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Constitutional Law Leading Cases: Judicial Elections

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2. Judicial Elections. — In an attempt to insulate judicial elections from partisan politics, many states have canons that forbid candidates for judicial office from expressing views on controversial topics during their campaigns.[1] There have been several challenges to these rules on free speech grounds.[2] Last Term, in *Republican Party of Minnesota v. White*,[3] the Supreme Court held that the First Amendment forbids states from restricting judicial candidates' statements on contentious issues in the name of preserving judicial integrity.[4] The outcome in *Republican Party* suggests that there is a majority for an antifunctionalist approach to free speech analysis on the Court, which could bode well for challengers to recently enacted campaign finance regulations.

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[92] *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 45–46 (1974) (arguing that the Constitution generally, and the First Amendment in particular, incorporate substantive moral concepts); *cf.* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575 (1991) (Scalia, J., concurring in the judgment) ("Our society prohibits . . . certain activities not because they harm others but because they are considered . . . '*contra bonos mores*,' *i.e.*, immoral.").

[93] *Barnes*, 501 U.S. at 569 (citing *Paris Adult Theatre I*, 413 U.S. at 61; and *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

[94] This exception could become even larger, because actual child pornographers might claim that their images are virtual child pornography to raise a reasonable doubt in their cases.

[95] *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (holding that nude dancing qualifies for First Amendment protection); *Barnes*, 501 U.S. at 565–66 (same).

[1] *See* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1065–67 (1996) (discussing the "efforts over several generations to restrain speech . . . by judges").

[2] *Compare* Stretton v. Disciplinary Bd., 944 F.2d 137 (3d Cir. 1991) (upholding an ethical canon against a free speech challenge), *with* Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224 (7th Cir. 1993) (Posner, J.) (striking down an ethical canon on free speech grounds).

[3] 122 S. Ct. 2528 (2002).

[4] *Id.* at 2542.

Minnesota has had rules governing the behavior of judicial candidates for over fifty years.[5] Since 1995, Canon 5 of the Judicial Code has contained the injunction that "[a] candidate for a judicial office, including an incumbent judge[,] shall not . . . make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] announce his or her views on disputed legal or political issues."[6] The first prohibition is known as the "promise clause," while the second prohibition is known as the "announce clause."[7] In addition, Canon 5 prohibits judicial candidates from speaking at or attending political party meetings, soliciting political party endorsements, identifying their own party, and personally soliciting campaign contributions.[8] In 1998, a judicial candidate named Gregory Wersal and the Minnesota Republican Party sued the Minnesota Board on Judicial Standards alleging that Canon 5's prohibitions violated Wersal's right to freedom of association and freedom of speech under the U.S. Constitution.[9]

The District Court dismissed the plaintiffs' claims.[10] The bulk of the opinion addressed the challenges to the party-related restrictions and the ban on soliciting campaign contributions.[11] With regard to the announce clause, the court found that a narrow construction allowed it to survive a facial overbreadth claim.[12] Citing Minnesota precedent requiring that statutes be read — where possible — to avoid unconstitutionality, the court limited the announce clause by interpreting it as only restricting a judicial candidate's ability to comment on those cases likely to come before his or her court.[13]

The Eighth Circuit affirmed. Writing for the panel, Judge Gibson[14] acknowledged that Canon 5 should be subject to strict scrutiny under the First Amendment,[15] but not before noting that the judicial role places unique constraints on judges and judicial candidates.[16] He

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[5] Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 970 (D. Minn. 1999).

[6] MINN. CODE JUD. CONDUCT, Canon 5 (2000).

[7] *See* Republican Party of Minn. v. Kelly, 996 F. Supp. 875, 877 (D. Minn. 1998)

[8] MINN. CODE JUD. CONDUCT, Canon 5 (2000).

