate is entirely unresponsive to minority interests. In that situation, a minority bloc would presumably still prefer the Democrat, who would not need to adjust any political positions to get the minority vote.

All of this reasoning, of course, carries a whiff of the lamp. I do not know how Georgia's voters will actually behave if the percentage of something is x, or maybe y, any more than the Court does. We are arguing about numerical abstractions, and my sole point is that the Court's abstract arguments do not hold up. Much less do they prove the District Court wrong.

IV

Section 5, after all, was not enacted to address abstractions. It was enacted "to shift

the advantage of time and inertia from the perpetrators of the evil to its victim," *Beer*…. Section 5 can only be addressed, and the burden to prove no retrogression can only be carried, with evidence of how particular populations of voters will probably act in the circumstances in which they live. The State has the burden to convince on the basis of such evidence. The District Court considered such evidence: it received testimony, decided what it was worth, and concluded as the trier of fact that the State had failed to carry its burden. There was no error, and I respectfully dissent.

Notes and Questions

1. For a careful study of the interaction of legal and political science issues raised in *Georgia v. Ashcroft*, see Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 NORTH CAROLINA LAW REVIEW 1517 (2002). Both the majority and dissenting opinions cited the Pildes article. See also *Metts v. Murphy*, previously published at 347 F.3d 346 (1st Cir. 2003), *withdrawn upon grant of reh'g en banc.*

2. The majority in *Georgia v. Ashcroft* writes: "The standard in § 5 is simple—whether the new plan 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" Simple? According to the case, what is a "retrogression" and how does that differ from the standard set forth in *Beer*? In what respects does the Court's conception of retrogression differ from the dissent's?

3. Who benefits from this decision? One beneficiary might be the Democratic party who can spread more reliably Democratic voters across a larger number of districts. The dissenters are concerned that in the longer run, "§ 5 will simply drop out as a safeguard against the 'unremitting and ingenious defiance of the Constitution' that required the procedure of preclearance in the first place." Is the dissenters' concern warranted?

4. The dissent is no doubt right that the majority's new test for non-retrogression will be much harder to administer than a test that simply counts the number of majority-minority districts. The Court said the old test was itself "fact intensive," but of course racially polarized voting is a relatively easy fact to determine through exit polling. The new standards set forth above involve measuring things for which either (1) there are no hard data (e.g., how much influence does a majority-minority member have in a legislature?) or no data at all (e.g., did the state decide to decrease the number of majority-minority districts because it had adopted a particular theory of representation or because it wanted to discriminate against minority voters?).

5. The majority remanded the case to the lower court for further proceedings under the new legal standard. Why did the majority not simply reverse the lower court and order the districting plan upheld on grounds that the lower court's factual findings were clearly erroneous? Perhaps the Court was worried about the burden on the Court itself in future cases. Had the Court reversed for clear error, it would have been the

second redistricting case in a row (the first being *Easley v. Cromartie*, discussed in the next chapter) in which the Court would have done so.

6. If Congress disagrees with the Court's interpretation of Section 5, it will have an opportunity to change it in 2007, when the provision comes up for renewal.

ADD THE FOLLOWING AT THE END OF THE *BOSSIER PARISH* CASE ON PAGE 228:

Note

Congress must decide whether to renew the preclearance provisions of Section 5 of the Voting Rights Act in 2007, when the provisions are currently set to expire. Commentators have begun to question whether Congress has the power to renew Section 5's preclearance provisions. Congress may act only pursuant to a power granted to it by the Constitution. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Supreme Court, over the dissent of Justice Black, upheld the original preclearance provisions of Section 5 as a valid exercise of Congressional power to "enforce" the Fifteenth Amendment. A similar enforcement power appears in Section 5 of the Fourteenth Amendment.

In recent years, the Supreme Court has undergone a "federalism revolution." It has read congressional power over the states much more narrowly than it had in cases such as *South Carolina v. Katzenbach*. The most important recent case for our purposes is *City of Boerne v. Flores*, 521 U.S. 507 (1997), where the Court explained that Congress' power under Section 5 of the Fourteenth Amendment is limited: "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." The Court further explained that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

Would a renewed Section 5 be "enforcing" the Fourteenth or Fifteenth Amendments, or would it be impermissibly substantive? Is a preclearance provision applied to a large number of jurisdictions "congruent and proportional" to violations of the Fourteenth or Fifteenth Amendments by the states? For a discussion of these issues, see Richard L. Hasen, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 120-36 (2003); Comment, Victor Andres Rodriguez, *Section 5 of the Voting Rights Act of 1965 After* Boerne*: The Beginning of the End of Preclearance*?, 91 CALIFORNIA LAW REVIEW 769 (2003); Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILLANOVA LAW REVIEW 1179 (2001); and Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WILLIAM AND MARY LAW REVIEW 725 (1998).

The Supreme Court's most recent case on Congressional enforcement power under the Fourteenth Amendment suggests that the Court may be more willing to uphold a Congressional Act when it attempts to prevent discrimination against a suspect class. *See Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003). *Hibbs*

appears to make it more likely that the Court would uphold renewed preclearance provisions as a valid exercise of Congressional power. See Richard L. Hasen, Congressional Power to Reenact Section 5 of the Voting Rights Act: The Evidentiary Quandary, Loyola-L.A. Public Research Paper 2003-19, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=450520.

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 251:

How should the population be counted to determine whether the minority group in question can constitute a majority of a compact district? In *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002), in the context of a Section 5 preclearance case, the court regarded voting age population as more relevant than total population, and also considered voter registration. These numbers did not vary greatly from each other in Georgia, where the minority group in question was African-Americans. In cases in which Latinos are in question, significant percentages are often recent immigrants, so that the Latino percentage of citizens is likely to be substantially below their percentage of the total population or voting age population.[9] For this reason, a three-judge District Court reviewing a Section 2 challenge by Latino voters to a California congressional and state Senate district, regarded citizen voting age population (CVAP, pronounced see-vap by aficionados) as the most relevant figure. *Cano v. Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002).

ADD THE FOLLOWING TO THE END OF NOTE 7 ON PAGE 253:

As a practical matter, polarized voting often presents difficult questions of proof, but in many of the Voting Rights Act cases in previous decades, it probably was strongly present. Now polarized voting may be less pervasive, especially in cases involving plaintiff groups other than blacks. Thus, in *Cano v. Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002), the court granted summary judgment against a Section 2 challenge to California districts brought by Latinos, largely for that reason:

> It is certainly not our view that racial discrimination no longer affects our political institutions or motivates any portion of the electorate of Los Angeles County. Still, the election returns offered by both sets of litigants reveal that in Los Angeles County, whites and other non-Latinos are currently far more willing to support Latino candidates for office than in the past. In short, at the outset of the 21st century, the data in the record before us paints [*sic*] a far more encouraging picture of racial voting attitudes than did the data in [a Los Angeles case from the 1980s].

It is perhaps noteworthy that the three-judge panel in *Cano* was made up of judges all generally regarded as liberal.

[9] The same could also be true if the plaintiff group consisted of Asian-Americans. However, concentrations of Asian-American populations large enough to be a majority in a legislative district are still relatively rare.

ADD THE FOLLOWING TO THE END OF NOTE 8 ON PAGE 256:

The correct citation for the then-forthcoming article cited at the end of Note 8 is Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 NORTH CAROLINA LAW REVIEW 1383 (2001).

In *Cano v. Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002), Latino plaintiffs challenging California congressional and state Senate districts under Section 2 presented expert testimony that the crucial factor determining Latinos' ability to elect candidates of their choice is the percentage of Latino voters in a Democratic primary. Although not reaching the issue, the *Cano* court expressed skepticism of this approach as a means of deciding the first prong of *Gingles*, saying (in footnote 28) that reliance on Democratic Party registration figures is "a measure that is unprecedented in redistricting law and raises difficult analytical questions, particularly in view of the existence of a number of Latino Republican office-holders in California, and of recent efforts by the California Republican Party to increase its share of the Latino vote and registration."

ADD THE FOLLOWING TO THE END OF NOTE 10 ON PAGE 258:

In *Cano*, in addition to their conventional *Gingles* claim, Latino plaintiffs also contended that the California legislature had intentionally limited the Latino population of a congressional and state Senate district in Los Angeles. The plaintiffs thus argued that under *Garza*, they were entitled to relief even if they could not meet the three prongs required by *Gingles*. The court declined to find legally cognizable intentional discrimination:

> Plaintiffs admit that they do not allege that defendants were motivated by racial hostility. Nor do they suggest that there was any desire to effectuate invidious racial discrimination generally. Although we assume, for summary judgment purposes, the truth of plaintiffs' intent evidence, and of their charge that the legislature sought to limit the number of Latino voters in the two districts at issue, given the background and record of California's 2001 redistricting, the evidence does not support an inference that the legislature intended to marginalize a racial group politically through invidious discrimination, or invidiously to maintain a system that perpetuates racial discrimination. Thus the intent appears not to be of the type that the Supreme Court held necessary for an intentional vote dilution claim in *Bolden*, *Rogers*, and *Bandemer*. Leaving aside plaintiffs' proffers, the other evidence as to intent reflects a complex set of legislative motivations that comprehended several goals, including protecting incumbents, ensuring adequate representation for Latinos and other minority groups thorough the establishment of majority-minority districts such as the new CD 38, and advancing partisan interests. Given the facts and circumstances in the record before us, including (1) the use of traditional districting principles to establish the districts in question, (2)

> the absence of any legal necessity to create another new majority-minority Congressional district in addition to the one being newly created in the redistricting statute, and (3) the high degree of Latino representation and participation in the redistricting process, we strongly doubt that the 2001 redistricting statute was a "purposeful device to further racial discrimination," in whole or in part. *Bolden*.

Despite this conclusion, the *Cano* court did not rest its grant of summary judgment for the defendants on its finding of no intentional discrimination. Rather, it addressed the question, left vague in *Garza*, of what discriminatory effects the plaintiffs must show in a Section 2 case if they are able to show intent to discriminate.

> [T]he effects standard for an intentional vote dilution claim is uncertain, largely because of a dearth of precedent. The cases provide little authority as to the requisite degree of dilutive effect for an intentional discrimination claim under either the constitution or the statute. This is so in part because direct evidence of discriminatory intent is relatively rare....
>
> Plaintiffs urge us to adopt a standard of effects in intentional vote dilution cases, both constitutional and statutory, that is considerably less demanding than that required in traditional § 2 cases. In support of this approach, plaintiffs cite *Garza*, a case that, like this one, included both constitutional and statutory intentional vote dilution claims. *Garza*, however, does not provide the clear direction that the plaintiffs assert it does. In that case, the court stated that a standard "less rigorous" than the § 2 effects standard applies to intentional vote dilution claims....
>
> We agree that, where invidious intent exists in a vote dilution, case, it may be appropriate to relax the first or even second of the *Gingles* pre-conditions, as well as to consider intent in connection with the "totality of circumstances" inquiry. We do not accept defendants' contention that in a case in which plaintiffs allege an intentional violation of the Fourteenth Amendment, proof of discrimination is wholly irrelevant. Nevertheless, plaintiffs in vote dilution cases must still show a practical effect on the minority group's ability to elect representatives of choice, whether or not intent is shown. In *Gingles*, the Court recognized this requirement of a practical effect primarily through the inclusion of pre-condition three—that in order to establish a traditional § 2 claim, a plaintiff must establish that a minority group's preferences are regularly defeated by a non-minority bloc of voters. In our view, the irreducible minimum in intentional vote dilution cases is similar.

Cano, 211 F. Supp. 2d at 1248-1250.

ADD THE FOLLOWING TO THE END OF NOTE 16 ON PAGE 273:

Partisanship provides a useful lens through which to evaluate three of the most-watched districting cases of the 2000s, in California, Georgia, and New Jersey. See *Cano v. Davis*, *supra*; *Georgia v. Ashcroft*, *supra*; *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001).

In each of these states, the districting process was more or less controlled by the Democrats, though with variations from state to state. Democratic control was most straightforward in Georgia, where Democrats in the legislature enacted the plan over Republican opposition. The Democrats also controlled the legislature and the governorship in California, but the plan was adopted with bipartisan support. The reason was that the Democrats had done so well in congressional and state legislative elections up to and including 2000 that they were content to consolidate their gains, rather than try to take more seats away from the Republicans. For their part, the Republicans supported the plan, in the belief that if they did not do so, the Democrats were likely to enact a plan that would be even worse for the Republicans. In New Jersey, the state legislature was redistricted by a commission, composed of five Democrats and five Republicans. The commission predictably deadlocked along partisan lines, in which event New Jersey law called for an 11th member to be appointed to the commission. The 11th member was Larry Bartels, a political scientist. Bartels sided with the Democrats.

The California plan was challenged by Latino plaintiffs. In Georgia and New Jersey, Republicans stood behind African-American plaintiffs. In each state, what gave rise to the controversy was that the plan reduced the minority population in certain districts, either to make the districts more comfortable for non-minority Democratic incumbents or to strengthen surrounding districts for the Democrats, at the cost of making the election of candidates favored by the minority groups in the challenged districts somewhat less certain than would have been the case if the minority populations had not been reduced.

In California and New Jersey, the plans were upheld. The final result in Georgia was the same, but in the District Court the state Senate plan was rejected. Though differences in the fact situations in each state and differences in the judges may have been part of the reason for the different outcomes in the lower courts, the main reason appears to be a legal one: Of the three states, only Georgia is subject to Section 5 of the Voting Rights Act, while in California and New Jersey, plaintiffs had to rely on Section 2.[10] The District Court in *Georgia v. Ashcroft* held that the reduction in black population constituted retrogression, whereas in California and New Jersey, equally or more consequential reductions in minority population survived attack under the *Gingles* test. Georgia is subject to Section 5 because of a past history of voting discrimination against blacks. Is that a good reason for inconsistent results in these states? In other words, one might believe that "friendly" reduction of minority percentages in selected districts for

[10] A few counties in California are subject to Section 5, but in the case of a statewide redistricting plan, only the districts affecting the covered counties need to be precleared. The districts in question in *Cano* were in Imperial, Los Angeles, and San Diego Counties, none of which is subject to Section 5.

incumbent-protection or partisan purposes should be permitted, or one might believe it should be prohibited. But is the past discrimination in Georgia a good reason for prohibiting it there and permitting it in California and New Jersey?

Whether such concerns may have influenced the Supreme Court in *Georgia v. Ashcroft* is a matter of speculation. One thing is certain: *Georgia v. Ashcroft* represents a challenge to those who believe Supreme Court results in voting rights cases are driven by partisanship. The five conservative justices upheld a plan adopted by Democrats and supported by liberal black politicians. The four liberal justices would have furthered the interests of Republicans by striking down that plan.

For an account of the New Jersey litigation written by one of the lawyers in the case, see Sam Hirsch, *Unpacking* Page v. Bartels: *A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION LAW JOURNAL 7 (2002).

Chapter 7. Racial Gerrymandering

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 306:

For criticism of the racial gerrymandering cases on the ground that they do not fulfill the goals favored by writers such as Blumstein and Butler, see Melissa L. Saunders, *The Dirty Little Secrets of* Shaw, 24 HARVARD JOURNAL OF LAW & PUBLIC POLICY 141 (2000).

ADD THE FOLLOWING TO THE END OF NOTE 8 ON PAGE 312:

Is the standing requirement of *Hays* applicable to plaintiffs bringing a partisan gerrymandering challenge under *Davis v. Bandemer* (Chapter 5)? That is, should the plaintiffs in such an action be required to show that they reside in a district that has been gerrymandered for partisan purposes? See *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 539-40 (M.D. Pa. 2002).

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 332:

In Mississippi, the state legislature failed to adopt a congressional redistricting plan. Democrats initiated litigation in a state court, which adopted a plan. While that plan was under submission to the Justice Department for preclearance, Republicans filed a federal action, in which the Democratic plaintiffs in the state action intervened. The federal three-judge District Court decided that under the circumstances, it would adopt a congressional plan for Mississippi. The Democratic intervenors argued that under *Upham*, the court should defer to state policy and adopt the plan that the state court adopted. In *Smith v. Clark*, 189 F. Supp. 2d 529 (S.D. Miss. 2002), the federal court declined to defer and adopted its own plan, which differed from one the Republican plaintiffs had submitted but to which the plaintiffs did not object. The federal court gave two reasons for declining to defer to the state-court plan. First, it was actually drawn by the Democratic plaintiffs in the state action (and intervenors in the federal action) and was adopted by a single judge. Second, it had not been precleared. The Supreme Court affirmed on the second ground only. See this Supplement, Chapter 5.

ADD THE FOLLOWING AT THE END OF THE CHAPTER, ON PAGE 354:

Notes and Questions

1. While this case was pending before the Supreme Court, North Carolina Governor James Hunt was replaced in office by Mike Easley. The case was nevertheless reported in the *Supreme Court Reporter* advance sheets under the name *Hunt v. Cromartie*, and the editors were informed by the Supreme Court Clerk's Office that the case would be reported in the *U.S. Reports* under that name. However, the case appeared in the *U.S. Reports* as *Easley v. Cromartie*, 532 U.S. 234 (2001), and therefore it should be cited under that name.

For commentary on the decision, see Melissa L. Saunders, *A Cautionary Tale:* Hunt v. Cromartie *and the Next Generation of* Shaw *Litigation*, 1 ELECTION LAW JOURNAL 173 (2002). For a perspective on the case written before the Court's decision, see Guy-Uriel E. Charles and Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium:* Hunt v. Cromartie *as a Case Study*, 58 WASHINGTON AND LEE LAW REVIEW 227 (2001)

2. In *Cano v. Davis*, 211 F. Supp. 2d 1208, (C.D. Cal. 2002), *summarily aff'd.*, 123 S. Ct. 851 (2003), Latino plaintiffs asserted a *Shaw* claim against two California congressional districts represented by white Democrats. The plaintiffs alleged that to protect these incumbents against potential Latino challengers in primaries, the legislature removed sufficient Latino precincts from their districts to assure that the Latino percentage of the population did not exceed a certain amount. The three-judge District Court rejected this claim on a summary judgment motion, stating that a legislatively-imposed ceiling on the percentage of Latino residents in a district might implicate a dilution claim but not the "analytically distinct" claim of racial gerrymandering. In footnote 9 of its opinion the court made clear that it was not holding that only white plaintiffs could bring *Shaw* claims, but went on to explain:

> [T]he rationale underlying *Shaw* is simply inapplicable to the districts at issue here. Plaintiffs' two *Shaw* claims are not addressed to the types of districts ordinarily at issue in the Supreme Court's racial gerrymandering cases. For one, these are not race-based districts that "balkanize us into competing racial factions" or deliberately segregate voters into separate racial enclaves. *Shaw I*. They cannot, under any fair reading, be characterized as "white districts" or "Caucasian districts." Nor are they districts that can only be reasonably understood to "belong" to one ethnic or racial group.
>
> To the contrary, the districts at issue here are diverse and multi-ethnic: each contains a variety of racial and ethnic groups; none unites any single group of individuals within its boundaries for the purpose of permitting that group to exercise hegemony. In fact, Latinos are the largest number of persons in any single racial or ethnic group in each district, and the number of whites in each case is substantially lower.

Chapter 8. Ballot Propositions

ADD THE FOLLOWING TO THE FIRST PARAGRAPH ON PAGE 392:

For an exhaustive analysis of the Florida Supreme Court's activism in its treatment of initiatives, see Thomas Rutherford, *The People Drunk or the People Sober? Direct Democracy Meets the Supreme Court of Florida*, 15 ST. THOMAS LAW REVIEW 61 (2002).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 413:

In *Manduley v. Superior Court*, 27 Cal.4th 537, 117 Cal.Rptr.2d 168, 41 P.3d 3 (Cal. 2002), the California Supreme Court upheld a lengthy initiative that addressed sentencing of repeat criminal offenders (by amending California's "three-strikes" law), gang-related crime, and the juvenile justice system. The common purpose was said to be addressing the problem of juvenile and gang-related crime, but not "simply to reduce crime generally." The court then said that this was a subject or goal that "clearly is not so broad that an unlimited array of provisions could be considered relevant thereto. Indeed,... in previous decisions we have upheld initiatives containing various provisions related to even broader goals in the criminal justice system." The court was willing to overlook the fact that the juvenile procedure provisions applied to juveniles who were not members of gangs, that the majority of gang members affected by the gang provisions were not juveniles, and that changes to the three-strikes law applied equally to adults and juveniles.

Does *Manduley* represent a retreat from *Jones*? Not overtly, but then *Jones* did not overtly represent a departure from *FPPC* and other California cases. It is undoubtedly too early to say, especially in light of the criticism offered by some that aggressive application of the single-subject rule inevitably entails inconsistent and even arbitrary results. One possible clue to the different results in *Jones* and *Manduley* is the court's statement that the provisions in the latter case do not "comprise 'a most fundamental and far-reaching change in the law' that clearly represents a single subject upon which a clear expression of the voters' intent is essential," quoting from *Jones*. If initiatives are more likely to violate the single-subject rule because one or more of their provisions are "fundamental and far-reaching," then the single-subject rule will come to resemble the constitutional revision doctrine, discussed in Note 2 on Page 400 of the Casebook.

MAKE THE FOLLOWING CHANGE IN NOTE 3 ON PAGE 413:

The correct citation for the then-forthcoming article quoted in this paragraph is 1 ELECTION LAW JOURNAL 35 (2002).

ADD THE FOLLOWING TO NOTE 6 BEFORE THE FIRST FULL PARAGRAPH ON PAGE 416:

The Oregon Supreme Court continues to apply the separate vote requirement with rigor. In *Lehman v. Bradbury*, 37 P.3d 989 (Or. 2002), it struck down an initiative that had been approved ten years earlier (!) and purported to impose term limits on executive and legislative elected officials in state government and on members of Congress elected from Oregon. Congressional term limits were later found unconstitutional in *U.S. Term Limits v. Thornton* (see Casebook, p. 649), but the Oregon court regarded that fact as immaterial to whether the initiative put before the voters in 1992 contained more than one amendment to the state constitution. The court rejected a lower court's determination that because a vote for one of the distinct term limits did not "necessarily imply" a vote for the other limits, they should be regarded as violative of the separate vote requirement. However, the court did conclude that changes "in the term limits for state executive officers and the creation of such limits for state legislators and for members of Congress are at least two substantive changes to the constitution."

The court assumed without deciding that term limits for the various state elected officials could be regarded as "closely related" enough to each other to constitute a single amendment, but held that congressional term limits required a separate amendment. The main reason given was that there were existing provisions in the Oregon Constitution regarding the qualifications of state elected officials while qualifications for members of Congress were entirely new. However, after setting forth this point at length, the court acknowledged that "[n]ewness, in and of itself, may be a neutral factor." What, then, was the rationale for the decision? Simply the conclusory statement that congressional term limits "had little or nothing to do with" term limits for state officers?

ADD THE FOLLOWING TO THE END OF NOTE 7 ON PAGE 416:

Washington can probably be added to the list of states whose courts have applied the single-subject rule with a new stringency. In *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762 (Wash. 2000), and *City of Burien v. Kiga*, 31 P.3d 659 (Wash. 2001), the Washington Supreme Court purported to apply a test under which an initiative would be upheld if "a rational unity among the matters addressed in the initiative exists." However, in each case, the court struck down an initiative that combined a provision to deal with an immediate matter and a provision that would have a broader and more permanent effect. In *Amalgamated*, the initiative combined a fixing of annual vehicle license fees at $30 with a general requirement that future tax and fee increases be subject to popular vote. In *Burien*, the initiative combined a nullification of a series of tax increases adopted in the year 1999 with a limitation on future annual increases in property taxes to 2 percent. The court struck down both initiatives while acknowledging that each related to a single "general topic," tax limitation in *Amalgamated* and tax relief in *Burien*.

Chapter 9. Major Political Parties

ADD THE FOLLOWING BEFORE THE FINAL PARAGRAPH OF NOTE 3 ON PAGE 449:

The Australian Democrats, a minor party in that country, have a provision in their constitution requiring that if a party nominee is elected to Parliament and then resigns from the party, he or she must also resign from Parliament. Should such a provision be enforced if the member resigns from the party but seeks to retain the parliamentary seat? If so, by whom? By a court? By the parliamentary chamber? For discussion, see Graeme Orr, *A politician's word: the legal (un)enforceability of political deals*, 5 CONSTITUTIONAL LAW & POLICY REVIEW 1 (2002).

ADD THE FOLLOWING NOTE BEFORE NOTE 1 ON PAGE 476:

0.5. Connecticut law now allows the parties to open their primaries to nonmembers, but the rules of both major parties allow only registered members to vote. See Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUPREME COURT REVIEW 95, 120.

