TEMPLE AMERICAN INN OF COURT – APRIL 2016

First Amendment Cases & Materials

Freedom of Speech:

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942): fighting words (words that by their very utterance inflict injury or tend to incite an immediate breach of the peace) are not protected by the First Amendment

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952): motion pictures are protected by the First Amendment

Roth v. United States, 354 U.S. 476 (1957): obscene material is not protected by the First Amendment

United States v. O'Brien, 391 U.S. 367 (1968): a criminal prohibition against draft-card burning does not violate the First Amendment because its effect on speech is only incidental, and it is justified by the significant governmental interest in maintaining as efficient and effective military draft system

Brandenburg v. Ohio, 395 U.S. 444 (1969): the mere advocacy of the use of force or violating the law is protected by the First Amendment, but inciting others to take direct and immediate unlawful action is not

Buckley v. Valeo, 424 U.S. 1 (1976): spending money to influence elections is a form of constitutionally protected free speech

Hustler Magazine v. Falwell, 485 U.S. 46 (1988): parodies of public figures are protected by the First Amendment, even when they are intended to cause emotional distress

Texas v. Johnson, 491 U.S. 397 (1989): laws criminalizing the desecration of the American flag are unconstitutional in violation of the First Amendment's protection of symbolic speech

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991): public indecency laws regulation nude dancing are constitutional because they further substantial governmental interests in maintaining order and protecting morality

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010): limits on corporate and union political expenditures during election cycles violate the First Amendment

Freedom of Religion:

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943): public schools cannot override the religious beliefs of their students by forcing them to salute the American flag and recite the pledge of allegiance

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993): the government must show a compelling interest to pass a law targeting a religion's ritual, and failing to show such an interest, the prohibition of animal sacrifice is a violation of the Free Exercise Clause

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __ (2014): closely held, for-profit corporations have free exercise rights under the Religious Freedom Restoration Act of 1993, and the requirement of the Affordable Care Act that employers provide their female employees with access to contraception violates that right

Freedom of Association:

NAACP v. Alabama, 357 U.S. 449 (1958): the freedom to associate with organizations dedicated to the "advancement of beliefs and ideas" is an inseparable part of the Due Process Clause

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995): private citizens organizing a public demonstration have the right to exclude groups whose message they disagree with from participating

Boy Scouts of America v. Dale, 530 U.S. 640 (2000): private organizations are allowed to choose their own membership and expel members based on their sexual orientation even if such discrimination would otherwise be prohibited by anti-discrimination legislation designed to protect minorities in public accommodations

Law Review Articles:

Algorithims and Speech - UPenn – 2013

Associational Speech - Yale – 2011

Constitutional Law in an Age of Proportionality - Yale – 2015

Hate Speech and Political Correctness - Illinois – 1992

Low Value Speech - Harvard – 2015

Origins of Freedom of Religion - Harvard – 1990

Punishment for Prejudice - South Dakota – 1994

Restraining the Heartless - Indiana – 2009

State Restrictions on Violent Expression - Vanderbilt – 1993

The Forgotten Freedom of Assembly - Tulane – 2010

The Hobby Lobby Moment - Harvard – 2014

The Unsettling Well Settled Law of Freedom of Association - Connecticut – 2010

When to Regulate Hate Speech - Penn State – 2006

Other Commentary:

What Does "Freedom of Assembly" Mean for Occupy Wall Street?, HARVARD CIVIL RIGHTS - CIVIL LIBERTIES LAW REVIEW, Blog Post, November 5, 2011

ACLU-TN Victory in Protecting Free Speech of Occupy Nashville Protesters Federal Judge Rules State Violated Demonstrators' FirstAmendment Rights, ACLU, June 13, 2013

The Right to Peaceably Assemble: U.S. Constitutional Law and Occupy Wall Street, Constitutional Litigation Clinic at Rutgers School of Law-Newark

Freedom of Speech Cases

CHAPLINSKY *v.* NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 255. Argued February 5, 1942.—Decided March 9, 1942.

1. That part of c. 378, § 2, of the Public Laws of New Hampshire which forbids under penalty that any person shall address "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place," or "call him by any offensive or derisive name," was construed by the Supreme Court of the State, in this case and before this case arose, as limited to the use in a public place of words directly tending to cause a breach of the peace by provoking the person addressed to acts of violence. *Held:*

   (1) That, so construed, it is sufficiently definite and specific to comply with requirements of due process of law. P. 573.

   (2) That as applied to a person who, on a public street, addressed another as a "damned Fascist" and a "damned racketeer," it does not substantially or unreasonably impinge upon freedom of speech. P. 574.

   (3) The refusal of the state court to admit evidence offered by the defendant tending to prove provocation and evidence bearing on the truth or falsity of the utterances charged is open to no constitutional objection. P. 574.

2. The Court notices judicially that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace. P. 574.

91 N. H. 310, 18 A. 2d 754, affirmed.

APPEAL from a judgment affirming a conviction under a state law denouncing the use of offensive words when addressed by one person to another in a public place.

Mr. Hayden C. Covington, with whom *Mr. Joseph F. Rutherford* was on the brief, for appellant. *Mr. Alfred A. Albert* entered an appearance.

Mr. Frank R. Kenison, Attorney General of New Hampshire, with whom *Mr. John F. Beamis, Jr.* was on the brief for appellee.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, § 2, of the Public Laws of New Hampshire:

"No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

The complaint charged that appellant, "with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists,' the same being offensive, derisive and annoying words and names."

Upon appeal there was a trial *de novo* of appellant before a jury in the Superior Court. He was found guilty and the judgment of conviction was affirmed by the Supreme Court of the State. 91 N. H. 310, 18 A. 2d 754.