[9] *Republican Party*, 63 F. Supp. 2d at 974. Wersal also argued that the prohibitions related to political parties violated the Equal Protection Clause. *Id.*

[10] *Id.* at 986. The plaintiffs had first made an unsuccessful attempt to get a temporary restraining order. *Id.* at 974. The district court's refusal to grant the order was upheld on appeal. Republican Party of Minn. v. Kelly, No. 98-831 MJD, 1998 WL 764782 (8th Cir. Oct. 19, 1998).

[11] The court decided that these restrictions were narrowly tailored to serve the state's compelling interests in an impartial and independent judiciary and in preserving the appearance of impartiality. *Republican Party*, 63 F. Supp. 2d at 974–76.

[12] *Id.* at 985.

[13] *Id.* (discussing *In re Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991)).

[14] Judge McMillian joined Judge Gibson's opinion.

[15] Republican Party of Minn. v. Kelly, 247 F.3d 854, 864 (8th Cir. 2001).

[16] *Id.* at 862 ("[T]he differences between judges and other government officials bear on the strength of the state's interest in restricting political speech." (quoting *In re Chmura*, 608 N.W.2d

next turned his attention to the government's concern for judicial integrity, concluding that Minnesota's interest in preserving an independent judiciary was "undeniably compelling."[17] In discussing the announce clause, Judge Gibson first noted that it would advance the government's interest by keeping judges out of the awkward position of either affirming past statements (in which case they looked craven) or reversing them (in which case they looked vacillating).[18] Such a dilemma creates a risk of actual or apparent partiality.[19] He went on to adopt the district court's narrowing construction to save the announce clause from the charge of unconstitutionality.[20]

Judge Beam dissented. He began his analysis by noting that all attempts to establish an appointed judiciary in Minnesota had failed.[21] In the face of this history, Judge Beam questioned whether Minnesota had an interest in keeping its judiciary independent of electoral pressure.[22] "[W]hen a state opts to hold an election, it must commit itself to a complete election, replete with free speech and association."[23]

The Supreme Court reversed. Writing for the Court, Justice Scalia[24] found that the canon, as interpreted, "prohibits speech on the basis of its content," and proceeded to subject it to strict scrutiny.[25] After skeptically reviewing narrowing constructions of the canon, the Court parsed the state's asserted interest in judicial impartiality and the appearance of impartiality, offering three possible interpretations of the term.[26] First, it discussed "'impartiality' in the judicial context" as referring to "the lack of bias for or against either *party* to a proceeding."[27] The Court faulted the announce clause for a lack of narrow tailoring under this justification.[28] Announcing an opinion on a particular *issue*, the Court reasoned, is not the same as announcing a

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31, 39–40 (Mich. 2000) (alteration in original) (internal quotation marks omitted)); *id.* ("The judicial candidate simply does not have a First Amendment right to promise to abuse his office.")).

[17] *Id.* at 864. Judge Gibson went on to find that all of the challenged restrictions were narrowly tailored to advance this interest. *Id.* at 868–85.

[18] *Id.* at 878.

[19] *Id.*

[20] *Id.* at 881.

[21] *Id.* at 885–91 (Beam, J., dissenting).

[22] *See id.* at 891.

[23] *Id.* at 897.

[24] Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas joined Justice Scalia's opinion.

[25] *Republican Party*, 122 S. Ct. at 2534.

[26] *Id.* at 2535–36 ("Respondents are rather vague . . . about what they mean by 'impartiality.' . . . Clarity on this point is essential before we can decide whether impartiality is indeed a compelling state interest, and, if so, whether the announce clause is narrowly tailored to achieve it.").

[27] *Id.* at 2535.