ADD THE FOLLOWING NOTES AFTER NOTE 1 ON PAGE 492:

1.1. Consider Note 8 of the majority opinion in *Jones*, suggesting that blanket primaries might be constitutionally distinct from open primaries, in which voters can ask for the ballot of whichever party they desire but at a given primary can select only one party's ballot. In *Arizona Libertarian Party v. Board of Supervisors of Pima County*, 216 F. Supp. 2d 1007 (D. Ariz. 2002), the District Court granted summary judgment to the Libertarian Party, which objected to an initiative measure that partially opened primaries in Arizona, by allowing independents to vote in primaries. However, the court's rationale apparently depended on the fact that in Arizona, primary voters selected not only nominees for public office but also party officials. The court wrote:

> In this case, Arizona, like California, has important interests in regulating political parties within the state and in increasing voter participation. This Court recognizes as laudable Arizona's efforts to improve voter participation by including independent and other voters in Arizona's primary elections and also recognizes that, under *Jones*, there may be open primary election systems which do not unconstitutionally impair a political party's freedom of association. However, in this case Arizona's system has failed to achieve the critical balance between a state's interests in regulating elections and its political parties' associational rights because Arizona's primary system allows voters who refuse to formally affiliate with a party through voter registration to choose that party's internal leadership.

Would the state be able to impose an open primary on a party that preferred a closed primary if the primary were limited to nominating candidates for public office? Would that result be consistent with *Tashjian*?

On appeal, the Ninth Circuit held that it was unconstitutional for Arizona to require party officials to be chosen in open primaries, but remanded the case to the district court for additional factual findings on the constitutionality of applying the open primary for choosing party nominees. *Arizona Libertarian Party v. Bayless*, 2003 WL 22881707 (9th Cir. Dec. 8, 2003). The upshot of the remand appears to be that the open primary will remain in effect for the 2004 primary season in Arizona.

1.2. Under *Jones*, what are the constitutional limits on the ability of a state to permit nonparty members to affect the nomination processes of a party? Is it unconstitutional to permit nonparty members to initiate a challenge to a candidate's nominating petitions for the primary? Not according to *Queens County Republican Committee v. New York State Board of Elections*, 222 F. Supp. 2d 341 (E.D.N.Y. 2002).

ADD THE FOLLOWING AFTER NOTE 5 ON PAGE 494:

6. You may at this point wish to think in general terms about the pros and cons of judicial oversight of political parties and the laws regulating them. One scholar, at least, has expressed considerable skepticism:

> Not only do political parties adapt to new circumstances, but most other aspects of the political environment also change over time. These changes then further affect political parties. The interactions and feedback effects increase the dynamic complexity facing courts and virtually guarantee that judicial decisions in this arena will have unforeseen consequences for all facets of government. Adjudication is a blunt and often counterproductive tool. Courts do not have the resources to gather reliable information about the political environment or to make accurate predictions about the likely effects of their rulings on parties and other institutions. Courts are presented only with a partial picture and often cannot grasp the entirety of a problem. Moreover, if the system adapts to a particular ruling in unexpected ways, courts do not have the ability to modify the law unless someone brings a case that allows adjustment. In an area of rapidly changing institutions and complex relationships among entities, the ability to revise policy over time, engage in new and expanded fact-finding, and make decisions incrementally can be crucial to success. None of these features plays to the strengths of the courts…

Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUPREME COURT REVIEW 95. Garrett therefore takes the view that judicial review "in political party cases should be limited to only the most extreme cases in which one segment of a party works successfully, perhaps with other party entities, to impose anticompetitive

structures." Do you agree? Garrett bases part of her argument on cases involving minor parties, so you may wish to revisit this question after studying Chapter 10.

Chapter 10. Third Parties and Independent Candidates

ADD THE FOLLOWING TO THE END OF THE PARAGRAPH BEFORE THE *MUNRO* DECISION ON PAGE 526:

For an argument that the Court made numerous factual errors in deciding *Jenness* and that the decision has had lasting negative influences on the ballot access cases, see Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of* Jenness v. Fortson, 1 ELECTION LAW JOURNAL 235 (2002).

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 535:

For an exploration of these issues, see Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEORGETOWN LAW JOURNAL 2181 (2001).

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 545:

4.5. New York City conducts its Democratic and Republican primaries using voting machines but requires the use of paper ballots for the Green Party's primary. Does this practice violate equal protection under *Bush v. Gore*'s equal protection holding described in Chapter 4? For an answer in the negative, see *Green Party of New York v. Weiner*, 216 F. Supp.2d 176 (S.D.N.Y. 2002).

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 556:

Pildes and Issacharoff have separately responded to criticisms of their "political markets" approach in ways that suggest the two authors have diverged on how far their approach goes. In Richard H. Pildes, *The Theory of Political Competition*, 85 VIRGINIA LAW REVIEW 1605 (1999), Pildes responds to an argument by Bruce Cain, *Garrett's Temptation*, 85 VIRGINIA LAW REVIEW 1589, 1600 (1999), to the effect that the logical implication of the approach is court-mandated proportional representation. Pildes lists a number of "countervailing values [that] could be marshaled against judicial imposition of proportional representation," including original intent, history, and the importance of public acceptability of judicial decisions.

In Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARVARD LAW REVIEW 593 (2002), Issacharoff calls upon the courts to strike down virtually all legislative districting conducted by partisan officials as unconstitutional, leading to districting conducted solely by nonpartisan commissions or by computer. To Issacharoff, the risk of gerrymandering is that it "constrict[s] the competitive processes by which voters can express choice."

Nathaniel Persily disagrees with Issacharoff on the question whether gerrymandering stifles political competition. Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-*

Protecting Gerrymanders, 116 HARVARD LAW REVIEW 649 (2002). Launching a broader attack on the political markets approach is Richard L. Hasen, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 138-56 (2003). Hasen sees connections between the Supreme Court's "structural equal protection" jurisprudence in *Shaw v. Reno* and *Bush v. Gore* and the "political markets approach," finding both "symptomatic of a belief in unlimited judicial wisdom."

Chapter 11. Campaigns

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 578:

For a case confirming that actual malice is required to sanction candidate speech, see *Ancheta v. Watada*, 135 F. Supp. 2d 1114, 1122 (D. Hawaii 2001). The court rejected the argument that Hawaii's regulation of candidate speech could be justified on grounds of preventing candidates from being discouraged from running for public office.

ADD THE FOLLOWING TO THE END OF NOTE 9 ON PAGE 580:

The Supreme Court took up the issue of judicial campaign speech in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). In *White*, the Court by a 5-4 vote struck down a Minnesota judicial rule that prohibited candidates for judicial election from "announcing" their views on political or legal issues. The state had asserted the ban was necessary to promote judicial impartiality and the appearance of impartiality in the judiciary. Applying strict scrutiny, the Court held the rule violated the First Amendment because it was not narrowly tailored to promote a compelling state interest.

The Court considered three different meanings of "impartiality." It first held that the rule did not serve to further impartiality in the sense of lack of bias for or against particular *parties* likely to come before the judge because the rule targeted *issues*, not parties. As for impartiality as a "lack of preconception in favor or against a particular *legal view*," the Court held the interest was not compelling.

> A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. … Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so…. And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either.

Finally, the Court rejected the idea that the rule was justified to preserve judicial openmindedness:

> The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of openmindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.

Justice O'Connor concurred, but expressed her belief that judicial elections are undesirable. Justice Kennedy filed a concurring opinion as well, in which he, among other things, distanced himself from Justice O'Connor's remarks.

Justice Stevens and Justice Ginsburg filed dissenting opinions, both joined by Justices Breyer and Souter. Justice Stevens wrote: "By obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by failing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court defies any sensible notion of the judicial office and the importance of impartiality in that context." Justice Ginsburg wrote: "I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons. Minnesota's choice to elect its judges, I am persuaded, does not preclude the State from installing an election process geared to the judicial office."

The Court majority was careful to note that it was not striking down rules preventing judges from making *explicit promises* in campaigns. Given the logic of *White*, are such rules constitutional under the First Amendment? If the state can no longer forbid a candidate from saying "I think it is constitutional for the legislature to prohibit same-sex marriages," what interest is served by a state law that prevents the candidate from saying, "If elected, I promise to rule that it is constitutional for the legislature to prohibit same-sex marriages"? In discussing campaign promises, Justice Scalia remarked: "one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment." If so, by what logic may they be banned?

New York's judicial conduct rules have been subject to conflicting judicial analysis after *White*. *Compare Spargo v. New York State Commission of Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y 2003) (striking down provisions of New York judicial code prohibiting certain partisan political activity by judges) *with In re Raab*, 793 N.E.2d 1287 (N.Y. 2003) (upholding provisions of New York judicial code prohibiting certain partisan political activity by judges) *and In re Watson*, 794 N.E.2d 1 (N.Y. 2003) (upholding provisions of New York judicial code prohibiting judicial candidates from making campaign promises). The Second Circuit vacated the district court ruling in *Spargo* without reaching the merits, holding that the federal courts should abstain from deciding the case. *Spargo v New York State Commission of Judicial Conduct,* 351 F.3d 65 (2d Cir. 2003).

Chapter 12. Incumbency

ADD THE FOLLOWING TO THE END OF SECTION 2 OF THE NOTE ON "INCUMBENCY AND ELECTORAL COMPETITION" ON PAGE 615:

A recent study considered the incumbency advantage in state executive and legislative elections as well as congressional elections from 1942-2000. The authors concluded that changes in the incumbency advantage tended to come at about the same times in all the types of elections they studied. This is potentially an important finding, because it casts considerable doubt on all assertions that the increases in the incumbency advantage in elections for the House of Representatives are caused by factors specific to the House or to Congress or to national elections generally. See Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. House Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 ELECTION LAW JOURNAL 315 (2002).

Chapter 14. Introductory Readings on Campaign Finance

ADD THE FOLLOWING TO END OF THE FIRST FULL PARAGRAPH ON PAGE 706:

According to Candice J. Nelson, *Spending in the 2000 Election*, in FINANCING THE 2000 ELECTION 22-24 (David B. Magleby, ed. 2002), the total amount spent in 1999-2000 on all election activity was just under $4 billion, well below the preliminary figure of $5.5 billion and below the adjusted $4.6 billion figure for the 1995-1996 cycle.

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 744:

2.5. Claiming that "[l]egal academics who call for campaign finance reform…have overlooked the significance of race," Spencer Overton argues in an important new article that a focus on race significantly bolsters the equality argument for such regulation. Spencer Overton, *But Some are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEXAS LAW REVIEW 987 (2002). According to Overton, "[e]xisting frameworks fail to acknowledge that past state-mandated discrimination against racial minorities has shaped the current distribution of property, which in turn hinders the ability of many people of color to participate fully in a privately financed political system….By using the First Amendment to undermine legislative restrictions on the use of political money, courts effectively enshrine the existing distribution of property as a baseline for political advantage." *Id*.

See also Terry Smith, *Race and Money in Politics*, 79 NORTH CAROLINA LAW REVIEW 1469 (2001). The Smith article is part of a symposium, *Democracy in a New America*, and includes commentaries on the article by Samuel Issacharoff, Daniel H. Lowenstein, and Spencer Overton.

Chapter 15. Contribution and Expenditure Limits, Round 1

ADD THE FOLLOWING TO THE END OF THE CARRYOVER PARAGRAPH AT THE TOP OF PAGE 748:

A recent article explores the drafting history of *Buckley* in detail. It turns out that the opinion was drafted by a committee of Justices. See Richard L. Hasen, *The Untold History of* Buckley v. Valeo, 2 ELECTION LAW JOURNAL 241 (2003).

Chapter 16. Money and Ballot Propositions

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 800:

Has the Supreme Court changed its views regarding the First Amendment rights of corporations to engage in electoral activities? Consider *Federal Election Commission v. Beaumont*, 123 S. Ct. 2200 (2003). In particular, consider the relevance, if any, of *Beaumont*'s footnote 8:

> Within the realm of contributions generally, corporate contributions are furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members, see*, e.g., NAACP v. Alabama*, and of the public in receiving information, see, *e.g., Bellotti.* A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions and deprives the public of little or no material information.

Might a ban on corporate *expenditures* be said to "leave individual members of corporations free to make their own contributions [and expenditures] and deprive[] the public of little or no material information"? If so, what is left of *Bellotti*? If not, what is the difference between corporate contributions and expenditures under *Beaumont*'s view of the First Amendment? Consider these questions again after reading excerpts from the Supreme Court's recent decision, *McConnell v. Federal Election Commission.*

ADD THE FOLLOWING TO NOTE 2 ON PAGE 813:

In recent years, Congress has inserted a provision known as the Barr Amendment into the District of Columbia appropriation law. The Barr Amendment prohibits the District from spending money "to enact or carry out" any law legalizing or reducing penalties associated with certain controlled substances, including marijuana. In *Marijuana Policy Project v. District of Columbia Board of Elections and Ethics*, 191 F. Supp. 2d 196 (D.D.C. 2002), plaintiffs sought to circulate an initiative petition that would legalize marijuana under some circumstances. The D.C. Board of Elections and Ethics refused to certify the petition for circulation because the attendant expenses would violate the Barr Amendment. The court acknowledged that Congress had power to prevent the carrying out of the proposed initiative, but relied on *Meyer v. Grant* to require the Board to permit plaintiffs to seek to qualify their measure for the ballot. Were plaintiffs' speech rights infringed? The District Court thought so: "Circulation of a Board-approved petition necessarily involves expressive interaction with the public." But the D.C. Circuit disagreed in *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002): The Barr Amendment "restricts no speech; to the contrary, medical marijuana advocates remain free to lobby, petition, or engage in other First Amendment-protected activities to reduce marijuana penalties. The Barr Amendment merely requires that, in order to have legal effect, their efforts must be directed to Congress rather than to the D.C. legislative process." Is the Court of Appeals' reasoning consistent with *Meyer*?

Chapter 17. Targeted Regulations

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 868:

To take advantage of the *MCFL* exception, must a not-for-profit organization have an official policy not to accept corporate contributions? See *Federal Election Commission v. National Rifle Association*, 254 F.3d 173 (D.C. Cir. 2001).

ADD THE FOLLOWING AFTER NOTE 11 ON PAGE 870:

12. One question left open after *MCFL* was whether it is permissible for the government to limit campaign *contributions* by corporations entitled to an *MCFL* exemption from the ban on direct corporate expenditures. In *Federal Election Commission v. Beaumont*, 123 S. Ct. 2200 (2003), the Supreme Court held it was permissible to ban such contributions. The opinion also contained language suggesting that *Austin* remained good law, a point made explicit in *McConnell v. Federal Election Commission*, discussed in this Supplement to Chapter 19.

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 880:

In 2000, the California Legislature proposed and the voters approved a new campaign finance regulation including a ban on contributions by lobbyists, modified just as the last paragraph of Note 2 suggests. That is, the first two objections in *FPPC v. Superior Court* were obviated by a provision limiting the prohibition to lobbyists who were registered to lobby before the official's or candidate's agency, such as the legislature or the Attorney General's office. In addition, administrative regulations adopted since *FPPC v. Superior Court* was decided had narrowed the definition of lobbyist in some respects. But the new prohibition, like the old one, was an absolute ban, with no exceptions for small contributions or contributions made when the legislature was out of session. Is the new prohibition constitutional? See *Institute of Governmental Advocates v. Fair Political Practices Commission*, 164 F. Supp. 2d 1183 (E.D. Cal. 2001).

ADD THE FOLLOWING TO THE END OF THE FIRST PARAGRAPH OF NOTE 3 ON PAGE 880:

In *Casino Association of Louisiana v. State*, 820 So.2d 494 (La. 2002), cert. denied *sub nom. Casino Association of Louisiana v. Louisiana*, 123 S. Ct. 1252 (2003), the Louisiana Supreme Court upheld a law barring campaign contributions by casinos. The court both distinguished and questioned the reasoning of its earlier *Penn* decision.

Chapter 18. Parties, Soft Money, and Issue Advocacy

ADD THE FOLLOWING TO THE END OF NOTE 4 ON PAGE 913:

The Supreme Court rejected Smith's reasoning in *McConnell v. Federal Election Commission*, discussed below.

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 921:

The FEC's coordination rules came in for strong criticism in James Bopp, Jr. and Heidi K. Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way to Regulate Issue Advocacy?*, 1 ELECTION LAW JOURNAL 209 (2002). Bopp and Abegg believe the new FEC regulations went too far. Congress apparently believed they did not go far enough. As part of recently passed campaign finance legislation (see this Supplement below describing The Bipartisan Campaign Reform Act of 2002), Congress ordered the repeal of the regulations and the promulgation of new regulations that "shall not require agreement or formal collaboration to require coordination." BCRA, § 214(b)-(c). For a response to Bopp and Abegg, see Grant Davis-Denny, *The Constitutionality of Regulating Coordinated Issue Advocacy: A Reply to James Bopp, Jr. and Heidi K. Abegg's* The Developing Constitutional Standards for 'Coordinated Expenditures,' 2 ELECTION LAW JOURNAL 367 (2003).

ADD THE FOLLOWING TO THE END OF PAGE 922:

In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA), an effort to regulate both soft money and issue advocacy. An extensive discussion of the Act and a constitutional challenge to it appears in this Supplement to Chapter 19, following the *Shrink Missouri* case, a case that turned out to be of central importance in the constitutional challenge to BCRA.

Chapter 19. Contribution and Expenditure Limits, Round 2

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 947:

Following *Shrink Missouri*, the Sixth Circuit upheld Akron, Ohio's campaign contributions limits as low as $100 in some races. "[W]e hold that the contribution limits in the [Akron ordinance] are not 'so radical in effect to render political association ineffective' or 'contributions pointless,' and therefore do not violate the First Amendment right of association." *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002), cert. denied *sub nom. City of Akron v. Kilby*, 123 S. Ct. 968 (2003). One judge, dissenting in part, criticized the majority for failing to provide any limiting principle: "Under the majority's rationale, there apparently would be no constitutionally significant difference between a law imposing a $1,000 contribution limit and one imposing a $1 limit." The judge urged the majority to examine some of the pre-*Shrink Missouri* cases regulating the *amount* of contribution limits. Do these cases, described on pages 923-24 in the Casebook, survive the Court's *Shrink Missouri* opinion?

ADD THE FOLLOWING AFTER NOTE 5 ON PAGE 948:

6. Consider the relevance of the *Shrink Missouri* case to the Supreme Court's consideration of the Bipartisan Campaign Reform Act of 2002.

The Bipartisan Campaign Reform Act of 2002

Background on Passage of the Act and Its Major Provisions

After six years of failed attempts, and with impetus from the scandal involving the Enron corporation, Congress passed the most significant campaign finance changes since 1974. The campaign finance bills had been known as the "McCain-Feingold" or "Shays-Meehan" bills before passage (named for their primary sponsors in the Senate and House, respectively), but campaign finance practitioners now refer to the law under its official title, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81, or "BCRA." The entire text of the act may be found at: http://www.law.stanford.edu/library/campaignfinance/107.155.pdf.

The law is quite complex and a whole book could be devoted to constitutional and statutory questions related to it. See Robert Bauer**,** MORE SOFT MONEY, HARD LAW: THE SECOND EDITION OF THE GUIDE TO THE NEW CAMPAIGN FINANCE LAW (2004) (offering, with good humor, some statutory interpretation). We focus here only on the major provisions, which took effect after the November 2002 elections (more detailed descriptions of the major provisions appear in the excerpts from the Supreme Court's opinions below):

- A *soft money ban* applicable to the national committees of political parties and a ban on solicitation of soft money by "any officer or agent acting on behalf of such a national committee." § 323(a).

- *A requirement that state and local parties generally pay for "Federal election activity" with money raised under federal limits* (hard money). § 323(b). A provision known commonly as the "Levin Amendment" (named for the Senator who proposed it) allows state and local parties (subject to state law requirements) to raise up to $10,000 in contributions from "persons" to partially fund certain campaign activity that might be considered "Federal election activity." Among other requirements, the activity funded with Levin money cannot refer to clearly identified candidates for federal office.

- A *redefinition of the line between express advocacy and issue advocacy* so as to require *disclosure* of "electioneering communications" meeting certain dollar thresholds. The statute defines "electioneering communications as "any broadcast, cable, or satellite communication" which "refers to a clearly identified candidate for federal office" made within 60 days of a general election or 30 days before a primary, and, in the case of candidates other than for President or Vice-President, is "targeted to the relevant electorate." § 201(a). If the provision is struck down as unconstitutional, the backup definition of "electioneering communications" in the Act applies to "any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office, (regardless of whether the communication expressly advocates a vote for or against a candidate) and which is also suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

- A *prohibition* on corporate or labor union "electioneering communications" as defined above except through *separate segregated funds*. § 203. The definition appears to include non-profit, ideologically oriented tax-exempt corporations like the Massachusetts Citizens for Life.

- A *prohibition* on electioneering communications by *unincorporated* tax-exempt organizations who take labor or union funding. The BCRA is especially convoluted on this point. Section 203 prevents "any other person using funds donated by" a labor union or corporation from making electioneering communications. (The statute does not specify whether the person "using" such funds must "use" them for electioneering communications to come within the ambit of the statute.) Although section 203 contains an exception for tax-exempt organizations that fund such communications solely out of individual contributions from American citizens or permanent residents, section 204 removes the exception,[11] meaning no

[11] One might wonder why Congress created an exception in Section 203 only to take it away in Section 204. The answer is the politics of the debate over passage of the BCRA in the Senate. Section 204 began as an amendment proposed by Senator Paul Wellstone, a liberal Democrat. The "Wellstone Amendment" passed, despite opposition by the bill's sponsors, Senators McCain and Feingold, through support from Senators who ultimately voted against the legislation, including the leading opponent of the legislation, Senator Mitch McConnell. Why do you suppose Wellstone proposed the amendment? Why do you suppose McConnell supported it?

entity that takes labor union or corporate money may make "electioneering communications."

- *An increase in individual contribution limits* from $1,000 to $2,000, now indexed to inflation, and an increase in the aggregate limit on campaign contributions for federal campaigns. § 307. These limits rise for contributions to a candidate who faces an opponent spending a large amount of his personal funds. § 304 (Senate); § 319 (House). These latter provisions have been referred to as "the Millionaire's Amendments."

The Litigation

President Bush signed the BCRA into law despite reservations about the constitutionality of several of its provisions (see his statement on signing at http://www.whitehouse.gov/news/releases/2002/03/20020327.html). Immediately upon the BCRA's passage, it was challenged in federal court, first by the National Rifle Association and then by a varied collection of groups and individuals including Senator Mitch McConnell, a leading opponent of campaign finance regulation. The cases were consolidated under the name *McConnell v. Federal Election Commission,* and heard, under expedited procedures set forth in the Act, by a three-judge district court in Washington D.C. with direct appeal to the Supreme Court. The three judges hearing the case were District Court judges Colleen Kollar-Kotelly and Richard Leon and D.C. Circuit Court judge Karen LeCraft Henderson.

The three-judge court heard oral argument on December 4 and 5, 2002. Most outside observers expected the Court to issue a ruling by late January or early February 2003, based upon comments made by one of the judges on the panel. Those dates passed without an opinion issuing and without explanation from the court.

The district court finally issued its ruling in the case on May 2, 2003, *McConnell v. Federal Election Commission*, 251 F. Supp. 2d 176 (D.D.C. 2003) (per curiam) (an opinion dated May 1, 2003). The three judges on the panel issued four opinions totaling an astounding 1,638 typescript pages (a mere 774 pages in the printed volume). The first opinion was a per curiam opinion by Judges Kollar-Kotelly and Leon dealing with general issues and the some of the law's disclosure provisions. Judge Kollar-Kotelly issued her own opinion and Judge Leon issued his own opinion concurring in part and dissenting in part from the per curiam opinion. Judge Henderson, who did not join the per curiam opinion, issued her own opinion concurring in the judgment in part and dissenting in part.

In the opinions, the judges disagreed not only on the merits of the case but also on whether the ruling was unreasonably delayed. Judge Henderson began with a long footnote in which she expressed the view that "[t]he panel's subsequent delay in resolving these actions has not only defied the statute's expedition mandate but, regrettably, has ill-served the strong public interest in election law." Judge Henderson suggested a panel of appellate Judges would have acted more expeditiously. Judges

Kollar-Kotelly and Leon defended the speed with which they issued their ruling, noting that "given the vast record developed through the six months of discovery in this case, it is not surprising that this Court required a few more months than the *Buckley* court to arrive at a decision after the arguments—for only careful consideration of the record before us could reduce the risk of committing clear error in our findings." In response to the majority's point about clear error, Judge Henderson stated: "The majority's view of the factual record—not to mention the record's legal significance—is quite different from mine, leaving me 'with the definite and firm conviction that a mistake has been committed' with respect to several of its findings."

