William & Mary Law Review

Volume 57 | Issue 3 Article 4

Neutral Principles and Some Campaign Finance Problems

John O. McGinnis

Repository Citation
John O. McGinnis, *Neutral Principles and Some Campaign Finance Problems*, 57 Wm. & Mary L. Rev. 841 (2016), https://scholarship.law.wm.edu/wmlr/vol57/iss3/4

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NEUTRAL PRINCIPLES AND SOME CAMPAIGN FINANCE PROBLEMS

JOHN O. MCGINNIS*

ABSTRACT

This Article has both positive and normative objectives. As a positive matter, it shows that the Roberts Court's campaign finance regulation jurisprudence can be best explained as a systematic effort to integrate that case law with the rest of the First Amendment, making the neutral principles refined in other social contexts govern this more politically salient one as well. It demonstrates that the typical Roberts Court majority in campaign finance cases follows precedent, doctrine, and traditional First Amendment theory, while the dissents tend to carve out exceptions at each of these levels.

As a normative matter, it argues that following neutral principles is particularly important in the application of the First Amendment to campaign finance for three reasons. First, campaign finance disputes bear directly on the political process that determines substantive results across the entire legislative policy space, making the danger of political decision making particularly high. Second, the First Amendment itself reflects a distrust of government officials, and the more a constitutional provision reflects an economy of distrust, the more it requires judicial constraint, which adherence to neutral principles can provide. Third, given that politicians have much to gain from skewing campaign finance regulations in their favor and that judges are appointed by politicians, neutral principles

* George C. Dix Professor in Constitutional Law, Northwestern University. Thanks to Nelson Lund, Jim Pfander, Mark Movsesian, Marty Redish, and participants in a Northwestern faculty workshop for their useful comments, and to Brad Smith for helpful conversations over the years on the subject.

help avoid partisanship and the appearance of partisanship in judicial decision making.

Finally, the Article confronts the most important arguments for departing from standard First Amendment principles in campaign finance and demonstrates that they have far-reaching implications, in that they would allow the legislature to regulate the press or even academics because of their disproportionate influence in politics. But it also shows that, even taken on their own terms, the proposals for judicial reform of First Amendment law in the campaign finance area are deeply flawed. In particular, the idea that the Constitution permits legislators to restrict the freedom of speech for fear it will distort their decision making has no basis in the Constitution. The Constitution provides no baseline for judging distortion, and indeed, its structure permits legislators to take into account the information generated by the First Amendment's spontaneous order of freedom rather than follow raw popular sentiment.

TABLE OF CONTENTS

INTRODUCTION 844
I. THE ROBERTS COURT'S APPLICATION OF FREE SPEECH PRINCIPLES TO CAMPAIGN FINANCE REGULATION 851
A. The Seven Roberts Court Campaign Finance Regulation Decisions 852
B. Free Speech Principles 861
1. Doctrinal Conclusions 861
2. Constitutional Tests 871
3. The Nature of the First Amendment 877
4. Arizona Free Enterprise Club 881
5. Williams-Yulee v. Florida Bar 885
6. Citations to First Amendment Cases 887
7. Moving Further Toward Neutral Principles in Campaign Finance 891
II. THE NEED FOR NEUTRAL PRINCIPLES IN CAMPAIGN FINANCE REGULATION 895
III. OBJECTIONS TO APPLYING NEUTRAL FREE SPEECH PRINCIPLES 902
A. Originalist Claims 902
B. Contrary Precedents 907
C. Constitutional and Political Theory 911
CONCLUSION 916
CITATION APPENDIX 918

INTRODUCTION

For the Roberts Court, campaign finance regulation raises the most conceptually deep, most politically consequential, and most persistently divisive constitutional questions. The questions are deep because they highlight a fundamental conflict within liberal democracy itself. Although some have seen liberal democracy as a coherent and stable state to which history is inevitably trending,[1] the concept contains within itself an inherent tension: the relative priority between liberty, the voluntary and spontaneous ordering generated by rights of individuals, democracy, and top-down ordering through collective decision making.

Giving priority to liberalism puts rights at the center of a regime.[2] Under this view, the exercise of free speech rights generates a civic order on which democracy rests, but which it must not control or disturb. Giving priority to democracy, in contrast, puts the authority of the people to govern themselves at the center, even at the expense of individual rights.[3]

Debate at election time raises the conflict between speech rights and democracy in its most acute form and along multiple dimensions. First, democracy gives every citizen one vote with equal consequences at the ballot box.[4] The First Amendment gives citizens equal rights against government restraints on their speech,[5] but equal rights naturally lead to unequal influence because of differences in endowment, position, and inclination. A few people are articulate, but most are not. Some people are wealthy, others own or work for the media or academia, and still others command attention through their own celebrity—but most have none of these advantages. Some people are so intensely interested in specific government projects or particular political ideals that they join together

1. Most famously in FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 47-50 (1992).

2. *See* Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 69 (1990).

3. *See* David Schultz, *Democracy on Trial: Terrorism, Crime and National Security Policy in a Post 9-11 World*, 38 GOLDEN GATE U. L. REV. 195, 198, 246 (2008).

4. *See* Maureen B. Cavanaugh, *Democracy, Equality, and Taxes*, 54 ALA. L. REV. 415, 416, 476 (2003).

5. U.S. CONST. amend. I.

to amplify their influence. But many, if not most, citizens are rationally uninterested in the details of policy and politics and do not care to speak out individually or in groups.[6] Democracy gives everyone an equal vote, but freedom inevitably leads to unequal voice.[7]

Second, elections in a democracy reflect a set of specific procedures for selecting representatives and occur at a set place and time. But the spontaneous order of civic discourse that the First Amendment creates is not bounded in place or time. And that discourse frames the campaign issues that determine which candidate is elected. In particular, the media importantly shapes the agenda for the election long before the campaign period.[8] But even before the media helps set the agenda, it is influenced by political and social theorists.[9] Speech rights naturally embrace the continuity of political and social discourse. In contrast, a focus on the mechanisms of democratic choice suggests that the election season is a severable aspect of civic life.

Finally, representative democracy empowers legislatures, which can use that authority to pursue ideals, including the ideal structures for political campaigns. In contrast, the First Amendment is premised in part on a distrust of legislators, however much they claim to be motivated by political ideals. This premise underscores that, at least when expression is concerned, government agents may not be faithful servants of the public's interests, but rather of their own.[10] Thus, representative democracy and elections fundamentally contrast with First Amendment speech rights in their nature, in their temporal scope, and in the trust attributed to government officials.

The Roberts Court's campaign finance regulation jurisprudence is distinctive because it uses long-standing constitutional doctrine

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6. *See* Neal Devins & Nicole Mansker, *Public Opinion and the State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 455, 476-77 (2010).

7. Rational ignorance stems from a brute fact of the world. A citizen's input into the democratic process, however well informed, is unlikely to be decisive given the large number of voters for political offices of any significance. *See* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1331 (1994). It is therefore rational to spend time learning about private enterprises or being entertained rather than following politics.

8. *See infra* Part III.C.

9. *See infra* Part III.C.

10. *See infra* text accompanying notes 169, 292.

shaped outside the electoral context to resolve these conflicts between free speech and representative democracy.[11] First, precedent shows that the First Amendment protects the exercise of free speech rights even if these rights are routes to unequal influence and even if individuals band together in partnerships or corporations to maximize that influence. Equalizing the exercise of rights has never been a legitimate governmental purpose for regulating expression because a right of free speech naturally leads to unequal influence. Moreover, the Constitution does not provide any baseline for measuring equality of influence. And trying to equalize the influence of those with money naturally exacerbates the inequality of influence along other dimensions such as celebrity and media access.

Second, both precedent and tradition demonstrate that a political message's proximity to an election cannot be a justification for regulating it. As shown by the outcry over the government's claim in *Citizens United v. FEC* that it could ban books about candidates near an election, it would be intolerable to subject media to more regulation at election time than at other times.[12] The case law also shows that individuals enjoy no less robust rights than those in the professional media, indicating that the proximity of their messages cannot be a basis of regulation either.[13] More generally, given that political discussion affecting political campaigns is not limited to the election season, the timing of citizens' messages about politics cannot serve as a principled basis for regulation. In contrast, unlike private citizens, government officials can use their office for corrupt purposes. Thus, electoral contributions to candidates can be regulated if the regulations meet other First Amendment standards.

Third, previous First Amendment cases provide stringent standards for regulations focused on expression. These precedents have repeatedly affirmed a distrust of regulation in this area and have required the government to meet a number of doctrinal tests to counter this skepticism.[14] For instance, the government must choose a narrowly tailored means of achieving even a legitimate,

11. *See infra* Part I.B.1.
12. *See infra* notes 134-35 and accompanying text.
13. *See infra* notes 137-41 and accompanying text.
14. *See infra* Part I.B.7.

content-neutral objective if its regulation targets expression.[15] The skepticism embodied in these traditional tests can hardly be suspended for regulation connected to electoral messaging when the positions of the legislative regulators are themselves at stake.

Respecting settled principles is essential in campaign finance regulation because there is no area in which political actors are more interested in reordering a constitutional regime for their own benefit. Political actors include the Justices themselves, who were all appointed in a political process and have distinct political affiliations. To depart from the Court's long-established First Amendment principles in the context of electoral messaging and contributions—without a persuasive argument for reversal in the original meaning of that Amendment—would suggest that the Supreme Court is trying to skew political campaigns for ideological, and indeed partisan, reasons. To countenance laws, like many of the campaign finance regulations invalidated by the Roberts Court, that permit the media unlimited influence on elections, but that restrict the influence of other citizens, is to give political preference to a particular class—a class that makes its living from social influence and has an enduring ideological bias.

Part I of this Article demonstrates that the majority or plurality of the Roberts Court grounds its campaign finance regulation opinions in principles that are accepted elsewhere in free speech law: at the levels of doctrinal conclusions, jurisprudential tests, and the fundamental structure of First Amendment analysis. In contrast, all but one of the dissents carve out exceptions for campaign finance regulation from ordinary First Amendment analysis. And in that case, *Williams-Yulee v. Florida Bar*, the plurality and dissent largely agreed on the standards to be applied as against a concurrence that the most senior dissenters in other cases wrote.[16]

Even citations in the cases in which the majority and dissent disagreed on principles tell much the same story: the majority or plurality opinions in these cases make approximately twice as many citations to First Amendment cases outside the campaign finance regulation area as do the dissents.[17]

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15. *See infra* Part I.B.7.

16. *See* 135 S. Ct. 1656, 1666, 1673, 1678 (2015).

17. To reach this conclusion, I compared the majority or plurality decision with the

Thus, my objective in Part I is largely a positive one: to show that the Roberts Court's campaign finance regulation jurisprudence can be best explained as a systematic effort to integrate that jurisprudence with the rest of the First Amendment, making the principles refined in other social spheres govern this one as well. Although law professors have routinely attacked these decisions,[18] including a now-famous former law professor, President Barack Obama, at the State of the Union,[19] this Part offers a sustained explanation of how they flow from existing law.[20] The Part ends by suggesting that the

principal dissent, defined as the opinion joined by the largest number of dissenting Justices. Thus, in each case there are two opinions that formed the basis of comparison. I set aside *Williams-Yulee*, in which the plurality and the dissent agreed on the relevant standards as against a concurrence. *See id.*

18. *See, e.g.*, Randall P. Bezanson, *No Middle Ground? Reflections on the* Citizens United *Decision*, 96 IOWA L. REV. 649, 654-55 (2011) (criticizing *Citizens United*); Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wisconsin Right to Life, 92 MINN. L. REV. 1064, 1064-66 (2008) (criticizing *FEC v. Wisconsin Right to Life*); Michael J. Kasper, *Magic Words and Millionaires: The Supreme Court's Assault on Campaign Funding*, 42 J. MARSHALL L. REV. 1, 2, 24 (2008) (criticizing *Davis v. FEC*); Ellen D. Katz, *Election Law's Lochnerian Turn*, 94 B.U. L. REV. 697, 697-98 (2014) (criticizing *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*); Burt Neuborne, *Symposium: Welcome to Oligarchs United*, SCOTUSBLOG (Apr. 3, 2014, 11:17 AM), http://www.scotusblog.com/2014/04/symposium-welcome-to-oligarchs-united/ [https://perma.cc/N7NL-4DLU] (criticizing *McCutcheon v. FEC*).

19. *See* President Barack Obama, Remarks by the President in State of the Union Address (Jan. 27, 2010), https://www.whitehouse.gov/the-press-office/remarks-president-state-union-address [https://perma.cc/EM52-GJBC].

20. Some individual decisions have received defenses. *See, e.g.*, Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 417 (2013); Bradley A. Smith, *Separation of Campaign and State*, 81 GEO. WASH. L. REV. 2038, 2040 (2013) (defending *Davis v. FEC* and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*). Smith's defense, while interesting, is in a sense the opposite of that advocated here. He believes constitutional law needs a new doctrine—separation of campaign and state—whereas this Article argues that campaign finance regulation jurisprudence has to be integrated with the rest of existing free speech doctrine to guarantee its neutrality. *See* Smith, *supra*, at 2038, 2040. At least for regulation by states, as opposed to regulation by the federal government, separation of campaign and state is no more a text-based principle than separation of church and state. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 488-89 (2002) (criticizing "wall of separation" as a metaphor for constitutional relation between church and state). Certainly nothing in the federal Constitution prevents states from regulating campaign-related activities unless they violate the First Amendment, and neutral principles of First Amendment interpretation outside the campaign context are the best way to discover these principles. It is true that there is a substantial argument as a matter of original meaning that the federal government lacks any enumerated power over campaigns, *see* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 1, 5-6 (2010), but not a single Supreme Court Justice has accepted that claim

integration is not yet complete, as the Roberts Court has not yet united its treatment of campaign contributions with the rest of First Amendment law: it has not yet fully explained the reason campaign contributions are subject to First Amendment scrutiny. This Part thus explores a rationale consistent with the rest of First Amendment jurisprudence: regulating campaign contributions targets speech because campaigns are inherently expressive in nature.

Part II describes why it is essential that general First Amendment principles control the outcome of campaign finance regulation cases. Our best guarantee that government officials, be they legislators or judges, are not manipulating the First Amendment for their own political and ideological benefit is that they apply its principles in a neutral way. Campaign finance regulation can provide a mask for creating a set of special rules for expression at election time, when danger of manipulation by politicians and the judges they appoint is the greatest. Moreover, the First Amendment is premised in part on distrust of government officials.[21] Thus, its interpretive methodology should reflect the constraint on judicial discretion that neutral principles can provide.[22] This Part also includes responses to conceptual objections to the possibility of deploying neutral principles in this or any area of law.

Part III considers three kinds of challenges that commentators have made against following general free speech principles in campaign finance regulation. Though they employ different methodologies, all share the view that speech at election time differs from expression at other times and can therefore be regulated as part of an effort to perfect democracy.[23]

One attack on the Court's campaign finance regulation jurisprudence is that these principles get the First Amendment wrong as an original matter. But these arguments are not well rooted in the original meaning of the Constitution.[24] For instance, Professor Lawrence Lessig argues that republican principles at the time of the

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for more than the century of campaign finance regulation. For a discussion of the principles for overruling such deeply entrenched precedent, see JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 175-96 (2013).

21. *See infra* note 292 and accompanying text.

22. *See infra* notes 292-94 and accompanying text.

23. *See infra* Part III.

24. *See infra* Part III.A.

Framing stressed that representatives must be dependent on the people, and thus it should be constitutional to make sure that the public opinion on which legislatures are dependent is free of distortion from moneyed interests.[25] But the Constitution does not provide any metric to judge whether that opinion is distorted, nor any provision to suggest that legislators should follow the predominant opinion of citizens on an issue.[26] To the contrary, the Framers rejected direct democracy and the authority of the people to instruct their representatives on how to vote.[27] Another argument is that other clauses of the Constitution, such as the Emoluments Clause, reveal that the Framers were concerned about corruption.[28] But these clauses reflect concern about officials' abuse of government power, not about the rights of citizens.[29] They thus reinforce the message of distrust of those officials' actions in regulating speech even when government actors claim to be pursuing a political ideal, including the ideal of making politics less corrupt.

The second kind of challenge stems from precedent, not about the speech of citizens, but about the electoral mechanisms of government.[30] On the basis of this precedent, the argument runs, such regulation should be upheld, because either the precedent shows deference to electoral regulation—as with gerrymandering doctrine—or actually provides a mandate for such regulation—as with doctrine requiring one-person, one-vote.[31] This Section contends that these arguments mistake a core premise of the First Amendment and its jurisprudence: free speech is a natural right of the individual, not a mechanism of government.[32] Election precedent is thus inapposite to campaign expression.[33] First Amendment jurisprudence properly focuses on preventing government from interfering with the civic order, whereas election law precedent focuses on ensuring that the government fairly runs the elections for which it

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25. *See infra* text accompanying notes 324-26.
26. *See infra* text accompanying notes 322-29.
27. *See infra* text accompanying note 329.
28. *See infra* text accompanying notes 336-40.
29. *See infra* text accompanying notes 342-46.
30. *See infra* Part III.B.
31. *See infra* Part III.B.
32. *See infra* Part III.B.
33. *See infra* Part III.B.

is responsible.[34] Moreover, given that political influence is not confined to the electoral season, a focus on electoral mechanisms offers no principled line for the regulation of political speech.[35]

Finally, various commentators have argued that some framework other than traditional First Amendment principles should determine the result in campaign finance regulation cases.[36] However, these nonoriginalist and nonprecedential arguments lack the authority to trump established principles of law.[37] Indeed, the breadth of these arguments underscores the violence that they do to settled First Amendment principles, because they would justify regulation of the media, particularly around election time.[38]

I. THE ROBERTS COURT'S APPLICATION OF FREE SPEECH PRINCIPLES TO CAMPAIGN FINANCE REGULATION

Campaign finance regulation cases are the most politically consequential for the Roberts Court because campaign finance regulation shapes the elections that affect all policy outcomes. *Burwell v. Hobby Lobby Stores, Inc.* got far more press last term than the latest campaign finance regulation decision, *McCutcheon v. FEC*,[39] but *Hobby Lobby* turns on an interpretation of the Religious Freedom Restoration Act,[40] which Congress can amend in any respect it chooses. It will be political campaigns that determine the success of amendments. While *NFIB v. Sebelius* held that the federal govern-

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34. *See infra* Part III.B.

35. *See infra* Part III.B.

36. *See infra* text accompanying notes 361-62.

37. *See infra* Part III.C.

38. *See infra* Part III.C.

39. 134 S. Ct. 1434 (2014). In the first week after the Court decided *Hobby Lobby*, there were 2915 mentions of that case in the press. Lexis Advance News Search for *Hobby Lobby* from June 30, 2014 through July 7, 2014, LEXIS ADVANCE, https://advance.lexis.com (search "Hobby Lobby," narrow category to "News," search within results for "'Hobby Lobby' /3 'Burwell' or 'case,'" narrow timeline to June 30, 2014 to July 7, 2014). However, there were only 1243 mentions of *McCutcheon* in the first week after the Court decided that case. Lexis Advance News Search for *McCutcheon* from April 2, 2014 through April 9, 2014, LEXIS ADVANCE, https://advance. lexis.com (search "McCutcheon," narrow category to "News," search within results for "'McCutcheon' /3 'FEC' or 'Federal Election Commission,' or 'case,'" narrow timeline to April 2, 2014 to April 9, 2014).