[28] *Id.* at 2535–36.

bias against a particular *individual*.[29] Second, the Court considered defining "impartiality" as "lack of preconception in favor of or against a particular *legal view*."[30] But the Court observed that a "tabula rasa" on a legal issue "would be evidence of lack of qualification, not lack of bias."[31] Finally, the Court considered impartiality as an openmindedness that "seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so."[32] The Court concluded, however, that "[a]s a means of pursuing [openmindedness], the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous."[33] The announce clause forbade only a tiny fraction of statements on disputed issues, since it did not prohibit such statements either before a candidate declared his candidacy or once he took his seat on the bench.[34] The Court ended its analysis by discussing and rejecting the claim that long historical practice justified the canon, noting that when compared to the long history of judicial elections, such canons were of recent vintage.[35]

Justice O'Connor concurred to "express [her] concerns about judicial elections generally."[36] Nevertheless, she remained sharply critical of the announce clause.[37] Justice Kennedy also concurred. He defended and praised the integrity of state court judges.[38] But unlike the majority, he would have held Minnesota's content-based restriction to be per se unconstitutional.[39]

Justice Stevens dissented,[40] arguing that "the Court defies any sensible notion of the judicial office and the importance of impartiality in that context."[41] Drawing a sharp distinction between "issues of policy" and "issues of law or fact," he offered several criticisms of the Court's

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[29] *Id.* ("*Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.").

[30] *Id.* at 2536.

[31] *See id.* at 2536 (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972)) (internal quotation marks omitted).

[32] *Id.* at 2536.

[33] *Id.* at 2537.

[34] *Id.* The opinion does contemplate that such statements would be forbidden once "litigation is pending." *See id.*

[35] *Id.* at 2540–41.

[36] *Id.* at 2542 (O'Connor, J., concurring).

[37] *Id.* at 2544 ("In [having judicial elections] the State has voluntarily taken on the risks of judicial bias.").

[38] *Id.* at 2545 (Kennedy, J., concurring).

[39] *See id.* at 2544.

[40] Justices Souter, Ginsburg, and Breyer joined Justice Stevens's dissent.

[41] *Republican Party*, 122 S. Ct. at 2546 (Stevens, J., dissenting).

analysis.[42] He had particularly harsh words for judicial candidates who make "statements [that] seek to enhance [their popularity] by indicating how [they] would rule in specific cases if elected."[43] Such statements, he wrote, "evidence a lack of fitness for the office."[44] Justice Stevens argued that when a candidate offers statements "*as a reason to vote for him*," the state "has a compelling interest in sanctioning such statements."[45]

Justice Ginsburg also dissented.[46] In critiquing the Court's doctrinal analysis, Justice Ginsburg began by emphasizing that "judges perform a function fundamentally different from that of the people's elected representatives."[47] She suggested that the majority struck down the speech restrictions because an "electoral process [was] at stake."[48] The Court, she argued, held that "if Minnesota opts to elect its judges . . . the State may not rein in what candidates may say."[49] Rejecting this "unilocular, 'an election is an election,' approach," she distinguished judges as occupying a unique, nonpolitical position.[50] The courts below had narrowed the announce clause to allow robust discussion, provided that candidates did not discuss how they would decide particular future cases.[51] Properly understood, she insisted, the announce clause was not an "election-nullifying" speech restriction.[52]

An examination of this case in the context of the Court's broader First Amendment jurisprudence indicates that the *Republican Party* Court took an antifunctionalist approach to free speech. The application of such an approach to some of the recently enacted campaign finance restrictions does not bode well for their constitutionality.

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[42] Justice Stevens explicitly rejected the Court's assertion that conceptual predispositions do not bias courts against particular parties and its claim that judicial openmindedness was unimportant or unattainable. *See id.* at 2548–49.

[43] *Id.* at 2547.

[44] *Id.*

[45] *Id.* at 2548.

[46] Justices Stevens, Souter, and Breyer joined Justice Ginsburg's dissent.

[47] *Republican Party*, 122 S. Ct. at 2550 (Ginsburg, J., dissenting).

[48] *Id.*

[49] *Id.*

[50] *Id.* at 2551.

[51] *See id.* at 2553 (observing that the announce clause prevents a judicial candidate from "publicly making known how [she] would *decide*" (alteration in original) (quoting *Republican Party of Minnesota v. Kelly*, 247 F. 3d 854, 881–82 (8th Cir. 2001)) (internal quotation marks omitted)). Likewise, she faulted the majority for modifying authoritative judicial construction with "respondents' on the spot answers to fast-paced hypothetical questions at oral argument." *Id.*

[52] *See id.* at 2554 (quoting *Republican Party*, 122 S. Ct. at 2539). Justice Ginsburg also analyzed the announce clause as a necessary adjunct to the promise clause, which the petitioners did not challenge in this case. *Id.* at 2556–58.