On the merits, the rulings themselves were quite fractured, leading the majority to include a chart in an attempt to summarize the key rulings in the case. Without reading the opinions themselves, the chart was undecipherable. For our purposes here, it is enough to note that the three judges split on the constitutionality of the major soft money and issue advocacy provisions of the law, and failed to issue any significant factual findings endorsed by a majority of the three judges. Furthermore, their decision never went into effect, as they themselves quickly stayed it, an action that Chief Justice Rehnquist declined to overrule when the plaintiffs asked him to do so.

The Supreme Court set a special oral argument date of September 8, 2003 for a four-hour oral argument (rather than the usual one hour period), a full month before the Court officially returned from its summer recess for the start of the October 2003 term. On December 10, 2003, the Court issued its decision, which upheld most of the BCRA, including the soft money and issue advocacy provisions. *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003). The opinion had the largest page count (279, excluding the heading and syllabus) and second largest word count (89,694) in Supreme Court history.

The Court's majority opinion was divided into three parts, with Justices Stevens and O'Connor writing the opinion for the Court as to the constitutionality of challenged provisions of BCRA's Title I and Title II. Chief Justice Rehnquist wrote for the Court on challenged Titles III and IV provisions, and Justice Breyer wrote for the court on BCRA section 504, the only challenged provision in Title V.

The most significant majority opinion was the Stevens/O'Connor opinion in which Justices Breyer, Ginsburg, and Souter concurred. The joint opinion upheld most of the soft money and issue advocacy provisions. Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas dissented from most of the joint opinion, although Rehnquist and Kennedy voted to uphold a portion of section 202 (concerning coordination rules) and 323(e) (concerning the solicitation of soft money by elected officials). All of the Justices except Justice Thomas voted to uphold most of the BCRA's disclosure provisions.

In setting the tone for the 5-4 upholding of the BCRA's most controversial provisions, the joint opinion began as follows:

> More than a century ago the "sober-minded Elihu Root" advocated legislation that would prohibit political contributions by corporations in order to prevent "the great aggregations of wealth, from using their corporate funds, directly or indirectly," to elect legislators who would "vote for their protection and the advancement of their interests as against those of the public." *United States v. Automobile Workers*, 352 U.S. 567 (1957). In Root's opinion, such legislation would "strike at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government." The Congress of the United States has repeatedly enacted legislation endorsing Root's judgment.
>
> BCRA is the most recent federal enactment designed "to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *Id*.

Justice Kennedy authored the main dissenting opinion on Title I and Title II issues. His dissent, joined by Chief Justice Rehnquist and (for the most part) by Justice Scalia, set a very different tone and began as follows:

> The First Amendment guarantees our citizens the right to judge for themselves the most effective means for the expression of political views and to decide for themselves which entities to trust as reliable speakers. Significant portions of Titles I and II of the Bipartisan Campaign Reform Act of 2002 (BCRA or Act) constrain that freedom. These new laws force speakers to abandon their own preference for speaking through parties and organizations. And they provide safe harbor to the mainstream press, suggesting that the corporate media alone suffice to alleviate the burdens the Act places on the rights and freedoms of ordinary citizens.
>
> Today's decision upholding these laws purports simply to follow *Buckley*, and to abide by *stare decisis*; 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. 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. 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." 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. And BCRA is only the beginning, as its congressional proponents freely admit....
>
> 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 the following pages, we focus upon the Court's constitutional analysis of BCRA's soft money provisions and the issue advocacy provisions requiring corporations and unions to pay for "electioneering communications" through segregated funds. We also briefly note some of the other rulings of the Court on challenged BCRA provisions. In the Supplement to Chapter 21, we consider the Court's discussion of the disclosure provisions. Quotations in the excerpts below followed by "(Henderson, J.)," "(Kollar-Kotelly, J.)," ("Leon, J."), or "(*per curiam*)" indicate that the Supreme Court opinion has quoted from or cited to the opinions of the lower court.

The Constitutionality of BCRA's Soft Money Provisions

McConnell v. Federal Election Commission
124 S. Ct. 619 (2003)

JUSTICE STEVENS and JUSTICE O'CONNOR delivered the opinion of the Court with respect to BCRA [Title I.[*]]

Soft Money

Under FECA, "contributions" must be made with funds that are subject to the Act's disclosure requirements and source and amount limitations. Such funds are known as "federal" or "hard" money. FECA defines the term "contribution," however, to include only the gift or advance of anything of value "made by any person for the purpose of influencing any election for *Federal* office." Donations made solely for the purpose of influencing state or local elections are therefore unaffected by FECA's requirements and prohibitions. As a result, prior to the enactment of BCRA, federal law permitted corporations and unions, as well as individuals who had already made the maximum permissible contributions to federal candidates, to contribute "nonfederal money"—also

[*] JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join this opinion in its entirety.

known as "soft money"—to political parties for activities intended to influence state or local elections.

Shortly after *Buckley* was decided, questions arose concerning the treatment of contributions intended to influence both federal and state elections. Although a literal reading of FECA's definition of "contribution" would have required such activities to be funded with hard money, the FEC ruled that political parties could fund mixed-purpose activities—including get-out-the-vote drives and generic party advertising—in part with soft money. In 1995 the FEC concluded that the parties could also use soft money to defray the costs of "legislative advocacy media advertisements," even if the ads mentioned the name of a federal candidate, so long as they did not expressly advocate the candidate's election or defeat.

As the permissible uses of soft money expanded, the amount of soft money raised and spent by the national political parties increased exponentially. Of the two major parties' total spending, soft money accounted for 5% ($21.6 million) in 1984, 11% ($45 million) in 1988, 16% ($80 million) in 1992, 30% ($272 million) in 1996, and 42% ($98 million) in 2000. The national parties transferred large amounts of their soft money to the state parties, which were allowed to use a larger percentage of soft money to finance mixed-purpose activities under FEC rules. In the year 2000, for example, the national parties diverted $ 280 million—more than half of their soft money—to state parties.

Many contributions of soft money were dramatically larger than the contributions of hard money permitted by FECA. For example, in 1996 the top five corporate soft-money donors gave, in total, more than $9 million in nonfederal funds to the two national party committees. In the most recent election cycle the political parties raised almost $300 million—60% of their total soft-money fundraising—from just 800 donors, each of which contributed a minimum of $120,000. Moreover, the largest corporate donors often made substantial contributions to both parties. Such practices corroborate evidence indicating that many corporate contributions were motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties.

Not only were such soft-money contributions often designed to gain access to federal candidates, but they were in many cases solicited by the candidates themselves. Candidates often directed potential donors to party committees and tax-exempt organizations that could legally accept soft money. For example, a federal legislator running for reelection solicited soft money from a supporter by advising him that even though he had already "contributed the legal maximum" to the campaign committee, he could still make an additional contribution to a joint program supporting federal, state, and local candidates of his party. Such solicitations were not uncommon.

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. . . .

III.

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. In short, § 323(a) takes national parties out of the soft-money business.

The remaining provisions of new FECA § 323 largely reinforce the restrictions in § 323(a). New FECA § 323(b) prevents the wholesale shift of soft-money influence from national to state party committees by prohibiting state and local party committees from using such funds for activities that affect federal elections. These "Federal election activities," defined in new FECA § 301(20)(A), are almost identical to the mixed-purpose activities that have long been regulated under the FEC's pre-BCRA allocation regime. New FECA § 323(d) reinforces these soft-money restrictions by prohibiting political parties from soliciting and donating funds to tax-exempt organizations that engage in electioneering activities. New FECA § 323(e) 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. Finally, new FECA § 323(f) prevents circumvention of the restrictions on national, state, and local party committees by prohibiting state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates.

Plaintiffs mount a facial First Amendment challenge to new FECA § 323, as well as challenges based on the Elections Clause, U.S. Const., Art. I, § 4, principles of federalism, and the equal protection component of the Due Process Clause. We address these challenges in turn.

A

In *Buckley* and subsequent cases, we have subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions. See, *e.g., Beaumont; Shrink Missouri*; *Buckley*. In these cases we have recognized that contribution limits, unlike limits on expenditures, "entail 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 "prevent 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," *Shrink Missouri,* since contributions serve "to affiliate a person with a candidate" and "enable like-minded persons to pool their resources," *Buckley*. Unlike expenditure limits, however, which "preclude 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." *Beaumont* (quoting *Shrink Missouri*).[39]

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." *NRWC; Colorado II*. 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." *NRWC*. Because the electoral process is the very "means through which a free society democratically translates political speech into concrete governmental action," *Shrink Missouri* (BREYER, J., concurring), 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." *Id.* (BREYER, J., concurring). 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.

Our application of this less rigorous degree of scrutiny has given rise to significant criticism in the past from our dissenting colleagues. See, *e.g.*, *Shrink Missouri* (KENNEDY, J., dissenting); *id.* (THOMAS, J., dissenting); *(Colorado I)* (THOMAS, J., dissenting). We have rejected such criticism in previous cases for the reasons identified above. We are also mindful of the fact that in its lengthy deliberations leading to the enactment of BCRA, Congress properly relied on the recognition of its authority contained in *Buckley* and its progeny. Considerations of *stare decisis*, buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided.

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. *Beaumont.* Complex as its provisions may be, § 323, in the main, does little more than regulate the ability of wealthy individuals, corporations,

[39] JUSTICE KENNEDY accuses us of engaging in a sleight of hand by conflating "unseemly corporate speech" with the speech of political parties and candidates, and then adverting to the "corporate speech rationale as if it were the linchpin of the litigation." This is incorrect. The principles set forth here and relied upon in assessing Title I are the same principles articulated in *Buckley* and its progeny that regulations of contributions to candidates, parties, and political committees are subject to less rigorous scrutiny than direct restraints on speech—including "unseemly corporate speech."

and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders.

Plaintiffs contend that we must apply strict scrutiny to § 323 because many of its provisions restrict not only contributions but also the spending and solicitation of funds raised outside of FECA's contribution limits. But for purposes of determining the level of scrutiny, it is irrelevant that Congress chose in § 323 to regulate contributions on the demand rather than the supply side. See, *e.g.*, *NRWC* (upholding a provision restricting PACs' ability to solicit funds). The relevant inquiry is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not. That is not the case here.

For example, while § 323(a) prohibits national parties from receiving or spending nonfederal money, and § 323(b) prohibits state party committees from spending nonfederal money on federal election activities, neither provision in any way limits the total amount of money parties can spend. Rather, they simply limit the source and individual amount of donations. That they do so by prohibiting the spending of soft money does not render them expenditure limitations.

Similarly, the solicitation provisions of § 323(a) and § 323(e), which restrict the ability of national party committees, federal candidates, and federal officeholders to solicit nonfederal funds, leave open ample opportunities for soliciting federal funds on behalf of entities subject to FECA's source and amount restrictions. Even § 323(d), which on its face enacts a blanket ban on party solicitations of funds to certain tax-exempt organizations, nevertheless allows parties to solicit funds to the organizations' federal PACs. As for those organizations that cannot or do not administer PACs, parties remain free to donate federal funds directly to such organizations, and may solicit funds expressly for that purpose. And as with § 323(a), § 323(d) places no limits on other means of endorsing tax-exempt organizations or any restrictions on solicitations by party officers acting in their individual capacities.

Section 323 thus shows "due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views." *Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 632 (1980). The fact that party committees and federal candidates and officeholders must now ask only for limited dollar amounts or request that a corporation or union contribute money through its PAC in no way alters or impairs the political message "intertwined" with the solicitation. Cf. *Riley v. National Federation of Blind of N. C., Inc.,* 487 U.S. 781, 795 (1988) (treating solicitation restriction that required fundraisers to disclose particular information as a content-based regulation subject to strict scrutiny because it "necessarily altered the content of the speech"). And rather than chill such solicitations, as was the case in *Schaumburg*, the restriction here tends to increase the dissemination of information by forcing parties, candidates, and officeholders to solicit from a wider array of potential donors. As with direct limits on

contributions, therefore, § 323's spending and solicitation restrictions have only a marginal impact on political speech.[42]

Finally, plaintiffs contend that the type of associational burdens that § 323 imposes are fundamentally different from the burdens that accompanied *Buckley*'s contribution limits, and merit the type of strict scrutiny we have applied to attempts to regulate the internal processes of political parties. *E.g.*, *California Democratic Party v. Jones*. In making this argument, plaintiffs greatly exaggerate the effect of § 323, contending that it precludes *any* collaboration among national, state, and local committees of the same party in fundraising and electioneering activities. We do not read the provisions in that way. Section 323 merely subjects a greater percentage of contributions to parties and candidates to FECA's source and amount limitations. *Buckley* has already acknowledged that such limitations "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." The modest impact that § 323 has on the ability of committees within a party to associate with each other does not independently occasion strict scrutiny. None of this is to suggest that the alleged associational burdens imposed on parties by § 323 have no place in the First Amendment analysis; it is only that we account for them in the application, rather than the choice, of the appropriate level of scrutiny.[43]

With these principles in mind, we apply the less rigorous scrutiny applicable to contribution limits to evaluate the constitutionality of new FECA § 323. Because the five challenged provisions of § 323 implicate different First Amendment concerns, we discuss them separately. We are mindful, however, that Congress enacted § 323 as an integrated whole to vindicate the Government's important interest in preventing corruption and the appearance of corruption.

---

[42] JUSTICE KENNEDY's contention that less rigorous scrutiny applies only to regulations burdening political association, rather than political speech, misreads *Buckley*. In *Buckley*, we recognized that contribution limits burden both protected speech and association, though they generally have more significant impacts on the latter. We nevertheless applied less rigorous scrutiny to FECA's contribution limits because neither burden was sufficiently weighty to overcome Congress' countervailing interest in protecting the integrity of the political process. See *Shrink Missouri* ("While we did not [in *Buckley*] attempt to parse [the] distinctions between the speech and association standards of scrutiny for contribution limits, we did make it clear that those restrictions bore more heavily on the associational right than on [the] freedom to speak. We consequently proceeded on the understanding that a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well, and we held the standard satisfied by the contribution limits under review."). It is thus simply untrue in the campaign finance context that all "burdens on speech necessitate strict scrutiny review."

[43] JUSTICE KENNEDY is no doubt correct that the associational burdens imposed by a particular piece of campaign-finance regulation may at times be so severe as to warrant strict scrutiny. In light of our interpretation of §323(a), however, § 323 does not present such a case. As JUSTICE KENNEDY himself acknowledges, even "*significant* interference" with "protected rights of association" are subject to less rigorous scrutiny. *Beaumont.* There is thus nothing inconsistent in our decision to account for the particular associational burdens imposed by § 323(a) when applying the appropriate level of scrutiny.

New FECA § 323(a)'s Restrictions on National Party Committees

The core of Title I is new FECA § 323(a), which provides that "national committees 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." 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."

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.

1. *Governmental Interests Underlying New FECA § 323(a)*

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 "dealt with only the most blatant and specific attempts of those with money to influence government action." Thus, "in 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." *Shrink Missouri*; see also *Colorado II* (acknowledging that corruption extends beyond explicit cash-for-votes agreements to "undue influence on an officeholder's judgment").

Of "almost equal" importance has been the Government's interest in combating the appearance or perception of corruption engendered by large campaign contributions. *Buckley*; see also *Shrink Missouri*; *NCPAC*. 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." *Shrink Missouri*. 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," *Colorado II,* these interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits, *id.,* ("All Members of the Court agree that circumvention is a valid theory of corruption").

"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." *Shrink Missouri*. 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. See *Buckley* (upholding FECA's $25,000 limit on aggregate yearly contributions to a candidate, political committee, and political party committee as a "quite modest restraint . . . to prevent evasion of the $1,000 contribution limitation" by, among other things, "huge contributions to the candidate's political party"). 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." *Colorado II*; see also *Shrink Missouri* (KENNEDY, J., dissenting) ("[Respondent] asks us to evaluate his speech claim in the context of a system which favors candidates and officeholders whose campaigns are supported by *soft money, usually funneled through political parties*" (emphasis added)). 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. As set forth above, the FEC's allocation regime has invited widespread circumvention of FECA's limits on contributions to parties for the purpose of influencing federal elections. 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.[45]

The evidence in the record shows that candidates and donors alike have in fact 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. Parties kept tallies of the amounts of soft money raised by each officeholder, and "the amount of money a Member of Congress raised for the national political committees often affected the amount the committees gave to assist the

[45] JUSTICE KENNEDY contends that the plurality's observation in *Colorado I* that large soft-money donations to a political party pose little threat of corruption "establishes that" such contributions are not corrupting. The cited dictum has no bearing on the present case. *Colorado I* addressed an entirely different question—namely, whether Congress could permissibly limit a party's independent expenditures—and did so on an entirely different set of facts. It also had before it an evidentiary record frozen in 1990—well before the soft-money explosion of the 1990's.

Member's campaign." *(*Kollar-Kotelly, J.*)*. Donors often asked that their contributions be credited to particular candidates, and the parties obliged, irrespective of whether the funds were hard or soft. (Kollar-Kotelly, J.); (Leon, J.). National party committees often teamed with individual candidates' campaign committees to create joint fundraising committees, which enabled the candidates to take advantage of the party's higher contribution limits while still allowing donors to give to their preferred candidate. (Kollar-Kotelly, J.); (Leon, J.). Even when not participating directly in the fundraising, federal officeholders were well aware of the identities of the donors: National party committees would distribute lists of potential or actual donors, or donors themselves would report their generosity to officeholders. (Kollar-Kotelly, J.) ("For a Member not to know the identities of these donors, he or she must actively avoid such knowledge, as it is provided by the national political parties and the donors themselves"); (Leon, J.).

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." (Kollar-Kotelly, J.) (quoting declaration of Robert Rozen, partner, Ernst & Young).

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. (Kollar-Kotelly, J.).

The evidence from the federal officeholders' perspective is similar. For example, one former Senator described the influence purchased by nonfederal donations as follows:

> "Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a $ 100,000 donation does not alter the way one thinks about—and quite possibly votes on—an issue? . . . When you don't pay the piper that finances your campaigns, you will never get any more money from that piper. Since money is the mother's milk of politics, you never want to be in that situation." (Kollar-Kotelly, J.) (quoting declaration of former Sen. Alan Simpson); (Leon, J.) (same).

By bringing soft-money donors and federal candidates and officeholders together, "parties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to

support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors." *Colorado II*.

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. See, *e.g.*, (Kollar-Kotelly, J.); (Leon, J.); (declaration of Sen. John McCain); (Simpson Decl. ("Donations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from the trial lawyers to Democrats stopped tort reform"); (declaration of former Sen. Paul Simon). 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." *Colorado II*. 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." *Colorado II*.

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. As one former Senator put it:

> "Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy . . . . Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way." (Kollar-Kotelly, J.) (quoting declaration of former Sen. Warren Rudman); (Leon, J.) (same).

So pervasive is this practice that the six national party committees actually furnish their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access. For example, the DCCC offers a range of donor options, starting with the $ 10,000-per-year Business Forum program, and going up to the $ 100,000-per-year National Finance Board program. The latter entitles the donor to bimonthly conference calls with the Democratic House leadership and chair of the DCCC, complimentary invitations to all DCCC fundraising events, two private dinners with the Democratic House leadership and ranking members, and two retreats with the Democratic House leader and DCCC chair in Telluride, Colorado, and

Hyannisport, Massachusetts. (Kollar-Kotelly, J.); see also *id* ,(describing records indicating that DNC offered meetings with President in return for large donations); *id.*. (describing RNC's various donor programs); *id.* (same for NRSC); *id.,* (same for DSCC); (same for NRCC). Similarly, "the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors." *Id.* (finding, further, that the RNC holds out the prospect of access to officeholders to attract soft-money donations and encourages officeholders to meet with large soft-money donors) accord, *id*. (Leon, J.).

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.[48]

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. The evidence set forth above, which is but a sampling of the reams of disquieting evidence contained in the record, convincingly demonstrates that soft-money contributions to political parties carry with them just such temptation.

---

[48] In addition to finding no support in our recent cases, see, e.g., *Colorado II*, (defining corruption more broadly than *quid pro quo* arrangements); *Shrink Missouri* (same), JUSTICE KENNEDY's contention that *Buckley* limits Congress to regulating contributions to a candidate ignores *Buckley* itself. There, we upheld FECA's $25,000 limit on aggregate yearly contributions to candidates, *political committees*, *and party committees* out of recognition that FECA's $1,000 limit on candidate contributions would be meaningless if individuals could instead make "huge contributions to the candidate's political party." Likewise, in *Cal. Med. Ass'n*, we upheld FECA's $5,000 limit on contributions to multicandidate political committees. It is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA's $1,000 limit on individual contributions to candidates. Given FECA's definition of "contribution," the $5,000 and $25,000 limits restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures. If indeed the First Amendment prohibited Congress from regulating contributions to fund the latter, the otherwise-easy-to-remedy exploitation of parties as pass-throughs (e.g., a strict limit on donations that could be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation.

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.

In sum, there is substantial evidence to support Congress' determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption.

2. *New FECA § 323(a)'s Restriction on Spending and Receiving Soft Money*

Plaintiffs and THE CHIEF JUSTICE contend that § 323(a) is impermissibly overbroad because it subjects *all* funds raised and spent by national parties to FECA's hard-money source and amount limits, including, for example, funds spent on purely state and local elections in which no federal office is at stake. Such activities, THE CHIEF JUSTICE asserts, pose "little or no potential to corrupt . . . federal candidates or officeholders." This observation is beside the point. Section 323(a), like the remainder of § 323, regulates *contributions,* not activities. As the record demonstrates, it is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect.

As one expert noted, "there is no meaningful distinction between the national party committees and the public officials who control them." (Kollar-Kotelly, J.) (quoting Mann Expert Report). The national committees of the two major parties are both run by, and largely composed of, federal officeholders and candidates. Indeed, of the six national committees of the two major parties, four are composed entirely of federal officeholders. The nexus between national parties and federal officeholders prompted one of Title I's framers to conclude:

> "Because the national parties operate at the national level, and are inextricably intertwined with federal officeholders and candidates, who raise the money for the national party committees, there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process. The only effective way to address this [soft-money] problem of corruption is to ban entirely all raising and spending of soft money by the national parties." (statement of Rep. Shays).

Given this close connection and alignment of interests, large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used.

This close affiliation has also placed national parties in a position to sell access to federal officeholders in exchange for soft-money contributions that the party can then use for its own purposes. Access to federal officeholders is the most valuable favor the national party committees are able to give in exchange for large donations. The fact that officeholders comply by donating their valuable time indicates either that officeholders place substantial value on the soft-money contribution themselves, without regard to their end use, or that national committees are able to exert considerable control over federal officeholders. See, *e.g.*, App. (Expert Report of Donald P. Green, Yale University) ("Once elected to legislative office, public officials enter an environment in which political parties-in-government control the resources crucial to subsequent electoral success and legislative power. Political parties organize the legislative caucuses that make committee assignments"); App. (Krasno & Sorauf Expert Report) (indicating that officeholders' re-election prospects are significantly influenced by attitudes of party leadership). Either way, large soft-money donations to national party committees are likely to buy donors preferential access to federal officeholders no matter the ends to which their contributions are eventually put. As discussed above, Congress had sufficient grounds to regulate the appearance of undue influence associated with this practice. The Government's strong interests in preventing corruption, and in particular the appearance of corruption, are thus sufficient to justify subjecting all donations to national parties to the source, amount, and disclosure limitations of FECA.[51]

3. *New FECA § 323(a)'s Restriction on Soliciting or Directing Soft Money*

Plaintiffs also contend that § 323(a)'s prohibition on national parties' soliciting or directing soft-money contributions is substantially overbroad. The reach of the solicitation prohibition, however, is limited. It bars only solicitations of soft money by national party committees and by party officers in their official capacities. The committees remain free to solicit hard money on their own behalf, as well as to solicit hard money on behalf of state committees and state and local candidates.[52] They also can

[51] The close relationship of federal officeholders and candidates to their parties answers not only THE CHIEF JUSTICE's concerns about § 323(a), but also his fear that our analysis of § 323's remaining provisions bespeaks no limiting principle. As set forth in our discussion of those provisions, the record demonstrates close ties between federal officeholders and the state and local committees of their parties. That close relationship makes state and local parties effective conduits for donors desiring to corrupt federal candidates and officeholders. Thus, in upholding §§ 323(b), (d), and (f), we rely not only on the fact that they regulate contributions used to fund activities influencing federal elections, but also that they regulate contributions to or at the behest of entities uniquely positioned to serve as conduits for corruption. We agree with THE CHIEF JUSTICE that Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a *benefit* on the candidate.