40. *See* 134 S. Ct. 2751, 2759 (2014) (citing Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012)).

ment can deploy the individual mandate to require insurance purchases so long as it is understood as a tax,[41] health care remains a perennial issue that future Congresses will reshape. And campaigns, affected in no small measure by the nature of campaign finance regulations, will mold the composition of these Congresses.

This Part begins by briefly describing the Roberts Court's work product in the campaign finance regulation area as well as briefly summarizing *Buckley v. Valeo*, still the seminal case in this particular area of the First Amendment. It then shows that at every level—doctrinal, test, structural, and case citations—the majority or plurality opinions are closer to long-standing First Amendment principles than are the dissents, particularly when cases outside the context of campaign finance are considered.[42]

A. *The Seven Roberts Court Campaign Finance Regulation Decisions*

There is no area of law in which the Roberts Court has been more active or more divided than in campaign finance regulation. It has decided six merits cases and one case per curiam for a total of seven cases—more than one every two years—and all were decided 5-4 except for one 6-3 decision. A brief description of their holdings shows their breadth. All but one invalidated either state or federal legislation, with the effect of deregulating electoral campaigns.

Randall v. Sorrell, the first campaign finance regulation decision of the Roberts Court, and the only one decided 6-3 rather than 5-4, was somewhat atypical, both because the issues did not seriously

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41. *See* 132 S. Ct. 2566, 2601 (2012).

42. There is one exception to the point about citation counts. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, Justice Kagan attempted to show that Arizona's scheme should be constitutional on account of First Amendment doctrine on government subsidies. *See* 131 S. Ct. 2806, 2834 (2011) (Kagan, J., dissenting). Because this dissent attempts to base its position in First Amendment law, it is a more persuasive legal analysis than the other dissents in campaign finance regulation cases in the Roberts Court Era. Nevertheless, its roots in First Amendment law are shallower than those of the majority and not sufficient to support the doctrinal tree that Justice Kagan plants. *See infra* Part I.B.4. And as noted above, *supra* note 17, I do not count *Williams-Yulee* in the citation list because a concurrence there shows that some Justices who are pivotal to the outcome are in greater disagreement over fundamental First Amendment principles with other members of the majority than is the dissent. *See infra* Part I.B.5.

test the boundaries of previous decisions and because the author of the plurality opinion was Justice Breyer, who dissented in most other campaign finance regulation cases decided by the Roberts Court.[43] In *Randall*, Vermont had limited the total amount of money that a candidate could spend on his race and had sharply limited contributions (to $400 for gubernatorial candidates, for instance)—far below the limitations for contributions in federal law.[44] The limitations even extended to a volunteer's in-kind contributions, such as the cost of driving to participate in campaigns.[45]

The case thus involved both of the core holdings of *Buckley v. Valeo*, the 1976 case that remains the keystone in campaign finance regulation.[46] *Buckley* prohibited expenditure limits, including those imposed on a candidate's personal funds, because these limits directly restricted political expression and the justification of equalizing speech was not a compelling one.[47] On the other hand, *Buckley* upheld reasonable contribution limits because the government had an interest in avoiding corruption and the appearance of corruption, to which substantial contributions could give rise.[48] Contribution limitations could be justified on anticorruption grounds so long as the limitations were reasonable.[49]

The *Buckley* Court grounded its decision in the free speech case law, but its explanation of why expenditures and contributions triggered the First Amendment was not as clear as it could have been. The distinction between conduct that raises no First Amendment

43. *See* 548 U.S. 230, 235 (2006).

44. *Id.* at 237-39.

45. *Id.* at 257, 260.

46. 424 U.S. 1 (1976); *see* Richard L. Hasen, *The Nine Lives of* Buckley v. Valeo, *in* FIRST AMENDMENT STORIES 345, 345 (Richard W. Garnett & Andrew Koppelman eds., 2012).

47. *Buckley*, 424 U.S. at 51-54.

48. *See id.* at 28-29. The Court also held that an individual's interest in contributions was weaker than his interest in making his own independent expenditures. *See id.* at 20-21.

49. The distinction between expenditures and contributions was widely criticized almost as soon as *Buckley* was decided. *See* L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 258-59 (critiquing the Court's distinction between "proxy" and "real" speech). The better view is that the interest is the same, but that contributions can be more easily related to that interest because they may be more likely to give rise to quid pro quo corruption, which the government has a compelling interest to prevent. *See infra* text accompanying notes 146-47, 153-54. The Court appears to be moving toward this view with the stringent scrutiny it gave to contributions in *McCutcheon*. *See infra* text accompanying notes 101, 157-62. This move, too, may represent a normalization of campaign finance regulation principles with the rest of the First Amendment.

questions and conduct that does turns on whether the harm from the conduct that the regulation seeks to avoid is unrelated to the communicative expression of the conduct.[50] As Lillian BeVier has written, the campaign finance regulations at issue in *Buckley* "sought to prevent harms that would only arise if giving and spending money [had] communicative significance."[51] For this reason, limitations on expenditures and contributions properly trigger scrutiny under the First Amendment.[52] It is the effectiveness of electoral messaging that creates the unequal playing field in an election that regulation sought to prevent.[53] It is a contribution's message of support that is related to singling out these contributions for regulation because of fear of political favoritism.[54]

The correctness of this conclusion is also readily apparent if we test it by considering similar limitations outside the context of campaign finance regulations. The First Amendment would obviously be triggered if the government wanted to restrict the amount a newspaper could spend on its editorials or reporting. It would also raise a First Amendment issue if the government wanted to limit contributions to opinion magazines by citizens who supported their viewpoints. It might be possible to justify these restrictions, but the First Amendment would be clearly implicated, and thus, free speech doctrine and tests would become relevant.

But even if *Buckley* was not as lucidly reasoned as it might have been, it has remained the key case for campaign finance regulation.[55] Almost all subsequent campaign finance regulation reforms work within its framework of analysis and with its distinction between expenditures and contributions, although the reforms sometimes attempt to find different structures for regulation and new justifications not squarely presented in *Buckley*. All subsequent Supreme Court decisions accept that campaign finance regulation implicates the First Amendment.[56]

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50. *See* United States v. O'Brien, 391 U.S. 367, 377, 381-82 (1968).

51. Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1058 (1985).

52. *See id.*

53. *See id.* at 1058-60.

54. *See id.*

55. Hasen, *supra* note 46, at 345.

56. *See id.*

Justice Breyer's plurality opinion in *Randall* was a straightforward application of *Buckley*, invalidating Vermont's expenditure limit as flatly inconsistent with *Buckley*'s prohibition of expenditure limits and holding that the contribution limits were unreasonably low, particularly given the constraints on limits of volunteer expenses.[57] Justice Souter wrote the principal dissent.[58] Justice Souter would have remanded the case to the circuit court to determine whether Vermont's interest in getting its officials to spend less time on fundraising justified the expenditure limits and would have upheld the contribution limits as reasonable.[59]

FEC v. Wisconsin Right to Life, Inc., a more characteristic Roberts Court campaign finance regulation case in its composition of the majority and dissent, concerned the constitutionality of campaign expenditures by corporations on political messaging.[60] The Court held that a corporation has the constitutional right to run advertisements about political issues in the run-up to an election, even if the advertisements' implicit messages are unfavorable to a candidate.[61] This decision appeared to cut back on a recent pre-Roberts Court decision, *McConnell v. FEC*, which upheld the McCain-Feingold Act's[62] prohibition on corporations engaging in "electioneering communication[s],"[63] which the Act defined as broadcast advertisements in the sixty days before a general election or thirty days before a primary.[64] Whereas *McConnell* had disposed of a facial challenge to

57. *See* Randall v. Sorrell, 548 U.S. 230, 236, 259-60 (2006). Justice Breyer was joined by Chief Justice Roberts and Justice Alito. *See id.* at 230. Justice Kennedy and Justice Thomas, joined by Justice Scalia, concurred separately in the judgment, objecting to *Buckley*'s previous decision to subject contributions to a lower level of scrutiny, but joined the plurality in finding both the Vermont expenditure and contribution limits unconstitutional. *See id.* at 235, 264-66.

58. *See id.* at 281 (Souter, J., dissenting). He was joined in full by Justice Ginsburg and largely by Justice Stevens. *See id.* Justice Stevens wrote a dissent for himself, which suggested that *Buckley*'s restrictions on limiting expenditures should be overruled. *See id.* at 274 (Stevens, J., dissenting).

59. *See id.* at 284-90 (Souter, J., dissenting).

60. *See* 551 U.S. 449, 455-56 (2007).

61. *See id.* at 449, 457.

62. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.). The Act is also known as the McCain-Feingold Act, named after its sponsors in the Senate.

63. 540 U.S. 93, 244 (2003).

64. 2 U.S.C. § 434(f)(3) (2012) (defining "electioneering communication[s]" as those disseminated through broadcast media thirty days before a primary or sixty days before a general election that "refer[ ] to a clearly identified candidate for Federal office").

the Act, *Wisconsin Right to Life* permitted a challenge to the application of the Act to advertisements that focused on particular issues and did not directly advocate the election or defeat of a candidate.[65] Although *Wisconsin Right to Life* did not overrule *McConnell*, it sharply limited the Act's constitutionally permissible scope to extend only to advertisements that were the "functional equivalent of express advocacy" of the election or defeat of particular candidates.[66] Chief Justice Roberts wrote the controlling opinion for himself and Justice Alito.[67] Justice Souter dissented, arguing that even on issue advertising, Congress could legislate against the "threat to democratic integrity" stemming from the "concentrations of money in corporate and union treasuries."[68]

In *Davis v. FEC*, decided a year later, the question revolved around another provision of the McCain-Feingold Act, the so-called Millionaire's Amendment.[69] This decision concerned the interaction of personal campaign expenditures and contribution limitations.[70] In particular, this provision relaxed contribution limits for any candidate whose opponent was spending substantial sums of his own money.[71] Justice Alito, writing for the same five-Justice majority as in *Wisconsin Right to Life*, invalidated the provision on the grounds that relaxing contribution limits for opponents burdened the free speech rights of the candidate expending his own funds.[72] The same four Justices dissented, arguing that the provision was justified by the government's interest in showing that elections could not be bought.[73]

Citizens United v. FEC, the best known of the Roberts Court's campaign finance regulation cases, determined that Congress could

65. *See Wis. Right to Life*, 551 U.S. at 456.

66. *Id.* at 469-70.

67. *See id.* at 455. Justices Scalia, Kennedy, and Thomas would have gone further and overruled *McConnell*'s ban on independent corporate expenditures altogether, *see id.* at 483, 503-04 (Scalia, J., concurring), thereby presaging the decision in *Citizens United*, which Chief Justice Roberts and Justice Alito would also join, *see* Citizens United v. FEC, 558 U.S. 310, 316 (2010).

68. *Wis. Right to Life*, 551 U.S. at 504 (Souter, J., dissenting). Breyer and the other dissenters in *Randall* joined this dissent. *See id.*

69. *See* 554 U.S. 724, 729 (2008).

70. *See id.* at 728.

71. *See id.* at 729.

72. *See id.* at 728, 743-44.

73. *See id.* at 749, 756 (Stevens, J., dissenting).

not impose expenditure limits on electoral messaging by corporations.[74] In so doing, it overruled the recent contrary decision in *McConnell*[75] as well as the older contrary decision in *Austin v. Michigan Chamber of Commerce*, the precedent that held that corporate independent expenditures could be differentially regulated because of their potential to distort the political process through their concentrated power.[76] Justice Kennedy, writing for the majority in *Citizens United*, held that the distortion rationale for regulating corporations was incompatible with the First Amendment because it restricted the speech of some to enhance that of others.[77] Justice Stevens dissented, emphasizing that the Framers' hostility toward corporations suggested that corporations did not have the rights comparable to persons under the First Amendment.[78]

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, decided a year later, was the first Roberts Court case to confront questions related to the intersection of public financing of an election with private expenditures and contributions.[79] The same five-member majority as in *Citizens United* invalidated an Arizona public financing scheme—not because public financing was illegal per se, but because of the way it interacted with the right of a candidate to spend his own money without limitation.[80] Arizona's

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74. *See* 558 U.S. 310, 319 (2010).

75. *Id.* at 365-66 (overruling the part of *McConnell* that upheld the McCain-Feingold Act's restrictions on corporate independent expenditures).

76. *See* 494 U.S. 652, 654-55, 658-60 (1990).

77. *Citizens United*, 558 U.S. at 319, 341. Justice Thomas joined the majority except that he dissented from its decision to uphold disclosure requirements. *Id.* at 480 (Thomas, J., concurring in part and dissenting in part). *Citizens United* was also notable for reaffirming that disclosure requirements are constitutional. *See id.* at 366-67 (majority opinion). Previous campaign finance regulation cases, beginning with *Buckley*, had consistently upheld these requirements on the grounds that the government interest in combating corruption was advanced by disclosure. *See* McConnell v. FEC, 540 U.S. 93, 196 (2003); Buckley v. Valeo, 424 U.S. 1, 67-68 (1976). *Doe v. Reed*, 561 U.S. 186, 191 (2010) was another Roberts Court case that concerned disclosure. Although the case cited *Buckley* and other campaign finance regulation cases, *see id.* at 196, it was not itself such a case because it concerned disclosure of the signers of a petition to begin a referendum, rather than the contributors to a campaign itself, *id.* at 190-91. The decision was 8-1, with only Justice Thomas dissenting. *See id.* at 228 (Thomas, J., dissenting).

78. *See Citizens United*, 558 U.S. at 425-32 (Stevens, J., dissenting).

79. *See* 131 S. Ct. 2806, 2813 (2011).

80. *See id.*

structure for election campaigns provided public funds to candidates who agreed to abide by spending limits.[81] But if they were opposed by a candidate who did not agree to abide by the limits and spent private funds on his or her own behalf, or had independent expenditures made on his or her behalf beyond a certain limit, the publicly-financed candidates received public funds in addition to their initial allocation.[82] Chief Justice Roberts held that the statute burdened the First Amendment rights of candidates or their supporters who spent their own funds to speak because the expenditures triggered a government decision to release additional funds to the opponents of the candidate.[83] Justice Kagan dissented on the grounds that the government could constitutionally decide to subsidize speech as it chose.[84]

In *McCutcheon*, the Court turned its attention to contribution limits—not limits on personal contributions to individual candidates, but limits on total personal contributions in federal elections.[85] The McCain-Feingold Act had imposed ceilings on total individual contributions of $48,600 for all candidates running for federal office and of $74,600 on contributions to political committees, such as those run by political parties.[86] Writing for a plurality of the usual group of Justices who comprise the majority in Roberts Court campaign finance decisions, with the exception of Justice Thomas, Chief Justice Roberts invalidated the ceilings.[87] He argued that because all the contributions that petitioner Shaun McCutcheon made complied with the direct contribution limits pertaining to individual candidates or parties—limits that were designed to prevent corruption or the appearance of corruption—simply multiplying the number of noncorrupting contributions could not itself be corrupt or apparently corrupt.[88] Justice Breyer demurred,

81. *See id.* at 2813-14.

82. *See id.* at 2813-16.

83. *See id.* at 2813.

84. *See id.* at 2830, 2833-34 (Kagan, J., dissenting). The dissenters were the same as in *Citizens United*, but with the substitution of Justice Kagan for the retired Justice Stevens.

85. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1442 (2014).

86. *Id.* The limits were first imposed in the Federal Election Campaign Act of 1971, and then raised in amount but continued in effect in McCain-Feingold. *See id.*

87. *See id.*

88. *See id.* at 1442, 1452. Justice Thomas concurred in large part and in the judgment, while contending that individual contribution limits should be invalidated as well. *Id.* at 1464-

arguing that the majority's definition of corruption was too narrow and that the aggregate limits helped prevent evasion of individual limits.[89]

Williams-Yulee, decided last year, was in some respects an outlier among the campaign finance cases in its division between the members of the majority and dissent, the former being composed of Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan, and the latter being composed of Justices Scalia, Kennedy, Thomas, and Alito.[90] Moreover, the majority itself was fractured on the fundamental issue of what standard to apply to the bar regulation at issue. Only Chief Justice Roberts and Justices Sotomayor and Kagan held the standard to be a compelling state interest.[91] Justice Ginsburg, joined by Justice Breyer, stated that the Court should not apply such an exacting standard.[92] It was the dissenters who agreed with Chief Justice Roberts that the correct standard to apply was that of a compelling interest.[93] Chief Justice Roberts and the dissent, however, disagreed on whether the standard had been met, with the Chief Justice concluding that the regulation was sufficiently narrowly tailored and not too overinclusive or underinclusive to achieve the goal of protecting the integrity of the judiciary.[94]

The above summary suffices to suggest that campaign finance regulation has been persistently contested on the Roberts Court, and no issue has generated such unyielding divisions. A fault line generally divides the principles of one set of the Justices—Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito—from those generally in dissent—Justices Ginsburg, Breyer, Sotomayor, and Kagan (and Souter and Stevens when they were on the Court). The former group believes that campaign finance regulations should be analyzed under general free speech principles.[95] The

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65 (Thomas, J., concurring).

89. *See id.* at 1465-66, 1468, 1471-72 (Breyer, J., dissenting). Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan. *See id.* at 1465.

90. *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1661 (2015).

91. *See id.* at 1666.

92. *See id.* at 1673 (Ginsburg, J., concurring).

93. *See id.* at 1676 (Scalia, J., dissenting).

94. *See id.* at 1666-72.

95. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 339-40 (2010).

latter generally seeks to decide campaign finance regulation issues by considerations unique to campaign finance regulation.[96]

This doctrinal disagreement plays out at a variety of levels. The *Citizens United* majority protected corporations in the context of campaign finance regulation as the Supreme Court has in other areas of the First Amendment.[97] The dissenters would not have.[98] That majority rejected as compelling interests those that were rejected elsewhere in the First Amendment, like concerns over distortion or equality.[99] The dissenters would have accepted such interests as justifications.[100] The Justices also disagreed on the doctrinal tests to be applied to assess the bona fides of campaign finance regulation. The *Citizens United* and *McCutcheon* majorities applied traditionally stringent tests for justifying intrusion on First Amendment interests.[101] The dissenters would have given deference to the legislature.[102] Finally, the majority and the dissenters persistently disagreed on the structure of the First Amendment. As in cases outside the campaign finance context, the *Citizens United* and *McCutcheon* majorities treated the right as that of the private individual and private organization, with government interests only measured to determine whether they were strong enough to overcome those rights.[103] The dissenters would have made a conception

96. *See, e.g.*, *id.* at 394-95 (Stevens, J., concurring in part and dissenting in part).