Commentators have identified antifunctionalism with the view that speech is an inherent good associated with autonomy.[53] For example, in *Cohen v. California*,[54] the Court extended First Amendment protection to the wearer of a jacket emblazoned with anti-conscription obscenities because, in part, such expression represented "otherwise inexpressible emotions."[55] Similarly, Justice Kennedy has defended speech on the theory that it is inextricably linked to freedom itself: "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[56] Professor G. Edward White has gone so far as to identify as one of the central themes of twentieth-century First Amendment theory the emergence of absolutist, self-expressive justifications for free speech from philosophically or democratically instrumental theories.[57]

However, many of the most powerful modern theories of free speech have rested on functionalist arguments that justify protections for types of speech by referring to the useful role each plays in society. Justice Holmes offered the earliest modern defense of free speech in his dissent in *Abrams v. United States*:[58]

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[59]

Holmes justified free speech by referring to its instrumental ability to facilitate a social process of discovering truth, pragmatically defined in terms of usefulness. Functionalist understandings of free speech continue to be important. In particular, freedom of speech has come to be related to the ideals of the democratic process.[60] Justice Brandeis jus-

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[53] "[I]s the freedom of speech to be regarded only as a means to some further end . . . or is freedom of speech in part also an end in itself, an expression of the sort of society we wish to become and the sort of persons we wish to be?" LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785 (2d ed. 1988) (footnote omitted).

[54] 403 U.S. 15 (1971).

[55] *Id.* at 26.

[56] Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1403 (2002).

[57] *See* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 390–92 (1996) (summarizing the structure of developments in twentieth-century free speech theory).

[58] 250 U.S. 616 (1919).

[59] *Id.* at 630 (Holmes, J., dissenting). Holmes's justification for free speech grew from the soil of philosophical pragmatism — perhaps the most aggressively functionalist epistemology in history — and not surprisingly is aggressively functionalist itself. *See* LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 430–31 (2001).

[60] For an account of the development of twentieth-century free speech theory and its shift from justifications rooted in pragmatic epistemology to those centered around the political theory of democracy, see generally White, *supra* note 57.

tified speech as a method of discovering "political truth,"[61] and Alexander Meiklejohn, an influential mid-century theorist, argued that free speech is a necessary condition for self-government, invoking the model of New England town meeetings.[62] More recent theorists have argued that speech should be protected to keep open the channels of political change[63] or to foster informed, civic-minded deliberation.[64]

Justice Scalia's majority opinion in *Republican Party* takes an anti-functionalist approach to free speech. He rejects the functionalist idea that protection of speech is a function of that speech's instrumental value.[65] The majority opinion stands in contrast to Justice Ginsburg's dissent, which articulates a functionalist justification for protecting speech — ensuring that voters can hold officials accountable for their political actions[66] — and then argues that this justification does not extend to the context of judicial elections.[67]

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[61] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[62] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22–27 (1948). "As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. That is why freedom of discussion for those minds may not be abridged." *Id.* at 25.

[63] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 105–16 (1980) (criticizing and defending free speech doctrine on this basis).

[64] *See* Cass R. Sunstein, *Free Speech Now*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 255, 304 (Geoffrey R. Stone, Richard A. Epstein & Cass R. Sunstein eds., 1992) (arguing for heightened First Amendment protection for political speech, defined as speech "both intended and received as a contribution to public deliberation about some issue").