[52] Plaintiffs claim that the option of soliciting hard money for state and local candidates is an illusory one, since several States prohibit state and local candidates from establishing multiple campaign accounts, which would preclude them from establishing separate accounts for federal funds. Plaintiffs maintain that § 323(a) combines with these state laws to make it impossible for state and local candidates to receive hard-money donations. But the challenge we are considering is a facial one, and on its face § 323(a) permits

contribute hard money to state committees and to candidates. In accordance with FEC regulations, furthermore, officers of national parties are free to solicit soft money in their individual capacities, or, if they are also officials of state parties, in that capacity.

This limited restriction on solicitation follows sensibly from the prohibition on national committees' receiving soft money. The same observations that led us to approve the latter compel us to reach the same conclusion regarding the former. A national committee is likely to respond favorably to a donation made at its request regardless of whether the recipient is the committee itself or another entity. This principle accords with common sense and appears elsewhere in federal laws. E.g., 18 U.S.C. § 201(b)(2) (prohibition on public officials "demanding [or] seeking . . . anything of value personally *or for any other person or entity* . . . " (emphasis added)); 5 CFR § 2635.203(f)(2) (2003) (restriction on gifts to federal employees encompasses gifts "given to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee").

Plaintiffs argue that BCRA itself demonstrates the overbreadth of § 323(a)'s solicitation ban. They point in particular to § 323(e), which allows federal candidates and officeholders to solicit limited amounts of soft money from individual donors under certain circumstances.. The differences between §§ 323(a) and 323(e), however, are without constitutional significance. We have recognized that "the differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process," *NRWC*, and we respect Congress' decision to proceed in incremental steps in the area of campaign finance regulation, see *MCFL*; *Buckley*. The differences between the two provisions reflect Congress' reasonable judgments about the function played by national committees and the interactions between committees and officeholders, subjects about which Members of Congress have vastly superior knowledge.

4. *New FECA § 323(a)'s Application to Minor Parties*

The McConnell and political party plaintiffs contend that § 323(a) is substantially overbroad and must be stricken on its face because it impermissibly infringes the speech and associational rights of minor parties such as the Libertarian National Committee, which, owing to their slim prospects for electoral success and the fact that they receive few large soft-money contributions from corporate sources, pose no threat of corruption comparable to that posed by the RNC and DNC. In *Buckley*, we rejected a similar argument concerning limits on contributions to minor-party candidates, noting that "any attempt to exclude minor parties and independents en masse from the Act's contribution limitations overlooks the fact that minor-party candidates may win elective office or have a substantial impact on the outcome of an election." We have thus recognized that the relevance of the interest in avoiding actual or apparent corruption is not a function of the number of legislators a given party manages to elect. It applies as much to a minor party that manages to elect only one of its members to federal office as it does to a major party whose members make up a majority of Congress. It is therefore reasonable to require that

---

solicitations. The fact that a handful of States might interfere with the mechanism Congress has chosen for such solicitations is an argument that may be addressed in an as-applied challenge.

all parties and all candidates follow the same set of rules designed to protect the integrity of the electoral process.

We add that nothing in § 323(a) prevents individuals from pooling resources to start a new national party. Only when an organization has gained official status, which carries with it significant benefits for its members, will the proscriptions of § 323(a) apply. Even then, a nascent or struggling minor party can bring an as-applied challenge if § 323(a) prevents it from "amassing the resources necessary for effective advocacy." *Buckley*.

5. *New FECA § 323(a)'s Associational Burdens*

Finally, plaintiffs assert that § 323(a) is unconstitutional because it impermissibly interferes with the ability of national committees to associate with state and local committees. By way of example, plaintiffs point to the Republican Victory Plans, whereby the RNC acts in concert with the state and local committees of a given State to plan and implement joint, full-ticket fundraising and electioneering programs. The political parties assert that § 323(a) outlaws *any* participation in Victory Plans by RNC officers, including merely sitting down at a table and engaging in collective decisionmaking about how soft money will be solicited, received, and spent. Such associational burdens, they argue, are too great for the First Amendment to bear.

We are not persuaded by this argument because it hinges on an unnaturally broad reading of the terms "spend," "receive," "direct," and "solicit." Nothing on the face of § 323(a) prohibits national party officers, whether acting in their official or individual capacities, from sitting down with state and local party committees or candidates to plan and advise how to raise and spend soft money. As long as the national party officer does not personally spend, receive, direct, or solicit soft money, § 323(a) permits a wide range of joint planning and electioneering activity. Intervenor-defendants, the principal drafters and proponents of the legislation, concede as much. The FEC's current definitions of § 323(a)'s terms are consistent with that view. See, *e.g.*, 11 CFR § 300.2(m) (2002) (defining "solicit" as "to *ask* . . . another person" (emphasis added)); § 300.2(n) (defining "direct" as "to *ask* a person who has expressed an intent to make a contribution . . . to make that contribution . . . including through a conduit or intermediary" (emphasis added)); § 300.2(c) (laying out the factors that determine whether an entity will be considered to be controlled by a national committee).

Given the straightforward meaning of this provision, JUSTICE KENNEDY is incorrect that "[a] national party's mere involvement in the strategic planning of fundraising for a state ballot initiative" or its assistance in developing a state party's Levin-money fundraising efforts risks a finding that the officers are in "indirect control" of the state party and subject to criminal penalties. Moreover, § 323(a) leaves national party committee officers entirely free to participate, in their official capacities, with state and local parties and candidates in soliciting and spending hard money; party officials may also solicit soft money in their unofficial capacities.

Accordingly, we reject the plaintiffs' First Amendment challenge to new FECA § 323(a).

New FECA § 323(b)'s Restrictions on State and Local Party Committees

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." 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." The Act explicitly excludes several categories of activity from this definition: public communications that refer solely to nonfederal candidates;[56] contributions to nonfederal candidates;[57] state and local political conventions; and the cost of grassroots campaign materials like bumper stickers that refer only to state candidates. All activities that fall within the statutory definition must be funded with hard money.

Section 323(b)(2), the so-called Levin Amendment, carves out an exception to this general rule. A refinement on the pre-BCRA regime that permitted parties to pay for certain activities with a mix of federal and nonfederal funds, the Levin Amendment allows state and local party committees to pay for certain types of federal election activity with an allocated ratio of hard money and "Levin funds"—that is, funds raised within an annual limit of $10,000 per person. Except for the $10,000 cap and certain related restrictions to prevent circumvention of that limit, § 323(b)(2) leaves regulation of such contributions to the States.

The scope of the Levin Amendment is limited in two ways. First, state and local parties can use Levin money to fund only activities that fall within categories (1) and (2) of the statute's definition of federal election activity—namely, voter registration activity, voter identification drives, GOTV drives, and generic campaign activities. And not all of these activities qualify: Levin funds cannot be used to pay for any activities that refer to "a clearly identified candidate for Federal office"; they likewise cannot be used to fund broadcast communications unless they refer "solely to a clearly identified candidate for State or local office."

[56] So long as the communication does not constitute voter registration, voter identification, GOTV, or generic campaign activity.

[57] Unless the contribution is earmarked for federal election activity.

Second, both the Levin funds and the allocated portion of hard money used to pay for such activities must be raised entirely by the state or local committee that spends them. This means that a state party committee cannot use Levin funds transferred from other party committees to cover the Levin funds portion of a Levin Amendment expenditure. It also means that a state party committee cannot use hard money transferred from other party committees to cover the hard-money portion of a Levin Amendment expenditure. Furthermore, national committees, federal candidates, and federal officeholders generally may not solicit Levin funds on behalf of state committees, and state committees may not team up to raise Levin funds. They can, however, jointly raise the hard money used to make Levin expenditures.

1. Governmental Interests Underlying New FECA § 323(b)

We begin by noting that, in 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. There is at least as much evidence as there was in *Buckley* that such donations have been made with the intent—and in at least some cases the effect—of gaining influence over federal officeholders.[61] Section 323(b) thus promotes an important governmental interest by confronting the corrupting influence that soft-money donations to political parties already have.

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," *Shrink Missouri*, 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," *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665 (1994), 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.

2. *New FECA § 323(b)'s Tailoring*

Plaintiffs argue that even if some legitimate interest might be served by § 323(b), the provision's restrictions are unjustifiably burdensome and therefore cannot be considered "closely drawn" to match the Government's objectives. They advance three main contentions in support of this proposition. First, they argue that the provision is

[61] The 1998 Senate Report found that, in exchange for a substantial donation to *state* Democratic committees and candidates, the DNC arranged meetings for the donor with the President and other federal officials. That same Report also detailed how Native American tribes that operated casinos made sizable soft-money contributions to state Democratic committees in apparent exchange for access and influence.

substantially overbroad because it federalizes activities that pose no conceivable risk of corrupting or appearing to corrupt federal officeholders. Second, they argue that the Levin Amendment imposes an unconstitutional burden on the associational rights of political parties. Finally, they argue that the provision prevents them from amassing the resources they need to engage in effective advocacy. We address these points in turn.

a. *§ 323(b)'s Application to Federal Election Activity*

Plaintiffs assert that § 323(b) represents a new brand of pervasive federal regulation of state-focused electioneering activities that cannot possibly corrupt or appear to corrupt federal officeholders and thus goes well beyond Congress' concerns about the corruption of the federal electoral process. We disagree.

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. As a practical matter, BCRA merely codifies the principles of the FEC's allocation regime while at the same time justifiably adjusting the formulas applicable to these activities in order to restore the efficacy of FECA's longtime statutory restriction—approved by the Court and eroded by the FEC's allocation regime—on contributions to state and local party committees for the purpose of influencing federal elections. See also *Buckley* (upholding FECA's $25,000 limit on aggregate contributions to candidates and political committees); cf. *Cal. Med. Ass'n* (upholding FECA's $5,000 limit on contributions to multicandidate political committees).

Like the rest of Title I, § 323(b) is premised on Congress' judgment that if a large donation is capable of putting a federal candidate in the debt of the contributor, it poses a threat of corruption or the appearance of corruption. As we explain below, § 323(b) is narrowly focused on regulating contributions that pose the greatest risk of this kind of corruption: those contributions to state and local parties that can be used to benefit federal candidates directly. Further, these regulations all are reasonably tailored, with various temporal and substantive limitations designed to focus the regulations on the important anti-corruption interests to be served. We conclude that § 323(b) is a closely-drawn means of countering both corruption and the appearance of corruption.

The first two categories of "Federal election activity," voter registration efforts, and voter identification, GOTV, and generic campaign activities conducted in connection with a federal election, clearly capture activity that benefits federal candidates. Common sense dictates, and it was "undisputed" below, that a party's efforts to register voters sympathetic to that party directly assist the party's candidates for federal office. (Kollar-Kotelly, J.). It is equally clear that federal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls. Representatives of the four major congressional campaign committees confirmed that they "transfer federal and nonfederal money to state and/or local party committees for" both voter registration and get-out-the-vote activities, and that "these efforts have a significant effect on the election of federal candidates."

The record also makes quite clear that federal officeholders are grateful for contributions to state and local parties that can be converted into GOTV-type efforts.

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. Similarly, the contribution limits . . . 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." 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. Furthermore, state committees can take advantage of the Levin Amendment's higher contribution limits to fund any [voter registration efforts] and [voter identification GOTV and generic campaign] activities that do not specifically mention a federal candidate. 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.

"Public communications" that promote or attack a candidate for federal office — the third category of "Federal election activity,"—also undoubtedly have a dramatic effect on federal elections. Such ads were a prime motivating force behind BCRA's passage. As explained below, any public communication that promotes or attacks a clearly identified federal candidate directly affects the election in which he is participating. The record on this score could scarcely be more abundant. Given the overwhelming tendency of public communications, as carefully defined in [the public communications provision], to benefit directly federal candidates, we hold that application of § 323(b)'s contribution caps to such communications is also closely drawn to the anticorruption interest it is intended to address.[64]

As for the final category of "Federal election activity," we find that Congress' interest in preventing circumvention of § 323(b)'s other restrictions justifies the requirement that state and local parties spend federal funds to pay the salary of any employee spending more than 25% of his or her compensated time on activities in connection with a federal election. In the absence of this provision, a party might use soft money to pay for the equivalent of a full-time employee engaged in federal

[64] We likewise reject the argument that [the public communications provision] is unconstitutionally vague. The words "promote," "oppose," "attack," and "support" clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision. These words "provide explicit standards for those who apply them" and "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). This is particularly the case here, since actions taken by political parties are presumed to be in connection with election campaigns. See *Buckley* (noting that a general requirement that political committees disclose their expenditures raised no vagueness problems because the term "political committee" "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate" and thus a political committee's expenditures "are, by definition, campaign related"). Furthermore, should plaintiffs feel that they need further guidance, they are able to seek advisory opinions for clarification, and thereby "remove any doubt there may be as to the meaning of the law," *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 580 (1973).

electioneering, by the simple expedient of dividing the federal workload among multiple employees. Plaintiffs have suggested no reason for us to strike down this provision. Accordingly, we give "deference to [the] congressional determination of the need for [this] prophylactic rule." *NCPAC*.

b. *Associational Burdens Imposed by the Levin Amendment*

Plaintiffs also contend that § 323(b) is unconstitutional because the Levin Amendment unjustifiably burdens association among party committees by forbidding transfers of Levin funds among state parties, transfers of hard money to fund the allocable federal portion of Levin expenditures, and joint fundraising of Levin funds by state parties. We recognize, as we have in the past, the importance of preserving the associational freedom of parties. See, e.g., *Jones*; *Eu*. But not every minor restriction on parties' otherwise unrestrained ability to associate is of constitutional dimension. See *Colorado II*.

As an initial matter, we note that state and local parties can avoid these associational burdens altogether by forgoing the Levin Amendment option and electing to pay for federal election activities entirely with hard money. But in any event, the restrictions on the use, transfer, and raising of Levin funds are justifiable anticircumvention measures. Without the ban on transfers of Levin funds among state committees, donors could readily circumvent the $10,000 limit on contributions to a committee's Levin account by making multiple $10,000 donations to various committees that could then transfer the donations to the committee of choice. The same anticircumvention goal undergirds the ban on joint solicitation of Levin funds. Without this restriction, state and local committees could organize "all hands" fundraisers at which individual, corporate, or union donors could make large soft-money donations to be divided between the committees. In that case, the purpose, if not the letter, of § 323(b)(2)'s $10,000 limit would be thwarted: Donors could make large, visible contributions at fundraisers, which would provide ready means for corrupting federal officeholders. Given the delicate and interconnected regulatory scheme at issue here, any associational burdens imposed by the Levin Amendment restrictions are far outweighed by the need to prevent circumvention of the entire scheme.

Section 323(b)(2)(B)(iv)'s apparent prohibition on the transfer of hard money by a national, state, or local committee to help fund the allocable hard-money portion of a separate state or local committee's Levin expenditures presents a closer question. The Government defends the restriction as necessary to prevent the donor committee, particularly a national committee, from leveraging the transfer of federal money to wrest control over the spending of the recipient committee's Levin funds. This purported interest is weak, particularly given the fact that § 323(a) already polices attempts by national parties to engage in such behavior. However, the associational burdens posed by the hard-money transfer restriction are so insubstantial as to be *de minimis*. Party committees, including national party committees, remain free to transfer unlimited hard money so long as it is not used to fund Levin expenditures. State and local party committees can thus dedicate all "homegrown" hard money to their Levin activities while relying on outside transfers to defray the costs of other hard-money expenditures. Given the strong anticircumvention interest vindicated by § 323(b)(2)(B)(iv)'s restriction on the

transfer of Levin funds, we will not strike down the entire provision based upon such an attenuated claim of associational infringement.

c. *New FECA § 323(b)'s Impact on Parties' Ability to Engage in Effective Advocacy*

Finally, plaintiffs contend that § 323(b) is unconstitutional because its restrictions on soft-money contributions to state and local party committees will prevent them from engaging in effective advocacy. As Judge Kollar-Kotelly noted, the political parties' evidence regarding the impact of BCRA on their revenues is "speculative and not based on any analysis." If the history of campaign finance regulation discussed above proves anything, it is that political parties are extraordinarily flexible in adapting to new restrictions on their fundraising abilities. Moreover, the mere fact that § 323(b) may reduce the relative amount of money available to state and local parties to fund federal election activities is largely inconsequential. The question is not whether § 323(b) reduces the amount of funds available over previous election cycles, but whether it is "so radical in effect as to . . . drive the sound of [the recipient's] voice below the level of notice." *Shrink Missouri*. If indeed state or local parties can make such a showing, as-applied challenges remain available.

We accordingly conclude that § 323(b), on its face, is closely drawn to match the important governmental interests of preventing corruption and the appearance of corruption.

New FECA § 323(d)'s Restrictions on Parties' Solicitations for, and Donations to, Tax-Exempt Organizations

Section 323(d) prohibits national, state, and local party committees, and their agents or subsidiaries, from "soliciting any funds for, or making or directing any donations" to, any organization established under § 501(c) of the Internal Revenue Code[66] that makes expenditures in connection with an election for federal office, and any political organizations established under § 527 "other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office."[67] The District Court struck down the provision on its face. We reverse and uphold § 323(d), narrowly construing the section's ban on donations to apply only to the donation of funds not raised in compliance with FECA.

1. *New FECA § 323(d)'s Regulation of Solicitations*

The Government defends § 323(d)'s ban on solicitations to tax-exempt organizations engaged in political activity as preventing circumvention of Title I's limits

[66] Section 501(c) organizations are groups generally exempted from taxation under the Internal Revenue Code. These include § 501(c)(3) charitable and educational organizations, as well as § 501(c)(4) social welfare groups.

[67] Section 527 "political organizations" are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity. They include any "party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures" for the purpose of "influencing or attempting to influence the selection, nomination, or appointment of any individual for Federal, State, or local public office."

on contributions of soft money to national, state, and local party committees. That justification is entirely reasonable. The history of Congress' efforts at campaign finance reform well demonstrates that "candidates, donors, and parties test the limits of the current law." *Colorado II*. Absent the solicitation provision, national, state, and local party committees would have significant incentives to mobilize their formidable fundraising apparatuses, including the peddling of access to federal officeholders, into the service of like-minded tax-exempt organizations that conduct activities benefiting their candidates.[68] All of the corruption and appearance of corruption attendant on the operation of those fundraising apparatuses would follow. Donations made at the behest of party committees would almost certainly be regarded by party officials, donors, and federal officeholders alike as benefiting the party as well as its candidates. Yet, by soliciting the donations to third-party organizations, the parties would avoid FECA's source-and-amount limitations, as well as its disclosure restrictions.

Experience under the current law demonstrates that Congress' concerns about circumvention are not merely hypothetical. Even without the added incentives created by Title I, national, state, and local parties already solicit unregulated soft-money donations to tax-exempt organizations for the purpose of supporting federal electioneering activity. Parties and candidates have also begun to take advantage of so-called "politician 527s," which are little more than soft-money fronts for the promotion of particular federal officeholders and their interests. See *id.* (Kollar-Kotelly, J.) ("Virtually every member of Congress in a formal leadership position has his or her own 527 group . . . . In all, Public Citizen found 63 current members of Congress who have their own 527s"); (Leon, J.). These 527s have been quite successful at raising substantial sums of soft money from corporate interests, as well as from the national parties themselves. See (Kollar-Kotelly, J.) (finding that 27 industries had each donated over $100,000 in a single year to the top 25 politician 527 groups and that the DNC was the single largest contributor to politician 527 groups; (Leon, J.) (same). Given BCRA's tighter restrictions on the raising and spending of soft money, the incentives for parties to exploit such organizations will only increase.

Section 323(d)'s solicitation restriction is closely drawn to prevent political parties from using tax-exempt organizations as soft-money surrogates. Though phrased as an absolute prohibition, the restriction does nothing more than subject contributions solicited by parties to FECA's regulatory regime, leaving open substantial opportunities for solicitation and other expressive activity in support of these organizations. First, and most obviously, § 323(d) restricts solicitations only to those § 501(c) groups "making

[68] The record shows that many of the targeted tax-exempt organizations engage in sophisticated and effective electioneering activities for the purpose of influencing federal elections, including waging broadcast campaigns promoting or attacking particular candidates and conducting large-scale voter registration and GOTV drives. For instance, during the final weeks of the 2000 presidential campaign, the NAACP's National Voter Fund registered more than 200,000 people, promoted a GOTV hotline, ran three newspaper print ads, and made several direct mailings. (Henderson, J.). The NAACP reports that the program turned out one million additional African-American voters and increased turnout over 1996 among targeted groups by 22% in New York, 50% in Florida, and 140% in Missouri. The effort, which cost $10 million, was funded primarily by a $7 million contribution from an anonymous donor. *Id.* See also *id.* (stating that in 2000 the National Abortion and Reproductive Rights Action League (NARAL) spent $7.5 million and mobilized 2.1 million pro-choice voters).

expenditures or disbursements in connection with an election for Federal office," and to § 527 organizations, which by definition engage in partisan political activity. Second, parties remain free to solicit hard-money contributions to a § 501(c)'s federal PAC, as well as to § 527 organizations that already qualify as federal PACs.[69] Third, § 323(d) allows parties to endorse qualifying organizations in ways other than direct solicitations of unregulated donations. For example, with respect to § 501(c) organizations that are prohibited from administering PACs, parties can solicit hard-money donations to themselves for the express purpose of donating to these organizations. Finally, as with § 323(a), § 323(d) in no way restricts solicitations by party officers acting in their individual capacities.

In challenging § 323(d)'s ban on solicitations, plaintiffs renew the argument they made with respect to § 323(a)'s solicitation restrictions: that it cannot be squared with § 323(e), which allows federal candidates and officeholders to solicit limited donations of soft money to tax-exempt organizations that engage in federal election activities. But if § 323(d)'s restrictions on solicitations are otherwise valid, they are not rendered unconstitutional by the mere fact that Congress chose not to regulate the activities of another group as stringently as it might have. See *NRWC*; see also *Katzenbach v. Morgan*. In any event, the difference between the two provisions is fully explained by the fact that national party officers, unlike federal candidates and officeholders, are able to solicit soft money on behalf of nonprofit organizations in their individual capacities. Section 323(e), which is designed to accommodate the individual associational and speech interests of candidates and officeholders in lending personal support to nonprofit organizations, also places tight content, source, and amount restrictions on solicitations of soft money by federal candidates and officeholders. Given those limits, as well as the less rigorous standard of review, the greater allowances of § 323(e) do not render § 323(d)'s solicitation restriction facially invalid.

2. *New FECA § 323(d)'s Regulation of Donations*

Section 323(d) also prohibits national, state, and local party committees from making or directing "any donation" to qualifying § 501(c) or § 527 organizations. The Government again defends the restriction as an anticircumvention measure. We agree insofar as it prohibits the donation of soft money. Absent such a restriction, state and local party committees could accomplish directly what the antisolicitation restrictions prevent them from doing indirectly—namely, raising large sums of soft money to launder through tax-exempt organizations engaging in federal election activities. Because the party itself would be raising and collecting the funds, the potential for corruption would be that much greater. We will not disturb Congress' reasonable decision to close that loophole, particularly given a record demonstrating an already robust practice of parties' making such donations. (Kollar-Kotelly); (Leon, J.).

[69] Notably, the FEC has interpreted § 323(d)(2) to permit state, district, and local party committees to solicit donations to § 527 organizations that are state-registered PACs, that support only state or local candidates, and that do not make expenditures or disbursements in connection with federal elections. The agency determined that this interpretation of "political committee"—at least with respect to state, district, and local committees—was consistent with BCRA's fundamental purpose of prohibiting soft money from being used in connection with federal elections.

The prohibition does raise overbreadth concerns if read to restrict donations from a party's federal account—*i.e.*, funds that have already been raised in compliance with FECA's source, amount, and disclosure limitations. Parties have many valid reasons for giving to tax-exempt organizations, not the least of which is to associate themselves with certain causes and, in so doing, to demonstrate the values espoused by the party. A complete ban on donations prevents parties from making even the "general expression of support" that a contribution represents. *Buckley*.[b] At the same time, prohibiting parties from donating funds already raised in compliance with FECA does little to further Congress' goal of preventing corruption or the appearance of corruption of federal candidates and officeholders.

The Government asserts that the restriction is necessary to prevent parties from leveraging their hard money to gain control over a tax-exempt group's soft money. Even if we accepted that rationale, it would at most justify a dollar limit, not a flat ban. Moreover, any legitimate concerns over capture are diminished by the fact that the restrictions set forth in §§ 323(a) and (b) apply not only to party committees, but to entities under their control.