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States, in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled and the case comes here on appeal.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets

of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a "racket." Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later, a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way, they encountered Marshal Bowering, who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky, who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that, when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply, Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint, with the exception of the name of the Deity.

Over appellant's objection the trial court excluded, as immaterial, testimony relating to appellant's mission "to preach the true facts of the Bible," his treatment at the hands of the crowd, and the alleged neglect of duty on the part of the police. This action was approved by the court below, which held that neither provocation nor the truth of the utterance would constitute a defense to the charge.

It is now clear that "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state

action." *Lovell* v. *Griffin,* 303 U. S. 444, 450.[1] Freedom of worship is similarly sheltered. *Cantwell* v. *Connecticut,* 310 U. S. 296, 303.

Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute. We turn, therefore, to an examination of the statute itself.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances.[2] There are certain well-defined and narrowly limited classes of speech, the prevention

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[1] See also *Bridges* v. *California,* 314 U. S. 252; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *Thornhill* v. *Alabama,* 310 U. S. 88, 95; *Schneider* v. *State,* 308 U. S. 147, 160; *De Jonge* v. *Oregon,* 299 U. S. 353, 364; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 243; *Near* v. *Minnesota,* 283 U. S. 697, 707; *Stromberg* v. *California,* 283 U. S. 359, 368; *Whitney* v. *California,* 274 U. S. 357, 362, 371, 373; *Gitlow* v. *New York,* 268 U. S. 652, 666.

Appellant here pitches his argument on the due process clause of the Fourteenth Amendment.

[2] *Schenck* v. *United States,* 249 U. S. 47; *Whitney* v. *California,* 274 U. S. 357, 373 (Brandeis, J., concurring); *Stromberg* v. *California,* 283 U. S. 359; *Near* v. *Minnesota,* 283 U. S. 697; *De Jonge* v. *Oregon,* 299 U. S. 353; *Herndon* v. *Lowry,* 301 U. S. 242; *Cantwell* v. *Connecticut,* 310 U. S. 296.

and punishment of which have never been thought to raise any Constitutional problem.[3] These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[4] It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[5] "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell* v. *Connecticut,* 310 U. S. 296, 309–310.

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. It has two provisions—the first relates to words or names addressed to another in a public place; the second refers to noises and exclamations. The court said: "The two provisions are distinct. One may stand separately from the other. Assuming, without holding, that the second were unconstitutional, the first could stand if constitutional." We accept that construction of severability and limit our consideration to the first provision of the statute.[6]

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[3] The protection of the First Amendment, mirrored in the Fourteenth, is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication. *Near* v. *Minnesota,* 283 U. S. 697, 714–715.

[4] Chafee, Free Speech in the United States (1941), 149.

[5] Chafee, *op. cit.,* 150.

[6] Since the complaint charged appellant only with violating the first provision of the statute, the problem of *Stromberg* v. *California,* 283 U. S. 359, is not present.

On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed."[7] It was further said: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including 'classical fighting words', words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. Cf. *Cantwell* v. *Connecticut*, 310 U. S. 296, 311; *Thornhill* v. *Alabama*,

[7] *State* v. *Brown*, 68 N. H. 200, 38 A. 731; *State* v. *McConnell*, 70 N. H. 294, 47 A. 267.

310 U. S. 88, 105. This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law. Cf. *Fox* v. *Washington*, 236 U. S. 273, 277.[8]

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances, is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge, or may be shown in mitigation, are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment.

Affirmed.

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[8] We do not have here the problem of *Lanzetta* v. *New Jersey*, 306 U. S. 451. Even if the interpretative gloss placed on the statute by the court below be disregarded, the statute had been previously construed as intended to preserve the public peace by punishing conduct, the direct tendency of which was to provoke the person against whom it was directed to acts of violence. *State* v. *Brown*, 68 N. H. 200, 38 A. 731 (1894).

Appellant need not therefore have been a prophet to understand what the statute condemned. Cf. *Herndon* v. *Lowry*, 301 U. S. 242. See *Nash* v. *United States*, 229 U. S. 373, 377.

Syllabus.

FEDERAL POWER COMMISSION ET AL. *v.* NATURAL GAS PIPELINE CO. ET AL.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 265. Argued February 10, 11, 1942.—Decided March 16, 1942.

1. Provisions of the Natural Gas Act of 1938, for regulating the prices at which natural gas originating in one State and transported to another shall be sold to distributors at wholesale, *held* consistent with the due process clause of the Fifth Amendment, and within the commerce power. P. 582.
2. Under §§ 5 (a) and 16 of the Natural Gas Act of 1938, the Federal Power Commission, when upon due hearing it has found the existing rates of an interstate gas pipeline company to be unjust and unreasonable, may make an *interim* order requiring the utility to file a new schedule of rates which shall effect a prescribed decrease in operating revenues. P. 583.
3. The Natural Gas Act of 1938 commands that the rates of natural gas companies subject to it shall be just and reasonable; declares that rates which are not just and reasonable are unlawful; provides that the Federal Power Commission shall determine the just and reasonable rate to be observed and fix the same by order and that the Commission may order a decrease where existing rates are unjust, unlawful, or are not the "lowest reasonable rates." §§ 4 (a) and 5 (a). On review of the Commission's orders by a Circuit Court of Appeals, as authorized by § 19 (b), the Commission's findings of fact, if supported by substantial evidence, "shall be conclusive." *Held:*

   (1) "Lowest reasonable rate" is the lowest rate which may be fixed without being confiscatory in the constitutional sense. P. 585.