[65] Ironically, Justice Ginsburg accused the majority of taking an aggressively functionalist approach. *Republican Party*, 122 S. Ct. at 2550 (Ginsburg, J., dissenting) ("The speech restriction must fail, in the Court's view, because an electoral process is at stake."). Yet as Justice Scalia rightly pointed out, Justice Ginsburg was responding to an "argument[] we do not make." *Republican Party*, 122 S. Ct. at 2539. Although he cited cases involving election speech, Justice Scalia disclaimed the idea that it is the context of an election that endows the speech with protection:

> [W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office. . . . We rely on the cases involving speech during elections only to make the obvious point that [the announce clause's] underinclusiveness cannot be explained by resort to the notion that the First Amendment provides less protection during an election campaign than at other times.

Id. at 2539 (footnote and citation omitted).

[66] Contrast Justice Scalia's perfunctory statement that election speech is "at the core of . . . [the] First Amendment," *Republican Party*, 122 S. Ct. at 2534 (quoting *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 864 (8th Cir. 2001)), with Justice Ginsburg's detailed functionalist analysis:

> Candidates for political offices, in keeping with their representative role, must be left free to inform the electorate of their positions on specific issues. Armed with such information, the individual voter will be equipped to cast her ballot intelligently, to vote for the candidate committed to positions the voter approves. Campaign statements committing the candidate to take sides on contentious issues are therefore not only appropriate in political elections, they are "at the core of our electoral process" . . . .

Id. at 2551 (Ginsburg, J., dissenting) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)) (internal quotation marks omitted).

[67] *Republican Party*, 122 S. Ct. at 2551 (Ginsburg, J., dissenting) ("[T]he rationale underlying unconstrained speech in elections for political office . . . does not carry over to campaigns for the

Yet despite its apparent rejection of functionalism, the majority does not seem to adopt the traditional autonomy-based, antifunctionalist approach to free speech. One will search the opinion in vain for references to "the premise of individual dignity and choice"[68] or other nods toward philosophies of personal autonomy. Since the opinion is silent regarding the justification for free speech that it adopts, one must be cautious in making claims, but it seems that at base the justification is some form of textualism.[69] Certainly, aggressive judicial review on the basis of seemingly absolutist textual language — "make no law . . . abridging the freedom of speech"[70] — has analogues elsewhere in Justice Scalia's jurisprudence.[71] For example, in *Maryland v. Craig*,[72] the Court considered the question whether the Confrontation Clause[73] gave an accused child molester the absolute right to be physically present during the testimony of his alleged victim.[74] The Court held that because the state had a compelling interest "in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator,"[75] it was permissible for states to dispense with face-to-face confrontation.[76] Justice Scalia dissented, arguing that "[s]eldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion."[77] His opinion stressed the "unmistakable

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bench."). The majority opinion did state that "speech about the qualifications of candidates" lies "at the core of our First Amendment freedoms," *Republican Party*, 122 S Ct. at 2534 (quoting *Republican Party*, 247 F.3d at 863) (internal quotation marks omitted), and noted that "[w]e have never allowed the government to prohibit candidates from communicating relevant information to voters during an election," *id.* at 2538. However, taken in context these statements seem like rhetorical flourishes because they are not accompanied by sustained functionalist reasoning.

[68] Cohen v. California, 403 U.S. 15, 24 (1971).

[69] Justice Scalia, of course, is a self-described "textualist in good standing." Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 23 (Amy Gutmann ed., 1997).

[70] U.S. CONST. amend. I.

[71] Justice Scalia has forcefully defended free speech on the basis of distrust of the government rather than some instrumentalist account. In his view, "the absolutely central truth of the First Amendment [is] that government cannot be trusted to assure, through censorship, the 'fairness' of political debate." Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting). Notably, however, his fear of censorship is not tied to any detailed articulation of a specific good to be achieved through freedom of speech. Unlike the functionalist analysis of Justice Ginsburg, Justice Scalia's approach does not grant differing levels of protection based on the function that the speech serves.

[72] 497 U.S. 836 (1990).

[73] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

[74] *Craig*, 497 U.S. at 840.

[75] *Id.* at 852.

[76] *Id.* at 857.