These observations do not, however, require us to sustain plaintiffs' facial challenge to § 323(d)'s donation restriction. "When the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932); see also *Boos v. Barry*, 485 U.S. 312, 331 (1988); *New York v. Ferber*, 458 U.S. 747, 769, n. 24 (1982). Given our obligation to avoid constitutional problems, we narrowly construe § 323(d)'s ban to apply only to donations of funds not raised in compliance with FECA. This construction is consistent with the concerns animating Title I, whose purpose is to plug the soft-money loophole. Though there is little legislative history regarding BCRA generally, and almost nothing on § 323(d) specifically, the abuses identified in the 1998 Senate report regarding campaign finance practices involve the use of nonprofit organizations as conduits for large *soft-money* donations. We have found no evidence that Congress was concerned about, much less that it intended to prohibit, donations of money already fully regulated by FECA. Given Title I's exclusive focus on abuses related to soft money, we would expect that if Congress meant § 323(d)'s restriction to have this dramatic and constitutionally questionable effect, it would say so explicitly. Because there is nothing that compels us to conclude that Congress intended "donations" to include transfers of federal money, and because of the constitutional infirmities such an interpretation would raise, we decline to read § 323(d) in that way. Thus, political parties remain free to make or direct donations of money to any tax-exempt organization that has otherwise been raised in compliance with FECA.

[b] To what extent does this statement (and the Supreme Court's decision to strike down the ban on federal campaign contributions by minors, discussed below) undermine state bans on contributions by gaming interests, lobbying interests and others, as described in Chapter 17 of the main volume?

New FECA § 323(e)'s Restrictions on Federal Candidates and Officeholders

New FECA § 323(e) regulates the raising and soliciting of soft money by federal candidates and officeholders. It prohibits federal candidates and officeholders from "soliciting, receiving, directing, transferring, or spending" any soft money in connection with federal elections. It also limits the ability of federal candidates and officeholders to solicit, receive, direct, transfer, or spend soft money in connection with state and local elections.

Section 323(e)'s general prohibition on solicitations admits of a number of exceptions. For instance, federal candidates and officeholders are permitted to "attend, speak, or be a featured guest" at a state or local party fundraising event. Section 323(e) specifically provides that federal candidates and officeholders may make solicitations of soft money to § 501(c) organizations whose primary purpose is not to engage in "Federal election activities" as long as the solicitation does not specify how the funds will be spent; to § 501(c) organizations whose primary purpose *is* to engage in "Federal election activities" as long as the solicitations are limited to individuals and the amount solicited does not exceed $ 20,000 per year per individual; and to § 501(c) organizations for the express purpose of carrying out such activities, again so long as the amount solicited does not exceed $ 20,000 per year per individual,.

No party seriously questions the constitutionality of § 323(e)'s general ban on donations of soft money made directly to federal candidates and officeholders, their agents, or entities established or controlled by them. Even on the narrowest reading of *Buckley*, a regulation restricting donations to a federal candidate, regardless of the ends to which those funds are ultimately put, qualifies as a contribution limit subject to less rigorous scrutiny. Such donations have only marginal speech and associational value, but at the same time pose a substantial threat of corruption. By severing the most direct link between the soft-money donor and the federal candidate, § 323(e)'s ban on donations of soft money is closely drawn to prevent the corruption or the appearance of corruption of federal candidates and officeholders.

Section 323(e)'s restrictions on solicitations are justified as valid anticircumvention measures. Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself. Without some restriction on solicitations, federal candidates and officeholders could easily avoid FECA's contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities. As the record demonstrates, even before the passage of BCRA, federal candidates and officeholders had already begun soliciting donations to state and local parties, as well as tax-exempt organizations, in order to help their own, as well as their party's, electoral cause. The incentives to do so, at least with respect to solicitations to tax-exempt organizations, will only increase with Title I's restrictions on the raising and spending of soft money by national, state, and local parties.

Section 323(e) addresses these concerns while accommodating the individual speech and associational rights of federal candidates and officeholders. Rather than place an outright ban on solicitations to tax-exempt organizations, § 323(e)(4) permits limited solicitations of soft money. This allowance accommodates individuals who have long served as active members of nonprofit organizations in both their official and individual capacities. Similarly, §§ 323(e)(1)(B) and 323(e)(3) preserve the traditional fundraising role of federal officeholders by providing limited opportunities for federal candidates and officeholders to associate with their state and local colleagues through joint fundraising activities. Given these many exceptions, as well as the substantial threat of corruption or its appearance posed by donations to or at the behest of federal candidates and officeholders, § 323(e) is clearly constitutional. We accordingly uphold § 323(e) against plaintiffs' First Amendment challenge.

New FECA § 323(f)'s Restrictions on State Candidates and Officeholders

The final provision of Title I is new FECA § 323(f). Section 323(f) generally prohibits candidates for state or local office, or state or local officeholders, from spending soft money to fund "public communications" as defined in § 301(20)(A)(iii)—i.e., a communication that "refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office." Exempted from this restriction are communications made in connection with an election for state or local office which refer only to the state or local candidate or officeholder making the expenditure or to any other candidate for the same state or local office.

Section 323(f) places no cap on the amount of money that state or local candidates can spend on any activity. Rather, like §§ 323(a) and 323(b), it limits only the source and amount of contributions that state and local candidates can draw on to fund expenditures that directly impact federal elections. And, by regulating only contributions used to fund "public communications," § 323(f) focuses narrowly on those soft-money donations with the greatest potential to corrupt or give rise to the appearance of corruption of federal candidates and officeholders.

Plaintiffs advance two principal arguments against § 323(f). We have already rejected the first argument, that the definition of "public communications" in new FECA § 301(20)(A)(iii) is unconstitutionally vague and overbroad. We add only that, plaintiffs' and JUSTICE KENNEDY's contrary reading notwithstanding, this provision does not prohibit a state or local candidate from advertising that he has received a federal officeholder's endorsement.

The second argument, that soft-money contributions to state and local candidates for "public communications" do not corrupt or appear to corrupt federal candidates, ignores both the record in this litigation and Congress' strong interest in preventing circumvention of otherwise valid contribution limits. The proliferation of sham issue ads has driven the soft-money explosion. Parties have sought out every possible way to fund and produce these ads with soft money: They have labored to bring them under the FEC's

allocation regime; they have raised and transferred soft money from national to state party committees to take advantage of favorable allocation ratios; and they have transferred and solicited funds to tax-exempt organizations for production of such ads. We will not upset Congress' eminently reasonable prediction that, with these other avenues no longer available, state and local candidates and officeholders will become the next conduits for the soft-money funding of sham issue advertising. We therefore uphold § 323(f) against plaintiffs' First Amendment challenge.[72]

B

[The Court here rejected the argument that Title I exceeds Congress' Election Clause authority to "make or alter" rules governing federal elections, U.S. Const., Art. I, § 4, and, by impairing the authority of the States to regulate their own elections, violates constitutional principles of federalism.]

C

Finally, plaintiffs argue that Title I violates the equal protection component of the Due Process Clause of the Fifth Amendment because it discriminates against political parties in favor of special interest groups such as the National Rifle Association (NRA), American Civil Liberties Union (ACLU), and Sierra Club. As explained earlier, BCRA imposes numerous restrictions on the fundraising abilities of political parties, of which the soft-money ban is only the most prominent. Interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications). We conclude that this disparate treatment does not offend the Constitution.

As an initial matter, we note that BCRA actually favors political parties in many ways. Most obviously, party committees are entitled to receive individual contributions that substantially exceed FECA's limits on contributions to nonparty political committees; individuals can give $25,000 to political party committees whereas they can give a maximum of $5,000 to nonparty political committees. In addition, party committees are entitled in effect to contribute to candidates by making coordinated expenditures, and those expenditures may greatly exceed the contribution limits that apply to other donors.

---

[72] JUSTICE KENNEDY faults our "unwillingness" to confront that "Title I's entirety . . . looks very much like an incumbency protection plan," citing § 323(e), which provides officeholders and candidates with greater opportunities to solicit soft money than §§ 323(a) and (d) permit party officers. But, § 323(e) applies to both officeholders *and candidates* and allows only *minimally* greater opportunities for solicitation out of regard for the fact that candidates and officeholders, unlike party officers, can never step out of their official roles. Any concern that Congress might opportunistically pass campaign-finance regulation for self-serving ends is taken into account by the applicable level of scrutiny. Congress must show concrete evidence that a particular type of financial transaction is corrupting or gives rise to the appearance of corruption and that the chosen means of regulation are closely drawn to address that real or apparent corruption. It has done so here. At bottom, JUSTICE KENNEDY has long disagreed with the basic holding of *Buckley* and its progeny that less rigorous scrutiny—which shows a measure of deference to Congress in an area where it enjoys particular expertise—applies to assess limits on campaign contributions. *Colorado II* (joining JUSTICE THOMAS [dissenting opinion] for the proposition that "*Buckley* should be over[]ruled" (citation omitted)); *Shrink Missouri* (KENNEDY, J., dissenting).

More importantly, however, Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. See *NRWC*. Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group. As a result, it is hardly surprising that party affiliation is the primary way by which voters identify candidates, or that parties in turn have special access to and relationships with federal officeholders. Congress' efforts at campaign finance regulation may account for these salient differences. Taken seriously, appellants' equal protection arguments would call into question not just Title I of BCRA, but much of the pre-existing structure of FECA as well. We therefore reject those arguments.

Accordingly, we affirm the judgment of the District Court insofar as it upheld §§ 323(e) and 323(f). We reverse the judgment of the District Court insofar as it invalidated §§ 323(a), 323(b), and 323(d).

JUSTICE KENNEDY, concurring in the judgment in part and dissenting in part with respect to BCRA [Title I.*]

I. TITLE I . . .

Title I principally bans the solicitation, receipt, transfer and spending of soft money by the national parties (new FECA § 323(a)). It also bans certain uses of soft money by state parties (new FECA § 323(b)); the transfer of soft money from national parties to nonprofit groups (new FECA § 323(d)); the solicitation, receipt, transfer, and spending of soft money by federal candidates and officeholders (new FECA § 323(e)); and certain uses of soft money by state candidates (new FECA § 323(f)). . . . Even a cursory review of the speech and association burdens these laws create makes their First Amendment infirmities obvious:

> Title I bars individuals with shared beliefs from pooling their money above limits set by Congress to form a new third party. See new FECA § 323(a).
>
> Title I bars national party officials from soliciting or directing soft money to state parties for use on a state ballot initiative. This is true even if no federal office appears on the same ballot as the state initiative. See new FECA § 323(a).
>
> A national party's mere involvement in the strategic planning of fundraising for a state ballot initiative risks a determination that the national party is exercising "indirect control" of the state party. If that determination is made, the state party must abide by federal regulations. And this is so even if the federal candidate on the ballot, if there is one,

* [On Title I issues, Chief Justice Rehnquist joined this opinion in its entirety and Justice Scalia joined the opinion except to the extent Justice Kennedy would have upheld new FECA § 323(e). Justice Thomas issued a separate opinion dissenting on all Title I issues. The opinions of Justices Thomas and Scalia on this point are omitted; the Chief Justice's separate opinion on Title I issues appears below.]

runs unopposed or is so certain of election that the only voter interest is in the state and local campaigns. See new FECA § 323(a).

Title I compels speech. Party officials who want to engage in activity such as fundraising must now speak magic words to ensure the solicitation cannot be interpreted as anything other than a solicitation for hard, not soft, money. See *ibid.*

Title I prohibits the national parties from giving any sort of funds to nonprofit entities, even federally regulated hard money, and even if the party hoped to sponsor the interest group's exploration of a particular issue in advance of the party's addition of it to their platform. See new FECA § 323(d).

By express terms, Title I imposes multiple different forms of spending caps on parties, candidates, and their agents. See new FECA §§ 323(a), (e), and (f).

Title I allows state parties to raise quasi-soft money Levin funds for use in activities that might affect a federal election; but the Act prohibits national parties from assisting state parties in developing and executing these fundraising plans, even when the parties seek only to advance state election interests. See new FECA § 323(b).

Until today's consolidated cases, the Court has accepted but two principles to use in determining the validity of campaign finance restrictions. First is the anticorruption rationale. The principal concern, of course, is the agreement for a *quid pro quo* between officeholders (or candidates) and those who would seek to influence them. The Court has said the interest in preventing corruption allows limitations on receipt of the *quid* by a candidate or officeholder, regardless of who gives it or of the intent of the donor or officeholder. See *Buckley*. Second, the Court has analyzed laws that classify on the basis of the speaker's corporate or union identity under the corporate speech rationale. The Court has said that the willing adoption of the entity form by corporations and unions justifies regulating them differently: Their ability to give candidates *quids* may be subject not only to limits but also to outright bans; their electoral speech may likewise be curtailed. See *Austin*; *NRWC.*

The majority today opens with rhetoric that suggests a conflation of the anticorruption rationale with the corporate speech rationale. See *ante* (hearkening back to, among others, Elihu Root and his advocacy against the use of corporate funds in political campaigning). The conflation appears designed to cast the speech regulated here as unseemly corporate speech. The effort, however, is unwarranted, and not just because money is not *per se* the evil the majority thinks. Most of the regulations at issue, notably all of the Title I soft money bans and the Title II coordination provisions, do not draw distinctions based on corporate or union status. Referring to the corporate speech rationale as if it were the linchpin of the case, when corporate speech is not primarily at issue, adds no force to the Court's analysis. Instead, the focus must be on *Buckley*'s anticorruption rationale and the First Amendment rights of individual citizens.

A. Constitutionally Sufficient Interest

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. . . .

In parallel, *Buckley* concluded the expenditure limitations in question were invalid because they did not advance that same interest.

Thus, though *Buckley* subjected expenditure limits to strict scrutiny and contribution limits to less exacting review, it held neither could withstand constitutional challenge unless it was shown to advance the anticorruption interest. In these consolidated cases, unless *Buckley* is to be repudiated, we must conclude that the regulations further that interest before considering whether they are closely drawn or narrowly tailored. If the interest is not advanced, the regulations cannot comport with the Constitution, quite apart from the standard of review.

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:

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .

Despite the Court's attempt to rely on language from cases like *Shrink Missouri* to establish that the standard defining corruption is broader than conduct that presents a *quid pro quo* danger, in those cases the Court in fact upheld limits on conduct possessing *quid pro quo* dangers, and nothing more. For example, the *Shrink Missouri* Court's distinguishing of what was at issue there and *quid pro quo*, in fact, shows only that it used the term *quid pro quo* to refer to actual corrupt, vote-buying exchanges, as opposed to interactions that possessed *quid pro quo* potential even if innocently undertaken. . . . Thus, the perception of corruption that the majority now asserts is somehow different from the *quid pro quo* potential discussed in this opinion, was created by an exchange featuring *quid pro quo* potential—contributions directly to a candidate.

In determining whether conduct poses a *quid pro quo* danger the analysis is functional. In *Buckley*, the Court confronted an expenditure limitation provision that capped the amount of money individuals could spend on any activity intended to influence a federal election (*i.e.*, it reached to both independent and coordinated expenditures). The Court concluded that though the limitation reached both coordinated and independent expenditures, there were other valid FECA provisions that barred coordinated expenditures. Hence, the limit at issue only added regulation to independent expenditures. On that basis it concluded the provision was unsupported by any valid

corruption interest. The conduct to which it added regulation (independent expenditures) posed no *quid pro quo* danger.

Placing *Buckley*'s anticorruption rationale in the context of the federal legislative power yields the following rule: Congress' interest in preventing corruption provides a basis for regulating federal candidates' and officeholders' receipt of *quids*, whether or not the candidate or officeholder corruptly received them. Conversely, the rule requires the Court to strike down campaign finance regulations when they do not add regulation to "actual or apparent *quid pro quo* arrangements."

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," 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." 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.

The majority says it is not abandoning our cases in this way, but its reasoning shows otherwise. . . .

The majority notes that access flowed from the regulated conduct at issue in *Buckley* and its progeny, then uses that fact as the basis for concluding that access peddling by the parties equals corruption by the candidates. That conclusion, however, is tenable only by a quick and subtle shift, and one that breaks new ground: The majority ignores the *quid pro quo* nature of the regulated conduct central to our earlier decisions. It relies instead solely on the fact that access flowed from the conduct.

To ignore the fact that in *Buckley* the money at issue was given to candidates, creating an obvious *quid pro quo* danger as much as it led to the candidates also providing access to the donors, is to ignore the Court's comments in *Buckley* that show *quid pro quo* was of central importance to the analysis. The majority also ignores that in *Buckley*, and ever since, those party contributions that have been subject to congressional limit were not general party-building contributions but were only contributions used to influence particular elections. That is, they were contributions that flowed to a particular candidate's benefit, again posing a *quid pro quo* danger. And it ignores that in *Colorado II*, the party spending was that which was coordinated with a particular candidate, thereby implicating *quid pro quo* dangers. In all of these ways the majority breaks the necessary tether between *quid* and access and assumes that access, all by itself, demonstrates corruption and so can support regulation.

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. Q*uid 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.

The *Buckley* decision made this analysis even clearer in upholding contribution limitations. It stated that even if actual corrupt contribution practices had not been proved, Congress had an interest in regulating the appearance of corruption that is "inherent in a regime of large individual financial contributions." The *quid pro quo* nature of candidate contributions justified the conclusion that the contributions pose inherent corruption potential; and this in turn justified the conclusion that their regulation would stem the appearance of real corruption.

From that it follows that the 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.

1. New FECA §§ 323(a), (b), (d), and (f)

Sections 323(a), (b), (d), and (f) cannot stand because they do not add regulation to conduct that poses a demonstrable *quid pro quo* danger. They do not further *Buckley*'s corruption interest.

The majority, with a broad brush, paints § 323(a) as aimed at limiting contributions possessing federal officeholder corruption potential. From there it would justify § 323's remaining provisions as necessary complements to ensure the national parties cannot circumvent § 323(a)'s prohibitions. The broad brush approach fails, however, when the provisions are reviewed under *Buckley*'s proper definition of corruption potential.

On its face § 323(a) does not regulate federal candidates' or officeholders' receipt of *quids* because it does not regulate contributions to, or conduct by, candidates or officeholders.

The realities that underlie the statute, furthermore, do not support the majority's interpretation. Before BCRA's enactment, parties could only use soft money for a candidate's "benefit" (*e.g.*, through issue ads, which all parties now admit may influence elections) independent of that candidate. And, as discussed later, § 323(e) validly prohibits federal candidate and officeholder solicitation of soft money party donations. Section 323(a), therefore, only adds regulation to soft money party donations not solicited by, or spent in coordination with, a candidate or officeholder.

These donations (noncandidate or officeholder solicited soft money party donations that are independently spent) do not pose the *quid pro quo* dangers that provide the basis for restricting protected speech. Though the government argues § 323(a) does regulate federal candidates' and officeholders' receipt of *quids*, it bases its argument on this flawed reasoning:

> (1) "Federal elected officeholders are inextricably linked to their political parties," FEC Brief; cf. (*Colorado I*) (KENNEDY, J., concurring in judgment and dissenting in part).
>
> (2) All party receipts must be connected to, and must create, corrupt donor favoritism among these officeholders.
>
> (3) Therefore, regulation of party receipts equals regulation of *quids* to the party's officeholders.

The reasoning is flawed because the Government's reliance on reasoning parallel to the *Colorado I* concurrence only establishes the first step in its chain of logic: that a party is a proxy for its candidates generally. It does not establish the second step: that as a proxy for its candidates generally, *all* moneys the party receives (not just candidate

solicited-soft money donations, or donations used in coordinated activity) represent *quids* for all the party's candidates and officeholders. The Government's analysis is inconsistent with what a majority of the Justices, in different opinions, have said.

JUSTICE THOMAS' dissent in *Colorado II,* taken together with JUSTICE BREYER's opinion announcing the judgment of the Court in *Colorado I*, rebuts the second step of the Government's argument. JUSTICE THOMAS demonstrated that a general party-candidate corruption linkage does not exist. . . .

JUSTICE BREYER reached the same conclusion about the corrupting effect general party receipts could have on particular candidates, though on narrower grounds. He concluded that independent party conduct lacks *quid pro quo* corruption potential. See *Colorado I* ("If anything, an independent [party] expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor"); *id.* ("The opportunity for corruption posed by [soft money] contributions is, at best, attenuated" because they may not be used for the purposes of influencing a federal election under FECA).

These opinions establish that independent party activity, which by definition includes independent receipt and spending of soft money, lacks a possibility for *quid pro quo* corruption of federal officeholders. This must be all the more true of a party's independent receipt and spending of soft money donations neither directed to nor solicited by a candidate.

The Government's premise is also unsupported by the record before us. The record confirms that soft money party contributions, without more, do not create *quid pro quo* corruption potential. As a conceptual matter, generic party contributions may engender good will from a candidate or officeholder because, as the Government says: "[A] Member of Congress can be expected to feel a natural temptation to favor those persons who have helped the 'team,'" FEC Brief. Still, no Member of Congress testified this favoritism changed voting behavior.

The piece of record evidence the Government puts forward on this score comes by way of deposition testimony from former Senator Simon and Senator Feingold. (Kollar-Kotelly, J.). Senator Simon reported an unidentified colleague indicated frustration with Simon's opposition to legislation that would benefit a party contributor on the grounds that "we've got to pay attention to who is buttering our bread" and testified he did not think there was any question "this" (*i.e.*, "donors getting their way") was why the legislation passed. Senator Feingold, too, testified an unidentified colleague suggested he support the legislation because "they [*i.e.*, the donor] just gave us [*i.e.*, the party] $100,000."

That evidence in fact works against the Government. These two testifying Senators expressed disgust toward the favoring of a soft money giver, and not the good will one would have expected under the Government's theory. That necessarily undercuts the inference of corruption the Government would have us draw from the evidence.

Even more damaging to the Government's argument from the testimony is the absence of testimony that the Senator who allegedly succumbed to corrupt influence had

himself solicited soft money from the donor in question. Equally, there is no indication he simply favored the company with his vote because it had, without any involvement from him, given funds to the party to which he belonged. This fact is crucial. If the Senator himself had been the solicitor of the soft money funds in question, the incident does nothing more than confirm that Congress' efforts at campaign finance reform ought to be directed to conduct that implicates *quid pro quo* relationships. Only if there was some evidence that the officeholder had not solicited funds from the donor could the Court extrapolate from this episode that general party contributions function as *quids*, inspiring corrupt favoritism among party members. The episode is the single one of its type reported in the record and does not seem sufficient basis for major incursions into settled practice. Given the Government's claim that the corrupt favoritism problem is widespread, its inability to produce more than a single instance purporting to illustrate the point demonstrates the Government has not fairly characterized the general attitudes of Members towards soft money donors from whom they have not solicited.

Other aspects of the record confirm the Government has not produced evidence that Members corruptly favor soft money donors to their party as a *per se* matter. Most testimony from which the Government would have the Court infer corruption is testimony that Members are rewarded by their parties for soliciting soft money. This says nothing about how Members feel about a party's soft money donors from whom they have not solicited. Indeed, record evidence on this point again cuts against the Government:

> "As a Member of the Senate Finance Committee, I experienced the pressure first hand. On several occasions when we were debating important tax bills, I needed a police escort to get into the Finance Committee hearing room because so many lobbyists were crowding the halls, trying to get one last chance to make their pitch to each Senator. Senators generally knew which lobbyist represented the interests of which large donor. I was often glad that I limited the amount of soft money fundraising I did and did not take PAC contributions, because it would be extremely difficult not to feel beholden to these donors otherwise." (testimony of former Senator Boren).

Thus, one of the handful of Senators on whom the Government relies to make its case candidly admits the pressure of appeasing soft money donors derives from the Members' solicitation of donors, not from those donors' otherwise giving to their party.

In light of all this, § 323(a) has no valid anticorruption interest. The anticircumvention interests the Government offers in defense of §§ 323(b), (d), and (f) must also fall with the interests asserted to justify § 323(a). Any anticircumvention interest can be only as compelling as the interest justifying the underlying regulation.

None of these other sections has an independent justifying interest. Section 323(b), for example, adds regulation only to activity undertaken by a state party. In the District Court two of the three judges found as fact that particular state and local parties exist primarily to participate in state and local elections, that they spend the majority of their resources on those elections, and that their voter registration and Get Out The Vote (GOTV) activities, in particular, are directed primarily at state and local elections. See

(Henderson, J.); (Leon, J.). These findings, taken together with BCRA's other, valid prohibitions barring coordination with federal candidates or officeholders and their soft money solicitation, demonstrate that § 323(b) does not add regulation to conduct that poses a danger of a federal candidate's or officeholder's receipt of *quids*.