97. *Id.* at 342 (majority opinion) ("The Court has recognized that First Amendment protection extends to corporations.... This protection has been extended by explicit holdings to the context of political speech.") (internal citations omitted).

98. *See id.* at 425 (Stevens, J., concurring in part and dissenting in part) (critiquing the majority for failing to make First Amendment distinctions for corporations in the case of campaign finance regulation).

99. *See id.* at 349-57 (majority opinion).

100. *See id.* at 465-77 (Stevens, J., concurring in part and dissenting in part).

101. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1464 (2014); *Citizens United*, 558 U.S. at 324-26.

102. *See McCutcheon*, 134 S. Ct. at 1480 (Breyer, J., dissenting) (concluding that campaign finance regulations relating to corporate speech are better suited for Congress than the Court); *Citizens United*, 558 U.S. at 461-62 (Stevens, J., concurring in part and dissenting in part) (concluding that Congress is better equipped to handle campaign finance regulations relating to corporate speech because of its "wisdom and experience in these matters").

103. *See McCutcheon*, 134 S. Ct. at 1448 ("The First Amendment 'is designed and intended to remove government restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us.'" (quoting Cohen v. California, 403 U.S. 15, 24 (1971))); *Citizens United*, 558 U.S. at 341 ("We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.").

of democratic self-governance count in defining the right itself, thus changing the nature of free speech when it was electoral expression.[104] Together, these pervasive and consistent differences in the analysis between the Justices in the majority and the Justices in the dissent make an overwhelming case that the core disagreement goes to whether First Amendment principles settled in other areas of the law apply to campaign finance regulation.

B. Free Speech Principles

1. Doctrinal Conclusions

The most obvious example of a doctrine applied elsewhere in the First Amendment that the Roberts Court insists be applied in campaign finance regulation is that of corporate personhood. The Court correctly noted that its First Amendment case law has consistently provided protections to corporations in contexts other than campaign finance regulation.[105] Many famous First Amendment decisions have protected the rights of for-profit corporations. Landmark cases such as *New York Times Co. v. Sullivan*, which strengthened protections against libel suits by public officials, involved the First Amendment rights of corporations.[106] And the Court's protection of corporations has not been limited to media corporations or to political speech. Commercial speech cases, which extended free speech rights to advertising and other commercial matters, largely stemmed from lawsuits by corporations.[107] Thus, given that the

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104. *See McCutcheon*, 134 S. Ct. at 1466-67 (Breyer, J., dissenting) (recognizing that "the integrity of our public governmental institutions" and the risk of corruption are satisfactory reasons to regulate corporate speech as it relates to elections); *Citizens United*, 558 U.S. at 451-52 (Stevens, J., concurring in part and dissenting in part) (recognizing that the Framers would have rejected the idea of corporate speech in the electoral context because of the threat it posed to republican self-government).

105. *See Citizens United*, 558 U.S. at 342-43.

106. *See* 376 U.S. 254, 283-92 (1964); *see also* Garrett Epps, *Don't Blame "Corporate Personhood,"* AM. PROSPECT (Apr. 16, 2012), http://prospect.org/article/dont-blame-corporate-personhood [https://perma.cc/UC6S-M53Y] ("The idea that corporations have some of the free-speech rights that people have is essential to important Court decisions like *New York Times Co. v. Sullivan*.").

107. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996) (holding that a complete ban on advertising alcohol was unconstitutional under the First Amendment); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 20-21 (1986) (holding that requiring

Court's case law under the First Amendment has provided protections to corporations in all contexts other than campaign finance regulation, it would be anomalous to deprive them of protections in this context without the kind of compelling interest that is accepted as a justification for abridging speech rights in other areas of First Amendment law.

Justice Stevens's reaction in the dissent to this normalization was to extend the area of dispute. He was not content to suggest that the distortion rationale for campaign finance regulation had a particular resonance with the corporate form.[108] He raised more general questions about the extension of the First Amendment to corporations themselves, arguing that materials at the Founding suggested that the "Framers ... took it as a given that corporations could be comprehensively regulated in the service of the public welfare."[109]

There are problems with Justice Stevens's argument—first as an argument sufficient to overcome the long-established precedent that the First Amendment protects corporations, and second as an originalist argument on its own terms. As to precedent, most originalists, and certainly Justice Stevens, accept that some doctrine is so well established that it should not be overturned.[110] Accepting that

electric company to carry messages that rebutted its own political message violated the First Amendment); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 571-72 (1980) (holding that regulation that completely banned electric utility from advertising violated the First Amendment); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 544 (1980) (holding that prohibiting inserts that an electric company sent to its consumers on controversial regulatory issues violated the First Amendment).

108. *See Citizens United*, 558 U.S. at 425 (Stevens, J., dissenting). This argument focuses on the distortion that the aggregate wealth of corporations is thought to create in the democratic process. The argument is addressed at notes 324-29 *infra* and accompanying text.

109. *Citizens United*, 558 U.S. at 428 (Stevens, J., dissenting).

110. Justice Stevens, for instance, has signed on to a statement of precedent that would follow a presumption in favor of precedent. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (suggesting that precedent should be followed unless it is, among other things, unworkable, based on facts that had changed, and/or engendered no reliance). Like most Supreme Court opinions, the majority in *Citizens United* did not purport to reconsider the corporate electoral messaging in light of the original meaning, but built its arguments on First Amendment precedent about corporate speech and other matters.

Leo Strine and Nicholas Walter end an article critiquing originalist support for corporate speech by saying that the decision in *Citizens United* is "more original than originalist." Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History* 90 (John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 812, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564708 [https://perma.cc/5KQ5-4WP7]. That comment is an amusing play on words, but it would be

corporations can be comprehensively regulated by the government would lead to overturning cases—like *Sullivan*, now at the core of the First Amendment—as well as almost the entire corpus of commercial speech law.[111] Even originalists who impose quite a high standard for following precedent rather than the original meaning would hesitate to do so, particularly when the originalist arguments are as weak as those here.[112]

Second, as to originalism, there are powerful reasons in the text and structure of the First Amendment not to distinguish as a matter of coverage between speech by associations, including corporations, and individuals.[113] The First Amendment is unambiguously phrased as a prohibition on Congress and makes no distinctions among associations, corporations, and individuals.[114] Thus, the original public meaning does not discriminate between individuals and organizations of any kind.[115]

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really novel if the Supreme Court started reconsidering all elements of First Amendment doctrine, however well established, by reference to original meaning.

111. For a discussion of this long line of precedent, see *infra* notes 129-33 and accompanying text. It is true that *Citizens United* itself overruled two cases, *see infra* note 297 and accompanying text, but these precedents are not nearly as well established as the general corporate right to speech. Justice Stevens's originalist arguments are an attack on that doctrine and are in no way limited to the electoral messaging by a corporation at issue in *Citizens United*.

112. *See* MCGINNIS & RAPPAPORT, *supra* note 20, at 175-85 (suggesting that precedents should be retained when it would be very costly to overrule them or when they reflect strong societal consensus).

113. Perhaps the government has a stronger interest in regulating corporations. For a discussion of such a distortion rationale, see *infra* notes 324-27 and accompanying text. But the nature of permissible regulation is a different matter from whether corporations enjoy First Amendment rights.

114. Leo Strine and Nicholas Walter argue that the text of the First Amendment is ambiguous with regard to speech by associations organized in corporate form. *See* Strine & Walter, *supra* note 110, at 16-17. First, they note that the First Amendment is not thought to protect the speech of "trees and polar bears," and this fact shows that there is potential ambiguity in its coverage. *Id.* at 17 (quoting *Citizens United*, 558 U.S. at 391-92 (Scalia, J., concurring)). With respect, animals and plants do not offer messages, whereas here in our actual world, associations, including corporations, offer messages all the time and did so at the time of the Framing. Their hypothetical is literally a fairy tale. Second, they note that Justice Scalia, as well as other Justices, agree that some kinds of speech, such as fighting words, are not protected. *Id.* at 18. But this argument goes to the nature of expression, not to the question of whether it applies to people acting in concert by using the corporate form.

115. For a discussion of the rise of original public meaning originalism, see Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 926-34 (2009).

To be sure, if the language were ambiguous, some originalists think the expected applications of a constitutional provision could be relevant to discerning its public meaning.[116] But Justice Stevens provides only statements of generalized distrust of corporations in support of his position. He does not offer any evidence that the enactors of the First Amendment thought Congress had the authority to regulate the speech of corporations. And at the time the First Amendment was enacted, it applied only to Congress.[117] It would thus be weak evidence of expected applications of the First Amendment even if state legislatures prohibited speech by corporations.[118]

Moreover, even if there had been scattered expectations by some people at the time of the Framing, the logic of the First Amendment cuts against them because it undermines a distinction between individuals acting alone and through the organizations they form, including corporations. A corporation is a nexus of contracts, like a partnership, by which individuals make their actions more effective than they would be if they pursued them individually.[119] If under the First Amendment an individual has the right to speak, why do partnerships or other associations of individuals not also enjoy that right? And if a partnership or association has that right, why does it lose it upon taking the corporate form? Given that the First Amendment also contains a right of assembly,[120] joint action to

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116. *See* John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 379-80 (2007) (requiring "strong reasons for believing the [original] applications were mistaken, rather than being merely applications modern interpreters happen to reject").

117. *See* Barron v. Mayor of Balt., 32 U.S. 243, 250 (1833) (stating that the Bill of Rights "contain[s] no expression indicating an intention to apply [the amendments] to the state governments" and that, as written, the amendments are to be applied only to Congress).

118. By the incorporation doctrine—which Stevens did not challenge—this prohibition, along with many other provisions of the Bill of Rights, was extended to state legislatures. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating free speech provisions of the First Amendment against the states). There may well be good originalist arguments against the incorporation of the First Amendment, but the Court has accepted the principle for decades. And, in any event, *Citizens United*, like most of the Roberts Court campaign finance cases, concerns regulation by the federal government.

119. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12 (1991); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310-11 (1976).

120. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

speak mediated through contract fits comfortably within the same protections enjoyed by individual action.

Finally, the First Amendment's purpose is well served by permitting citizens to use mechanisms such as corporations for concerted action that give them more effective speech rights. Individuals are often relatively powerless to make their message heard when acting alone and thus are without much recourse for contesting the actions of government officials.[121] Together, in associations—whether partnerships, nonprofits, or for-profit corporations—they have a bigger megaphone and a larger capacity to persuade others about the merits and demerits of government action.[122]

Citizens United has facilitated citizens joining together for political speech by contributing not only to nonprofit corporations, but to so-called Super PACs. A Super PAC is a political committee registered with the FEC.[123] It remains subject to the federal organizational, registration, reporting, and disclosure requirements that apply to other political committees.[124] A Super PAC may then make independent expenditures on behalf of, or against, candidates.[125] Before *Citizens United*, there was a substantial question about whether contribution limits could be applied to Super PACs.[126] But, citing *Citizens United*, the Court of Appeals for the District of Columbia Circuit held that limits on contributions to vehicles for independent expenditures were unconstitutional.[127] Super PACs

press; or *the right of the people peaceably to assemble*, and to petition the government for a redress of grievances.") (emphasis added).

121. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

122. *See* John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 528 (2002) (noting that associations of speakers amplify their power).

123. 2 U.S.C. § 434 (2006 & Supp. IV 2007).

124. *Id.*

125. *See* Jan Witold Baran & Caleb P. Burns, *Political Contributions and Expenditures by Corporations*, *in* COURSE HANDBOOK FOR CORPORATE POLITICAL ACTIVITIES 2015: COMPLYING WITH CAMPAIGN FINANCE, LOBBYING AND ETHICS LAWS 97 (2015); Ctr. for Responsive Politics, *Super PACs*, OPENSECRETS, http://www.opensecrets.org/pacs/superpacs.php [https://perma.cc/9WZU-7XRJ] (last visited Feb. 21, 2016) (detailing FEC treatment of Super PACs).

126. For a full discussion, see Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1656-57 (2012).

127. *See* SpeechNow.org v. FEC, 599 F.3d 686, 689 (D.C. Cir. 2010).

enable individuals to band together for candidates and causes, thus preventing independent expenditures from becoming the preserve of extremely wealthy individuals who could fund expenditures on their own, regardless of whether a corporation or Super PAC was available to them. Thus, far from being simply a source of inequality, *Citizens United* increased the opportunities for expression for a wider group of citizens.[128] This effect underscores the spontaneous order aspects of free speech: individuals combine freely to do that which they could not do effectively alone.

Second, the Court also renormalized First Amendment law in refusing to make any distinctions between the media and the rest of the public. The Supreme Court had long refused to give special First Amendment protections to the press that it did not extend to other entities. It has refused to uniquely enable reporters to protect the identities of their sources,[129] or to be exempt from labor,[130] antitrust,[131] or other laws,[132] even if an argument could be made that such exemptions would enhance their information-providing functions.[133]

The traditional parity between the media and nonmedia voices in campaigns is an important theme of the majority's campaign finance regulation decisions. For instance, the Roberts Court majority

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128. For a discussion of the egalitarian effect of *Citizens United*, see generally Abby K. Wood & Douglas M. Spencer, *In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns* (Univ. of S. Cal. Legal Studies Research Paper Series, Paper No. 15-29, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1901551 [https://perma.cc/56JW-KWNN].

129. *See* Branzburg v. Hayes, 408 U.S. 665, 697-98 (1972) (refusing to permit the First Amendment creation of a "shield" to allow reporters to avoid disclosing the identities of their sources when subpoenaed).

130. *See* Associated Press v. NLRB, 301 U.S. 103, 129 (1937) (permitting reporters to bargain collectively).

131. *See* Associated Press v. United States, 326 U.S. 1, 11-13 (1945) (prohibiting newspapers from entering in consortium that the Court believed represented a restraint of trade under the Sherman Act).

132. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 669-70 (1991) ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.... [E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.").

133. For a full discussion of these cases, see Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 506-21 (2012). McConnell also relies on this parity in his Press Clause analysis. *See* McConnell, *supra* note 20, at 433-34.

observed that banning a message from the media similar to that offered by Citizens United at the time of the election would be unthinkable.[134] Indeed, the government's admission at the first oral argument in *Citizens United* that principles it supported would allow the banning of campaign books and pamphlets distributed by corporations around election time[135] was widely seen as devastating to the government's chances of prevailing. Thus, given that such interference was impermissible, neutral principles required nondiscrimination, and nonmedia corporations should also be protected.

In *McCutcheon*, the Court extended the comparison from the context of independent expenditures to the context of contributions. In noting that McCutcheon would not have substantial alternative avenues to express his support for a candidate if aggregate limits prevented him from making a contribution, the majority contrasted his position with a Hollywood entertainer who could easily attract a crowd for fundraisers to express his or her support for many candidates.[136] A celebrity can contribute his reputation to a campaign—a reputation that itself is a media product.

The Roberts Court followed traditional First Amendment analysis in refusing to treat those broadly understood to be in the media and those outside the media unequally when it came to spending money to support speech at election time. First, there does not seem to be any justification for making a distinction between those who own a press or media outlet and those who want to rent one.[137] The First Amendment, by its text, does not distinguish between these different kinds of property rights, and there is nothing adduced in the purpose or history of the Amendment that would justify differential constitutional treatment. It is certainly not a distinction that easily maps on to any equality claims. There are many fewer people who

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134. *See* Citizens United v. FEC, 558 U.S. 310, 352-53 (2010).

135. *See* Transcript of Oral Argument at 27-29, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205); *see also* Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the* Citizens United *Decision*, NEW YORKER, May 21, 2012, at 36 (suggesting that this concession changed the course of the case even though Solicitor General Elena Kagan changed the government's position at the second oral argument in the case and said the government could not ban books produced by corporations, even if it could ban corporate advertisements).

136. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1449 (2014).

137. *See* McConnell, *supra* note 20, at 419 (arguing that the Press Clause protects the activity of publishing rather than the institution).

own media outlets or who, by dint of their celebrity, are in a sense their own outlets than those who have sufficient resources to make media buys or contribute to a lot of candidates.

Second, applying neutral principles is particularly important if the speakers who own or have preferred access to media outlets have distinctive political views. And that is the case in the United States: reporters lean Democrat to Republican by about four to one.[138] The mix is even more unbalanced if one looks to those in entertainment[139] or education[140] who also can speak constantly about politics and political ideas. These groups have particularly powerful platforms because their vocations make it easy for them to directly propagate ideas even outside the electoral season. They therefore do not have to seek the attention of the public by buying campaign advertisements at election time. In contrast, the wealthy have a partisan mix that looks a lot more like the rest of society.[141] As a

138. LARS WILLNAT & DAVID H. WEAVER, THE AMERICAN JOURNALIST IN THE DIGITAL AGE: KEY FINDINGS 11 (2014), http://news.indiana.edu/releases/iu/2014/05/2013-american-journalist-key-findings.pdf [https://perma.cc/NA9U-9BFE] (revealing 2013 survey data in which 7.1 percent of journalists identified as "Republican" whereas 28.1 pecent identified as "Democrat"). For other evidence that journalists are generally left-leaning, see *The American Journalist*, PEW RES. CTR. (Oct. 6, 2006), http://www.journalism.org/node/2304 [https://perma.cc/M4X7-CTRH] (discussing data from a recent book titled *The American Journalist in the 21st Century: U.S. News People at the Dawn of a New Millennium* in which the authors conclude that, although journalists have moved slightly to the right since the 1990s, they "are still considerably more liberal than the general public").

139. It is almost universally accepted that Hollywood is predominately left-leaning. For an example of one of the many sources asserting that Hollywood is overwhelmingly liberal, see BEN SHAPIRO, PRIMETIME PROPAGANDA: THE TRUE HOLLYWOOD STORY OF HOW THE LEFT TOOK OVER YOUR TV 2-3 (2011). Even the jokes on late-night TV make Republican candidates the target at election time by a two-to-one ratio. *See* S. ROBERT LICHTER ET AL., POLITICS IS A JOKE!: HOW TV COMEDIANS ARE REMAKING POLITICAL LIFE 70 (2015).

140. Strikingly, Ivy League professors, who have some of the most prestigious platforms in higher education, gave 96 percent of their campaign contributions to Barack Obama as opposed to Mitt Romney. Oliver Darcy, *96% of Political Donations from Ivy League Faculty & Staff Went for Obama*, CAMPUS REFORM (Nov. 27, 2012, 12:55 PM), http://www.campusreform.org/?ID=4511 [https://perma.cc/S9L7-J7ZC]. In elite law schools, the ratio of Democratic to Republican contributors is about five to one. John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1170 (2005). The evidence demonstrating that academics have traditionally affiliated themselves with the Democratic Party is long standing. Two surveys of political scientists in 1959 and 1970 revealed that 75 percent of respondents were Democrats, far greater than the general population. Henry A. Turner & Carl C. Hetrick, *Political Activities and Party Affiliations of American Political Scientists*, 25 W. POL. Q. 361, 362 (1972).