[77] *Id.* at 860 (Scalia, J., dissenting).

clarity" of the Sixth Amendment,[78] and he later affirmed that textualism motivated his decision.[79] Similar textualism seems to be at work in *Republican Party*. The opinion, contrary to Justice Ginsburg's characterization, does not rest on an "an election is an election" rationale. Although the underlying rationale is not clearly stated, it seems to be a "speech is speech" rationale that refuses to differentiate levels of constitutional protection on the basis of function.

Proponents of campaign finance laws have used functionalist arguments to uphold restrictions — including some that discriminated on the basis of content — against First Amendment challenges. Justice Marshall, for example, invoked an ideal of "equal access to the political arena" to argue unsuccessfully that Congress should have the right to limit independent advocacy in presidential elections.[80] A few years later, a version of Justice Marshall's functionalism commanded a majority in *Austin v. Michigan Chamber of Commerce*,[81] in which the Court upheld a state law forbidding the use of corporate treasury funds to support or oppose any candidate for state office.[82] Writing for the Court in *Austin*, Justice Marshall reasoned that the state could regulate such expenditures to ensure that speech in the political marketplace reflected popular support rather than economic resources.[83] Behind both of these opinions stands a functionalist vision of speech as a tool serving a model of democratic discourse free of "the corrosive and distorting effects of immense aggregations of wealth."[84] More recently, Justice Breyer has argued that limitations on campaign contributions, which are subject to First Amendment scrutiny,[85] actually

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[78] *Id.*

[79] Scalia, *supra* note 69, at 43–44. Justice Scalia wrote: "I dissented, because the Sixth Amendment provides that 'in *all* criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.' There is no doubt what confrontation meant — or indeed means today. It means face-to-face, not watching from another room." *Id.*

[80] Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 521 (1985) (Marshall, J., dissenting) (quoting *Buckley v. Valeo*, 424 U.S. 1, 287 (1976) (Marshall, J., concurring in part and dissenting in part)) (internal quotation marks omitted).

[81] 494 U.S. 652 (1990).

[82] *Id.* at 654–55.

[83] *See id.* at 659 ("[T]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas." (quoting *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986)) (second alteration in original)); *id.* ("We . . . have recognized that 'the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form.'" (quoting *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 500–01 (1985)) (alteration in original)).

[84] *Id.* at 660.

[85] *See Buckley*, 424 U.S. at 20–21 (per curiam) (arguing that although "a limitation upon the amount that any one person . . . may contribute to a candidate . . . entails only a marginal restriction on the contributor's ability to engage in free communication," it is possible that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candi-

serve to advance free speech.[86] According to Justice Breyer, contribution limits "seek to protect the integrity of the electoral process — the means through which a free society democratically translates political speech into concrete government action."[87] Not surprisingly, Justice Scalia has been hostile to these functional justifications for limitations on the "First Amendment's guarantee of freedom of speech."[88]

The Bipartisan Campaign Reform Act (BCRA),[89] like the law at issue in *Republican Party*, contains content-based restrictions on speech. The act effectively prohibits so-called 501(c) or 527 organizations — groups such as the National Rifle Association and the Sierra Club — from broadcasting any advertisement within sixty days of a federal election that mentions the name of a federal candidate.[90] This provision of BCRA already faces a court challenge.[91] Predicting the outcome of a challenge to a complex law such as BCRA is difficult; but the law is likely to fare better in the hands of a functionalist majority than an antifunctionalist one. Proponents of BCRA claim that its restrictions are necessary to ensure that 501(c) and 527 organizations do not become alternative conduits for the so-called "soft money" contri-

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dates . . . from amassing the resources necessary for effective advocacy"); *id.* at 22 ("[C]ontribution . . . limitations also impinge on protected associational freedoms.").

[86] *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring) (suggesting that campaign finance restrictions "encourag[e] the public participation and open discussion that the First Amendment itself presupposes").

[87] *Id.*

[88] *Republican Party*, 122 S. Ct. at 2534. Justice Scalia dissented from the majority opinions in *Austin* and *Nixon*.

[89] Pub L. No. 107-155, 116 Stat. 81 (2002).