Even § 323(b)'s narrowest regulation, which bans state party soft money funded ads that (1) refer to a clearly identified federal candidate, and (2) either support or attack any candidate for the office of the clearly mentioned federal candidate fails the constitutional test. The ban on conduct that by the statute's own definition may serve the interest of a federal candidate suggests to the majority that it is conduct that poses *quid pro quo* danger for federal candidates or officeholders. Yet, even this effect—considered after excising the coordination and candidate-solicited funding aspects elsewhere prohibited by BCRA §§ 202 and 214(a) and new FECA § 323(a)—poses no danger of a federal candidate's or officeholder's receipt of a *quid*. That conduct is no different from an individual's independent expenditure referring to and supporting a clearly identified candidate—and this poses no regulable danger.

Section 323(d), which governs relationships between the national parties and nonprofit groups, fails for similar reasons. It is worth noting that neither the record nor our own experience tells us how significant these funds transfers are at this time. It is plain, however, that the First Amendment ought not to be manipulated to permit Congress to forbid a political party from aiding other speakers whom the party deems more effective in addressing discrete issues. One of the central flaws in BCRA is that Congress is determining what future course the creation of ideas and the expression of views must follow. Its attempt to foreclose new and creative partnerships for speech, as illustrated here, is consistent with neither the traditions nor principles of our Free Speech guarantee, which insists that the people, and not the Congress, decide what modes of expression are the most legitimate and effective.

The majority's upholding § 323(d) is all the more unsettling because of the way it ignores the Act as Congress wrote it. . . .

Though § 323(f) in effect imposes limits on candidate contributions, it does not address federal candidate and officeholder contributions. Yet it is the possibility of federal officeholder *quid pro quo* corruption potential that animates *Buckley*'s rule as it relates to Acts of Congress (as opposed to Acts of state legislatures).

When one recognizes that §§ 323(a), (b), (d), and (f) do not serve the interest the anticorruption rationale contemplates, Title I's entirety begins to look very much like an incumbency protection plan. See J. Miller, Monopoly Politics 84-101 (1999) (concluding that regulations limiting election fundraising and spending constrain challengers more than incumbents). That impression is worsened by the fact that Congress exempted its officeholders from the more stringent prohibitions imposed on party officials. Compare new FECA § 323(a) with new FECA § 323(e). Section 323(a) raises an inflexible bar against soft money solicitation, in any way, by parties or party officials. Section 323(e), in contrast, enacts exceptions to the rule for federal officeholders (the very centerpiece of possible corruption), and allows them to solicit soft money for various uses and organizations.

The law in some respects even weakens the regulation of federal candidates and officeholders. Under former law, officeholders were understood to be limited to receipt of hard money by their campaign committees. BCRA, however, now allows them and their campaign committees to receive soft money that fits the hard money source and amount restrictions, so long as the officeholders direct that money on to other nonfederal candidates. The majority's characterization of this weakening of the regime as "tightly constraining" candidates is a prime example of its unwillingness to confront Congress' own interest or the persisting fact that the regulations violate First Amendment freedoms. The more lenient treatment accorded to incumbency-driven politicians than to party officials who represent broad national constituencies must render all the more suspect Congress' claim that the Act's sole purpose is to stop corruption.

The majority answers this charge by stating the obvious, that " § 323(e) applies to both officeholders *and candidates*." The controlling point, of course, is the practical burden on challengers. That the prohibition applies to both incumbents and challengers in no way establishes that it burdens them equally in that regard. Name recognition and other advantages held by incumbents ensure that as a general rule incumbents will be advantaged by the legislation the Court today upholds.

The Government identifies no valid anticorruption interest justifying §§ 323(a), (b), (d), and (f). The very nature of the restrictions imposed by these provisions makes one all the more skeptical of the Court's explanation of the interests at stake. These provisions cannot stand under the First Amendment.

2. New FECA § 323(e)

Ultimately, only one of the challenged Title I provisions satisfies *Buckley*'s anticorruption rationale and the First Amendment's guarantee. It is § 323(e). This provision is the sole aspect of Title I that is a direct and necessary regulation of federal candidates' and officeholders' receipt of *quids*. Section 323(e) governs "candidates, individuals holding Federal office, agents of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office. These provisions, and the regulations that follow, limit candidates' and their agents' solicitation of soft money. The regulation of a candidate's receipt of funds furthers a constitutionally sufficient interest. More difficult, however, is the question whether regulation of a candidate's solicitation of funds also furthers this interest if the funds are given to another.

I agree with the Court that the broader solicitation regulation does further a sufficient interest. The making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request). Rules governing candidates' or officeholders' solicitation of contributions are, therefore, regulations governing their receipt of *quids*. This regulation fits under *Buckley*'s anticorruption rationale.

B. Standard of Review

It is common ground between the majority and this opinion that a speech-suppressing campaign finance regulation, even if supported by a sufficient Government

interest, is unlawful if it cannot satisfy our designated standard of review. In *Buckley*, we applied "closely drawn" scrutiny to contribution limitations and strict scrutiny to expenditure limitations. Against that backdrop, the majority assumes that because *Buckley* applied the rationale in the context of contribution and expenditure limits, its application gives Congress and the Court the capacity to classify any challenged campaign finance regulation as either a contribution or an expenditure limit. Thus, it first concludes Title I's regulations are contributions limits and then proceeds to apply the lesser scrutiny.

> 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.

Though the majority's analysis denies it, Title I's dynamics defy this facile, initial classification.

Title I's provisions prohibit the receipt of funds; and in most instances, but not all, this can be defined as a contribution limit. They prohibit the spending of funds; and in most instances this can be defined as an expenditure limit. They prohibit the giving of funds to nonprofit groups; and this falls within neither definition as we have ever defined it. Finally, they prohibit fundraising activity; and the parties dispute the classification of this regulation (the challengers say it is core political association, while the Government says it ultimately results only in a limit on contribution receipts).

The majority's classification overlooks these competing characteristics and exchanges *Buckley*'s substance for a formulaic caricature of it. Despite the parties' and the majority's best efforts on both sides of the question, it ignores reality to force these regulations into one of the two legal categories as either contribution or expenditure limitations. Instead, these characteristics seem to indicate Congress has enacted regulations that are neither contribution nor expenditure limits, or are perhaps both at once.

Even if the laws could be classified in broad terms as only contribution limits, as the majority is inclined to do, that still leaves the question what "contribution limits" can include if they are to be upheld under *Buckley*. *Buckley*'s application of a less exacting review to contribution limits must be confined to the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder. Any broader definition of the category contradicts *Buckley*'s *quid pro quo* rationale and overlooks *Buckley*'s language, which contemplates limits on contributions to a candidate or campaign committee in explicit terms.

The Court, it must be acknowledged, both in *Buckley* and on other occasions, has described contribution limits due some more deferential review in less than precise terms. At times it implied that donations to political parties would also qualify as contributions whose limitation too would be subject to less exacting review. See *id* ("The general understanding of what constitutes a political contribution[:] Funds provided to a candidate or political party or campaign committee either directly or indirectly through an

intermediary constitute a contribution"). See also *Beaumont* ("Contributions may result in political expression if spent by a candidate or an association").

These seemingly conflicting statements are best reconciled by reference to *Buckley*'s underlying rationale for applying less exacting review. In a similar, but more imperative, sense proper application of the standard of review to regulations that are neither contribution nor expenditure limits (or which are both at once) can only be determined by reference to that rationale.

Buckley's underlying rationale is this: Less exacting review applies to Government regulations that "significantly interfere" with First Amendment rights of association. But any regulation of speech or associational rights creating "markedly greater interference" than such significant interference receives strict scrutiny. Unworkable and ill advised though it may be, *Buckley* unavoidably sets forth this test:

> Even a significant interference with protected rights of political association' may be sustained if the State demonstrates [1] a sufficiently important interest and [2] employs means closely drawn to avoid unnecessary abridgment of associational freedoms.
>
> The markedly greater burden on basic freedoms [referring to the freedom of speech and association] caused by [expenditure limits] thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of [the expenditure limits] turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.

The majority, oddly enough, first states this standard with relative accuracy, but then denies it. Compare:

> The relevant inquiry [in determining the level of scrutiny] is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not, *with*:
>
> None of this is to suggest that the alleged associational burdens imposed on parties by § 323 have no place in the First Amendment analysis. It is only that we account for them in the application, rather than the choice, of the appropriate level of scrutiny.

The majority's attempt to separate out how burdens on speech rights and burdens on associational rights affect the standard of review is misguided. It is not even true to *Buckley*'s unconventional test. *Buckley*, as shown in the quotations above, explained the lower standard of review by reference to the level of burden on associational rights, and it explained the need for a higher standard of review by reference to the higher burdens on both associational and speech rights. In light of *Buckley*'s rationale, and in light of this

Court's ample precedent affirming that burdens on speech necessitate strict scrutiny review, "closely drawn" scrutiny should be employed only in review of a law that burdens rights of association, and only where that burden is significant, not markedly greater. Since the Court professes not to repudiate *Buckley*, it was right first to say we must determine how significant a burden BCRA's regulations place on First Amendment rights, though it should have specified that the rights implicated are those of association. Its later denial of that analysis flatly contradicts *Buckley*.

The majority makes *Buckley*'s already awkward and imprecise test all but meaningless in its application. If one is viewing BCRA through *Buckley*'s lens, as the majority purports to do, one must conclude the Act creates markedly greater associational burdens than the significant burden created by contribution limitations and, unlike contribution limitations, also creates significant burdens on speech itself. While BCRA contains federal contribution limitations, which significantly burden association, it goes even further. The Act entirely reorders the nature of relations between national political parties and their candidates, between national political parties and state and local parties, and between national political parties and nonprofit organizations.

The many and varied aspects of Title I's regulations impose far greater burdens on the associational rights of the parties, their officials, candidates, and citizens than do regulations that do no more than cap the amount of money persons can contribute to a political candidate or committee. The evidence shows that national parties have a long tradition of engaging in essential associational activities, such as planning and coordinating fundraising with state and local parties, often with respect to elections that are not federal in nature. This strengthens the conclusion that the regulations now before us have unprecedented impact. It makes impossible, moreover, the contrary conclusion—which the Court's standard of review determination necessarily implies—that BCRA's soft money regulations will not much change the nature of association between parties, candidates, nonprofit groups, and the like. Similarly, Title I now compels speech by party officials. These officials must be sure their words are not mistaken for words uttered in their official capacity or mistaken for soliciting prohibited soft, and not hard, money. Few interferences with the speech, association, and free expression of our people are greater than attempts by Congress to say which groups can or cannot advocate a cause, or how they must do it.

Congress has undertaken this comprehensive reordering of association and speech rights in the name of enforcing contribution limitations. Here, however, as in *Buckley*, "the markedly greater burden on basic freedoms caused by [BCRA's pervasive regulation] cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." BCRA fundamentally alters, and thereby burdens, protected speech and association throughout our society. Strict scrutiny ought apply to review of its constitutionality. Under strict scrutiny, the congressional scheme, for the most part, cannot survive. This is all but acknowledged by the Government, which fails even to argue that strict scrutiny could be met.

1. New FECA § 323(e)

Because most of the Title I provisions discussed so far do not serve a compelling or sufficient interest, the standard of review analysis is only dispositive with respect to

new FECA § 323(e). As to § 323(e), I agree with the Court that this provision withstands constitutional scrutiny.

Section 323(e) is directed solely to federal candidates and their agents; it does not ban all solicitation by candidates, but only their solicitation of soft money contributions; and it incorporates important exceptions to its limits (candidates may receive, solicit, or direct funds that comply with hard money standards; candidates may speak at fundraising events; candidates may solicit or direct unlimited funds to organizations not involved with federal election activity; and candidates may solicit or direct up to $ 20,000 per individual per year for organizations involved with certain federal election activity (*e.g.*, GOTV, voter registration)). These provisions help ensure that the law is narrowly tailored to satisfy First Amendment requirements. For these reasons, I agree § 323(e) is valid.

2. New FECA §§ 323(a), (b), (d), and (f)

Though these sections do not survive even the first test of serving a constitutionally valid interest, it is necessary as well to examine the vast overbreadth of the remainder of Title I, so the import of the majority's holding today is understood. Sections 323(a), (b), (d), and (f) are not narrowly tailored, cannot survive strict scrutiny, and cannot even be considered closely drawn, unless that phrase is emptied of all meaning.

First, the sections all possess fatal overbreadth. By regulating conduct that does not pose *quid pro quo* dangers, they are incursions on important categories of protected speech by voters and party officials.

At the next level of analytical detail, § 323(a) is overly broad as well because it regulates all national parties, whether or not they present candidates in federal elections. It also regulates the national parties' solicitation and direction of funds in odd-numbered years when only state and local elections are at stake.

Likewise, while § 323(b) might prohibit some state party conduct that would otherwise be undertaken in conjunction with a federal candidate, it reaches beyond that to a considerable range of campaign speech by the state parties on nonfederal issues. A state or local party might want to say: "The Democratic slate for state assembly opposes President Bush's tax policy . . . . Elect the Republican slate to tell Washington, D. C. we don't want higher taxes." Section 323(b) encompasses this essential speech and prohibits it equally with speech that poses a federal officeholder *quid quo pro* danger.

Other predictable political circumstances further demonstrate § 323(b)'s overbreadth. It proscribes the use of soft money for all state party voter registration efforts occurring within 120 days of a federal election. So, the vagaries of election timing, not any real interest related to corruption, will control whether state parties can spend nonfederally regulated funds on ballot efforts. This overreaching contradicts important precedents that recognize the need to protect political speech for campaigns related to ballot measures. See generally *CARC; Bellotti.*

Section 323(b) also fails the narrow tailoring requirement because less burdensome regulatory options were available. The Government justifies the provision as an attempt to stop national parties from circumventing the soft money allocation

constraints they faced under the prior FECA regime. We are told that otherwise the national parties would let the state parties spend money on their behalf. If, however, the problem were avoidance of allocation rates, Congress could have made any soft money transferred by a national party to a state party subject to the allocation rates that governed the national parties' similar use of the money.

Nor is § 323(d) narrowly tailored. The provision, proscribing any solicitation or direction of funds, prohibits the parties from even distributing or soliciting regulated money (*i.e.*, hard money). It is a complete ban on this category of speech. To prevent circumvention of contribution limits by imposing a complete ban on contributions is to burden the circumventing conduct more severely than the underlying suspect conduct could be burdened.

By its own terms, the statute prohibits speech that does not implicate federal elections. The provision prohibits any transfer to a § 527 organization, irrespective of whether the organization engages in federal election activity. This is unnecessary, as well, since Congress enacted a much narrower provision in § 323(a)(2) to prevent circumvention by the parties via control of other organizations. Section 323(a)(2) makes "any entity that is directly or indirectly . . . controlled by" the national parties subject to the same § 323(a) prohibitions as the parties themselves.

Section 323(f), too, is not narrowly tailored or even close to it. It burdens a substantial body of speech and expression made entirely independent of any federal candidate. The record, for example, contains evidence of Alabama Attorney General Pryor's reelection flyers showing a picture of Pryor shaking hands with President Bush and stating: "Bush appointed Pryor to be Alabama co-chairman of the George W. Bush for President campaign." A host of circumstances could make such statements advisable for state candidates to use without any coordination with a federal candidate. Section 323(f) incorporates no distinguishing feature, such as an element of coordination, to ensure First Amendment protected speech is not swept up within its bounds.

Compared to the narrowly tailored effort of § 323(e), which addresses in direct and specific terms federal candidates' and officeholders' quest for dollars, these sections cast a wide net not confined to the critical categories of federal candidate or officeholder involvement. They are not narrowly tailored; they are not closely drawn; they flatly violate the First Amendment; and even if they do encompass some speech that poses a regulable *quid pro quo* danger, that little assurance does not justify or permit a regime which silences so many legitimate voices in this protected sphere.

CHIEF JUSTICE REHNQUIST, dissenting with respect to BCRA Titles I and V.[*]

Although I join JUSTICE KENNEDY's opinion in full, I write separately to highlight my disagreement with the Court on Title I . . . and to dissent from the Court's opinion upholding § 504 of Title V [discussed in the Supplement to Chapter 21—EDS].

[*] JUSTICE SCALIA and JUSTICE KENNEDY join this opinion in its entirety.

I

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. Under our precedent, restrictions on political contributions implicate important First Amendment values and are constitutional only if they are "closely drawn" to reduce the corruption of federal candidates or the appearance of corruption. Yet, the Court glosses over the breadth of the restrictions, characterizing Title I of BCRA as "doing little more that regulating the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders." Because, in reality, Title I is much broader than the Court allows, regulating a good deal of speech that does *not* have the potential to corrupt federal candidates and officeholders, I dissent.

The lynchpin of Title I, new FECA § 323(a*)*, prohibits national political party committees from "soliciting," "receiving," "directing to another person," and "spending" *any* funds not subject to federal regulation, even if those funds are used for nonelection related activities. The Court concludes that such a restriction is justified because under FECA, "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." Accordingly, "it is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." But the Court misses the point. Certainly "infusions of money into [candidates'] campaigns," *NCPAC*, 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. See *Jones*; *Eu*; *Tashjian*. 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 as a majority of the District Court found, 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. Indeed, some national political parties exist primarily for the purpose of expressing ideas and generating debate.

As these activities illustrate, political parties often foster speech crucial to a healthy democracy and fulfill the need for like-minded individuals to ban[d] 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. *E.g.*, *NCPAC*; *CARC*; *Buckley*. 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 funds 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. 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). 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.

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. See (Henderson, J.); (Leon, J.); see also *Colorado I* (plurality opinion) (noting that "the opportunity for corruption posed by [nonfederal contributions for state elections, get-out-the-vote, and voter registration activities] is, at best, attenuated"). Nonetheless, the Court concludes that because these activities *benefit* federal candidates and officeholders, or prevent the circumvention of pre-existing or contemporaneously enacted restrictions,[2] 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

[2] Ironically, in the Court's view, Congress cannot be trusted to exercise judgment independent of its parties' large donors in its usual voting decisions because donations may be used to further its members' reelection campaigns, but yet must be deferred to when it passes a comprehensive regulatory regime that restricts election-related speech. It seems to me no less likely that Congress would create rules that favor its Members' reelection chances, than be corrupted by the influx of money to its political parties, which may in turn be used to fund a portion of the Members' reelection campaigns.

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.[3] See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247, 250 (1974) (holding unconstitutional a state law that required newspapers to provide "right to reply" to any candidate who was personally or professionally assailed in order to eliminate the "abuses of bias and manipulative reportage" by the press).

It is also true that any circumvention rationale ultimately must rest on the circumvention itself leading to the corruption of federal candidates and officeholders. See *Buckley* (upholding restrictions on funds donated to national political parties "for the purpose of influencing any election for a Federal office" because they were prophylactic measures designed "to prevent evasion" of the contribution limit on *candidates*). 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.[4] 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.

---

[3] The Court's suggestion that the "close relationship" between federal officeholders and state and local political parties in some way excludes the media from its rationale is unconvincing, see *ante* (THOMAS, J., concurring in part, concurring in result in part, and dissenting in part), particularly because such a relationship may be proved with minimal evidence. Indeed, although the Court concludes that local political parties have a "close relationship" with federal candidates, thus warranting greater congressional regulation, I am unaware of *any* evidence in the record that indicates that local political parties have *any* relationship with federal candidates.

[4] BCRA does not even close all of the "loopholes" that currently exist. Nonprofit organizations are currently able to accept, without disclosing, unlimited donations for voter registration, voter identification, and get-out-the-vote activities, and the record indicates that such organizations already receive large donations, sometimes in the millions of dollars, for these activities.(Henderson, J.) (noting that the NAACP Voter Fund received a single, anonymous $7 million donation for get-out-the-vote activities). There is little reason why all donations to these nonprofit organizations, no matter the purpose for which the money is used, will deserve any more protection than the Court provides state parties if Congress decides to regulate them. And who knows what the next "loophole" will be.

No doubt Congress was convinced by the many abuses of the current system that something in this area must be done. Its response, however, was too blunt. Many of the abuses described by the Court involve donations that were made for the "purpose of influencing a federal election," and thus are already regulated. See *Buckley.* Congress could have sought to have the existing restrictions enforced or to enact other restrictions that are "closely drawn" to its legitimate concerns. But it should not be able to broadly restrict political speech in the fashion it has chosen. Today's decision, by not requiring tailored restrictions, has significantly reduced the protection for political speech having little or nothing to do with corruption or the appearance of corruption.

Notes and Questions

1. *Fidelity to* Buckley *on the Definition of Corruption.* Is the majority opinion's approach to corruption or Justice Kennedy's approach more consistent with *Buckley v. Valeo*? What is the Court's current definition of corruption? What role does the *appearance* of corruption play in the majority's decision and how does that compare to the role that the appearance of corruption played in *Buckley*?

2. *Conferring Benefits and Affecting Elections*. In responding to Chief Justice Rehnquist's dissent, the majority states (in footnote 51) its agreement that "Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a *benefit* on the candidate." According to the majority, what distinguishes talk show hosts and newspaper editors from local political parties? Certainly both groups may not only confer a *benefit* on candidates but also may engage in activities that *affect* federal elections.

3. *Standard of Review and Evidentiary Burden*. It appears that the constitutionality of many of BCRA's soft money provisions depended upon the majority's determination to use a relaxed standard of review and a relatively low evidentiary burden. Might it be said that whether or not the majority is showing fidelity to *Buckley* on these points, it is certainly showing fidelity to the Court's more recent campaign finance cases, most notably *Shrink Missouri*? How does the Court know when a Congressional view of the possibility of corruption or its appearance is "neither novel nor implausible?"

4. *Deference to Factual Findings of Lower Court.* To the extent that facts mattered to the Court on the soft money questions, how did the Court decide among conflicting factfinding by the lower court judges? The majority appeared to rely only on the findings of Judge Kollar-Kotelly, the only lower court judge who would have upheld almost the entire act, on a number of issues related to access and corruption. Was this appropriate? *See Wright v. Rockefeller*, 376 U.S. 52 (1964).

5. *Incumbency protection?* The dissenting Justices (especially Justice Scalia, whose dissent is not excerpted above) view the BCRA as a measure aimed at incumbency protection. The majority's answer to this contention appears in footnote 72. Does the standard of review and the need for Congress to provide "concrete evidence" answer

these concerns? Did the Court require such "concrete evidence" here, or did it use the relaxed evidentiary standard of *Shrink Missouri*?

6. *The next "loophole" to be closed*? In the wake of the *McConnell* decision, certain Section 527 organizations have begun accepting large donations to make electioneering communications in connection with the 2004 federal elections. Some opponents of these groups have claimed that it is illegal for individuals to make large donations to these groups for these purposes. As a matter of statutory interpretation, at least some of these organizations might be considered political committees (because their "major purpose" is to influence federal elections), and therefore subject to the FECA's individual contribution limit of $5,000 applicable to political committees. Is such an individual contribution limit constitutional under *McConnell*? Under what theory? Does footnote 48 of the majority opinion bear on this question?

Issue Advocacy and Limits on Direct Corporate and Union Expenditures

McConnell v. Federal Election Commission
124 S. Ct. 619 (2003)

JUSTICE STEVENS and JUSTICE O'CONNOR delivered the opinion of the Court with respect to BCRA [Title II.*]

Issue Advertising

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

* JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join this opinion in its entirety.

products such as Coca-Cola, should, and did, avoid the use of the magic words.[18] 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,[20] 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. . . .

IV. . . .

BCRA § 201's Definition of "Electioneering Communication"

The first section of Title II, § 201, comprehensively amends FECA § 304, which requires political committees to file detailed periodic financial reports with the FEC. The amendment coins a new term, "electioneering communication," to replace the narrowing construction of FECA's disclosure provisions adopted by this Court in *Buckley*. As discussed further below, that construction limited the coverage of FECA's disclosure requirement to communications expressly advocating the election or defeat of particular

[18] It is undisputed that very few ads—whether run by candidates, parties, or interest groups—used words of express advocacy. In the 1998 election cycle, just 4% of candidate advertisements used magic words; in 2000, that number was a mere 5%.

[20] The spending on electioneering communications climbed dramatically during the last decade. In the 1996 election cycle, $135 to $150 million was spent on multiple broadcasts of about 100 ads. In the next cycle (1997-1998), 77 organizations aired 423 ads at a total cost between $270 and $340 million. By the 2000 election, 130 groups spent over an estimated $500 million on more than 1,100 different ads. Two out of every three dollars spent on issue ads in the 2000 cycle were attributable to the two major parties and six major interest groups.

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.[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.