141. For instance, in 2008, those with incomes of $250,000 and above favored President

result, it is especially problematic for the Court to permit the suppression of speech of nonmedia speakers, entrenching by law the gatekeeper role in public discourse.

Just as the Court looked to the First Amendment principles outside of campaign finance regulation to determine what entities should be protected in the context of campaign finance regulation, so too it applied settled First Amendment doctrine to determine what kind of interests would be strong enough to support restrictions on speech.[142] To be sure, some of these had been previously articulated in the context of campaign finance regulation cases, but the Court reasserted and refined them by considering more general First Amendment principles.

For instance, the *Citizens United* Court rejected the arguments that *Austin* had accepted as sufficiently compelling interests to restrict corporate speech.[143] Foremost among those government interests was the antidistortion rationale—namely, that corporations, with their ability to amass funds, will distort debate on an issue or candidate.[144] The Court held that the antidistortion rationale was in essence another name for requiring less speech from some to equalize the opportunities for others.[145] It was thus inconsistent with *Buckley*'s rejection of the proposition that equalizing the playing field through campaign finance regulation restrictions was a compelling interest.[146] The conclusion is self-evident in areas outside this regulatory field. It would obviously be impermissible to force media celebrities to speak less on a subject because the greater attention they command would skew public discourse.

Obama by a small margin. R.M. Schneiderman, *How Did Rich People Vote, and Why?*, N.Y. TIMES: ECONOMIX (Nov. 11, 2008, 5:27 PM), http://economix.blogs.nytimes.com/2008/11/11/how-did-rich-people-vote-and-why/?_r=0 [https://perma.cc/FBA8-MGMJ]; *see also Election Center 2008*, CNN, http://www.cnn.com/ELECTION/2008/results/polls/#val=USP00p1 [https://perma.cc/985L-PG46] (last visited Feb. 21, 2016). Even among the larger spenders there is a lot of ideological diversity, with the Koch Brothers and Sheldon Adelson on the right, and Tom Steyer and George Soros on the left. *See* Steve Friess & Michael Keller, *Follow the Money: Big Donors Leave Big Mark on 2014 Elections*, AL JAZEERA AM. (Nov. 1, 2014, 12:44 PM), http://america.aljazeera.com/multimedia/2014/11/big-election-donors2014.html [https://perma.cc/4X93-5GZ7].

142. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 392-93 (2010).

143. *See id.* at 351-52.

144. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).

145. *See Citizens United*, 558 U.S. at 350-51.

146. *See id.*

The Roberts Court majority also made clear that corruption and the appearance of corruption—the one interest that had been deemed a compelling justification for campaign finance regulation—had to be interpreted narrowly enough to fit within First Amendment norms. The *Citizens United* Court held that an independent expenditure was not corrupt, nor did it generate an appearance of corruption, even if those who made such expenditures had more influence or gained more access.[147] As the Court stated, "Democracy is premised on responsiveness,"[148] and "[t]he appearance of influence or access ... will not cause the electorate to lose faith in our democracy."[149] Moreover, the Court noted that "[r]eliance on a 'generic favoritism or influence theory ... is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.'"[150]

Thus, a theme of the Roberts Court jurisprudence is that even the content of interests that traditionally have been held to justify campaign finance regulation must be cabined to make sure that they are not enlarged in matters that would be impermissible in other First Amendment contexts. The Court is making sure that the interests accepted as compelling in the campaign finance regulation context do not drift to mean something functionally different than they do in other First Amendment contexts. It is always a danger that, as case law in one area becomes isolated from its roots in more general doctrine, its fidelity to the doctrine will become ever more attenuated, as with the distortions in a game of telephone.

In particular, the *Citizens United* Court saw that expanding the corruption rationale beyond the attempt to prohibit quid pro quo corruption could not be squared with the rest of First Amendment law. Speech in any context provides a route to influence or access. Reporters have access because they write about politicians. Pundits have influence because they pontificate and move voters. Celebrities have access because they add luster to officials. But it is obvious that the First Amendment would not allow Congress to limit reporting, punditry, or the effusions of celebrity. As a result, corruption

147. *Id.* at 359-60.
148. *Id.* at 359 (quoting McConnell v. FEC, 540 U.S. 93, 297 (2003)).
149. *Id.* at 360.
150. *Id.* at 359 (quoting *McConnell*, 540 U.S. at 296).

had to be defined narrowly as an exchange of support for a vote or other political favor. In contrast to prohibiting influence and access, preventing bribery would be compelling in any First Amendment context, let alone that of campaigns.[151]

The narrowing of the scope of this interest was in turn important in the Court's decision to invalidate aggregate contribution limits in *McCutcheon*. The Court majority reasoned that contributing to many candidates might give McCutcheon more influence and more access, but more contributions did not raise the risk of quid pro quo corruption because that risk came from individual quid pro quo arrangements and did not increase with more contributions.[152] The Court sharply distinguished the gratitude that leaders of a party would feel toward a donor that gave widely distributed support from quid pro quo corruption: "To recast such shared interest, standing alone, as an opportunity for *quid pro quo* corruption would dramatically expand government regulation of the political process."[153] In support, the Court cited cases for the proposition that political parties enjoy substantial First Amendment protections.[154]

Here the Court again followed the logic of the First Amendment by refusing to regulate access and gratitude differently. Gratitude and the grant of access for party organizers who help elect federal candidates is the coin of the realm in politics. There is no constitutional justification to single out for less protection private donors who have less influence than these political actors.

2. Constitutional Tests

The Roberts Court majority and plurality opinions have not only renormalized campaign finance regulation law by aligning their doctrinal conclusions with the rest of First Amendment law, but

151. For instance, in a context distinct from campaign finance regulation, the Court has interpreted the Sherman Act to permit petitioning the government, even if that petitioning seeks anticompetitive action by government. But that immunity does not extend to attempts to influence the government through bribery. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 504 (1988); Cal. Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

152. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1452 (2014).

153. *Id.* at 1461.

154. *See id.* (citing Cal. Democratic Party v. Jones, 530 U.S. 567, 572-73 (2000); Tashjian v. Republican Party of Conn., 479 U.S. 208, 214-16 (1986)).

they have also deployed the standard of review and tests that this body of law has elsewhere employed. Thus, the Roberts Court has refused to defer to the legislature's factual claims, instead requiring legislation to burden rights no more than is necessary to meet its objectives, and making sure that the legislation is not over- or underinclusive. This kind of analysis not only comports with other First Amendment cases,[155] but is generally consistent with cases protecting other fundamental rights.[156]

In First Amendment cases, the government bears the burden of showing that it has a compelling factual predicate for its interests.[157] The Roberts Court majority has insisted that the government bear the burden of proving the need for its campaign finance regulations.[158] For instance, this burden made a difference to the result in *McCutcheon*. The government's principal argument there was that the aggregate limits helped prevent circumvention of the individual limits.[159] It offered various possible scenarios that showed how such circumvention might occur.[160] The main concern was that a contributor could evade the limits on contributions to a particular candidate by giving to other political action committees (PACs) or party committees that were likely to give more money to the candidate of his choice.[161] But the government did not provide evidence of the likelihood of its scenarios. Moreover, given that the contributor would suffer substantial dilution of his contribution—because the PACs must give to others besides his favored candidate—this scenario and others were "sufficiently implausible that the Government

155. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2741-42 (2011) (noting that when legislative objectives "affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive").

156. *See* Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 108-09 (2000) (discussing the underinclusiveness inquiry in the context of fundamental rights and free exercise cases).

157. *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000) (discussing the requirement that the government bear the burden of showing both that the legislature has presented evidence of an actual problem that is in need of solution and that the law is aimed at solving that problem); *see also* Note, *Deference to Legislative Fact Determinations in First Amendment Cases After* Turner Broadcasting, 111 HARV. L. REV. 2312, 2317 (1998) (outlining the government's burden in First Amendment cases).

158. *See McCutcheon*, 134 S. Ct. at 1452.

159. *See id.*

160. *See id.* at 1453-55.

161. *See id.* at 1453.

ha[d] not carried its burden of demonstrating that the aggregate limits further[ed] its anticircumvention interest."[162]

In direct contradiction, Justice Breyer's *McCutcheon* dissent suggested that Congress's judgment about the need for these rules to prevent circumvention was entitled to deference: "These kinds of questions, while not easily answered, are questions that Congress is far better suited to resolve than are judges."[163] Similarly, in *Citizens United*, Justice Stevens stated that campaign legislation was entitled to "presumptive deference."[164] Thus, the majority and dissenting Justices fundamentally clash on the standard of review in campaign finance regulation cases.

Here, too, the majority is better rooted in First Amendment law. Outside of national security questions, in which the Court may have trouble evaluating justifications,[165] the Court does not generally defer to legislative judgments about the need to curtail First Amendment freedoms. This decision not to defer is generally consistent with the standard of review in other constitutional rights contexts.[166] But it has particular bite in the First Amendment context because the right of electoral expression is one that legislators may particularly want to suppress, given that it threatens their power and, indeed, their continuance in office.

Breyer's contrary argument is akin to an administrative expertise claim.[167] His contention is that members of Congress run for elections and thus are uniquely knowledgeable in determining the rules for regulating these campaigns.[168] But this assertion focuses only on knowledge and ignores the interest of members of Congress. Incumbent members of Congress have a substantial interest in regulating

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162. *Id.*

163. *Id.* at 1480 (Breyer, J., dissenting).

164. Citizens United v. FEC, 558 U.S. 310, 461 (2010) (Stevens, J., concurring in part and dissenting in part).

165. *See* Alexandra A.E. Shapiro, Note, *Title X, The Abortion Debate, and The First Amendment*, 90 COLUM. L. REV. 1737, 1753 n.103 (1990) (noting that in national security cases the judiciary defers to the government's factual claims).

166. *See, e.g.*, Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 962-64 (2002) (discussing searching scrutiny applied in equal protection cases).

167. *See* William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 887 (2013) (noting the analogy between an expertise argument for deference to Congress and deference to administrative agency).

168. *See McCutcheon*, 134 S. Ct. at 1480 (Breyer, J., dissenting).

campaigns to protect their incumbency. And given that the First Amendment singles out this right for protection from Congress, at least in part because of distrust of legislators' benevolence in this area,[169] it is interest rather than knowledge that should guide the standard of review.[170] Deferring to legislative expertise on campaigns turns the First Amendment's charter of freedom into a delegation to self-interested regulators.

And the driving force of Congress's interest is apparent from some of the other provisions of the McCain-Feingold Act that the Roberts Court invalidated. Take the so-called Millionaire's Amendment. Although the average member of Congress is wealthier than the average citizen,[171] few are so wealthy that they can self-fund campaigns. Yet there are over 10,000 households worth $100,000,000 that could likely self-fund a campaign completely,[172] and hundreds of thousands of wealthy individuals that could provide substantial support for themselves. Aggregate limits can also entrench incumbents, because they prevent a contributor from aiding a lot of challengers. They prevent contributors from helping incumbents as well, but incumbents, as a matter of course, begin with a substantial advantage of name recognition,[173] and additional contributions are thus likely to help them less at the margin.

Another characteristic test of the First Amendment is the requirement that the government show that even if there is a problem to be solved, the infringement is burdening speech rights no more than is necessary to solve it.[174] Thus, the Court employs the so-called

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169. *See infra* notes 292-94 and accompanying text.

170. *See* Araiza, *supra* note 167, at 956-57 (arguing that nature of the doctrinal question is the most important factor in determining the degree of expertise Congress should receive).

171. *See* Russ Choma, *Millionaires' Club: For First Time, Most Lawmakers Are Worth $1 Million-Plus*, OPENSECRETS (Jan. 9, 2014), http://www.opensecrets.org/news/2014/01/millionaires-club-for-first-time-most-lawmakers-are-worth-1-million-plus/ [https://perma.cc/96FD-2RJ4] (reporting that the 530 members of Congress had a median net worth of slightly more than $1 million).

172. ReportsnReports, *US HNWI Trends, Asset Allocation & Wealth Sector Challenges and Opportunities*, PITCHENGINE, http://pitchengine.com/pitches/cb09ba3d-76f7-4a78-af9d-2df18e69ceb7 [https://perma.cc/XBS9-PE9T] (last visited Feb. 21, 2016).

173. *See* Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 87 (1997) (noting brand name advantage of incumbents).

174. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) ("[T]he curtailment of free speech must be actually necessary to the solution."). It may be that the least restrictive requirement applies only to content-based restrictions. But there is no doubt that campaign

narrow tailoring test requiring the government to demonstrate why alternatives with a less substantial burden on the exercise of free speech rights would not accomplish the goals of the regulation.[175] The Roberts campaign finance regulation majority put the government to this burden of proof as well.

In *McCutcheon*, the government expressed concern that without aggregate limits, contributors could circumvent individual limits because the other candidates' PACs could transfer money back to candidates to whom the citizens had already donated.[176] Moreover, party organizations could funnel large sums donated to the party to the preferred individual candidate.[177] But Chief Justice Roberts noted that Congress could impose restrictions on the transfer of funds between committees, which would help prevent this result.[178] He also observed that the FEC could tighten its earmark rules, ensuring that money in certain PACs be given diffusely rather than earmarked for particular candidates.[179] Both provisions would make it more difficult to circumvent individual contribution limits without interfering with a donor's ability to express his support for multiple candidates.

Moreover, the Chief Justice also pointed out that aggregate limits undermined the professed objective of disclosure.[180] Aggregate limits had the perverse effect of encouraging the flow of campaign funds into entities like 501(c)(4) organizations, to which contributions are not required to be disclosed.[181] The Court noted that, with the rise of the Internet, disclosure itself was more of a constraint on corruption than ever before, thus implying that the effect of aggregate limits was peculiarly perverse in our information age.[182]

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finance restrictions are content based. Campaign finance regulations target only expenditures related to politics. One can support messages on any other subject. Similarly, contributions are restricted only if they are given to political campaigns and not to other activities.

175. *See* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422 (1996).

176. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1457 (2014).

177. *See id.* at 1454-55.

178. *See id.* at 1458-59.

179. *See id.* at 1459.

180. *See id.* at 1459-60.

181. *See id.* at 1460.

182. *See id.*

The dissenters' failure to test whether Congress is narrowly tailoring its means suggests that they are not willing to examine how justified their trust in Congress is, because checking the means of legislation against the objectives provides a metric for ascertaining whether that legislation is actually aimed at the proclaimed objectives. Even if the judiciary's inclination is to trust legislatures, it should be open to verifying that trust.

As well as imposing a narrow tailoring test, the Roberts Court has followed other First Amendment cases in assessing whether the legislative solution in a campaign finance case is underinclusive or overinclusive in relation to the problem it seeks to solve.[183] One way of understanding the under/overinclusiveness test is by focusing on the fit between the proffered purpose of the legislation and its scope, which helps to ferret out pretext and uncover legislation that claims to solve a problem but is instead directed at an impermissible objective.[184] If the legislation is underinclusive with respect to its objective, the test suggests that the legislation is pretextual because it does not solve the problem.[185] If it is overinclusive, the test suggests the legislation is burdening more speech rights than is necessary because it applies regardless of whether the rationale for the legislation is present.[186]

For instance, in *Citizens United*, the Court considered whether the prohibition on corporate spending around an election fit one of the claimed government objectives.[187] The government urged that prohibition of corporate expenditures around election time served the interests of minority shareholders because it would prevent them from funding speech with which they disagreed.[188] But the

183. *See* Volokh, *supra* note 175, at 2420-23.

184. *See* Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 427 (1995); *see also* J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407, 450 (2003) (suggesting that underinclusiveness, and possibly overinclusiveness as well, are means of ferreting out pretext). Another way of understanding the underinclusiveness test is that if a statute is underinclusive, then the interest is not that compelling. *See* Volokh, *supra* note 175, at 2420.

185. *See* Levy, *supra* note 184, at 427.

186. Thus, the overinclusiveness element of the test is not dissimilar to the least-restrictive-means test discussed above. *See* Volokh, *supra* note 175, at 2423.

187. Citizens United v. FEC, 558 U.S. 310, 348-49 (2010).

188. *See id.* at 361-62.

Court found that the government's asserted interest in protecting minority shareholders was both under- and overinclusive.[189] It was underinclusive because minority shareholders would have an interest in avoiding political expenditures with which they disagreed at any time, not just around the time of an election.[190] It was overinclusive because it covered corporations with just a single shareholder who obviously would agree with the speech he had decided to fund.[191] Indeed, it would also cover nonprofit corporations established by those who had come together for the precise objective of advocating an electoral outcome.

It is hard to argue that legislatures are so much more trustworthy in campaign finance regulation that the usual tests for substantiality of interest and pretext should be abandoned.[192] The failure to apply this established inquiry goes beyond "presumptive deference"[193] and verges on blind trust.

3. The Nature of the First Amendment

But the most striking differences between the Roberts Court's majority and dissenting opinions in campaign finance regulation cases are even more fundamental. The Justices in the majority in these cases reasserted that the First Amendment was defined by its nature as a right exercised by private individuals and their organizations.[194] Thus, for the majority, the government interest in perfecting democracy did not help define the nature of the right, but was evaluated only to see whether it was strong enough and sufficiently connected to the legislative objective to trump the right.

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189. *See id.*

190. *See id.*

191. *See id.* The Court rejected the underinclusiveness claim that the disclosure requirements were defective because they applied only to broadcast and not print or internet political advertisements. *See id.* at 368.

192. All of the campaign finance regulations that the Roberts Court addressed were enacted through regulation. Of course, it is possible that some states might enact regulation through referendum. It is settled Supreme Court doctrine that this method of enactment will make no difference to the Court's assessment of constitutionality. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 803-05 (1995).

193. *Citizens United*, 558 U.S. at 461 (Stevens, J., concurring in part and dissenting in part) (terming his own deference "presumptive").

194. *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434, 1448 (2014).

In contrast, Justice Breyer argued in *McCutcheon* for the dissenters that the First Amendment is in part a "collective" right because it is designed to connect the legislators to the sentiments of the people.[195] Such government interests should not be measured in order "to be weighed against the constitutional right to political speech. Rather, they are interests rooted in the First Amendment itself."[196]

The majority's opinion in *McCutcheon* shows that its view is far better rooted in free speech precedent and First Amendment structure than the dissent's view. First, as the majority noted, traditional First Amendment analysis considers the governmental interest in some collective action only to assess if it justifies the restriction: "[S]uch restrictions are measured against the asserted public interest (usually framed as an important or compelling governmental interest)."[197] The majority's conclusion here is supported by many citations, but the dissent cited no cases in which the governmental interest is used to define the scope of the First Amendment itself.[198]

Moreover, the majority observed that the First Amendment is a right located in individuals and the entities that they organize.[199] It does not protect a majority acting through the government, even if the interest proffered by the legislative majority is asserted to be in the public interest.[200] Indeed, the majority could have added that Justice Breyer's idea was in tension with the position of the First Amendment in the Constitution. The First Amendment, along with the other individual rights in the Bill of Rights, was passed as a restriction on the federal legislature.