   (2) The Congressional standard prescribed by this statute coincides with that of the Constitution; and the courts are without authority under the statute to set aside as too low any "reasonable rate" adopted by the Commission which is consistent with constitutional requirements. P. 586.
4. Rate-making bodies are not required by the Constitution to follow any single formula or combination of formulas. Once a full hearing

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* Together with No. 268, *Natural Gas Pipeline Co. et al.* v. *Federal Power Commission et al.*, also on writ of certiorari, 314 U. S. 593, to the Circuit Court of Appeals for the Seventh Circuit.

JOSEPH BURSTYN, INC. *v.* WILSON, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 522. Argued April 24, 1952.—Decided May 26, 1952.

Provisions of the New York Education Law which forbid the commercial showing of any motion picture film without a license and authorize denial of a license on a censor's conclusion that a film is "sacrilegious," *held* void as a prior restraint on freedom of speech and of the press under the First Amendment, made applicable to the states by the Fourteenth Amendment. Pp. 497–506.

1. Expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. Pp. 499–502.

(a) It cannot be doubted that motion pictures are a significant medium for the communication of ideas. Their importance as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. P. 501.

(b) That the production, distribution and exhibition of motion pictures is a large-scale business conducted for private profit does not prevent motion pictures from being a form of expression whose liberty is safeguarded by the First Amendment. Pp. 501–502.

(c) Even if it be assumed that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression, it does not follow that they are not entitled to the protection of the First Amendment or may be subjected to substantially unbridled censorship. P. 502.

(d) To the extent that language in the opinion in *Mutual Film Corp.* v. *Industrial Comm'n*, 236 U. S. 230, is out of harmony with the views here set forth, it is no longer adhered to. P. 502.

2. Under the First and Fourteenth Amendments, a state may not place a prior restraint on the showing of a motion picture film on the basis of a censor's conclusion that it is "sacrilegious." Pp. 502–506.

(a) Though the Constitution does not require absolute freedom to exhibit every motion picture of every kind at all times and all places, there is no justification in this case for making an

exception to the basic principles of freedom of expression previously announced by this Court with respect to other forms of expression. Pp. 502–503.

(b) Such a prior restraint as that involved here is a form of infringement upon freedom of expression to be especially condemned. *Near* v. *Minnesota,* 283 U. S. 697. Pp. 503–504.

(c) New York cannot vest in a censor such unlimited restraining control over motion pictures as that involved in the broad requirement that they not be "sacrilegious." Pp. 504–505.

(d) From the standpoint of freedom of speech and the press, a state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. P. 505.

303 N. Y. 242, 101 N. E. 2d 665, reversed.

The New York Appellate Division sustained revocation of a license for the showing of a motion picture under § 122 of the New York Education Law on the ground that it was "sacrilegious." 278 App. Div. 253, 104 N. Y. S. 2d 740. The Court of Appeals of New York affirmed. 303 N. Y. 242, 101 N. E. 2d 665. On appeal to this Court under 28 U. S. C. § 1257 (2), *reversed,* p. 506.

Ephraim S. London argued the cause and filed a brief for appellant.

Charles A. Brind, Jr. and *Wendell P. Brown,* Solicitor General of New York, argued the cause for appellees. With them on the brief were *Nathaniel L. Goldstein,* Attorney General of New York, and *Ruth Kessler Toch,* Assistant Attorney General.

Morris L. Ernst, Osmond K. Fraenkel, Arthur Garfield Hays, Herbert Monte Levy, Emanuel Redfield, Shad Polier, Will Maslow, Leo Pfeffer, Herman Seid and *Eberhard P. Deutsch* filed a brief for the American Civil Liberties Union et al., as *amici curiae,* urging reversal.

Charles J. Tobin, Edmond B. Butler and *Porter R. Chandler* filed a brief for the New York State Catholic Welfare Committee, as *amicus curiae,* urging affirmance.

MR. JUSTICE CLARK delivered the opinion of the Court.

The issue here is the constitutionality, under the First and Fourteenth Amendments, of a New York statute which permits the banning of motion picture films on the ground that they are "sacrilegious." That statute makes it unlawful "to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel [with specified exceptions not relevant here], unless there is at the time in full force and effect a valid license or permit therefor of the education department . . . ." [1] The statute further provides:

> "The director of the [motion picture] division [of the education department] or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto." [2]

Appellant is a corporation engaged in the business of distributing motion pictures. It owns the exclusive rights to distribute throughout the United States a film produced in Italy entitled "The Miracle." On November 30, 1950, after having examined the picture, the motion picture division of the New York education depart-

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[1] McKinney's N. Y. Laws, 1947, Education Law, § 129.
[2] *Id.*, § 122.

ment, acting under the statute quoted above, issued to appellant a license authorizing exhibition of "The Miracle," with English subtitles, as one part of a trilogy called "Ways of Love." [3] Thereafter, for a period of approximately eight weeks, "Ways of Love" was exhibited publicly in a motion picture theater in New York City under an agreement between appellant and the owner of the theater whereby appellant received a stated percentage of the admission price.

During this period, the New York State Board of Regents, which by statute is made the head of the education department,[4] received "hundreds of letters, telegrams, post cards, affidavits and other communications" both protesting against and defending the public exhibition of "The Miracle." [5] The Chancellor of the Board of Regents requested three members of the Board to view the picture and to make a report to the entire Board. After viewing the film, this committee reported to the Board that in its opinion there was basis for the claim that the picture was "sacrilegious." Thereafter, on January 19, 1951, the Regents directed appellant to show cause, at a hearing to be held on January 30, why its license to show "The Miracle" should not be rescinded on that ground. Appellant appeared at this hearing, which was conducted by the same three-member committee of the Regents which had previously viewed the picture, and challenged the jurisdiction of the committee and of the Regents to proceed with the case. With the consent of the committee, various interested persons and

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[3] The motion picture division had previously issued a license for exhibition of "The Miracle" without English subtitles, but the film was never shown under that license.