In addition to setting forth this definition, BCRA's amendments to FECA § 304 specify significant disclosure requirements for persons who fund electioneering communications. BCRA's use of this new term is not, however, limited to the disclosure context: A later section of the Act (BCRA § 203, which amends FECA § 316(b)(2)) 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. Thus, plaintiffs maintain, Congress cannot constitutionally require disclosure of, or regulate expenditures for, "electioneering communications" without making an exception for those "communications" that do not meet *Buckley*'s definition of express advocacy.

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 began by examining then-18 U.S.C. § 608(e)(1), which restricted 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 § 608(e)(1) as limited to communications

[73] BCRA also provides a "backup" definition of "electioneering communication," which would become effective if the primary definition were "held to be constitutionally insufficient by final judicial decision to support the regulation provided herein." We uphold all applications of the primary definition and accordingly have no occasion to discuss the backup definition.

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,'" *id.,* n. 52, and those examples eventually gave rise to what is now known as the "magic words" requirement.

We then considered FECA's disclosure provisions, including 2 U.S.C. § 431(f), which defined "expenditure" to include the use of money or other assets "for the purpose of . . . influencing" a federal election. *Buckley*. Finding that the "ambiguity of this phrase" posed "constitutional problems," we noted our "obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness." "To insure that the reach" of the disclosure requirement was "not impermissibly broad, we construed 'expenditure' for purposes of that section in the same way we construed the terms of § 608(e)—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. Nor did we suggest as much in *MCFL*, in which we addressed the scope of another FECA expenditure limitation and confirmed the understanding that *Buckley*'s express advocacy category was a product of statutory construction.[76]

In short, the concept of express advocacy and the concomitant class of magic words were born of an effort to avoid constitutional infirmities. See *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 500(1979). We have long "rigidly adhered" to the tenet "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *United States v. Raines,* 362 U.S. 17, 21 (1960), for "the nature of judicial review constrains us to consider the case that is actually before us," *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 547 (1991) (Blackmun, J., dissenting). Consistent with that principle, our decisions in *Buckley* and *MCFL* were specific to the statutory language before us; they in no way drew a constitutional

[76] The provision at issue in *MCFL*—2 U.S.C. § 441b—required corporations and unions to use separate segregated funds, rather than general treasury moneys, on expenditures made "in connection with" a federal election. *MCFL*. We noted that *Buckley* had limited the statutory term "expenditure" to words of express advocacy "in order to avoid problems of overbreadth." We held that "a similar *construction*" must apply to the expenditure limitation before us in *MCFL* and that the reach of 2 U.S.C. § 441b was therefore constrained to express advocacy. (emphasis added). [In response to this footnote, Justice Thomas wrote in his dissent: "[I]n *MCFL*, the Court arguably eliminated any ambiguity remaining in *Buckley* when it explicitly stated that the narrowing interpretations taken in *Buckley* were necessary "in order to avoid problems of overbreadth." *MCFL*. The joint opinion's attempt to explain away *MCFL*'s uncomfortable language is unpersuasive. The joint opinion emphasizes that the *MCFL* Court "held that a 'similar *construction*' must apply to the expenditure limitation," as if that somehow proved its point. The fact that the *MCFL* Court said this does not establish anything, of course; adopting a narrow construction of a statute "in order to avoid problems of overbreadth," is perfectly consistent with a holding that, lacking the narrowing construction, the statute would be overly broad, *i.e.*, unconstitutional."—EDS.]

boundary that forever fixed the permissible scope of provisions regulating campaign-related speech.

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, as all three judges on the District Court agreed, 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.[78] *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. See *Grayned v. City of Rockford,* 408 U.S. 104, 108-114 (1972). Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here. . . .

[The court then upheld the disclosure requirements contained in Title II. A discussion of these provisions appears in this Supplement to Chapter 21.]

BCRA § 203's Prohibition of Corporate and Labor Disbursements for Electioneering Communications

Since our decision in *Buckley*, 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 authorized by FECA § 316, 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.

---

[78] One striking example is an ad that a group called "Citizens for Reform" sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated:

"Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values."

The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.

Section 203 of BCRA amends FECA § 316(b)(2*)* to extend this rule, which previously applied only to express advocacy, to all "electioneering communications" covered by the definition of that term in amended FECA § 304(f)(3), discussed above. 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. *Beaumont*. 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.

See also *Austin*.

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. Our consideration of plaintiffs' challenge is informed by our earlier conclusion that the distinction between express advocacy and so-called issue advocacy is not constitutionally compelled. In that light, we must examine the degree to which BCRA burdens First Amendment expression and evaluate whether a compelling governmental interest justifies that burden. The latter question—whether the state interest is compelling—is easily answered by our prior decisions regarding campaign finance regulation, which "represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Beaumont.* 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." *Austin*; see *Beaumont*; *NRWC* [Did *NRWC* so hold?—EDS]. Moreover, recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against "circumvention of [valid] contribution limits." *Beaumont*.

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," *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971) and "advocacy 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." *Buckley*. 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. The precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court. Nevertheless, the vast majority of ads clearly had such a purpose. Annenberg Report 13-14; Krasno & Sorauf Expert Report; 251 F. Supp. 2d, at 573-578 (Kollar-Kotelly, J.); *id.*, at 826-827 (Leon, J.). Moreover, whatever the precise percentage may have been in the past, 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.[88]

We are therefore not persuaded that plaintiffs have carried their heavy burden of proving that amended FECA § 316(b)(2) is overbroad. See *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973). 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." *Virginia v. Hicks*, 539 U.S. ___ (2003). 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

[88] As JUSTICE KENNEDY emphasizes in dissent, we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads. The premise that apparently underlies JUSTICE KENNEDY's principal submission is a conclusion that the two categories of speech are nevertheless entitled to the same constitutional protection. If that is correct, JUSTICE KENNEDY must take issue with the basic holding in *Buckley* and, indeed, with our recognition in *Bellotti,* that unusually important interests underlie the regulation of corporations' campaign-related speech. In *Bellotti* we cited *Buckley*, among other cases, for the proposition that "preserving the integrity of the electoral process, preventing corruption, and 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government' are interests of the highest importance." "Preservation of the individual citizen's confidence in government," we added, "is equally important." BCRA's fidelity to those imperatives sets it apart from the statute in *Bellotti*—and, for that matter, from the Ohio statute banning the distribution of anonymous campaign literature, struck down in *McIntyre* [*infra*, Chapter 21—EDS.]

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." 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." *Ibid.*; see, *e.g.*, 2 U.S.C. § 431(9)(B)(i) (exempting news stories, commentaries, and editorials from FECA's definition of "expenditure"); 15 U.S.C. §§ 1801-1804 (providing a limited antitrust exemption for newspapers); 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).

We affirm the District Court's judgment to the extent that it upheld the constitutionality of FECA § 316(b)(2); to the extent that it invalidated any part of § 316(b)(2), we reverse the judgment.

BCRA § 204's Application to Nonprofit Corporations

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 *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 *MCFL*. 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. *Broadrick*; *Buckley*. 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. See *Bowen v. Massachusetts,* 487 U.S. 879, 896 (1988); *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979). Indeed, the Government itself concedes that § 316(c)(6) does not apply to *MCFL* organizations. As so construed, the provision is plainly valid. See *Austin* (holding that a segregated-fund requirement that did not explicitly carve out an *MCFL* exception could apply to a nonprofit corporation that did not qualify for *MCFL* status).

Accordingly, the judgment of the District Court upholding § 316(c)(6) as so limited is affirmed.

JUSTICE KENNEDY, concurring in the judgment in part and dissenting in part with respect to BCRA [Title II.*]

II. TITLE II PROVISIONS. . . .
B. BCRA § 203

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*, 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 "refer to a clearly identified candidate" in an election season. Instead of extending *Austin* to suppress new and vibrant voices, I would overrule it and

* [On Title II issues addressed here, Chief Justice Rehnquist and Justice Scalia joined this opinion. Justice Thomas' separate dissent would have struck down Title II on a number of grounds, including his view that the line between express advocacy and issue advocacy was constitutionally significant. Excerpts from Justice Thomas's dissenting opinion on the disclosure issues appear in this Supplement to Chapter 21.]

return our campaign finance jurisprudence to principles consistent with the First Amendment.

1.

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 *Bellotti*, 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. *Bellotti* was decided in the face of the same arguments on which the majority now relies. Corporate participation, the Government argued in *Bellotti*, "would exert an undue influence on the outcome of a referendum vote." The influence, presumably, was undue because "immense aggregations of wealth" were facilitated by the "unique state-conferred corporate structure." *Austin*. With these "state-created advantages," corporations would "drown out other points of view" and "destroy the confidence of the people in the democratic process." *Bellotti* rejected these arguments in emphatic terms:

> To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'. . . . 'The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .'

Bellotti similarly dismissed the argument that the prohibition was necessary to "protect corporate shareholders" "by preventing the use of corporate resources in

furtherance of views with which some shareholders may disagree." Among other problems, the statute was overinclusive:

> [It] would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure . . . . Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests . . . . Minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements . . . . Assuming, *arguendo*, that protection of shareholders is a 'compelling' interest under the circumstances of this case, we find 'no substantially relevant correlation between the governmental interest asserted and the State's effort' to prohibit appellants from speaking.

See also *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209 (1977) (providing analogous protections to union members).

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," *Austin*, *i.e.,* the same "corrosive and distorting effects of immense aggregations of wealth," found insufficient to sustain a similar prohibition just a decade earlier. Unless certain narrow exceptions apply, see *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. The majority's contrary contention is simply incorrect. Contra, *ante* ("Since our decision in *Buckley*, 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"). I dissented in *Austin*, and continue to believe that the case represents an indefensible departure from our tradition of free and robust debate. Two of my colleagues joined the dissent, including a member of today's majority. *Ibid.* (O'CONNOR and SCALIA, JJ.). See also *id.* (SCALIA, J., dissenting).

To be sure, *Bellotti* concerns issue advocacy, whereas *Austin* is about express advocacy. This distinction appears to have accounted for the position of at least two members of the Court. See (Brennan, J., concurring) ("The Michigan law . . . prohibits corporations from using treasury funds only for making independent expenditures in support of, or in opposition to, any candidate in state elections. A corporation remains free . . . to use general treasury funds to support an initiative proposal in a state referendum" (citation omitted)); *id.,* (STEVENS, J., concurring) ("There is a vast difference between lobbying and debating public issues on the one hand, and political

campaigns for election to public office on the other"). 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. ("[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. *Shrink Missouri* (KENNEDY, J., dissenting).

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 "public 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, "discussions 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." 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 "advocacy 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. See *Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530 (1980).

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* ("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"), but *Buckley* itself warned that "the First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." The exemption for broadcast media companies, moreover, makes the First Amendment problems worse, not better. See *Austin* (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.* (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." FEC Brief. "Electioneering communications paid for with the general treasury funds of labor unions and corporations," the Government warns, "endear those entities to elected officials in a way that could be perceived by the public as corrupting." (Kollar-Kotelly, J.*)* (stating the Government's position).

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." *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.

2.

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. "The corporation *as a corporation* is prohibited from speaking." *Austin* (SCALIA, J., dissenting). 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." *Ibid.*

Our cases recognize the practical difficulties corporations face when they are limited to communicating through PACs. The majority need look no further than *MCFL* for an extensive list of hurdles PACs have to confront. . . .

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.

Even if the newly formed PACs manage to attract members and disseminate their messages against these heavy odds, they have been forced to assume a false identity while doing so. As the American Civil Liberties Union (ACLU) points out, political committees are regulated in minute detail because their primary purpose is to influence federal elections. "The ACLU and thousands of other organizations like it," however, "are not created for this purpose and therefore should not be required to operate as if they were." Reply Brief for Appellant ACLU. A requirement that coerces corporations to adopt alter egos in communicating with the public is, by itself, sufficient to make the PAC option a false choice for many civic organizations. Forcing speech through an artificial "secondhand endorsement structure . . . debases the value of the voice of nonprofit corporate speakers . . . [because] PAC's are interim, ad hoc organizations with little continuity or responsibility." *Austin* (KENNEDY, J., dissenting). In contrast, their sponsoring organizations "have a continuity, a stability, and an influence" that allows "their members and the public at large to evaluate their . . . credibility." *Id*.

The majority can articulate no compelling justification for imposing this scheme of compulsory ventriloquism. If the majority is concerned about corruption and distortion of the political process, it makes no sense to diffuse the corporate message and, under threat of criminal penalties, to compel the corporation to spread the blame to its ad hoc intermediary.

For all these reasons, the PAC option cannot advance the Government's argument that the provision meets the test of strict scrutiny....

Once we turn away from the distraction of the PAC option, the provision cannot survive strict scrutiny. [The primary definition,] with its crude temporal and geographic proxies, is a severe and unprecedented ban on protected speech. [S]uppose a few Senators want to show their constituents in the logging industry how much they care about working families and propose a law, 60 days before the election, that would harm

the environment by allowing logging in national forests. Under § 203, a nonprofit environmental group would be unable to run an ad referring to these Senators in their districts. The suggestion that the group could form and fund a PAC in the short time required for effective participation in the political debate is fanciful. For reasons already discussed, moreover, an ad hoc PAC would not be as effective as the environmental group itself in gaining credibility with the public. Never before in our history has the Court upheld a law that suppresses speech to this extent.

The group would want to refer to these Senators, either by name or by photograph, not necessarily because an election is at stake. It might be supposed the hypothetical Senators have had an impeccable environmental record, so the environmental group might have no previous or present interest in expressing an opinion on their candidacies. Or, the election might not be hotly contested in some of the districts, so whatever the group says would have no practical effect on the electoral outcome. The ability to refer to candidates and officeholders is important because it allows the public to communicate with them on issues of common concern. Section 203's sweeping approach fails to take into account this significant free speech interest. Under any conventional definition of overbreadth, it fails to meet strict scrutiny standards. It forces electioneering communications sponsored by an environmental group to contend with faceless and nameless opponents and consign their broadcast, as the NRA well puts it, to a world where politicians who threaten the environment must be referred to as "He Whose Name Cannot Be Spoken." Reply Brief for Appellants NRA.

In the example above, it makes no difference to § 203 or to the Court that the bill sponsors may have such well-known ideological biases that revealing their identity would provide essential instruction to citizens on whether the policy benefits them or their community. Nor does it make any difference that the names of the bill sponsors, perhaps through repetition in the news media, have become so synonymous with the proposal that referring to these politicians by name in an ad is the most effective way to communicate with the public. Section 203 is a comprehensive censor: On the pain of a felony offense, the ad must not refer to a candidate for federal office during the crucial weeks before an election.

We are supposed to find comfort in the knowledge that the ad is banned under § 203 only if it "is targeted to the relevant electorate," defined as communications that can be received by 50,000 or more persons in the candidate's district. This Orwellian criterion, however, is analogous to a law, unconstitutional under any known First Amendment theory, that would allow a speaker to say anything he chooses, so long as his intended audience could not hear him. See *Kleindienst v. Mandel*, 408 U.S. 753, 762-765 (1972) (discussing the "First Amendment right to receive information and ideas"). A central purpose of issue ads is to urge the public to pay close attention to the candidate's platform on the featured issues. By banning broadcast in the very district where the candidate is standing for election, § 203 shields information at the heart of the First Amendment from precisely those citizens who most value the right to make a responsible judgment at the voting booth.

In defending against a facial attack on a statute with substantial overbreadth, it is no answer to say that corporations and unions may bring as-applied challenges on a case-by-case basis. When a statute is as out of bounds as § 203, our law simply does not force

speakers to "undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation." *Virginia v. Hicks*. If they instead "abstain from protected speech," they "harm not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Ibid.* Not the least of the ill effects of today's decision is that our overbreadth doctrine, once a bulwark of protection for free speech, has now been manipulated by the Court to become but a shadow of its former self.

In the end the Government and intervenor-defendants cannot dispute the looseness of the connection between § 203 and the Government's proffered interest in stemming corruption. At various points in their briefs, they drop all pretense that the electioneering ban bears a close relation to anticorruption purposes. Instead, they defend § 203 on the ground that the targeted ads "may influence," are "likely to influence," or "will in all likelihood have the effect of influencing" a federal election. See FEC Brief; Brief for Intervenor-Defendants Senator John McCain et al. The mere fact that an ad may, in one fashion or another, influence an election is an insufficient reason for outlawing it. I should have thought influencing elections to be the whole point of political speech. Neither strict scrutiny nor any other standard the Court has adopted to date permits outlawing speech on the ground that it might influence an election, which might lead to greater access to politicians by the sponsoring organization, which might lead to actual corruption or the appearance of corruption. Settled law requires a real and close connection between end and means. The attenuated causation the majority endorses today is antithetical to the concept of narrow tailoring.

3.

[Justice Kennedy then explains that he would also strike down section 203's "backup definition" as unconstitutionally overbroad and vague.]

4.

Before concluding the analysis on Title II, it is necessary to add a few words about the majority's analysis of § 204. The majority attempts to minimize the damage done under § 203 by construing § 204 (the Wellstone Amendment) to incorporate an exception for *MCFL*-type corporations. See *MCFL*. Section 204, however, does no such thing. As even the majority concedes, the provision "does not, on its face, exempt *MCFL* organizations from its prohibition." Although we normally presume that legislators would not deliberately enact an unconstitutional statute, that presumption is inapplicable here. There is no ambiguity regarding what § 204 is intended to accomplish. Enacted to supersede the Snowe-Jeffords Amendment that would have carved out precisely this exception for *MCFL* corporations, § 204 was written to broaden BCRA's scope to include issue-advocacy groups. Instead of deleting the Snowe-Jeffords Amendment from the bill, however, the Wellstone Amendment was inserted in a separate section to preserve severability.

Were we to indulge the presumption that Congress understood the law when it legislated, the Wellstone Amendment could be understood only as a frontal challenge to *MCFL*. Even were I to agree with the majority's interpretation of § 204, however, my analysis of Title II remains unaffected. The First Amendment protects the right of all organizations, not just a subset of them, to engage in political speech. See *Austin*

(KENNEDY, J., dissenting) ("The First Amendment does not permit courts to exercise speech suppression authority denied to legislatures").

5.

Title II's vagueness and overbreadth demonstrate Congress' fundamental misunderstanding of the First Amendment. The Court, it must be said, succumbs to the same mistake. The majority begins with a denunciation of direct campaign contributions by corporations and unions. It then uses this rhetorical momentum as its leverage to uphold the Act. The problem, however, is that Title II's ban on electioneering communications covers general commentaries on political issues and is far removed from laws prohibiting direct contributions from corporate and union treasuries. The severe First Amendment burden of this ban on independent expenditures requires much stronger justifications than the majority offers. See *Buckley*.

The hostility toward corporations and unions that infuses the majority opinion is inconsistent with the viewpoint neutrality the First Amendment demands of all Government actors, including the members of this Court. Corporations, after all, are the engines of our modern economy. They facilitate complex operations on which the Nation's prosperity depends. To say these entities cannot alert the public to pending political issues that may threaten the country's economic interests is unprecedented. Unions are also an established part of the national economic system. They, too, have their own unique insights to contribute to the political debate, but the law's impact on them is just as severe. The costs of the majority's misplaced concerns about the "corrosive and distorting effects of immense aggregations of wealth," *Austin*, moreover, will weigh most heavily on budget-strapped nonprofit entities upon which many of our citizens rely for political commentary and advocacy. These groups must now choose between staying on the sidelines in the next election or establishing a PAC against their institutional identities. PACs are a legal construct sanctioned by Congress. They are not necessarily the means of communication chosen and preferred by the citizenry.

In the same vein the Court is quite incorrect to suggest that the mainstream press is a sufficient palliative for the novel and severe constraints this law imposes on the political process. The Court should appreciate the dynamic contribution diverse groups and associations make to the intellectual and cultural life of the Nation. It should not permit Congress to foreclose or restrict those groups from participating in the political process by constraints not applicable to the established press.

Notes and Questions

1. *Issue advocacy and reaffirmation of* Austin. Eight of the nine Supreme Court Justices deciding *McConnell* rejected any distinction between express advocacy and issue advocacy. Indeed, as this Supplement to Chapter 21 explains, eight Justices voted to uphold BCRA's main disclosure provisions, requiring that anyone who spends enough money on "electioneering communications" must disclose such spending as well as most contributions funding that spending. (Only Justice Thomas disagreed on these points.) Thus, eight Justices agreed that the presence of express words of advocacy—what the Court majority refers to as "magic words" (a term that had heretofore been

embraced by the reform community and derided by those opposing regulation)—did not limit the universe of election-related advertising that legislatures may constitutionally regulate.

That determination called *Austin* directly into question; thus, the focus shifted to the constitutionality of preventing corporations and unions from engaging in unlimited independent expenditures (whether containing words of express advocacy or not) mentioning candidates for federal office.

Recall that *Austin* was a 6-3 decision. Justices Kennedy, O'Connor, and Scalia dissented in *Austin*, and of the six-member majority, only Justice Stevens and Chief Justice Rehnquist remained on the Court. When the Chief Justice suggested at the *McConnell* oral argument that he thought he made a mistake in supporting *Austin*, the very future of the corporate and union ban on direct independent expenditures was called into question, because it was clear from his earlier opinions that Justice Thomas would vote to overrule *Austin*.

It turns out that Chief Justice Rehnquist indeed changed his vote, concurring with Justice Kennedy that *Austin* was wrongly decided and should be overturned. What saved *Austin* and indeed led to its ringing affirmation in *McConnell* was the switch in position by Justice O'Connor, who joined with Justices Breyer, Ginsburg, Souter, and Stevens in the majority opinion on Title II. This was not the first time that Justice O'Connor had changed her vote on this question. See the main volume, page 867, note 1.

2. *The Overbreadth Question*. Before the Supreme Court decided *McConnell*, many people believed that the question whether the Court would uphold section 203 depended upon the extent to which the law's bright line test for electioneering communications would capture "genuine issue ads," that is, advertisements not intended to influence the outcome of federal elections. See the main volume, page 922, note 7. The three lower court judges hearing *McConnell* devoted literally hundreds of pages to this question, and focused particularly on two social science studies (the "Buying Time" studies) examining the question. Judge Leon found that between 14.7 percent and 17 percent of the ads run before the 1998 and 2000 elections were genuine issue advertisements. See 251 F. Supp. 2d at 795-99. Judge Kollar-Kotelly disagreed with both the 17 percent figure as well as its significance for the overbreadth analysis. 251 F. Supp. 2d at 636. Judge Henderson believed the figure was anywhere from 11.38 percent to 50.5 percent and in any case that the law was overbroad. 251 F. Supp. 2d at 372 n.149.

The controversy spilled into the popular press after the lower court opinions issued. Compare George F. Will, *1,600 Pages of Confusion*, WASHINGTON POST, May 8, 2003, at A31, with Thomas E. Mann, *No Merit in Brennan Center Smear Campaign*, ROLL CALL, May 22, 2003.

It was therefore surprising when the Supreme Court majority opinion devoted only a single paragraph to this issue. On the main point, the Court wrote: "The precise percentage of issue ads that clearly identified a candidate and were aired during those

relatively brief preelection time spans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court. Nevertheless, the vast majority of ads clearly had such a purpose. Annenberg Report 13-14; App. (Krasno & Sorauf Expert Report); 251 F. Supp. 2d, at 573-578 (Kollar-Kotelly, J.); *id.*, at 826-827 (Leon, J.)." The pages the Court cited from Judge Leon's opinion are from his factual findings noting that "[m]any so-called 'issue ads' by political parties were actually electioneering advertisements that focused" either on the positions, past actions, or general character traits of federal candidates or compared the position of two competing federal candidates, but not upon upcoming federal executive action or pending legislation. The Court never cited Judge Leon's conclusion that up to 17 percent of advertisements could be considered "genuine issue advertisements," nor did it explain how such a number is consistent with the Court's determination that a "vast majority" of such ads had an electioneering purpose.

After concluding that the vast majority of advertisements featuring candidates for federal office had an electioneering purpose, the Court added: "Moreover, whatever the precise percentage may have been in the past, 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." Does this solve the overbreadth problem by creating a new First Amendment problem?

3. *An As-Applied Challenge for "Genuine Issue Ads?"* At a number of places in the majority opinion on Title I and Title II, the Court suggests that some First Amendment challenges to BCRA might come in the form of an "as applied" challenge after the law has already been put into operation. However, the Court never says explicitly that such a challenge may be brought by a corporation or union that wishes to use its treasury funds on an issue advertisement mentioning a candidate for federal office, and it is not clear that such a challenge may be brought. In note 88, the Court says that "we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads" without suggesting the use of an as-applied challenge. And in the portion of the majority opinion addressing Title V of BCRA written by Justice Breyer, the Court characterizes its Title II holding as "upholding stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey messages of support or opposition." (Original emphasis.) Should a lower court entertain such an as-applied challenge brought by a corporation or union that wishes to run a broadcast advertisement paid for with corporate or union funds in October 2004 asking President Bush to intervene in a nasty labor dispute?