Justice Breyer offered some statements from the Founding Era to support his view of the First Amendment as embodying a "collective" right, but these materials undermine his claims. First, he quoted a snippet from lectures by James Wilson on the Constitution, through which he purported to demonstrate that Wilson believed that "[the] First Amendment ... would facilitate a 'chain of communi-

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195. *Id.* at 1467 (Breyer, J., dissenting).

196. *Id.* at 1468.

197. *Id.* at 1450 (majority opinion).

198. *See id.* at 1466-67 (Breyer, J., dissenting); *infra* note 269 and accompanying text (discussing cases that Justice Breyer used for support in *McCutcheon*).

199. *See McCutcheon*, 134 S. Ct. at 1449-50.

200. *See id.*

cation between the people and those, to whom they have committed the exercise of the powers of government.'"[201] Actually, the quote from Wilson does not appear in a discussion of the First Amendment as Justice Breyer implied; instead, it appears in a discussion of the novelty and virtue of representative government as opposed to "monarchical, aristocratical and democratical" forms of government.[202] Rejecting direct democracy, Wilson specifically notes in this very discussion the necessity of a legislator's freedom to vote *at variance* with the sentiments of his constituents.[203]

Indeed, not only does this phrase have nothing to do with the First Amendment, but the term "communication" is used here to mean voting, not expression.[204] That is clear from the next sentence in the passage, a sentence which Justice Breyer failed to quote: "This chain may consist of one or more links; but in all cases it should be sufficiently strong and discernible."[205] In the context of discussing the nature of electoral representation, Wilson's meaning is that representation may be direct (one vote between the people and choice of representative) or indirect, like the Constitution's own establishment of the electoral college (at least two votes between the people and the choice of representative).[206] Justice Breyer appears not to understand the larger context of his quotation.

Justice Breyer also quoted James Madison in support, noting that Madison states that citizens could use their First Amendment rights to "publicly address their representatives" or "privately advise them."[207] Of course, this view is hardly a surprise; who could think that citizens could not use their right of free speech in this way? But

201. *Id.* at 1467 (Breyer, J., dissenting) (quoting JAMES WILSON & THOMAS MCKEAN, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 30-31 (London, J. Debrett 1792)).

202. JAMES WILSON & THOMAS MCKEAN, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 29-31 (London, J. Debrett 1792).

203. *Id.* at 27.

204. *See id.* at 30-31.

205. *Id.* at 31.

206. State legislatures decide the manner of choosing the electoral college. *See* U.S. CONST. art. II, § 1, cl. 2. These electors then determine the election of the President by their vote. *See* U.S. CONST. amend. XII. Thus, the election of the President has at least two "links" in the "chain of communication" in Wilson's sense. *See* WILSON & MCKEAN, *supra* note 202, at 30-31.

207. McCutcheon v. FEC, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting) (quoting T. BENTON, 1 ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 141 (New York, D. Appleton & Co. 1857)).

what is notable is the context of the comments, again omitted by Justice Breyer. Madison is opposing an amendment to the First Amendment that would have entitled citizens to instruct their representatives on how to vote.[208] Thus, Madison is actually arguing *against* a provision that would have required representatives to reflect more closely the sentiments of the people.

The larger context certainly does not support, and in fact undermines, Justice Breyer's point that the government's representatives may regulate expression to make what they claim is a closer connection between representatives and the people. Justice Breyer also failed to put Madison's comments here in the larger context of Madison's understanding of the nature of the First Amendment. Madison elsewhere stated clearly and emphatically that he believed that the Amendment reflects the right of the individual, not of the collective:

> [Property] in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."
>
> In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*.
>
> In the former sense, a man's land, or merchandize, or money is called his property.
>
> In the latter sense, a man has a property in his opinions and the free communication of them.
>
> He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.
>
> He has a property very dear to him in the safety and liberty of his person.
>
> He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.
>
> In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights....
>
> Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of

208. *See* T. BENTON, 1 ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856, at 138 (New York, D. Appleton & Co. 1857) (noting introduction of amendment in favor of "instruc[tion]").

> government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.[209]

Madison thus understood free speech as a natural right of the individual, not a collective right for government.

Justice Breyer also found support for his claims about the meaning of the First Amendment in Rousseau and his notion of the general will.[210] But Rousseau had little, if any, influence on any provision of the Constitution, let alone the First Amendment.[211] In fact, some of the Founders who did know him thought his theories "mad," bad, and dangerous.[212] For that reason, he has never been cited in a majority opinion of the Supreme Court. Thus, Justice Breyer's effort to find support for a revolution in First Amendment doctrine is alternately misleading and silly. It is far from the kind of evidence about the original meaning of the Constitution that would warrant changing the nature of free speech analysis.[213]

4. Arizona Free Enterprise Club

As discussed above, *Arizona Free Enterprise Club* concerned whether the government could provide additional funds to candidates because they were running against a candidate who was spending money of his own.[214] Chief Justice Roberts, writing for the

209. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983). For further discussion of Madison's understanding of free speech as an individual right of property and other sources of support for this understanding during the Framing period, see John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 56-57, 64-71 (1996).

210. *See McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) (citing J. ROUSSEAU, AN INQUIRY INTO THE NATURE OF THE SOCIAL CONTRACT 265-66 (transl. 1791)).

211. *See* Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 194 tbl.3 (1984); *see also* Nelson Lund, *Rousseau and Direct Democracy (with a Note on the Supreme Court's* Term Limits *Decision)*, 13 J. CONTEMP. LEGAL ISSUES 459, 459, 460 & n.5 (2004) (discussing Rousseau and American constitutional thought).

212. 10 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 103 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1856) (commenting unfavorably on theories of Rousseau).

213. Justice Breyer also relied on ROBERT POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION (2014). *See McCutcheon*, 134 S. Ct. at 1468 (Breyer, J., dissenting). The book is discussed *infra* at note 375.

214. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2813 (2011).

majority, believed that *Davis* governed this case because, as with the Millionaire's Amendment, the Arizona scheme also burdened free speech rights by making the exercise of speech rights trigger adverse consequences to the speaker.[215] The arguments for the unconstitutionality of the Millionaire's Amendment were deeply rooted in First Amendment doctrine outside of the campaign finance regulation context.[216] If the government imposed a tax on someone's First Amendment expression, that would be an abridgement.[217] Providing additional privileges to an opponent—as did the Millionaire's Amendment by relaxing the opponent's contribution limits—penalizes and deters expression no less than a tax and thus also constitutes an abridgement.

Similarly, Chief Justice Roberts argued that the Arizona scheme burdened First Amendment rights by "triggering" government subsidies for opponents of those exercising their rights.[218] Indeed, the Court found that the burden was greater than that in *Davis* in three separate ways.[219] First, in *Davis*, opposing candidates were given only additional opportunities to raise funds, but in *Arizona Free Enterprise Club*, they were actually given funds.[220] Second, the additional public subsidies provided by the scheme could create a "multiplier effect": when there is more than one opponent, all opponents get more public money to counter the candidate making private expenditures.[221] Third, the candidate who uses private contributions cannot even control whether he will face additional public expenditures, because independent expenditures on his behalf will trigger additional public expenditures for his opponents.[222]

Justice Kagan's dissent, however, argued that the case simply concerned a public subsidy and thus should be understood as constitutional under traditional free speech doctrine permitting such subsidies.[223] To the argument that these subsidies are not triggered by the exercise of First Amendment rights, Justice Kagan argued

215. *See id* at 2818.
216. *See id.*
217. *See id.*
218. *See id.* at 2818-19.
219. *See id.*
220. *Id.*
221. *Id.* at 2819.
222. *See id.*
223. *See id.* at 2830 (Kagan, J., dissenting).

that the government could have chosen to furnish greater subsidies in the first place without violating the First Amendment,[224] and that the trigger mechanism helps the government to calibrate the appropriate level of a subsidy for a particular race.[225]

Justice Kagan's analysis has been widely regarded as a powerful dissent,[226] and it gains its strength from its claim to root its analysis in neutral First Amendment principles, thus distinguishing it from many of the other dissents in Roberts Court campaign finance regulation cases. Nevertheless, she does not have the better of the doctrinal arguments.

As Justice Kagan herself recognized when she was Professor Kagan, government action can be simultaneously a subsidy *and* a penalty.[227] The distinction depends on the perspective of the person whose behavior is being affected. To the recipient of public funds for campaign expenditures, the trigger is a subsidy. But to the candidate using his own funds, the trigger is a penalty because it results in more opportunities for opposing speech. Such a trigger makes the candidate (or entity making an independent expenditure on the candidate's behalf) less likely to exercise First Amendment rights. This effect is self-evident if the trigger results in a tax: if one taxes an activity, there will likely be less of the activity.[228] Similarly, if an activity triggers an event that will result in other untoward consequences for the actor—even if they are not monetary—there will also likely be less of the activity. Thus, such a scheme should be held to be unconstitutional under principles the Court has previously embraced outside the campaign context.

Nor is the scheme saved by the fact that Arizona could have chosen higher levels of subsidies. This contention offers a classic greater-includes-the-lesser argument: because the government can

224. *See id.* at 2839.

225. *See id.* at 2842.

226. *See* Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 318 (2012).

227. *See* Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v St. Paul*,* Rust v Sullivan*, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 46-47 (recognizing that the penalty/subsidy distinction depends on the perspective taken); *see also* John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1150 (2005) (same).

228. Levying a tax on a First Amendment activity would be self-evidently unconstitutional. *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 576-77, 593 (1983) (finding a statute unconstitutional that imposed a "special tax" on newspapers through taxation of paper and ink products).

fund at higher levels generally, it should be able to do so on a selective basis. But classic, greater-includes-the-lesser arguments are not compatible with First Amendment doctrine.[229] Justice Oliver Wendell Holmes provided the first famous version of such an argument in dismissing the First Amendment claim of a public employee: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[230] But the Supreme Court has long rejected that logic in the context of free speech and public employment.[231] Similarly, it has rejected the argument that because the government could ban a commercial activity altogether, it can ban commercial speech about that activity.[232] The reason for rejecting such arguments is that a lesser power may be more offensive than the greater because its exercise may target speech.

Finally, it is useful to consider the trigger in a First Amendment context other than campaign finance regulation to confirm its condemnation. Assume that Congress passed a law that provided subsidies for a newspaper dedicated by law to rebutting any editorial written by any newspaper that spent over a certain threshold of money for its operations, capturing perhaps only the ten largest newspapers in the United States. Indeed, to make it better resemble the campaign finance regulation issue in *Arizona Free Enterprise Club*, perhaps the government should subsidize two newspapers in opposition to each private one, because a candidate expending his or her private funds may have many opponents. In this noncampaign context, it is obvious that the government is clearly burdening the rights of newspapers by setting up newspapers expressly to

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229. *See* Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 600 (1996) (showing that greater-includes-the-lesser doctrine would justify suppressing speech advocating overthrow of the government because the government can constitutionally prevent its own overthrow).

230. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892); *see* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. L. REV. 905, 916 (1990) (seeing this opinion as a classic example of the greater-includes-the-lesser argument).

231. *See* Rankin v. McPherson, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting) ("The Court long ago rejected Justice Holmes' approach to the free speech rights of public employees, that '[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" (quoting *McAuliffe*, 29 N.E. at 517)).

232. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 511 (1996) (plurality opinion); *id.* at 534 (O'Connor, J., concurring in the judgment).

rebut them. The result should be no different in the context of a campaign.

5. *Williams-Yulee v. Florida Bar*

In *Williams-Yulee v. Florida Bar*, Chief Justice Roberts upheld the Florida Bar's restriction on personal solicitation by candidates on the ground that it was narrowly tailored to the compelling state interest of ensuring the public integrity of the judiciary.[233] Lanell Williams-Yulee had mailed and posted online a letter soliciting contributions for her campaign to be a judge.[234] After her election defeat, the Florida Bar disciplined her for violating its rule forbidding personal solicitations.[235] The Chief Justice acknowledged that Williams-Yulee was engaged in pure speech and thus the State had to meet the compelling interest standard.[236] The dissent readily agreed with that proposition.[237] And it is hardly a surprise: asking for support for a campaign, including monetary support, is speech—indeed, core political speech—and thus targeting prohibitions on that speech requires strict scrutiny. Both the plurality and the dissent rooted their decisions in ample First Amendment precedent outside the context of campaign finance regulation.

In contrast, Justice Ginsburg advocated for a less exacting standard in her concurrence.[238] Had the Court adopted that standard, it would have had to overrule a previous case, *Republican Party of Minnesota v. White*, which applied compelling interest protection to judicial electioneering speech unconnected to the solicitation of funds.[239] And the dissent had no support in other free speech cases for the proposition that solicitation of donations was not pure political speech. Thus, this aspect of *Williams-Yulee* again shows that a majority of Justices—although not the majority that supported the

233. *See* 135 S. Ct. 1656, 1673 (2015).
234. *Id.* at 1663.
235. *Id.* at 1663-64.
236. *See id.* at 1665.
237. *See id.* at 1676 (Scalia, J., dissenting). Justices Kennedy and Alito did not directly join the primary dissent but said they largely agreed with it. *See id.* at 1682 (Kennedy, J., dissenting); *id.* at 1685 (Alito, J., dissenting).
238. *See id.* at 1673 (Ginsburg, J., concurring).
239. *See* 536 U.S. 765, 774-75 (2002).

result in this case—were following established First Amendment law in their choice of the standard of review.

Moreover, all the Justices agreed that Florida's interest in ensuring judicial impartiality and the appearance of impartiality was potentially compelling. The plurality and dissent disagreed on whether the rule was narrowly tailored to that goal. The dissent noted several problems it saw in this respect. First, the ban was overinclusive because it applied to fundraising appeals that went to those who were neither litigants nor attorneys.[240] Second, it was underinclusive because it did not apply to requests for anything other than campaign contributions, such as personal loans.[241] The dissent also objected that there was little evidence that, in a structure that permitted campaign contributions in the first place, banning requests substantially advanced the interest in judicial impartiality.[242]

The Chief Justice's opinion answered these objections. The ban was not overinclusive: the idea of limiting restrictions to people who were neither litigants nor attorneys was unworkable because it was unclear who would appear in those capacities.[243] The prohibition also was not fatally underinclusive because it applied to all gifts given for the purpose of influencing a judge, and thus, problematic gifts outside campaign contributions were already covered.[244] Finally, the Chief Justice suggested that personal appeals by judges have inherent dangers, including creating fears of retaliation for those who do not donate and the spectacle of the direct passing of money.[245] According to the Chief Justice, the judiciary is very different from a legislature in this respect: it is supposed to apply the law fearlessly and thus be unresponsive to particular citizens' wishes.[246] Thus, the plurality and the dissent did not so much disagree on the nature of the tests to be applied as on their application to the facts of the case.

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240. *See Williams-Yulee*, 135 S. Ct. at 1679 (Scalia, J., dissenting).
241. *See id.* at 1680-81.
242. *See id.* at 1678.
243. *See id.* at 1670-71 (plurality opinion).
244. *See id.* at 1668-69.
245. *See id.* at 1667-68.
246. *See id.* at 1666.

Moreover, Williams-Yulee conceded,[247] and the dissent did not disagree, that direct in-person requests for donations from litigants and attorneys could be banned.[248] Conversely, the plurality relied for the constitutionality of the rule on the capacity of a judge's campaign committee to make such requests on behalf of that judicial candidate.[249] Thus, the difference between what the plurality and dissent would permit in judicial elections is actually very narrow. Under the holding of the case, personal requests for judicial campaign donations may be prohibited, but campaign committees can make exactly the same requests. Even if one believes, as I do, that the dissent, in applying doctrine to the facts of the case, had the better argument, the specific holding is less important than the principles embraced by a majority of the Justices.

In short, *Williams-Yulee* is largely consistent with the view that the Roberts Court has been applying more general First Amendment principles to the campaign finance area. The plurality and dissent agreed on these principles even if their judgments diverged on how they should be applied. Even then, the difference in application was one of degree—and not a large degree at that. It was the concurrence by Justice Ginsburg that was most out of line with the Roberts Court's general approach to campaign finance regulation. And that is not a surprise because both Justices Ginsburg and Breyer have consistently wanted to apply different First Amendment standards to political campaigns.

6. Citations to First Amendment Cases

A final way of understanding the majority's greater integration of campaign finance regulation into the rest of First Amendment law is simply to compare the number of citations to First Amendment cases in the majority or principal plurality decisions with those in the principal dissenting opinions in the cases in which the Court split on the principles at stake.[250] Taken together over these six cases, the majority or plurality opinions cited First Amendment cases outside the campaign finance regulation area seventy-eight

247. *See id.* at 1670.
248. *See id.* at 1676-77 (Scalia, J., dissenting).
249. *See id.* at 1670 (plurality opinion).
250. Thus, I do not count *Williams-Yulee*. *See supra* Part I.B.5.

times.[251] The principal dissents cited such cases thirty-eight times.[252] The difference approximates two to one. Even this count understates the imbalance. As the Roberts Court has infused First Amendment principles into campaign finance regulation decisions, the decisions themselves become more representative of general First Amendment principles. When these previous Roberts Court cases are then cited in later cases, they bring with them an infusion of general free speech principles.[253]

In three of the cases, the divergence in citation to First Amendment cases outside the context of campaign finance regulation was overwhelming. In *Wisconsin Right to Life*, the plurality cited ten First Amendment cases outside the campaign finance regulation area while the dissent cited none.[254] In *Citizens United*, the majority cited forty-six such cases, and the dissent cited twenty-one.[255] In *McCutcheon*, the plurality cited thirteen such First Amendment cases while the dissent cited to three.[256]

In *Randall*, neither the majority nor the principal dissent cited any First Amendment cases outside of the campaign finance regulation context. This failure is not surprising because of all such cases decided by the Roberts Court, this case broke the least new ground and could easily be decided within the *Buckley* framework. Moreover, Justice Breyer, the author of *Randall*, dissented in every other such case decided by the Roberts Court.

In *Davis*, the majority and principal dissent each cited to only one prior First Amendment case outside the context of campaign finance regulation.[257] The reason for the paucity of citations in the majority

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251. *See infra* Citation Appendix. The methodology of constructing the Citation Appendix is straightforward. Any citation in the cases surveyed to a free speech case that was not related to campaign finance was catalogued and counted. It did not matter whether the citation appeared in a string cite or was discussed in the opinion. The wide net seems appropriate, because the idea behind the Appendix is to assess how closely nested a campaign finance opinion is in the network of other free speech cases. The Citation Appendix lists cited cases in order of their appearance in the opinions.

252. *See infra* Citation Appendix.

253. For example, the majority cited a First Amendment case to justify *Davis*, and then the same majority believed the analysis in *Davis* governed *Arizona Free Enterprise Club*. *See supra* notes 214-15 and accompanying text.

254. *See infra* Citation Appendix.

255. *See infra* Citation Appendix.

256. *See infra* Citation Appendix.