[4] McKinney's N. Y. Laws, 1947, Education Law, § 101; see also N. Y. Const., Art. V, § 4.

[5] Stipulation between appellant and appellee, R. 86.

organizations submitted to it briefs and exhibits bearing upon the merits of the picture and upon the constitutional and statutory questions involved. On February 16, 1951, the Regents, after viewing "The Miracle," determined that it was "sacrilegious" and for that reason ordered the Commissioner of Education to rescind appellant's license to exhibit the picture. The Commissioner did so.

Appellant brought the present action in the New York courts to review the determination of the Regents.[6] Among the claims advanced by appellant were (1) that the statute violates the Fourteenth Amendment as a prior restraint upon freedom of speech and of the press; (2) that it is invalid under the same Amendment as a violation of the guaranty of separate church and state and as a prohibition of the free exercise of religion; and, (3) that the term "sacrilegious" is so vague and indefinite as to offend due process. The Appellate Division rejected all of appellant's contentions and upheld the Regents' determination. 278 App. Div. 253, 104 N. Y. S. 2d 740. On appeal the New York Court of Appeals, two judges dissenting, affirmed the order of the Appellate Division. 303 N. Y. 242, 101 N. E. 2d 665. The case is here on appeal. 28 U. S. C. § 1257 (2).

As we view the case, we need consider only appellant's contention that the New York statute is an unconstitutional abridgment of free speech and a free press. In *Mutual Film Corp.* v. *Industrial Comm'n,* 236 U. S. 230 (1915), a distributor of motion pictures sought to enjoin the enforcement of an Ohio statute which required the prior approval of a board of censors before any motion

[6] The action was brought under Article 78 of the New York Civil Practice Act, Gilbert-Bliss N. Y. Civ. Prac., Vol. 6B, 1944, 1949 Supp., § 1283 *et seq.* See also McKinney's N. Y. Laws, 1947, Education Law, § 124.

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picture could be publicly exhibited in the state, and which directed the board to approve only such films as it adjudged to be "of a moral, educational or amusing and harmless character." The statute was assailed in part as an unconstitutional abridgment of the freedom of the press guaranteed by the First and Fourteenth Amendments. The District Court rejected this contention, stating that the first eight Amendments were not a restriction on state action. 215 F. 138, 141 (D. C. N. D. Ohio 1914). On appeal to this Court, plaintiff in its brief abandoned this claim and contended merely that the statute in question violated the freedom of speech and publication guaranteed by the Constitution of Ohio. In affirming the decree of the District Court denying injunctive relief, this Court stated:

> "It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion." [7]

In a series of decisions beginning with *Gitlow* v. *New York,* 268 U. S. 652 (1925), this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action.[8] That principle has been

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[7] 236 U. S., at 244.

[8] *Gitlow* v. *New York,* 268 U. S. 652, 666 (1925); *Stromberg* v. *California,* 283 U. S. 359, 368 (1931); *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 707 (1931); *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244 (1936); *De Jonge* v. *Oregon,* 299 U. S. 353, 364 (1937); *Lovell* v. *Griffin,* 303 U. S. 444, 450 (1938); *Schneider* v. *State,* 308 U. S. 147, 160 (1939).

followed and reaffirmed to the present day. Since this series of decisions came after the *Mutual* decision, the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of "speech" or "the press." [9]

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.[10] The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters* v. *New York,* 333 U. S. 507, 510 (1948):

> "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amend-

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[9] See *Lovell* v. *Griffin,* 303 U. S. 444, 452 (1938).

[10] See Inglis, Freedom of the Movies (1947), 20–24; Klapper, The Effects of Mass Media (1950), *passim*; Note, Motion Pictures and the First Amendment, 60 Yale L. J. 696, 704–708 (1951), and sources cited therein.

ment.[11] We fail to see why operation for profit should have any different effect in the case of motion pictures.

It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corp.* v. *Industrial Comm'n, supra,* is out of harmony with the views here set forth, we no longer adhere to it.[12]

To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other

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[11] See *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936); *Thomas* v. *Collins,* 323 U. S. 516, 531 (1945).

[12] See *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 166 (1948): "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." It is not without significance that talking pictures were first produced in 1926, eleven years after the *Mutual* decision. Hampton, A History of the Movies (1931), 382–383.

media of communication of ideas.[13] Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection.[14] It was further stated that "the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only

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[13] *E. g., Feiner* v. *New York,* 340 U. S. 315 (1951); *Kovacs* v. *Cooper,* 336 U. S. 77 (1949); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942); *Cox* v. *New Hampshire,* 312 U. S. 569 (1941).

[14] *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 713–719 (1931); see also *Lovell* v. *Griffin,* 303 U. S. 444, 451–452 (1938); *Grosjean* v. *American Press Co.,* 297 U. S. 233, 245–250 (1936); *Patterson* v. *Colorado,* 205 U. S. 454, 462 (1907).

in exceptional cases." *Id.*, at 716. In the light of the First Amendment's history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case.