[90] BCRA accomplishes this through — to put it mildly — a rather convoluted set of provisions. First, it defines "electioneering activity" to include advertisements mentioning a candidate's name within sixty days of an election or thirty days of a primary election. *See id.* § 201(a), 116 Stat. at 89. BCRA then forbids "electioneering activity" by corporations, unions, or any organization to which they donate. *Id.* § 202, 116 Stat. at 91. Then BCRA specifically creates an exception that allows 501(c) and 527 organizations to engage in "electioneering activity" without their activity being counted as electioneering activity for the purposes of the act, provided that they do so with funds "provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence." *Id.* § 203(b), 116 Stat. at 91. Then it creates an exception to this exception for organizations that are funded in part by contributions from corporate treasury funds by conclusively presuming that all their "electioneering activity" is paid for with prohibited corporate or union money. *See id.* (noting that exceptions are made for organizations noted in 2 U.S.C. § 441(a) (2000)). The result is that organizations receiving corporate or union money are effectively banned from "electioneering activity" after all. *See* ROBERT F. BAUER, SOFT MONEY, HARD LAW 61 (2002) ("The exception turns out to be 'fool's gold' — the opposite in substance than a quick first impression might suggest.").

[91] *See* Complaint for Declaratory and Injunctive Relief, McConnell v. Fed. Election Comm'n, Civ. No. 02-582 (D.D.C. filed Apr. 12, 2002), *available at* http://www.law.stanford.edu/library/campaignfinance/mcconnelvfec32702.html.

butions that the law banned.[92] Soft money refers to large contributions from corporate treasuries to political parties for party-building activities and issue advocacy.[93] Those who see the First Amendment as protecting an idealized democratic process free of "the corrosive and distorting effects of immense aggregations of wealth"[94] are more likely to accept the limitations that BCRA imposes. In contrast, the textualism and antifunctionalism evidenced by the *Republican Party* majority are more likely to see such purported justifications as resorting "to the notion that the First Amendment provides less protection during election campaigns than at other times."[95] BCRA's content-based restrictions thus may have difficulty surviving a constitutional challenge should the Court approach the law with the textualist, antifunctionalist analysis it employed in *Republican Party*.

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[92] *See* Pub L. No. 107-155, § 101, 116 Stat. 81, 82 (2002) (to be codified at 2 U.S.C. § 441i). For a summary of the arguments made in defense of this provision of BCRA, see BAUER, *supra* note 90, at 51–54.

[93] *See generally* BRADLEY SMITH, UNFREE SPEECH 35 (2001) (defining soft money); *id.* at 186 (stating that soft money can be used for issue advocacy).

[94] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990) (Marshall, J.).

[95] *Republican Party*, 122 S. Ct. at 2539 (Scalia, J.).

[1] *See, e.g.*, Schneider v. State, 308 U.S. 147, 158–59 (1939) (invalidating certain laws prohibiting or regulating the distribution of leaflets, as applied to proselytizing by Jehovah's Witnesses); Cantwell v. Connecticut, 310 U.S. 296, 300 (1940) (overturning the convictions of Jehovah's Witnesses for violating a statute prohibiting the solicitation of money for alleged religious causes without state approval and for inciting a breach of the peace); Murdock v. Pennsylvania, 319 U.S. 105, 107 (1943) (invalidating a license tax that applied to door-to-door religious pamphleteers); Martin v. Struthers, 319 U.S. 141, 142 (1943) (invalidating an ordinance prohibiting the distributors of leaflets from, among other things, ringing doorbells and knocking on doors of private residences); Marsh v. Alabama, 326 U.S. 501, 509 (1946) (overturning the conviction of a Jehovah's Witness for distributing religious literature without permission in a company-owned town).

[2] *Schneider*, 308 U.S. at 164; *see also Martin*, 319 U.S. at 146–47 (recognizing the distribution of information as "vital to the preservation of a free society").

[3] 122 S. Ct. 2080 (2002).

[4] *Id.* at 2091.