257. *See infra* Citation Appendix.

was that this result flowed from a relatively straightforward application of *Buckley*'s constitutional protection for unlimited candidate expenditures on his behalf.[258] But it is important to note that the one case cited by Justice Stevens's dissent, *Red Lion Broadcasting Co. v. FCC*, is one of the most criticized First Amendment cases in the modern era—and is likely not even good law.[259] *Red Lion* upheld the constitutionality of the "fairness doctrine," which required broadcasters to give each side of public issues "fair coverage."[260] One of the rationales for the *Red Lion* Court's conclusion was the scarcity of the broadcasting spectrum.[261] Given scarcity in the medium, the claim was that this requirement of balanced treatment was needed to make sure that individuals with opposing views could find a way to express themselves.[262] Subsequently, the FCC repealed that doctrine, expressing concerns about its constitutionality, particularly given the rise of cable and other media that undermined the scarcity rationale.[263] Because of the Internet and cornucopia of media today, the scarcity rationale is even less persuasive.[264] Even accepting the premise of scarcity, *Red Lion* has been heavily criticized because a free market facilitates efficient allocation despite scarcity.[265] In light of the widespread criticism and anachronism of

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258. *See supra* notes 69-73 and accompanying text.

259. *See* THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 156 (2d ed. 1998) ("Although the Supreme Court has not abandoned *Red Lion*, the FCC has abandoned the fairness doctrine and challenged most of the justifications asserted in the *Red Lion* opinion.").

260. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369, 396 (1969). The fairness doctrine required broadcast radio and television licensees "to provide coverage of vitally important controversial issues of interest in the community served by the licensees and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues." Inquiry into Section 73.1910 of the Comm'n's Rules & Regulations Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 142, 146 (1985).

261. *See Red Lion*, 395 U.S. at 390 (suggesting the characteristics of broadcasting, including the scarcity of the broadcasting spectrum, supported the constitutionality of the fairness doctrine).

262. *See id.*

263. *See* Syracuse Peace Council, 2 FCC Rcd. 5043, 5051 (1987).

264. *See, e.g.*, Josephine Soriano, *The Digital Transition and the First Amendment: Is It Time to Reevaluate* Red Lion*'s Scarcity Rationale?*, 15 B.U. PUB. INT. L.J. 341, 355-56 (2006) (noting the disappearance of the scarcity rationale).

265. *See, e.g.*, Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 137-38 (1990). Richard Posner called the idea that scarcity causes less than optimal production of speech "economic nonsense." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 943 (8th ed. 2001).

Red Lion, Justice Stevens's citation of *Red Lion* actually distances the *Davis* dissenters from current First Amendment principles.

The one case in which the number of First Amendment citations by the dissent is larger than that of the majority is *Arizona Free Enterprise Club*, by thirteen to eight.[266] The imbalance, however, is not as large as that in *Citizens United*, and not anywhere approximating *Wisconsin Right to Life* or *McCutcheon*.[267] As previously noted, the *Arizona Free Enterprise Club* dissent is the most plausible of the campaign finance regulation dissents in the Roberts Court.[268] This count helps confirm that this plausibility comes from the relative rootedness of its analysis in the general First Amendment, as the overall citation analysis confirms the conclusion that the Roberts Court majority is overall better rooted in traditional First Amendment doctrine than are the dissenters.[269]

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266. *See infra* Citation Appendix.

267. *See infra* Citation Appendix.

268. *See supra* Part I.B.4.

269. It is also the case that some of the First Amendment citations by the dissenters are quite distant from demonstrating current First Amendment principles that cut concretely in favor of their positions. For instance, in *McCutcheon*, Justice Breyer relied on two First Amendment cases from seventy years ago as support for his view that the First Amendment is a "collective" right. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting). First, he noted that Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927), stated that the "protection of speech was 'essential to effective democracy.'" *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) (quoting *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring)). He also observed that Chief Justice Hughes stated in *Stromberg v. California*, 283 U.S. 359 (1931), that "[a] fundamental principle of our constitutional system" is the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people." *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting) (emphasis omitted) (quoting *Stromberg*, 283 U.S. at 369). But these general sentiments hardly seem strong enough to support his position. Neither Justice Brandeis nor Justice Hughes opined that the First Amendment was not a right that should be defined by its private exercise, rather than its effect on public governance. Justice Brandeis expressly said otherwise. *See Whitney*, 274 U.S. at 373 (Brandeis, J., concurring) (comparing free speech to other fundamental rights like the right to teach). Justice Hughes's decision invalidated a statute that tried to prevent an individual's expression of "opposition to organized government." *Stromberg*, 283 U.S. at 361, 369-70. Neither case provides support for government interference with free speech to prevent undue influence, promote equality, or any other objective of campaign finance regulation. It seems especially odd to use some very general dicta in Justice Hughes's opinion to empower government regulation when the opinion was notable, particularly at its time, for overturning regulation of expression.

7. Moving Further Toward Neutral Principles in Campaign Finance

While the Roberts Court majority has made progress in applying neutral principles to campaign finance law, one more important step remains to be taken: campaign contributions still need to be better integrated with the rest of First Amendment law. This Section will describe three steps that need to be taken to complete the integration. First, the Court needs to better articulate the reason that the restrictions on campaign contributions deserve First Amendment scrutiny is that these limitations are targeted at campaigns, which are themselves quintessentially expressive activities. But such scrutiny does not necessarily mean that those limitations are impermissible so long as they remain content neutral. Thus, the second step is to decide whether the government objective for restriction is permissible and content neutral. Third, assuming it is permissible and content neutral, the regulation of campaign contributions must still be narrowly tailored and allow for alternative avenues for participation in campaigns.[270] Although what the *McCutcheon* majority (in judgment) said is largely consistent with this approach, the doctrinal structure needs to be put on more secure theoretical foundations.

Perhaps the Roberts Court has had trouble setting the right conceptual relation of contributions to the First Amendment because *Buckley* was not particularly articulate about why contributions raise First Amendment problems. It is true, as *Buckley* suggested, that contributions help facilitate speech,[271] but so do many other things, like transportation, and yet regulations of these nonexpressive activities do not implicate the First Amendment. The reason that limitations on *campaign* contributions implicate the First Amendment is that they are regulations differentially targeted at campaigns, which are inherently expressive.[272] Thus, while cam-

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270. Eugene Volokh has nicely set out such an analysis. *See* Eugene Volokh, *Freedom of Speech and Speech About Political Candidates: The Unintended Consequences of Three Proposals*, 24 HARV. J.L. & PUB. POL'Y 47 (2000).

271. *See* Buckley v. Valeo, 424 U.S. 1, 21 (1976) ("While contributions may result in political expression ... the transformation of contributions into political debate involves speech by someone other than the contributor.").

272. *See* Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 23-24, 33 (2016).

paign contribution ceilings limit nonexpressive conduct, the regulation is targeted on the basis of its relation to expressive conduct.[273]

Participation in campaigns is expressive activity for both the contributor and the candidate. A campaign is a joint enterprise between candidates and supporters in which each seeks to express himself—the candidate by campaigning, the supporter by choosing the campaign to support. Indeed, supporters influence the expressive nature of the campaign, and candidates naturally try to get more of them by taking into account their interests. Thus, by targeting contributions to campaigns, the government makes both the interests of the candidate and the contributor relevant to First Amendment analysis.

As usual, the best way of understanding why a campaign finance regulation triggers First Amendment scrutiny is to analogize it to similar restrictions outside of the context of campaign regulations. For instance, the Court has applied First Amendment scrutiny to special taxes on nonexpressive items, like materials to put out a newspaper, because those taxes are targeted at expressive activity.[274] Even more analogously, if the government were to put a ceiling on the contributions to magazines of political opinion, or indeed, aesthetic opinion, that limitation would also fall on nonexpressive financial activities. Yet, it would be targeted at an expressive activity and require First Amendment scrutiny. And because a political magazine reflects both the interests of its owners and the contributors that choose to keep it afloat, regulations that target monetary contributions to the magazine implicate both their interests. It should now be easier to clearly see this, as more recent First Amendment law has been making its scrutiny under the First

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273. It is true that campaigns do things other than express themselves. For instance, they try to conduct demographic research and get voters to the polls. But a huge proportion of campaign contributions are spent on expressive purposes. A regulation restricting contributions to opinion magazines would still deserve First Amendment scrutiny, even if some of those contributions were spent on market research. Perhaps the campaign finance law could restrict contributions spent on nonexpressive activities without engendering any First Amendment scrutiny, but campaign finance law generally does not make such a distinction. *See infra* note 275 and accompanying text.

274. *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 593 (1983) (overturning use tax on newsprint that applied to papers).

Amendment of nonexpressive activity depend on whether regulation of that activity is based on its relation to expressive activity.[275]

The fact that the limitation of campaign contributions implicates the First Amendment does not necessarily make that limitation unconstitutional, but it does create certain doctrinal hoops through which the regulation must jump—doctrines that *McCutcheon* correctly applied. First, the government must seek an objective that is itself permissible.[276] Equalizing speech opportunities is not permissible, because that is a justification that itself targets speech. Preventing quid pro quos between candidates and contributions is a legitimate purpose because bribery is an activity that is legitimately punished and targeted at speech. Thus, *McCutcheon*'s sound advance in doctrinal analysis on this point is to hold that expanding the quid pro quo justification to influence or access to politicians is not a permissible reason.[277] And that conclusion is right. To use the example of the noncampaign-finance activity described above, it would obviously be impermissible to cap the contributions to political magazines for fear that the magazines or their contributors would gain influence or access, because that too is targeting speech. It is a legitimate purpose of speech to gain influence and a hearing for the ideas expressed.

Second, even if the objective is permissible, the regulation must be content neutral and narrowly tailored to meet that objective. Here, *McCutcheon* is again instructive. The difficulty in that case was that the aggregate limits were not narrowly tailored to achieve their objective,[278] as is required even of content-neutral regulations targeted at speech. It would have been useful if *McCutcheon* had cited more generally to cases outside of the campaign contribution context that make this point. For instance, *Ward v. Rock Against Racism* made clear that restrictions on sound at political rallies must be narrowly tailored to prevent the evil complained of—there, excessive noise—without tamping down too much on speech.[279]

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275. *See* Campbell, *supra* note 272, at 1.

276. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014).

277. *See supra* text accompanying notes 152-54.

278. *See McCutcheon*, 134 S. Ct. at 1457-59 (noting that the government could have prevented the use of aggregate limits to circumvent individual limits by others means).

279. *See* 491 U.S. 781, 791, 803 (1989).

Third, even content-neutral regulations must leave sufficient alternatives for expression. *McCutcheon* contributes some relevant context to the analysis for campaign regulations by noting that most citizens, unlike entertainers and celebrities, do not have alternative avenues by which to convey their support for multiple candidates other than by contributions.[280]

That last part of the doctrinal framework may become relevant to future challenges to campaign contribution limits for individual campaigns—challenges that are already being made.[281] Before the Court in *Citizens United* permitted citizens to use the corporate vehicle for independent expenditures[282] and lower courts, relying in part on *Citizens United*, legitimated Super PACs,[283] it was difficult for citizens of more modest means to make their voices heard on behalf of a particular candidate. But now they have the ability to give unlimited amounts of money for independent expenditures that will make the case on behalf of that candidate. This capacity weakens the argument that individual contribution limits are too low. Now there are alternative means of supporting a candidate without creating a substantial danger of quid pro quo corruption.

However, joining together in either corporate form or through Super PACs is not a perfect substitute for campaign contributions to candidates themselves. Independent expenditures on behalf of a candidate cannot be coordinated with a candidate and thus do not perform exactly the same function as contributions controlled by the candidate, which are focused on the candidate's message. But there may well be a sufficient substitute once a supporter is allowed to contribute a reasonable amount directly to the candidate. Thus, it is not necessarily the case that all of the developments in the Roberts Court campaign finance jurisprudence should lead to relaxation of campaign finance strictures. Limits on individual campaign contributions may be a case in point.[284]

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280. *See McCutcheon*, 134 S. Ct. at 1449.

281. *See, e.g.*, Lair v. Murry, 903 F. Supp. 2d 1077 (D. Mont. 2012), *rev'd and remanded sub nom.* Lair v. Bullock, 798 F.3d 736 (9th Cir. 2015) (reversing district court decision striking down Montana's statutory contribution limits, and remanding to the district court to decide whether the limits further a valid "important state interest").

282. *See* Citizens United v. FEC, 558 U.S. 310, 372 (2010).

283. *See supra* text accompanying notes 123-28.

284. Another area that could be better integrated with the rest of the First Amendment is disclosure of campaign contributions. Unlike other areas of campaign finance law, most

II. THE NEED FOR NEUTRAL PRINCIPLES IN CAMPAIGN FINANCE REGULATION

The idea that the judiciary must decide its cases according to "neutral principles" became central to American constitutional jurisprudence in the twentieth century.[285] Precisely because at this time the Supreme Court exercised a more robust power of judicial review than at previous times in its history, the Court had to establish its

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Justices are not divided on the permissibility of disclosure or disclaimers that require advertisements funded by independent expenditures to declare who is responsible for them. All of the current Justices except Justice Thomas believe that the legislature can require disclosures and disclaimers, unless releasing that information is likely to lead to harassment. *Compare Citizens United*, 558 U.S. at 368-71, *with id.* at 483-85 (Thomas, J., concurring in part and dissenting in part). This conclusion may well be right with respect to contributions. If preventing quid pro quo corruption is a substantial government interest, disclosure may be required to police it. This position is not inconsistent with the Court's approach to disclosing membership in an expressive association. Outside the electoral context, the Court employs much the same test. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 464 (1958) (noting that interest of Alabama was insubstantial in determining eligibility). In *Patterson*, the Court held unconstitutional an Alabama statute that required the NAACP to provide lists of its members in order to prove eligibility to do business in the state. *See id.* at 466. In the climate of that time, with Jim Crow laws and other official antagonisms toward African Americans, requiring disclosure was clearly meant for harassment. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 383 (2004) (noting that Alabama had succeeded in shutting down the NAACP for eight years, including the years during which the litigation over disclosure took place). The Court nevertheless affirmed that governmental interests could justify disclosure in other circumstances. *See Patterson*, 357 U.S. at 460, 462.

But it is far from clear that the Court has fully reconciled requiring disclosure of independent expenditures with other First Amendment law. Disclosing the identity of independent expenditures is tantamount to disclosing the identity of the speaker. But the Court has expressly held that there is a right to anonymous speech. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (invalidating an Ohio law that prohibited anonymous campaign literature). Perhaps one way to reconcile the requirement of disclosure of those making independent expenditures with the anonymous speech holding is to observe that disclosure is needed to ensure that independent expenditures are not coordinated with a candidate's campaign. Coordination would make independent expenditures essentially the equivalent of contributions, raising the problems of quid pro quo corruption. But even if fear of coordination provides a justification for disclosure to government agencies, it would not justify requiring people or organizations to identify themselves in campaign ads. This requirement would be in substantial tension with the right to anonymous speech.

285. *See generally* Eldon J. Eisenach, *Can Liberalism Still Tell Powerful Stories?*, *in* 11 THE EUROPEAN LEGACY: TOWARD NEW PARADIGMS 47, 48 (2006) (discussing the rise of neutral principles in the mid-twentieth century).

legitimacy in overturning the judgments of the political branches.[286] One source of legitimacy was the nature of its decision making. In defending the Constitution, it was not to act in the ad hoc manner of ordinary politics.[287] Instead, the Court was to render decisions according to reasoned elaboration of constitutional principles.[288]

Reason meant applying constitutional principles of content generality and equal applicability.[289] As Martin Redish has written, neutral principles require that "whatever rationale a court selects to justify its chosen interpretive doctrine must be applied consistently in all cases; it cannot be selectively altered in subsequent cases solely because the court finds the outcome dictated by use of that principle to be politically distasteful or offensive."[290] Thus, a decision should not depend on the identity of the parties, or even on the nature of the particular dispute, but rather on principles that transcend the dispute and the nature of the parties.[291] These neutral principles guaranteed the political neutrality essential to establishing the judiciary's comparative advantage over the political branches in adjudicating cases under the Constitution.

The requirement of neutral principles has particular purchase in First Amendment law—especially in the campaign finance regulation area—for three reasons. First, while most constitutional disputes are about specific substantive results, First Amendment disputes bear directly on the political process that determines substantive results across the entire legislative policy space. Thus,

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286. *See* Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 30-31 (1999) (arguing that an overriding purpose of neutral principles was to constrain judicial discretion).

287. *See* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 672-73 (1993).

288. *See id.*

289. Herbert Wechsler's *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959), is the classic statement of the position. He argued for a process based on generality and neutrality, which "transcend[s] any immediate result that is involved." *Id.*

290. Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 77 (2007).

291. *See* Wechsler, *supra* note 289, at 15, 19. What was controversial about Wechsler's article was that it suggested that *Brown v. Board of Education*, 347 U.S. 483 (1954), could not be justified along the lines of neutral principles. *See id.* at 22, 26, 32-34. But the argument for neutral principles can be separated from the argument against *Brown*. And it was so separated, as a variety of commentators argued that *Brown* could be justified in terms of the neutral principle of antisubordination. *See* Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 531 (1997).

if the Supreme Court does not apply neutral principles, it will not only be engaging in ad hoc decision making itself, but it also will be systematically distorting the entire range of decision making of the political branches.

Second, the First Amendment is premised on a view that the government cannot be trusted with decisions about speech.[292] But even though judges themselves are government officials, the Court necessarily has to make decisions about when and how the First Amendment will apply. Given the special problems of trust in this area, the Court has a particular need to make its decisions according to neutral principles in order to make its method of interpretation reflect the underlying nature of the Amendment. The more a constitutional provision reflects an economy of distrust, the more it requires judicial constraint,[293] which adherence to neutral principles can provide. In other words, where there are reasons to believe that trust in those interpreting the law should be low, constraint on discretion is even more necessary.[294]

Third, campaign regulations are conceived by politicians who strive for reelection and the defeat of their opponents. The members of the Supreme Court are appointed through a political process dominated by these same politicians. To dispel the appearance of partisanship, it is particularly important to show that the Court's campaign finance regulation jurisprudence follows neutral First Amendment principles.

If there are more powerful reasons to apply neutral principles to campaign regulation, it is also easier to do. The Court has returned to the subject of free speech again and again, laying down a reticulated set of principles in a variety of contexts that have lower political stakes than campaign finance regulation.[295] Such principles forged outside the hurly-burly of partisan politics are available to guide judicial decision making.

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292. *See* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 48 (1992). There would be little reason to single out free speech as an individual right beyond government control if one trusted the government with its management.

293. *See* SCOTT J. SHAPIRO, LEGALITY 346 (2011).

294. *See id.*

295. For instance, a study showed that between 1993 and 2002, the Court decided more free speech cases than any other category of cases in constitutional law other than criminal procedure cases. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1792 n.139 (2004).