New York's highest court says there is "nothing mysterious" about the statutory provision applied in this case: "It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule . . . ." [15] This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society.[16] In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no

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[15] 303 N. Y. 242, 258, 101 N. E. 2d 665, 672. At another point the Court of Appeals gave "sacrilegious" the following definition: "the act of violating or profaning anything sacred." *Id.*, at 255, 101 N. E. 2d at 670. The Court of Appeals also approved the Appellate Division's interpretation: "As the court below said of the statute in question, 'All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another . . . .'" *Id.*, at 258, 101 N. E. 2d at 672. Judge Fuld, dissenting, concluded from all the statements in the majority opinion that "the basic criterion appears to be whether the film treats a religious theme in such a manner as to offend the religious beliefs of any group of persons. If the film does have that effect, and it is 'offered as a form of entertainment,' it apparently falls within the statutory ban regardless of the sincerity and good faith of the producer of the film, no matter how temperate the treatment of the theme, and no matter how unlikely a public disturbance or breach of the peace. The drastic nature of such a ban is highlighted by the fact that the film in question makes no direct attack on, or criticism of, any religious dogma or principle, and it is not claimed to be obscene, scurrilous, intemperate or abusive." *Id.*, at 271–272, 101 N. E. 2d at 680.

[16] Cf. *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940); *Stromberg* v. *California*, 283 U. S. 359, 369–370 (1931).

charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor. Cf. *Kunz* v. *New York*, 340 U. S. 290 (1951).[17] Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the "sacrilegious" test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all.[18] However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.[19]

Since the term "sacrilegious" is the sole standard under attack here, it is not necessary for us to decide, for ex-

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[17] Cf. *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Saia* v. *New York*, 334 U. S. 558 (1948); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Lovell* v. *Griffin*, 303 U. S. 444 (1938).

[18] See *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

[19] See the following statement by Mr. Justice Roberts, speaking for a unanimous Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, 310 (1940):

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of

ample, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us.[20] We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious."

Reversed.

MR. JUSTICE REED, concurring in the judgment of the Court.

Assuming that a state may establish a system for the licensing of motion pictures, an issue not foreclosed by the Court's opinion, our duty requires us to examine the facts of the refusal of a license in each case to determine

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this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

"The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."

[20] In the *Near* case, this Court stated that "the primary requirements of decency may be enforced against obscene publications." 283 U. S. 697, 716. In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942), Mr. Justice Murphy stated for a unanimous Court: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." But see *Kovacs* v. *Cooper*, 336 U. S. 77, 82 (1949): "When ordinances undertake censorship of speech or religious practices before permitting their exercise, the Constitution forbids their enforcement."

whether the principles of the First Amendment have been honored. This film does not seem to me to be of a character that the First Amendment permits a state to exclude from public view.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON joins, concurring in the judgment of the Court; MR. JUSTICE BURTON, having concurred in the opinion of the Court, also joins this opinion.

A practised hand has thus summarized the story of "The Miracle": [1]

> "A poor, simple-minded girl is tending a herd of goats on a mountainside one day, when a bearded stranger passes. Suddenly it strikes her fancy that he is St. Joseph, her favorite saint, and that he has come to take her to heaven, where she will be happy and free. While she pleads with him to transport her, the stranger gently plies the girl with wine, and when she is in a state of tumult, he apparently ravishes her. (This incident in the story is only briefly and discreetly implied.)
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> "The girl awakens later, finds the stranger gone, and climbs down from the mountain not knowing whether he was real or a dream. She meets an old priest who tells her that it is quite possible that she did see a saint, but a younger priest scoffs at the notion. 'Materialist!' the old priest says.
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> "There follows now a brief sequence—intended to be symbolic, obviously—in which the girl is reverently sitting with other villagers in church. Moved by a whim of appetite, she snitches an apple from the basket of a woman next to her. When she leaves the church, a cackling beggar tries to make her share

[1] Crowther, "The Strange Case of 'The Miracle,'" Atlantic Monthly, April, 1951, pp. 35, 36–37.

the apple with him, but she chases him away as by habit and munches the fruit contentedly.

"Then, one day, while tending the village youngsters as their mothers work at the vines, the girl faints and the women discover that she is going to have a child. Frightened and bewildered, she suddenly murmurs, 'It is the grace of God!' and she runs to the church in great excitement, looks for the statue of St. Joseph, and then prostrates herself on the floor.

"Thereafter she meekly refuses to do any menial work and the housewives humor her gently but the young people are not so kind. In a scene of brutal torment, they first flatter and laughingly mock her, then they cruelly shove and hit her and clamp a basin as a halo on her head. Even abused by the beggars, the poor girl gathers together her pitiful rags and sadly departs from the village to live alone in a cave.

"When she feels her time coming upon her, she starts back towards the village. But then she sees the crowds in the streets; dark memories haunt her; so she turns towards a church on a high hill and instinctively struggles towards it, crying desperately to God. A goat is her sole companion. She drinks water dripping from a rock. And when she comes to the church and finds the door locked, the goat attracts her to a small side door. Inside the church, the poor girl braces herself for her labor pains. There is a dissolve, and when we next see her sad face, in close-up, it is full of a tender light. There is the cry of an unseen baby. The girl reaches towards it and murmurs, 'My son! My love! My flesh!' "