4. *Regulating Unions in the Same Manner as Corporations*. *Austin* did not uphold the separate fund requirement for unions; indeed, the *Austin* Court held it was permissible to restrict corporations without extending the requirement to unions. See the main volume, page 869, note 8. Without any explicit discussion, the *McConnell* Court upheld the treatment of unions under the *Austin* rationale. Do unions obtain "immense

aggregations of wealth" in the same manner as corporations? Following *Abood*, do union members need the same protections as corporate shareholders?

Other BCRA provisions

Putting aside the disclosure provisions (described in Chapter 21), the Court also:

- upheld BCRA § 202, which treated electioneering communications coordinated with candidates as contributions;

- struck down BCRA § 213, which required political parties to choose between coordinated and independent expenditures after nominating a candidate;

- upheld BCRA § 214's coordination rules, holding that "[w]e 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 are truly independent" (noting also that expenditures after a "wink or nod" often will be "as useful to the candidate as cash");

- struck down BCRA § 318, prohibiting individuals 17 years or younger from making contributions to candidates or political parties;

- and held that the challenges to certain provisions were nonjusticiable, including BCRA § 305 (imposing certain requirements on candidates who wish to obtain the lowest unit charge for broadcast advertisements); BCRA § 307 (increasing and indexing for inflation certain contribution limits);[c] and BCRA §§ 304, 316, and 319 (the "millionaire's provisions" that increase contribution limits when a candidate's opponent spends a certain amount of personal funds).

The majority opinion on Titles I and II noted the following in its conclusion: "We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are questions for another day."

Notes

1. The *Election Law Journal*, Volume 3, Issue 2 (to be published in early 2004) will feature a symposium issue on the *McConnell* case, with contributions by Senators, lawyers who participated in the case, and a host of academic and other

[c] In this holding, the Court appeared to reject on the merits the arguments of Raskin and Bonifaz (see the main volume, page 744, note 3) that cases such as *Harper* and *Lubin v. Panish* provide that privately financed elections violate the Equal Protection Clause.

commentators. In addition, two symposia in the *Election Law Journal* published before the district court decision explored constitutional issues presented by BCRA. Volume 1, Number 3 (2001) of the journal featured a symposium co-sponsored by the Brennan Center for Justice, including articles by E. Joshua Rosenkranz, Richard Briffault, Thomas Joo, Frank Askin, and Glenn Moramarco, and a commentary by Nathaniel Persily. Volume 2, Number 1 (2002) of the journal features a symposium co-sponsored by the James Madison Center for Free Speech including articles by James Bopp, Jr. and Raeanna S. Moore, Herbert E. Alexander, Joel M. Gora, Gerald M. Pomper, and Ronald Rotunda. Finally, *ELJ* Volume 2:4 and Volume 3:1 featured a debate on BCRA's issue advocacy provisions between Edward Foley and Robert Bauer.

2. In addition to the constitutional questions, BCRA raises a number of difficult statutory questions. For the many statutory questions arising out of the anti-solicitation provisions of section 323, see Robert F. Bauer, *In the Line of Fire: Liability of Federal Candidates and Officeholders Under the Bipartisan Campaign Reform Act of 2002*, 1 ELECTION LAW JOURNAL 531 (2002).

3. Scholars have also begun exploring the consequences of BCRA for politics. For some thoughts about how the BCRA will affect interest group politics, see Michael J. Malbin, Cylde Wilcox, Mark Rozell, and Richard Skinner, *New Interest Group Strategies: A Preview of Post McCain-Feingold Politics?*, 1 ELECTION LAW JOURNAL 541 (2002). The early thinking is that the law will benefit Republicans over Democrats. *See* Seth Gittell, *The Democratic Party Suicide Bill*, ATLANTIC MONTHLY, July/August 2003, at 106.

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 951:

The issue of campaign finance in judicial campaigns has received increased attention as judicial races have become nastier and more expensive. For a summary of the recent issues, see Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 LAW REVIEW OF MICHIGAN STATE UNIVERSITY DETROIT COLLEGE OF LAW 849. Schotland also edited a symposium that will interest readers interested in judicial campaign finance in particular or judicial elections generally. See *Symposium, National Summit on Improving Judicial Selection: Call to Action*, 34 LOYOLA OF LOS ANGELES LAW REVIEW 1353 (2001).

Chapter 20. Public Financing

ADD THE FOLLOWING TO THE END OF THE FIRST PARAGRAPH ON PAGE 966:

Ever since voters enacted the Massachusetts public financing scheme, the Massachusetts legislature has sought to end it. It began when the legislature refused to allocate funding for the program, leading a state supreme court justice to issue a court order allowing a candidate to seize state property to pay for his election campaign. For an opinion of the Supreme Judicial Court of Massachusetts on the funding issue, see *Bates v. Director of the Office of Campaign and Political Finance*, 763 N.E.2d 6 (Mass. 2002). The legislature then voted to repeal the program. See *Massachusetts Legislature Repeals Clean Elections Law*, NEW YORK TIMES, June 21, 2003, at A16.

Arizona's public financing system, enacted by initiative in 1998, is partially funded by a 10% surcharge on criminal and civil fines. A fined motorist challenged the surcharge on First Amendment and other grounds. The Arizona Supreme Court rejected the challenge in *May v. McNally*, 55 P.3d 768 (Ariz. 2002).

Pursuant to BCRA, the General Accounting Office issued a study of Arizona and Maine's public financing systems. The report, entitled *Campaign Finance Reform: Early Experiences of Two States That Provide Full Public Funding for Political Candidates*, GAO-03-453, May 9, 2003, is available at this link: http://www.gao.gov/new.items/d03453.pdf

The report found it too early to fully assess the success of the programs in reaching their goals, though the report was generally seen as being skeptical about the programs. PubliCampaign, an organization that was instrumental in passing the laws in Arizona and Maine, criticized the report as too "cautious." A press release with some criticisms is available at this link: http://www.publicampaign.org/pressroom/pressreleases/release2003/release05-21-03.htm.

ADD THE FOLLOWING BEFORE THE FIRST FULL PARAGRAPH ON PAGE 985:

President Bush has decided to decline public financing in the Republican primaries leading to the 2004 election. He has set a target of raising $170 million during this period, which will be spent on advertisements attacking the Democrats; Bush is expected to have no serious opposition in the Republican primary. Democrat Howard Dean, running in a field of nine Democratic candidates, also has declined public financing. Dean made the decision after raising relatively large sums over the Internet.

Chapter 21. Campaign Finance Disclosure

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 1010:

For a case upholding the ability of the state to require disclosure of express advocacy in ballot measure elections, see *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003).

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 1011:

A highest criminal court in Texas struck down as violating *McIntyre* a state statute requiring one who has contracted to print or publish a political advertisement—in this case, as in *Griset*, a bulk mailing opposing a candidate in a candidate election—to identify himself in the advertisement. *Doe v. State*, 112 S.W.3d 532 (Tex. Crim. App. 2003) The dissenting judge believed the case was closer to *Buckley* than *McIntyre*.

The U.S. Supreme Court decided another case on the right to anonymity, *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002). The Court struck down on First Amendment grounds a local village's law requiring anyone who wished to go door-to-door to advocate for a political cause to first obtain a permit and display that permit to a resident on demand. The case had important implications for campaign finance disclosure laws because the petitioners relied upon *McIntyre* and *ACLF* in arguing for the law's unconstitutionality.

The Court in *Watchtower* characterized *McIntyre* as a case "involving distribution of unsigned handbills." It stated in dicta that a government "may well be justified" in requiring the identity of persons canvassing door-to-door based on "the special state interest in protecting the integrity of a ballot-initiative process." *Watchtower*, 536 U.S. at 167. What is the "special state interest" in this context? Is it the informational interest that *McIntyre* appeared to downplay or some other interest?

5.5 Does government-required disclosure of information on the face of documents (or through spoken words on radio or superimposed words on television broadcasts) violate government prohibitions against compelled speech? California passed a campaign finance initiative with a provision requiring publishers of "slate mailers" advocating the election or defeat of certain candidates or ballot measures to include certain information on the mailers. For example, the statute required that three dollar signs accompany the publication of a statement supporting or opposing a candidate when someone paid the publisher to take that position. Relying upon *McIntyre*'s statement that the state's information interest did "not justify a requirement that a writer make statements or disclosures she would otherwise omit," a federal district judge struck down the California law. *California Prolife Council Political Action Committee v. Scully*, No. Civ. S-96-1965 LKK/DAD (E.D. Ca. Mar. 1, 2001). (The unpublished opinion may be downloaded from http://www.law.ucla.edu/faculty/bios/lowenste/slatemailorder.pdf.) If the government cannot require disclosure on the face of slate mailers, can it require that a radio or television communication governed by federal campaign law include "in a

clearly spoken manner, the following audio statement: '_____ is responsible for the content of this advertising.' (with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor.)"? See BCRA, § 311, upheld by the Supreme Court in *McConnell v. Federal Election Commission*, and imposing a similar requirement.

ADD THE FOLLOWING TO THE END OF THE FIRST PARAGRAPH OF NOTE 8 ON PAGE 1012:

For a further examination of the intersection of tax and campaign finance law, see Daniel L. Simmons, *An Essay on Federal Income Taxation and Campaign Finance Reform*, 54 FLORIDA LAW REVIEW 1 (2002).

ADD THE FOLLOWING TO THE END OF THE FIRST PARAGRAPH OF NOTE 8 ON PAGE 1014:

8.5. The Supreme Court answered a number of these questions but left open others in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003). Most of *McConnell* is described above in this Supplement to Chapter 19. Readers should be sure to read first in Chapter 19 that portion of the majority opinion entitled "*BCRA § 201's Definition of "Electioneering Communication*" before reading the excerpts below.

McConnell v. Federal Election Commission
124 S. Ct. 619 (2003)

JUSTICE STEVENS and JUSTICE O'CONNOR delivered the opinion of the Court with respect to BCRA [Title II.[*]]

IV

[The Court began this section of the opinion by upholding BCRA § 201's definition of electioneering communications. "[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."]

[T]he constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here.

[*] JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join this opinion in its entirety.

BCRA § 201's Disclosure Requirements

Having rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy, we turn to plaintiffs' other concerns about the use of the term "electioneering communication" in amended FECA § 304's disclosure provisions. Under those provisions, whenever any person makes disbursements totaling more than $10,000 during any calendar year for the direct costs of producing and airing electioneering communications, he must file a statement with the FEC identifying the pertinent elections and all persons sharing the costs of the disbursements. If the disbursements are made from a corporation's or labor union's segregated account, or by a single individual who has collected contributions from others, the statement must identify all persons who contributed $1,000 or more to the account or the individual during the calendar year. The statement must be filed within 24 hours of each "disclosure date"—a term defined to include the first date and all subsequent dates on which a person's aggregate undisclosed expenses for electioneering communications exceed $10,000 for that calendar year. Another subsection further provides that the execution of a contract to make a disbursement is itself treated as a disbursement for purposes of FECA's disclosure requirements.

In addition to the failed argument that BCRA's amendments to FECA § 304 improperly extend to both express and issue advocacy, plaintiffs challenge amended FECA § 304's disclosure requirements as unnecessarily (1) requiring disclosure of the names of persons who contributed $1,000 or more to the individual or group that paid for a communication, and (2) mandating disclosure of executory contracts for communications that have not yet aired. The District Court rejected the former submission but accepted the latter, finding invalid new FECA § 304(f)(5), which governs executory contracts. Relying on BCRA's severability provision, the court held that invalidation of the executory contracts subsection did not render the balance of BCRA's amendments to FECA § 304 unconstitutional.

We agree with the District Court that the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA. Accordingly, *Buckley* amply supports application of FECA § 304's disclosure requirements to the entire range of "electioneering communications." As the authors of the District Court's *per curiam* opinion concluded after reviewing evidence concerning the use of purported "issue ads" to influence federal elections:

> The factual record demonstrates that the abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal elections, but permits them to do so while concealing their identities from the public. BCRA's disclosure provisions require these organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. Plaintiffs' disdain for BCRA's disclosure provisions is nothing short of surprising. Plaintiffs challenge BCRA's restrictions on electioneering communications on the premise that they

> should be permitted to spend corporate and labor union general treasury funds in the sixty days before the federal elections on broadcast advertisements, which refer to federal candidates, because speech needs to be 'uninhibited, robust, and wide-open.' McConnell Br. (quoting *New York Times Co. v. Sullivan)*. Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: 'The Coalition-Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers Charles and Sam Wyly). Given these tactics, Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.

The District Court was also correct that *Buckley* forecloses a facial attack on the new provision in § 304 that requires disclosure of the names of persons contributing $1,000 or more to segregated funds or individuals that spend more than $10,000 in a calendar year on electioneering communications. Like our earlier decision in *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958), *Buckley* recognized that compelled disclosures may impose an unconstitutional burden on the freedom to associate in support of a particular cause. Nevertheless, *Buckley* rejected the contention that FECA's disclosure requirements could not constitutionally be applied to minor parties and independent candidates because the Government's interest in obtaining information from such parties was minimal and the danger of infringing their rights substantial. In *Buckley*, unlike *NAACP*, we found no evidence that any party had been exposed to economic reprisals or physical threats as a result of the compelled disclosures. We acknowledged that such a case might arise in the future, however, and addressed the standard of proof that would then apply:

> We recognize that unduly strict requirements of proof could impose a heavy burden, but it does not follow that a blanket exemption for minor parties is necessary. Minor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim. The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties.

A few years later we used that standard to resolve a minor party's challenge to the constitutionality of the State of Ohio's disclosure requirements. We held that the First Amendment prohibits States from compelling disclosures that would subject identified persons to "threats, harassment, and reprisals," and that the District Court's findings had

established a "reasonable probability" of such a result. *Brown v. Socialist Workers '74 Campaign Comm.*

In this litigation the District Court applied *Buckley*'s evidentiary standard and found—consistent with our conclusion in *Buckley*, and in contrast to that in *Brown*—that the evidence did not establish the requisite "reasonable probability" of harm to any plaintiff group or its members. The District Court noted that some parties had expressed such concerns, but it found a "lack of specific evidence about the basis for these concerns." We agree, but we note that, like our refusal to recognize a blanket exception for minor parties in *Buckley,* our rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement.

We also are unpersuaded by plaintiffs' challenge to new FECA § 304(f)(5), which requires disclosure of executory contracts for electioneering communications. . . . In our view, this provision serves an important purpose the District Court did not advance. BCRA's amendments to FECA § 304 mandate disclosure only if and when a person makes disbursements totaling more than $10,000 in any calendar year to pay for electioneering communications. Plaintiffs do not take issue with the use of a dollar amount, rather than the number or dates of the ads, to identify the time when a person paying for electioneering communications must make disclosures to the FEC. Nor do they question the need to make the contents of parties' disclosure statements available to curious voters in advance of elections. Given the relatively short time frames in which electioneering communications are made, the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant. Yet fixing the deadline for filing disclosure statements based on the date when aggregate disbursements exceed $10,000 would open a significant loophole if advertisers were not required to disclose executory contracts. In the absence of that requirement, political supporters could avoid preelection disclosures concerning ads slated to run during the final week of a campaign simply by making a preelection downpayment of less than $10,000, with the balance payable after the election. Indeed, if the advertiser waited to pay that balance until the next calendar year then, as long as the balance did not itself exceed $10,000, the advertiser might avoid the disclosure requirements completely.

The record contains little evidence identifying any harm that might flow from the enforcement of § 304(f)(5)'s "advance" disclosure requirement. The District Court speculated that disclosing information about contracts "that have not been performed, and may never be performed, may lead to confusion and an unclear record upon which the public will evaluate the forces operating in the political marketplace." Without evidence relating to the frequency of nonperformance of executed contracts, such speculation cannot outweigh the public interest in ensuring full disclosure before an election actually takes place. It is no doubt true that § 304(f)(5) will sometimes require the filing of disclosure statements in advance of the actual broadcast of an advertisement.[84] But the

[84] We cannot judge the likelihood that this will occur, as the record contains little if any description of the contractual provisions that commonly govern payments for electioneering communications. Nor does the record contain any evidence relating to JUSTICE KENNEDY's speculation that advance disclosure may disadvantage an advertiser.

same would be true in the absence of an advance disclosure requirement, if a television station insisted on advance payment for all of the ads covered by a contract. Thus, the possibility that amended § 304 may sometimes require disclosures prior to the airing of an ad is as much a function of the use of disbursements (rather than the date of an ad) to trigger the disclosure requirement as it is a function of § 304(f)(5)'s treatment of executory contracts.

As the District Court observed, amended FECA § 304's disclosure requirements are constitutional because they "do not prevent anyone from speaking." Moreover, the required disclosures "would not have to reveal the specific content of the advertisements, yet they would perform an important function in informing the public about various candidates' supporters *before* election day." Accordingly, we affirm the judgment of the District Court insofar as it upheld the disclosure requirements in amended FECA § 304 and rejected the facial attack on the provisions relating to donors of $1,000 or more, and reverse that judgment insofar as it invalidated FECA § 304(f)(5).

JUSTICE THOMAS [concurring in the judgment in part and dissenting in part with respect to BCRA Title II.]

II.

[In a portion of Justice Thomas's dissent not reprinted here, he disagreed with the majority's position that the line between express advocacy and issue advocacy was constitutionally insignificant under *Buckley*.]

C

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* (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." *Id.* 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 "the 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." *Id.* 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*. 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. See also *id.* (SCALIA, J., dissenting). 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.[10]

JUSTICE KENNEDY, concurring in the judgment in part and dissenting in part with respect to BCRA [Title II.[*]]

II. TITLE II PROVISIONS

A. Disclosure Provisions

BCRA § 201, which requires disclosure of electioneering communications, including those coordinated with the party but independent of the candidate, does not substantially relate to a valid interest in gathering data about compliance with contribution limits or in deterring corruption. As the above analysis of Title I demonstrates, Congress has no valid interest in regulating soft money contributions that do not pose *quid pro quo* corruption potential. In the absence of a valid basis for imposing such limits the effort here to ensure compliance with them and to deter their allegedly corrupting effects cannot justify disclosure. The regulation does substantially relate to the other interest the majority details, however. This assures its constitutionality.

---

[10] BCRA § 212(a) is also unconstitutional. Although the plaintiffs only challenge the advance disclosure requirement of § 212(a), by requiring disclosure of communications using express advocacy, the entire reporting requirement is unconstitutional for the same reasons that § 201 is unconstitutional. Consequently, it follows that the advance disclosure provision is unconstitutional.

BCRA §§ 311 and 504 also violate the First Amendment. By requiring any television or radio advertisement that satisfies the definition of "electioneering communication" to include the identity of the sponsor, and even a "full-screen view of a representative of the political committee or other person making the statement" in the case of a television advertisement, new FECA § 318, § 311 is a virtual carbon copy of the law at issue in *McIntyre* (the only difference being the irrelevant distinction between a printed pamphlet and a television or radio advertisement). And § 504 not only has the precise flaws of § 201, but also sweeps broadly as well, covering any "message relating to any political matter of national importance, including . . . a national legislative issue of public importance." Hence, both §§ 311 and 504 should be struck down.

[*] [Chief Justice Rehnquist and Justice Scalia joined in this portion of Justice Kennedy's opinion.]

For that reason, I agree with the Court's judgment upholding the disclosure provisions contained in § 201 of Title II, with one exception.

Section 201's advance disclosure requirement—the aspect of the provision requiring those who have contracted to speak to disclose their speech in advance —is, in my view, unconstitutional. Advance disclosure imposes real burdens on political speech that *post hoc* disclosure does not. It forces disclosure of political strategy by revealing where ads are to be run and what their content is likely to be (based on who is running the ad). It also provides an opportunity for the ad buyer's opponents to dissuade broadcasters from running ads. Against those tangible additional burdens, the Government identifies no additional interest uniquely served by advance disclosure. If Congress intended to ensure that advertisers could not flout these disclosure laws by running an ad before the election, but paying for it afterwards, then Congress should simply have required the disclosure upon the running of the ad. Burdening the First Amendment further by requiring advance disclosure is not a constitutionally acceptable alternative. To the extent § 201 requires advance disclosure, it finds no justification in its subordinating interests and imposes greater burdens than the First Amendment permits. . . .

Notes and Questions

1. *Other BCRA disclosure provisions*. The majority also upheld BCRA § 212 (adding new disclosure requirement for those making independent expenditures of $1,000 or more during the 20-day period immediately preceding an election); BCRA § 311 (requiring that certain communications authorized by a candidate or his committee clearly identify the candidate or committee, or, if not so authorized, identify the payor and announce the lack of authorization); and BCRA section 504 (amending the Communications Act of 1934 to require broadcaster to keep certain records of requests to broadcast certain advertisements by candidates and others). Section 504's "issue request" requirement is broadest of all, requiring broadcasters to keep records of requests made by anyone to broadcast "message[s]" related to a "national legislative issue of public importance" or "otherwise relating to a political matter of national importance."

Writing for a Court majority of five (Breyer, Ginsburg, O'Connor, Souter, and Stevens), Justice Breyer gave a number of reasons for the recordkeeping requirements, including that "recordkeeping can help both the regulatory agencies and the public evaluate broadcast fairness, and determine the amount of money that individuals or groups, supporters or opponents, intend to spend to help elect a particular candidate." He recognized that the "issue request" requirements could impose an administrative burden, and left open a challenge to FCC implementing regulations in the future. Chief Justice Rehnquist, joined by Justices Kennedy and Scalia (Justice Thomas dissented separately) dissented on the constitutionality of section 504. On the "issue request" provisions, the Chief Justice wrote that the requirement "is a far cry from the Government interests endorsed in *Buckley*, which were limited to evaluating and preventing corruption of federal candidates. See also *McIntyre*."

2. *The questionable vitality of* McIntyre. Justice Thomas' view of *McIntyre* is that it *sub silentio* overruled *Buckley* on the question whether the informational interest is ever

sufficient to justify government-compelled disclosure of spending on election-related communications. If Justice Thomas is right, might it be said that *McConnell* similarly *sub silentio* overruled *McIntyre*, so as to allow the informational interest alone to prevail? *McIntyre* is barely mentioned in the majority opinions. Consider footnote 88 in the Stevens/O'Connor majority opinion (tersely distinguishing the interests underlying BCRA from the interests in the *McIntyre* and *Bellotti* cases) and the Breyer majority opinion upholding the "issue request" requirements of BCRA § 504, which require disclosure of much spending completely unrelated to federal elections.

Justice Kennedy, joined by the Chief Justice and Justice Scalia, endorse the informational interest alone as a sufficient basis for requiring disclosure of spending on electioneering communications. (Note, however, that Justice Kennedy fails to even mention the interest by name: "The regulation does substantially relate to the other interest the majority details, however.") Why does Justice Kennedy not consider whether the regulation is substantially overbroad as to disclosure? Why does Chief Justice Rehnquist not view the informational interest as sufficient to uphold BCRA § 504?

Chapter 22. Academic Perspectives on the Future of Campaign Finance Regulation

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 1036:

For reviews of Smith's book, see Joel M. Gora, *"No Law . . . Abridging,"* 24 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 841 (2001) and J. Clark Kelso, *Mr. Smith Goes to Washington*, 1 ELECTION LAW JOURNAL 75 (2001).

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 1071:

Ayres and Bruce Ackerman, one of the proponents of a voucher system for campaign finance (see page 1067, note 1), have written a book combining their two ideas. See Bruce Ackerman and Ian Ayres, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002). The book has received an extraordinary amount of scholarly commentary, including two symposia and a number of other reviews. Volume 91, Issue 3 (May 2003) of the CALIFORNIA LAW REVIEW features commentaries on the book by Richard Briffault, John Ferejohn, Pamela S. Karlan, and David Strauss (with a rejoinder by Ackerman and Ayres). Volume 37, Number 4 (May 2003) of the UNIVERSITY OF RICHMOND LAW REVIEW features commentaries on the book by Kathryn Abrams, Bruce E. Cain, Daniel A. Farber, Elizabeth Garrett, Richard L. Hasen, Kenneth R. Mayer, and Fred Wertheimer & Alexandra T.V. Edsall (with a response by Ackerman and Ayres). See also Lillian Bevier, *What Ails Us?* (Book Review), 112 YALE LAW JOURNAL 1135 (2003); Guy-Uriel E. Charles, *Mixing Metaphors: Voting, Dollars and Campaign Finance Reform* (Book Review), 2 ELECTION LAW JOURNAL 271 (2003); and Daniel H. Lowenstein, *Voting with Votes* (Book Review), 116 HARVARD LAW REVIEW 1971 (2003).