Thus, it counts heavily in favor of the Roberts Court's jurisprudence that it follows neutral principles by uniting campaign finance regulation analysis with the rest of the free speech jurisprudence. Part I has shown that the majority does a far better job of integration at a variety of levels—from the simple doctrinal unity, to the deployment of similar tests for evaluating compelling interests, to the fundamental structure of First Amendment analysis.[296]

One possible argument against the Roberts Court's adherence to neutral principles is that the majority did overrule some precedents. By holding that a corporation had a right to make independent expenditures, the Court in *Citizens United* overruled *Austin* and portions of *McConnell*.[297] By holding that aggregate limits of campaign contributions were unconstitutional, the Court in *McCutcheon* departed from some language in *Buckley*.[298] But following precedents is not the same as adhering to neutral principles if the precedents themselves are outliers to the principles forged elsewhere in case law.[299] Otherwise, the law would, in fact, come to be unprincipled, as the judiciary would have to choose between precedents reflecting incompatible principles.

In particular, while *Citizens United* overruled *Austin* and *McConnell*, it brought the First Amendment into line with far more established and pervasive lines of cases that asserted that corporations possessed the same rights as individuals.[300] *Citizens United* also followed the language and purpose of the First Amendment, which offers no foothold for the distinction between individual speech and joint speech—that is, speech determined by individuals but facilitated by mechanisms of association.[301]

McCutcheon did not even overrule any holding of *Buckley* because campaign finance law had changed substantially. *Buckley* had upheld the overall ceilings as "prevent[ing] evasion of the $1,000 [individual] contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate

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296. *See supra* Part I.

297. *See* Citizens United v. FEC, 558 U.S. 310, 378-85 (2010).

298. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1445 (2014).

299. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 759 n.200 (1988) (stating that precedents that are inconsistent with widely applicable principles may be overruled).

300. *See supra* text accompanying note 297.

301. *See supra* notes 113-15 and accompanying text.

through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party."[302] As the *McCutcheon* Court explained, there are now new limitations on circumvention in place.[303] Moreover, in applying the least restrictive means test to this new ceiling in a different campaign finance regime, the Court was following tests applied in other areas of First Amendment law.[304] Thus, it was adhering to neutral principles, even as it distinguished *Buckley*.[305]

One other possible argument against the Roberts Court's adherence to neutral principles is that its campaign jurisprudence actually reflects an interest in aiding particular groups such as corporations or the wealthy. For instance, it has been suggested more generally that the Roberts Court favors businesses, and a recent study showed that it decided cases for the business litigants more than had previous courts.[306] But this evidence is not necessarily a riposte to the operation of neutral principles. Neutral principles do not suggest that one side or the other should win more or less often, but rather that the Court should follow the principles of previous law. Thus, for instance, if the better argument under legal doctrine is that corporations have full First Amendment rights, it is not a violation of neutral principles for business interests to continually beat back the claim that they do not. And, in fact, the study of the Roberts Court has been criticized on the ground that it fails to consider the shape of preexisting law.[307]

To be sure, adherence to neutral principles as a jurisprudential touchstone has itself been subject to criticism. For instance, in perhaps the most widely cited critique of this issue, Mark Tushnet argues that a judge can always retrospectively reinterpret precedent to generate a wide variety of principles.[308] And certainly Tushnet is

302. Buckley v. Valeo, 424 U.S. 1, 38 (1975).

303. *See McCutcheon*, 134 S. Ct. at 1446-47.

304. *See id.* at 1441, 1445.

305. *See id.* at 1445-46.

306. *See* Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1431, 1472 (2013).

307. *See* Jonathan H. Adler, *Business and the Roberts Court Revisited (Again)*, VOLOKH CONSPIRACY (May 6, 2013, 11:20 PM), http://volokh.com/2013/05/06/business-and-the-roberts-court-revisited-again/ [https://perma.cc/WNS8-9FUL].

308. *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism*

right that precedents can be reinterpreted to yield different principles. But that does not mean that one interpretation is not more plausible than another. Consider this analogy: Given any sequence of numbers, we can frame a rule to obtain whatever number we want in the sequence. But for many sequences, particularly one with a substantial sequence of numbers (say, 2, 4, 6, 8, 10, or 1, 2, 3, 5, 8, 13), we would consider that one rule has more intuitive plausibility than any other. So it is with the law: some principles that explain previous precedent are more plausible than others.

Moreover, it is important to note that the dissenting Justices on the Court do not generally frame their critique by arguing for the impossibility of principle. Rather, they most often argue that their decisions are better rooted in neutral principles than those of the majority or plurality.[309] In *Davis*, Justice Stevens argued that permitting others to raise more money did not burden speech rights of the "millionaire."[310] Most notably, Justice Kagan tried to argue that Arizona's scheme comported with the government's right to subsidize speech.[311] These are attempts at justification by neutral principles.[312] The difficulty is that they are not as principled as the majority's elaboration. Indeed, in all but Justice Kagan's dissent, as previously discussed, it is quite obvious that the principles invoked diverge from principles decisive in other free speech cases. Thus, the kind of critique of neutral principles developed by Tushnet is largely external to the debate on campaign finance regulation on the Court.

Another complaint may be that neutral principles are not neutral in that judges can choose them with recognition of their consequences. But insofar as the principles cover a variety of current and future disputes, it is much harder to predict the consequences that will come by following them. Judges are thus under a thicker veil of ignorance when using neutral principles.[313] The First Amendment

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and Neutral Principles, 96 HARV. L. REV. 781, 814-15 (1983).

309. Occasionally, the dissenting Justices argue that principles should be revised for originalist reasons. *See infra* note 320 and accompanying text. These are also principled arguments. However, in this case they are unavailing because they are mistaken. *See infra* Part III.A.

310. Davis v. FEC, 554 U.S. 724, 753 (2008) (Stevens, J., concurring in part and dissenting in part).

311. *See supra* notes 223-25 and accompanying text.

312. *See supra* text accompanying notes 223-25.

313. *See* Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 48 (2011).

is a case in point. The determination that corporations had speech rights was made in a wide variety of circumstances, not just in campaign finance regulation. Of course, once the neutral principles are in place, one can calculate the consequences of following them in a particular case. But it is precisely to avoid such political and, in campaign finance regulation cases, potentially partisan calculations that neutral principles have a special attraction.

Professor Cass Sunstein provides a critique of neutral principles more particularly focused on campaign legislation, namely that neutral principles presuppose a prepolitical distribution of property.[314] Thus, for Sunstein, *Buckley* and all campaign finance regulation cases share a faulty premise that the government is "a guarantor of unrestricted speech 'markets,'" because those markets depend on distributions subject to regulation by the government.[315] This particular attack on the use of neutral principles in campaign finance regulation is incompatible with both the foundations of our Constitution and popular consensus. First, such a conception is contrary to the understanding of the Framers of the Constitution as well as the structure of the Constitution.[316] The Constitution presupposes that some rights were prepolitical in the sense of being prior to government, and that the distribution created by the exercise of rights could be changed only by means of the structure they put in place, including the First Amendment.[317] Second, Sunstein's view was not only rejected at the time of the Framing, but it is also widely rejected today. If people understood the distribution of resources that support speech as subject to regulation by government, there would not have been the outcry at the government's first oral argument in *Citizens United* about banning the corporate release of books about candidates[318]—a distribution of information that depends on a preexisting distribution of resources. Once it is recognized that there are speech rights presumptively beyond political regulation, the question of their protection must be decided

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314. *See* Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 8, 10-11 (1992).

315. *Id.* at 10-11.

316. *See* John O. McGinnis, *The Partial Republican*, 35 WM. & MARY L. REV. 1751, 1760-62 (1994) (book review) (showing that the Constitution contemplates rights that are prepolitical in the sense that political is meant to protect their exercise rather than reorder them).

317. *Id.*

318. *See supra* note 135 and accompanying text.

by neutral principles that do not distinguish between sectors of society like the media and nonmedia entities.[319]

III. Objections to Applying Neutral Free Speech Principles

There are three possible ways to attack the use of long-standing First Amendment doctrine to settle campaign finance regulation. The first is to argue that the original meaning of the Constitution supports campaign finance regulation and thus justifies dispensing with intervening precedent. The second is to contend that precedent about elections other than overlapping free speech precedent should control the outcome of campaign finance regulation. The third is to introduce some new principle from political theory that is powerful enough to reorganize the doctrine and permit campaign finance regulation to survive.

All of these efforts have a common objective: reordering the relation between democracy and free speech previously established by First Amendment doctrine, so that collectively enacted legislation can dominate the civic order generated by individual rights. But all suffer from common problems as well. The first difficulty is legitimacy—what makes it legitimate to use a particular methodology to trump established First Amendment doctrine? The second problem is the persuasiveness on the merits: few of the theories add some convincing argument to those that the Court has already rejected. The third issue is the impossibility of containing these arguments so that they protect only campaign finance regulation that has passed and do not destabilize the rest of free speech law.

A. Originalist Claims

It is not surprising that Justice Stevens in *Citizens United* and Justice Breyer in *McCutcheon* tried to offer originalist reasons to alter First Amendment principles. Originalism provides the most powerful way to solve the problems of legitimacy in changing doc-

319. It is true that *Citizens United* itself created an outcry in some quarters. But that just shows why the Court, being relatively insulated from the public, has the comparative advantage in making principled decisions that are necessary to constitutional maintenance, rather than following the unprincipled passions unleashed in the political process.

trine.[320] Indeed, Justices Scalia and Thomas, who were part of the consistent campaign finance regulation majority, believe originalism is the only legitimating theory of constitutional interpretation.[321] All the other Justices in the majority and almost everyone else on the Court believe that originalism is at least a respectable modality of constitutional interpretation,[322] one that may be capable of altering settled doctrine in some circumstances.[323]

But as we have also seen in considering the defects of Justice Stevens's and Justice Breyer's arguments, gesturing to originalism is not enough to provide legitimacy. The academic efforts to support campaign finance regulation through historical analysis may be more sophisticated than those of the Justices, but they also have methodological and substantive problems that prevent them from succeeding.

Professor Lawrence Lessig, perhaps the most famous academic opponent of the Court's campaign finance regulation jurisprudence, suggests that the Framers believed that elections should make the government dependent upon the people alone.[324] That dependence, according to Lessig, was the basic principle of republican government at the time.[325] As a result, Congress can legitimately regulate campaign expenditures to prevent the "distortion" that would occur from permitting legislators to become dependent on those who make campaign contributions or expend large sums of money on elections, rather than on the people themselves.[326]

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320. Indeed, Robert Bork famously believed that neutral principles had to be derived only from the original understanding of the Constitution rather than from case law. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971). For criticism of his claim that, so analyzed, the First Amendment protects only political speech, see John O. McGinnis, *Public Choice Originalism: Bork, Buchanan, and the Escape from the Progressive Paradigm*, 10 J.L. ECON. & POL'Y 669, 675-76 (2014).

321. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-47 (1997); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6-7 (1996).

322. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 26 (1982) (describing and defending originalism as one modality of constitutional law).

323. Even nonoriginalists concede this point. *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 554 (2006).

324. *See* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 130-31, 157-58 (2011).

325. *Id.* at 127-28.

326. *Id.* at 151. Lessig worries about two kinds of distortion—distortion of the issues that get on the agenda and distortion of the substantive results of issues on the agenda. *See id.* at 151-52.

Lessig's argument resembles the equality argument: permitting campaign expenditures distorts the political process by giving the opinions of some citizens greater salience than those of others. But his focus on dependence actually undermines the claim that any type of equality argument can be rooted in the original Constitution. Although Lessig can adduce general statements from the period of the Framing about the republican idea that legislators should be dependent on the people,[327] the difficulty is that he does not show that the Framers thought that dependence should be policed by regulating expression.

In fact, the Constitution does not provide any measure to determine how this opinion becomes "distorted" by the differential exercise of rights under the First Amendment. The constitutional dependence of representatives does not come from their being in sync with the opinions of their constituents on any set of issues, but from their desire to get the most votes in periodic elections.[328] It is striking that the Constitution does not include any mechanism of direct democracy for determining issues in order to provide a baseline for following public opinion. Indeed, the Framers rejected the idea that representatives should be required to follow the instructions of their constituents.[329] Elected representatives were thus empowered to prefer the opinions of a few over those of many, even if those few had more money or more social influence.

The recognition that public opinion is made through expression and has no fixed measure is also not novel; the idea goes back to the early Republic. In their opposition to the Sedition Act of 1798, which penalized criticism of government officials, the Democratic Republicans recognized that public opinion was made by the unpredictable collision of different ideas, rather than a static phenomenon that

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327. *See id.* at 128 (citing THE FEDERALIST NO. 52 (James Madison)).

328. Nonoriginalist theories that seek to restrict expression to improve the alignment of the preferences of a representative with his or her constituents have similar problems in locating a constitutional metric for measuring "misalignment" and providing a baseline for regulating speech rights. *See* Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 338-40 (2014). Moreover, unlike arguments that are rooted in originalism, Stephanopoulos's arguments also suffer from legitimacy problems because a new political theory of how the polity should work cannot justify overturning campaign finance regulation decisions rooted in years of precedent and the text and structure of the First Amendment. *See infra* notes 371-83 and accompanying text.

329. Justice Breyer himself made this clear through the materials he quoted. *See supra* notes 201-13 and accompanying text.

law could protect from change between elections. As the historian Gordon Wood writes, they believed that public opinion was "the combined product of multitudes of minds thinking and reflecting independently, communicating their ideas in different ways, causing opinions to collide and blend with one another, to refine and correct each other, leading toward 'the ultimate triumph of Truth.'"[330]

Professor Zephyr Teachout has pressed more textually based arguments to show that the Framers were so "obsessed with corruption" that Congress should be allowed to define corruption broadly enough to sustain significant campaign finance restrictions.[331] The clauses with the greatest nexus to corruption on which she relies are the Emoluments Clause,[332] the Incompatibility Clause,[333] and the Ineligibility Clause.[334] According to Teachout, taken together these clauses show that "[t]he Framers were obsessed with corruption."[335] But her arguments, if anything, support the Roberts Court's stringent review of campaign finance regulation.

Even if one concluded that the provisions demonstrated an obsession with corruption,[336] all of these clauses focus on the personal

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330. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 311 (2009) (quoting TUNIS WORTMAN, A TREATISE CONCERNING POLITICAL ENQUIRY, AND THE LIBERTY OF THE PRESS 123 (1800)).

331. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 348 (2009).

332. U.S. CONST. art. I, § 9, cl. 8 ("[N]o person holding any Office of Profit or Trust under them, shall ... accept of any present, Emolument, Office, or Title of any kind whatever, from any King, Prince, or foreign State."); *see* Teachout, *supra* note 331, at 359.

333. U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."); *see* Teachout, *supra* note 331, at 359.

334. U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time."); *see* Teachout, *supra* note 331, at 359.

335. Teachout, *supra* note 331, at 348.

336. These clauses, however, do not substantively imply a general concern with government corruption because there are a lot of gaps in their coverage. As Seth Tillman has argued at length, the Emoluments Clause does not cover members of Congress, and perhaps not even the President and Vice President. *See* Seth Barrett Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. 399, 406-08 (2012). In fact, there is widespread agreement that the Emoluments Clause applies to Executive Branch and Judicial Branch officers within the scope of the Appointments Clause (or Inferior Office Appointments Clause, or Recess Appointments Clause). *Id.* at 407 n.27. But it is less clear what other (nonelected) positions, if any, this clause may also apply to. Similarly, the Incompatibility Clause does not try to prevent dependence of members of Congress on any particular class of private citizens or on state officials, such as governors, who control

corruption of government officials by other government officials, either domestic or foreign. The Emoluments Clause prevents foreign officials from bribing U.S. officials with gifts.[337] The Incompatibility Clause prevents the Executive from buying off members of Congress by giving them additional offices within the Executive Branch.[338] The Ineligibility Clause prevents Congress and the Executive from entering into a conspiracy to buy off members of Congress by raising the salary of a sinecure to which congressional members can be appointed upon leaving Congress.[339] The common theme here is that officials are not to be trusted because they engage in self-dealing and favor swapping with other officials. This understanding underscores the agency costs of government: the difficulty the principals—the people—face in controlling their government agents, particularly when the government agents conspire among themselves.[340]

But as we have seen, one of the leading concerns about campaign finance legislation is that it represents a conspiracy by government officials to increase agency costs by entrenching incumbents against challengers, thereby allowing them to continue to enjoy the perquisites of office.[341] If we were looking at these clauses with a high

appointments to lucrative office. Instead, the clause seeks to ensure only a limited congressional independence primarily by precluding members from simultaneously serving in offices subject to the President's (or his appointee's) appointment power. *Cf. id.* at 417-18. The Ineligibility Clause tries to prevent self-interest from distorting congressional judgment, but only by preventing Congress and the Executive from creating higher pay for offices that members of Congress will later fill, presumably in return for services rendered, including voting "correctly" on other legislation. *See id.* at 420-21. It does not even violate the Ineligibility Clause to appoint members of Congress to lucrative offices for which pay is not increased! Given their limited coverage and many loopholes, from the perspective of preventing corruption, it is difficult to make the case that these clauses point to an obsession with corruption rather than to a solution to a specific set of problems.

337. *See* U.S. CONST. art. I, § 9, cl. 8 ("[N]o person holding any Office of Profit or Trust under them, shall ... accept of any present, Emolument, Office, or Title, of any kind whatever, *from any King, Prince, or foreign State*.") (emphasis added).

338. *See id.* § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

339. *See id.* ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time.").

340. *See* Tom Ginsburg & Eric A. Posner, *Subconstitutionalism,* 62 STAN. L. REV. 1583, 1590-91 (2010) (seeing the main purpose of many constitutional provisions as reducing agency costs).

341. *See supra* notes 167-73 and accompanying text.

level of generality, their structural message is one of distrust of representatives, which should encourage the application of the strictest scrutiny of campaign legislation with the kind of doctrines that the Roberts Court has employed to test their bona fides.[342]

To support her position, Teachout also adduces some very general clauses of the Constitution, mostly checks and balances such as the veto power and bicameralism.[343] These clauses have many broader purposes than preventing corruption, like requiring a consensus for federal legislation[344] and protecting federalism by making it difficult for the federal government to displace state legislation.[345] Their multiplicity of purpose makes it difficult to mold them into structural swords aimed at corruption in particular. And here, too, a more obvious message of forcing "ambition ... to counteract ambition"[346] is to be distrustful of politicians' ambitions for office and entrenched power. The distrust of the separation of powers naturally leads to a more stringent standard of judicial review for the legislative impositions on the liberties of citizens.

B. Contrary Precedents

A second argument for displacing neutral free speech principles is that the Court should look to other precedents about constitutional provisions relevant to elections because expression seeking to influence a campaign is an aspect of the electoral process.[347] The argument comes in two varieties. One is that the Court should defer

342. To be clear, this interpretation is not likely a good enough originalist argument to change a long history of precedent to the contrary, but Teachout's argument more plausibly reinforces the Roberts Court's decision to apply stringent scrutiny to the public interest claims made for campaign finance legislation.

343. *See* Teachout, *supra* note 331, at 365-70.

344. *See* Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1130 (2006) (arguing that bicameralism and the presidential veto require substantial national consensus to pass federal legislation); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 394 (1999) (same).

345. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1456 (2001).

346. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009).