"The Miracle"— a film lasting forty minutes—was produced in Italy by Roberto Rossellini. Anna Magnani played the lead as the demented goat-tender. It was first shown at the Venice Film Festival in August, 1948,

combined with another moving picture, "L'Umano Voce," into a diptych called "Amore." According to an affidavit from the Director of that Festival, if the motion picture had been "blasphemous" it would have been barred by the Festival Committee. In a review of the film in L'Osservatore Romano, the organ of the Vatican, its film critic, Piero Regnoli, wrote: "Opinions may vary and questions may arise—even serious ones—of a religious nature (not to be diminished by the fact that the woman portrayed is mad [because] the author who attributed madness to her is not mad) . . . ." [2] While acknowledging that there were "passages of undoubted cinematic distinction," Regnoli criticized the film as being "on such a pretentiously cerebral plane that it reminds one of the early d'Annunzio." The Vatican newspaper's critic concluded: "we continue to believe in Rossellini's art and we look forward to his next achievement." [3] In October, 1948, a month after the Rome premiere of "The Miracle," the Vatican's censorship agency, the Catholic Cinematographic Centre, declared that the picture "constitutes in effect an abominable profanation from religious and moral viewpoints." [4] By the Lateran agreements and the Italian Constitution the Italian Government is bound to bar whatever may offend the Catholic religion. However, the Catholic Cinematographic Centre did not invoke any governmental sanction thereby afforded. The Italian Government's censorship agency gave "The Miracle" the regular *nulla osta* clearance. The film was freely shown throughout Italy, but was not a great success.[5] Italian movie critics divided in opinion. The critic for Il Popolo, speaking for the Christian Democratic Party, the Catholic

[2] L'Osservatore Romano, Aug. 25, 1948, p. 2, col. 1, translated in part in The Commonweal, Mar. 23, 1951, p. 592, col. 2.

[3] *Ibid.*

[4] N. Y. Times, Feb. 11, 1951, § 2, p. 4, cols. 4–5.

[5] Time, Feb. 19, 1951, pp. 60–61.

party, profusely praised the picture as a "beautiful thing, humanly felt, alive, true and without religious profanation as someone has said, because in our opinion the meaning of the characters is clear and there is no possibility of misunderstanding." [6] Regnoli again reviewed "The Miracle" for L'Osservatore Romano.[7] After criticising the film for technical faults, he found "the most courageous and interesting passage of Rossellini's work" in contrasting portrayals in the film; he added: "Unfortunately, concerning morals, it is necessary to note some slight defects." He objected to its "carnality" and to the representation of illegitimate motherhood. But he did not suggest that the picture was "sacrilegious." The tone of Regnoli's critique was one of respect for Rossellini, "the illustrious Italian producer." [8]

On March 2, 1949, "The Miracle" was licensed in New York State for showing without English subtitles.[9] However, it was never exhibited until after a second license was issued on November 30, 1950, for the trilogy, "Ways of Love," combining "The Miracle" with two French films, Jean Renoir's "A Day in the Country" and Marcel Pagnol's "Jofroi." [10] All had English subtitles. Both li-

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[6] Il Popolo, Nov. 3, 1948, p. 2, col. 9, translated by Camille M. Cianfarra, N. Y. Times, Feb. 11, 1951, § 2, p. 4, col. 5.

[7] L'Osservatore Romano, Nov. 12, 1948, p. 2, cols. 3–4.

[8] *Ibid.*

[9] "The Miracle" was passed by customs. To import "any obscene, lewd, lascivious, or filthy . . . motion-picture film" is a criminal offense, 35 Stat. 1088, 1138, 18 U. S. C. (Supp. IV) § 1462; and importation of any obscene "print" or "picture" is barred. 46 Stat. 590, 688, 19 U. S. C. § 1305. Compare the provision, "all photographic-films imported . . . shall be subject to such censorship as may be imposed by the Secretary of the Treasury." 38 Stat. 114, 151 (1913), 42 Stat. 858, 920 (1922), repealed 46 Stat. 590, 762 (1930). See Inglis, Freedom of the Movies, 68.

[10] Life, Jan. 15, 1951, p. 63; Sat. Rev. of Lit., Jan. 27, 1951, pp. 28–29.

censes were issued in the usual course after viewings of the picture by the Motion Picture Division of the New York State Education Department. The Division is directed by statute to "issue a license" "unless [the] film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." N. Y. Education Law, § 122. The trilogy opened on December 12, 1950, at the Paris Theatre on 58th Street in Manhattan. It was promptly attacked as "a sacrilegious and blasphemous mockery of Christian religious truth" [11] by the National Legion of Decency, a private Catholic organization for film censorship, whose objectives have intermittently been approved by various non-Catholic church and social groups since its formation in 1933.[12] However, the National Board of Review (a non-industry lay organization devoted to raising the level of motion pictures by mobilizing public opinion, under the slogan "Selection Not Censorship")[13] recommended the picture as "especially worth seeing." New York critics on the whole praised "The Miracle"; those who dispraised did not suggest sacrilege.[14] On December 27 the critics selected the "Ways of Love" as the best foreign language

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[11] N. Y. Times, Dec. 31, 1950, p. 23, col. 4.

[12] Inglis, Freedom of the Movies, 120 *et seq.*

[13] *Id.*, at 74–82.

[14] Howard Barnes, N. Y. Herald Tribune, Dec. 13, 1950, p. 30, cols. 1–3: "it would be wise to time a visit to the Paris in order to skip ['The Miracle']. . . . Altogether it leaves a very bad taste in one's mouth."

Bosley Crowther, N. Y. Times, Dec. 13, 1950, p. 50, cols. 2–3: "each one of the [three] items . . . stacks up with the major achievements of the respective directors . . . . ['The Miracle'] is by far the most overpowering and provocative of the lot." N. Y. Times, Dec. 17, 1950, § 2, p. 3, cols. 7–8: "a picture of mounting intensity that wrings the last pang of emotion as it hits its dramatic

film in 1950.[15] Meanwhile, on December 23, Edward T. McCaffrey, Commissioner of Licenses for New York City, declared the film "officially and personally blasphemous" and ordered it withdrawn at the risk of suspension of the license to operate the Paris Theatre.[16] A week later the program was restored at the theatre upon the decision by the New York Supreme Court that the City

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peak . . . vastly compassionate comprehension of the suffering and the triumph of birth."

Wanda Hale, N. Y. Daily News, Dec. 13, 1950, p. 82, cols. 1–3: "Rossellini's best piece of direction, since his greatest, 'Open City.' . . . artistic and beautifully done by both the star and the director."

Archer Winsten, N. Y. Post, Dec. 13, 1950, p. 80, cols. 1–3: "Magnani's performance is a major one and profoundly impressive. This reviewer's personal opinion marked down the film as disturbingly unpleasant and slow."

Seymour Peck, N. Y. Daily Compass, Dec. 13, 1950, p. 13, cols. 3–5: " 'The Miracle' is really all Magnani. . . . one of the most exciting solo performances the screen has known."

Alton Cook, N. Y. World-Telegram, Dec. 13, 1950, p. 50, cols. 1–2: "['The Miracle' is] charged with the same overwrought hysteria that ran through his 'Stromboli.' . . . the picture has an unpleasant preoccupation with filth and squalor . . . exceedingly trying experience."

Time, Jan. 8, 1951, p. 72, cols. 2–3: "['The Miracle'] is second-rate Rossellini despite a virtuoso performance by Anna Magnani."

Newsweek, Dec. 18, 1950, pp. 93–94, col. 3: "strong medicine for most American audiences. However, it shows what an artist of Rossellini's character can do in the still scarcely explored medium of the film short story."

Hollis Alpert, Sat. Rev. of Lit., Jan. 27, 1951, pp. 28–29: "pictorially the picture is a gem, with its sensitive evocation of a small Italian town and the surrounding countryside near Salerno . . . . Anna Magnani again demonstrates her magnificent qualities of acting. The role is difficult . . . .

"But my quarrel would be with Mr. Rossellini, whose method of improvisation from scene to scene . . . can also result in extraneous detail that adds little, or even harms, the over-all effect."

[15] N. Y. Times, Dec. 28, 1950, p. 22, col. 1.

[16] *Id.*, Dec. 24, 1950, p. 1, cols. 2–3.

License Commissioner had exceeded his authority in that he was without powers of movie censorship.[17]

Upon the failure of the License Commissioner's effort to cut off showings of "The Miracle," the controversy took a new turn. On Sunday, January 7, 1951, a statement of His Eminence, Francis Cardinal Spellman, condemning the picture and calling on "all right thinking citizens" to unite to tighten censorship laws, was read at all masses in St. Patrick's Cathedral.[18]

The views of Cardinal Spellman aroused dissent among other devout Christians. Protestant clergymen, repre-

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[17] *Joseph Burstyn, Inc.* v. *McCaffrey*, 198 Misc. 884, 101 N. Y. S. 2d 892.

[18] N. Y. Times, Jan. 8, 1951, p. 1, col. 2. The Cardinal termed "The Miracle" "a vile and harmful picture," "a despicable affront to every Christian" ("We believe in miracles. This picture ridicules that belief"), and finally "a vicious insult to Italian womanhood." As a consequence, he declared: "we, as the guardians of the moral law, must summon you and all people with a sense of decency to refrain from seeing it and supporting the venal purveyors of such pictures . . . ." *Id.*, at p. 14, cols. 2–3.

For completeness' sake, later incidents should be noted. Picketers from the Catholic War Veterans, the Holy Name Society, and other Catholic organizations—about 1,000 persons in all during one Sunday—paraded before the Paris Theatre. *Id.*, Dec. 29, 1950, p. 36, col. 3; Jan. 8, 1951, p. 1, col. 2; Jan. 9, 1951, p. 34, col. 7; Jan. 10, 1951, p. 22, col. 6; Jan. 15, 1951, p. 23, col. 3. A smaller number of counterpickets appeared on several days. *Id.*, Jan. 10, 1951, p. 22, col. 6; Jan. 20, 1951, p. 10, cols. 4–5. See also *id.*, Jan. 23, 1951, p. 21, col. 8; Jan. 25, 1951, p. 27, col. 7.

The Paris Theatre on two different evenings was emptied on threat of bombing. *Id.*, Jan. 21, 1951, p. 1, cols. 2–3; Jan. 28, 1951, p. 1, cols. 2–3. Coincidently with the proceedings before the New York Board of Regents which started this case on the way to this Court, the Paris Theatre also was having difficulties with the New York City Fire Department. The curious may follow the development of those incidents, not relevant here, in the N. Y. Times, Jan. 21, 1951, p. 53, cols. 4–5; Jan. 27, 1951, p. 11, col. 3; Feb. 6, 1951, p. 29, col. 8; Feb. 10, 1951, p. 15, col. 8; Feb. 15, 1951, p. 33, col. 2.

senting various denominations, after seeing the picture, found in it nothing "sacrilegious or immoral to the views held by Christian men and women," and with a few exceptions agreed that the film was "unquestionably one of unusual artistic merit." [19]

In this estimate some Catholic laymen concurred.[20] Their opinion is represented by the comment by Otto L. Spaeth, Director of the American Federation of Arts and prominent in Catholic lay activities:

> "At the outbreak of the controversy, I immediately arranged for a private showing of the film. I invited a group of Catholics, competent and respected for their writings on both religious and cultural subjects. The essential approval of the film was unanimous.
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> "There was indeed 'blasphemy' in the picture—but it was the blasphemy of the villagers, who stopped at nothing, not even the mock singing of a

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[19] Excerpts from letters and statements by a great many clergymen are reproduced in the Record before this Court, pages 95–140. The representative quotations in the text are from letters written by the Rev. H. C. DeWindt, Minister of the West Park Presbyterian Church, New York City, R. 97, and the Rev. W. J. Beeners of Princeton, New Jersey, R. 98, respectively.