347. *See* Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1218 (1999) (looking at campaign finance regulation through the prism of the structure of elections rather than rights-based law).

to legislative decisions as it does in some important election law cases. To run an election, the legislature determines the districts, makes rules about which candidates have access to the ballot, and chooses the manner of voting. Here, the argument runs, the legislature often receives substantial deference from the Court. Thus, it should receive similar deference in campaign finance regulation. The other argument is that some precedent concerning elections—like the one-person, one-vote doctrine—mandates, or at least justifies, campaign finance regulation.

Before considering the details of these separate contentions, it is important to note that these arguments try to recapitulate in the form of precedent two elements that First Amendment jurisprudence has long rejected. First, the analogy to elections elides the distinction between actions of individuals and actions of the government. Electoral mechanisms by their nature require government action: they are a creature of the state. Election precedents thus focus on the fairness of the electoral mechanism, which the government itself establishes.[348] In contrast, expressive activity requires no government regulation outside the general rules of property, tort, and contract. First Amendment precedent is expressly designed to protect the civic order created by these rights from suppression and manipulation. In short, election precedents address an activity suffused by government, whereas First Amendment precedents address an activity to be presumptively walled off from government.

Second, the analogy to elections wrongly suggests that expression at election time can be segregated from the political debate that is ever-billowing in a democracy. To be sure, elections happen at discrete times with particular mechanisms. But the back and forth of political and social debate, in contrast, is not an aspect of government mechanisms for elections, but part of an ever-flowing stream of the public discourse.

For those who believe the Court should defer to campaign regulation, the most important recent case is *Vieth v. Jubelirer*, in which the Court deferred to the legislature's choices in drawing electoral

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348. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 104-05, 110-11 (2000) (concluding that the Florida recount resulted in vote dilution); Reynolds v. Sims, 377 U.S. 533, 579 (1964) (establishing one-person, one-vote). For discussion of more such cases, see *infra* note 351.

districts.[349] There, a plurality of the Court held that the constitutionality of partisan gerrymandering was nonjusticiable because there were no judicially administrable rules to police the practice.[350]

The arguments for deference in *Vieth* cut against deference in campaign finance regulation. Deference in *Vieth* prevented the Court from exercising discretion without judicially administrable rules, but making distinctions about which expressions are election related—and thus subject to regulation—and which expressions are not so related—and thus protected—would require the Court to exercise discretion without judicially administrable rules. Neutral principles that protect expressive activity at all times and apply to all sectors of society are much easier to administer. Moreover, as noted above, electoral precedent is about the governance of electoral mechanisms that the government establishes and whose details the Court cannot easily supervise. The pervasive government setting necessitates a modicum of deference.[351] But speech does not owe its

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349. *See* 41 U.S. 267, 305-06 (2004); *see also* Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1406-08 (2013) (noting the potential relevance of *Vieth* to campaign finance regulation).

350. *See Vieth*, 541 U.S. at 305-06 (plurality opinion). In his decisive concurrence, Justice Kennedy did not go quite so far as the plurality in foreclosing judicial review of gerrymandering, but he agreed that judicial restraint was required until a clear principle for regulating gerrymandering was identified. *See id.* at 306, 317 (Kennedy, J., concurring).

351. Ballot access cases are another kind of electoral mechanism case in which the Court gives a measure of deference to the government. *See* Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277, 1319 (2005). In ballot cases, a party or individual complains of obstruction in getting his name on the ballot. *See, e.g.*, Storer v. Brown, 415 U.S. 724, 727-28 (1974). But these cases are also inapposite for similar functional and doctrinal reasons as those that undermine the relevance of the gerrymandering cases. It is true that in ballot access cases there is at least a First Amendment claim. *See* Evseev, *supra*, at 1278-79. However, the claim is not one of free speech but rather of free association. More fundamentally, the ballot, like the electoral district, is a creation of the government, not of the citizens. As the Supreme Court has noted, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer*, 415 U.S. at 730 (rejecting certain restrictions on ballot access for independent candidates). The need for the government to fashion access rules is a reason for discretion.

Cases that focus on the voting rights of citizens are similar to candidate ballot access cases. Again, a theme is that states enjoy some discretion because they must make choices about the electoral process. As an example, consider *Burdick v. Takushi*, 504 U.S. 428 (1992), probably the most cited voting rights case. There, the Court declined to disturb Hawaii's refusal to permit write-in ballots in either its primary or general elections. *See Takushi*, 504 U.S. at 441-42. The Court held that any incidental effect on voting or First Amendment rights of association was outweighed by the state's interest in structuring an electoral mechanism to

existence to government, and the Court need not defer to the government for the speech to flourish.

The paradigmatic case for arguing that election law precedent justifies regulation is *Reynolds v. Sims*, requiring one-person, one-vote.[352] The argument runs that unequal speech around election time leads to unequal influence, making the votes of citizens effectively unequal.[353] As a matter of doctrine, this claim is a stretch. The problem in *Reynolds* was that the state made affirmative decisions in creating legislative districts of widely varying size so as to make the weight of actual votes unequal.[354] Expression at any time, including elections, is not the responsibility of the government. Nor does the differential exercise of First Amendment rights prevent the government from establishing voting districts and other procedures that ensure that everyone's vote is counted with equal weight.

Most recently, advocates for campaign finance regulation have claimed support in a case that did indeed reject a free speech claim.[355] In *Nevada Commission on Ethics v. Carrigan*, the Court refused to accept the First Amendment argument of a Nevada legislator who complained that the legislature would not let him vote or speak on an issue in which he had a financial interest because state law prohibited such self-interested participation.[356] In an opinion by Justice Scalia, the Court said that the representative had no right to vote on the issue, and thus no right to speak, because the

"winnow out" candidates in an orderly manner that focused attention on the most "contested races," which were likely to be those with candidates on the ballot rather than write-in candidates. *Id.* at 438-39 (quoting *Storer*, 415 U.S. at 735). The state must make decisions about how to structure its electoral process and gets deference because its interest is substantial. Individuals are at liberty to advocate for the election of anyone they want, but counting votes will be determined by reasonable electoral rules.

352. *See* 377 U.S. 533, 560-61 (1964).

353. *See, e.g.*, Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 32 (2012) (stating that one-person, one-vote cases show that "[g]overnment has an interest in equalizing ... influence" in elections (quoting Citizens United v. FEC, 558 U.S. 310, 350 (2010))); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1161, 1164 (1994) (arguing that equal protection analysis of *Reynolds v. Sims* rather than free speech doctrine should govern treatment of campaign finance regulation).

354. *See Reynolds*, 377 U.S. at 540-41.

355. *See* Hellman, *supra* note 349, at 1390, 1398.

356. *See* 131 S. Ct. 2343, 2346-47 (2011).

right to speak in a legislature is dependent on the right to vote.[357] If nonvoters had the right to speak, the legislature would become a town meeting, not a deliberative body.[358]

While this case is a precedent on free speech, it supports rather than undermines the Roberts Court's application of free speech principles in campaign finance regulation cases. The Court's opinion relied on the long tradition of disqualifying legislators with financial interests—one that dates back to Thomas Jefferson's rules when he was President of the Senate—suggesting it showed that such restrictions could not be considered to interfere with the concept of freedom of speech.[359] There is no analogous tradition going back to the Founding Era of restrictions similar to those campaign finance regulations invalidated by the Court.

Even more fundamentally, the case underscores the distinction between regulating the actions of government officials alone and the actions of citizens. Justice Scalia observed that the legislator's vote was not personal to him but to the people, and thus was not protected by the First Amendment.[360] *Carrigan*'s overall message reminds us that the regulation of government officials is fundamentally different from the regulation of private citizens. Precedent for the former is not precedent for the latter.

C. Constitutional and Political Theory

Perhaps the most cited argument as a matter of constitutional theory is what has been called "electoral exceptionalism."[361] Electoral exceptionalism is the view that the First Amendment simply should not apply in the same way to speech at election time as it does to other speech.[362] Instead of applying principles established elsewhere in First Amendment law, one should create special First Amendment law for elections. In a sense, it is the opposite

357. *See id.* at 2347.
358. *See id.*
359. *See id.* at 2348-49.
360. *See id.* at 2350.
361. Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1805 (1999).
362. *Id.* at 1805-06.

theory of the Roberts Court's view of the relation between electoral speech and the First Amendment.

First, according to electoral exceptionalism, "elections should be constitutionally understood as (relatively) bounded domains of communicative activity."[363] Second, within that domain, the Court should not be bound by principles of individual rights that cut across speech domains, because that conception is itself wrongheaded.[364] According to the originators of this idea, "rights are less protections for intrinsic interests of individuals than linguistic tools the law invokes in the pragmatic task of bringing certain issues before the courts for judicial resolution."[365] These resolutions should focus on the "common good."[366]

The first premise is false as a factual matter. There is no principled boundary between electoral speech and political speech more generally. Democracy is an ever-bubbling cauldron of political ideas and endorsements during, between, and after elections. It is commonplace to say that the next election season begins the day after counting the votes of the last election has ended. In particular, the media helps set the agenda long before a campaign begins. Even this agenda is shaped by academics and social theorists long before the campaign. Moreover, creating this artificial boundary has a clear partisan valence because Republicans are far less well represented among the academics and media who shape our politics between cycles.[367]

The second premise is wrong as a matter of law. The claim that rights are "linguistic tools" that give power to judges to make pragmatic decisions about issues flies in the face not only of the obvious structure and history of the First Amendment as a right, but of the nature of judicial review itself. The First Amendment was called a right by its author, James Madison, and was analogized to other individual rights.[368] It has been treated throughout its history as a right of the individual rather than a tool by which judges can make decisions about the common good. And if one is not concerned

363. *Id.* at 1805.
364. *See id.* at 1818-19.
365. *Id.* at 1814.
366. *Id.*
367. *See supra* notes 138-42 and accompanying text.
368. *See supra* note 209 and accompanying text.

with the original meaning of the Amendment, the contemporary consensus about its nature is the same: any nominee who argued that the First Amendment (and other rights in the Bill of Rights) was a "linguistic tool" and not a right would not be confirmed as a judge.

The view that judicial review is about putting issues before the Court for pragmatic resolution has nothing in common with the defense of judicial review that the Framers gave. Justices were to be entrusted with this awesome duty because they were bound by "strict rules" and "precedents,"[369] not because they could be trusted to make good pragmatic judgments. And whatever normative attraction the latter view could conceivably have in areas other than the First Amendment, it is particularly troublesome there. Judges are actors appointed by politicians and have clear partisan affiliations. Their decisions about who can speak at what time in campaigns have clear political consequences. In this area, above all, we would want them to be bound by "strict rules" and "precedents."[370]

The final way to trump First Amendment doctrine is to appeal to a political principle that justifies reordering the doctrine. The most interesting political theory case for reconfiguration of First Amendment doctrine in the campaign finance regulation area is that of Professor Deborah Hellman.[371] She argues that the idea of corruption in an institution is dependent on the nature of the institution, and thus the notion of corruption in a democracy is parasitic to our understanding of the nature of democracy.[372] For instance, if one believes that having unequal influence is incompatible with the legislator's democratic duty to weigh everyone's interest equally, unequal influence is a form of corruption.[373] From this insight, she argues that the Court should defer to the legislature's view of democracy, both because the legislature itself has the primary responsibility of defining the role of a legislator in a democracy, and because the Court has no manageable standards to define that role.[374]

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369. THE FEDERALIST NO. 78, at 397 (Alexander Hamilton) (Ian Shapiro ed., 2009).
370. *See id.*
371. *See* Hellman, *supra* note 349, at 1394-95.
372. *See id.*
373. *See id.* at 1399-400.
374. *See id.* at 1385, 1412.

Hellman gets to the nub of the issue in campaign finance regulation.[375] Democracy can indeed be defined in various ways that will give greater or less space to speech rights. This fundamental tension is not surprising. Many modern democratic states are to some degree also liberal states in that they define some set of rights that majorities cannot modify. But the contours of these rights and their relation to democracy differ depending on the constitutional settlement of the particular polity—especially in the capacity of free speech—and create a more or less freewheeling political debate at election time.

In France, for instance, the relationship between free speech and democracy is wholly different from that relationship in the United States. There, the legislature carves out a space in which elections are protected from spontaneous civic ordering. Candidates have restricted advertising, and even their posters are regulated for size.[376] The media must give equal time to all candidates, including the no-hopers like monarchists and Trotskyites, with the unhappy result that serious candidates get less coverage than they otherwise

375. Professor Robert Post's proffer of a political theory to reorder the campaign finance regulation cases is less successful on its own terms. He argues that concerns for "electoral integrity" justify campaign finance regulation. *See* POST, *supra* note 213, at 61-62 (arguing that "electoral integrity" requires representatives to be responsive to the people). But his is not an originalist argument—Post is a critic of originalism—and thus does not gain legitimacy from that quarter. He calls First Amendment doctrine "clumsy," *id.* at 4, but it is unclear, to say the least, why his views should take priority over years of precedent decided by different Justices in widely different free speech contexts. And his notion of electoral integrity does not contribute anything particularly new to the debate. There are three important electoral aspects that the Court has considered as justifications for campaign finance regulation: corruption, distortion or undue influence, and inequality. In Post's sense, all are species of electoral integrity in that they can prevent legislators from being responsive to the people. Electoral integrity is a term that is more opaque than those three concepts, but that is an unfortunate characteristic of a legal term, as opaqueness can mask political decision making, particularly in this area in which political temptations are so great. *Cf.* Pamela S. Karlan, *Citizens Deflected: Electoral Integrity and Political Reform*, *in* CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 141, 150 (2014) (worrying that Post's "electoral integrity" concept could be used to uphold voter ID laws). And like other academic proposals for a new campaign finance regulation framework, Post has no principled way to prevent electoral integrity from justifying regulation of the press, because a powerful press can make politicians responsive to it rather than to the people. *See infra* notes 380-83 and accompanying text.

376. *See* Bruce Crumley, *France's Stringent Election Laws: Lessons for the America's Free-for-All Campaigns*, TIME (Apr. 20, 2012), http://world.time.com/2012/04/20/frances-stringent-election-laws-lessons-for-the-americas-free-for-all-campaigns/ [https://perma.cc/8CXW-6HFV].

would.[377] This process does represent a vision of democracy—one in which election discourse with unequal influence would be corrupting, and which is strictly limited in the interests of equality and order and in which there is top-down ordering for civic discourse around election time. It is a very different, more insular regime from the one in the United States, for instance, making it very difficult for outsiders like Ross Perot to substantially contest an election and put a new issue, like the deficit, front and center in politics.[378] If we deferred to the legislature's conception of a possible ideal of the relation between democracy and speech rights, this electoral regime should be upheld here.

Yet it would not be legally sound under the Constitution of the United States for the Court to defer to a legislative decision that would create this kind of relation between democracy and free speech. Part I has already shown that this kind of deference overturns a host of core free speech principles and would not comport with the Framers' notion of free speech as rights that individuals exercise either alone or in organizations to create a civic order free from government control. Given its premises, Hellman's conceptual analysis is much more analytically tidy and accurate than those of scholars who attempt originalist, or simply precedential, arguments on behalf of campaign finance regulation.[379] But because her arguments are not rooted in either originalism or free speech doctrine, and given the background of precedent, tradition, and text with which they conflict, their premises lack force as legal arguments.

Finally, a sweeping political theory argument like Hellman's proves too much because it would justify regulation of the press on the grounds that the media has too much influence on elections.[380]

377. *See* Scott Sayare, *As Candidates Speak in France, the Meter is Running*, N.Y. TIMES (Mar. 7, 2012), http://www.nytimes.com/2012/03/08/world/europe/as-french-candidates-speak-the-meter-is-running.html [https://perma.cc/RR3S-ACSP].

378. *See* Elhauge, *supra* note 173, at 156.

379. Hellman does make some arguments from precedent; the major ones have been addressed previously. *See supra* notes 371-74 and accompanying text.

380. Lessig's dependence argument, *see supra* notes 324-27 and accompanying text, and Teachout's corruption argument, *see supra* notes 331-46 and accompanying text, suffer from a similar problem of boundlessness that encroaches on the core of First Amendment doctrine. The media can have substantial influence on elected officials. If one wants to permit legislatures to make sure that a politician is not dependent on anything or anyone but the people, one could regulate the media as much as independent expenditures, because the media influence may make politicians dependent on the media.

Any reordering that has this result is a principle that neither comports with past precedent nor with current intuitions.[381] Lest one think that regulation of the media on the basis of concern about inequality is speculative, there is substantial evidence showing that the media can wield large amounts of influence—amounts that dwarf those of other corporations. For instance, the *New York Times* endorsement is all-important in local elections in New York City and State.[382] And all over the country, politicians act as if media endorsements matter, spending many hours with editorial boards. Campaign restrictions on the use of other money in politics would magnify this influence, permitting those in this sector to wield even more influence than other citizens. Britain, for instance, has severe regulations on how much citizens can spend and contribute, and both the Labor and Conservative Parties spend a lot of time and effort cozying up to press barons as a result.[383] If equality concerns shape our view of what constitutes corruption, a legislature would be justified in adopting a view of democracy that would begin by regulating our media aristocracy.

CONCLUSION

Of all the provisions of the Constitution, the First Amendment has given rise to the most majestic edifice of doctrine. In hundreds of cases from disparate walks of life—commerce, art, and politics—the Court has teased out the logic of the Amendment's underlying plan: protect a civic discourse created by individual choice, unfettered by government control except in the most compelling of circumstances. Over time the case law has also elucidated the weight of an interest that qualifies as compelling, as well as the burdens the government must shoulder in making its proof.

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381. Current intuitions are reflected in the reaction to the answer to the government at the first *Citizens United* oral argument. *See supra* notes 135, 318 and accompanying text.

382. *See* David Freedlander, *The Editorial Plea: How the* New York Times *Decides Who Wins and Loses Local Elections*, OBSERVER (May 2, 2012, 6:03 AM), http://observer.com/2012/05/the-editorial-plea-how-the-new-york-times-decides-who-wins-and-loses-local-elections/ [https://perma.cc/V33K-PWPY].

383. *See* Jacob Rowbottom, *How Campaign Finance Laws Made the British Press So Powerful*, NEW REPUBLIC (July 25, 2011), http://www.tnr.com/article/world/92507/campaign-finance-united-kingdom-news-corporation [https://perma.cc/7JBB-CUAP].

As there is an inner logic of free speech doctrine that reflects the First Amendment's plan, there is always an inner temptation to distort its application. In the regulation of political campaigns, that temptation is at its greatest. The Justices owe their high position to choices of partisan politics—politics that will be shaped directly by their decisions in this area. The temptation is all the more powerful, because by controlling the expression of ordinary citizens, campaign finance regulation aggrandizes the influence of members of the press and academics, the citizens most responsible for determining the Justices' reputation.

The Roberts Court majority has escaped this temptation by recurring to the First Amendment principles in contexts other than political campaigns. The principles forged over decades by Justices of many different political parties provide assurance that the Justices themselves are not acting to favor one party or ideology over another.

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