[20] Catholic opinion generally, as expressed in the press, supported the view of the Legion of Decency and of Cardinal Spellman. See, for example, The [New York] Catholic News, Dec. 30, 1950, p. 10; Jan. 6, 1951, p. 10; Jan. 20, 1951, p. 10; Feb. 3, 1951, p. 10; Feb. 10, 1951, p. 12; and May 19, 1951, p. 12; Commonweal, Jan. 12, 1951, p. 351, col. 1; The [Brooklyn] Tablet, Jan. 20, 1951, p. 8, col. 4; *id.*, Jan. 27, 1951, p. 10, col. 3; *id.*, Feb. 3, 1951, p. 8, cols. 3–4; Martin Quigley, Jr., "'The Miracle'—An Outrage"; The [San Francisco] Monitor, Jan. 12, 1951, p. 7, cols. 3–4 (reprinted from Motion Picture Herald, Jan. 6, 1951); The [Boston] Pilot, Jan. 6, 1951, p. 4. There doubtless were comments on "The Miracle" in other diocesan papers which circulate in various parts of the country, but which are not on file in the Library of Congress or the library of the Catholic University of America.

> hymn to the Virgin, in their brutal badgering of the tragic woman. The scathing indictment of their evil behavior, implicit in the film, was seemingly overlooked by its critics." [21]

William P. Clancy, a teacher at the University of Notre Dame, wrote in The Commonweal, the well-known Catholic weekly, that "the film is not *obviously* blasphemous or obscene, either in its intention or execution." [22] The Commonweal itself questioned the wisdom of transforming Church dogma which Catholics may obey as "a free act" into state-enforced censorship for all.[23] Allen Tate, the well-known Catholic poet and critic, wrote: "The picture seems to me to be superior in acting and photography but inferior dramatically. . . . In the long run what Cardinal Spellman will have succeeded in doing is insulting the intelligence and faith of American Catholics with the assumption that a second-rate motion picture could in any way undermine their morals or shake their faith." [24]

At the time "The Miracle" was filmed, all the persons having significant positions in the production—producer, director, and cast—were Catholics. Roberto Rossellini, who had Vatican approval in 1949 for filming a life of St. Francis, using in the cast members of the Franciscan

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[21] Spaeth, "Fogged Screen," Magazine of Art, Feb., 1951, p. 44; N. Y. Herald Tribune, Jan. 30, 1951, p. 18, col. 4.

[22] Clancy, "The Catholic as Philistine," The Commonweal, Mar. 16, 1951, pp. 567–569.

[23] The Commonweal, Mar. 2, 1951, pp. 507–508. Much the same view was taken by Frank Getlein writing in The Catholic Messenger, Mar. 22, 1951, p. 4, cols. 1–8, in an article bearing the headline: "Film Critic Gives Some Aspects of 'The Miracle' Story: Raises Questions Concerning Tactics of Organized Catholic Resistance Groups in New York." See also, "Miracles Do Happen," The New Leader, Feb. 5, 1951, p. 30, col. 2.

[24] N. Y. Times, Feb. 1, 1951, p. 24, col. 7.

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Order, cabled Cardinal Spellman protesting against boycott of "The Miracle":

> "In *The Miracle* men are still without pity because they still have not come back to God, but God is already present in the faith, however confused, of that poor, persecuted woman; and since God is wherever a human being suffers and is misunderstood, *The Miracle* occurs when at the birth of the child the poor, demented woman regains sanity in her maternal love." [25]

In view of the controversy thus aroused by the picture, the Chairman of the Board of Regents appointed a committee of three Board members to review the action of the Motion Picture Division in granting the two licenses. After viewing the picture on Jan. 15, 1951, the committee declared it "sacrilegious." The Board four days later issued an order to the licensees to show cause why the licenses should not be cancelled in that the picture was "sacrilegious." The Board of Regents rescinded the licenses on Feb. 16, 1951, saying that the "mockery or profaning of these beliefs that are sacred to any portion of our citizenship is abhorrent to the laws of this great State." On review the Appellate Division upheld the Board of Regents, holding that the banning of any motion picture "that may fairly be deemed sacrilegious to the adherents of any religious group . . . is directly related to public peace and order" and is not a denial of religious freedom, and that there was "substantial evidence upon which the Regents could act." 278 App. Div. 253, 257, 258, 260, 104 N. Y. S. 2d 740, 743, 744–745, 747.

The New York Court of Appeals, with one judge concurring in a separate opinion and two others dissenting,

[25] *Id.*, Jan. 13, 1951, p. 10, col. 6; translation by Chworowsky, "The Cardinal: Critic and Censor," The Churchman, Feb. 1, 1951, p. 7, col. 2.

affirmed the order of the Appellate Division. 303 N. Y. 242, 101 N. E. 2d 665. After concluding that the Board of Regents acted within its authority and that its determination was not "one that no reasonable mind could reach," *id.*, at 250–255, 256–257, 101 N. E. 2d 665, 667–671, the majority held, first, that "sacrilegious" was an adequately definite standard, quoting a definition from Funk & Wagnalls' Dictionary and referring to opinions in this Court that in passing used the term "profane," which the New York court said was a synonym of "sacrilegious"; second, that the State's assurance "that no religion . . . shall be treated with contempt, mockery, scorn and ridicule . . . by those engaged in selling entertainment by way of motion pictures" does not violate the religious guarantee of the First Amendment; and third, that motion pictures are not entitled to the immunities from regulation enjoyed by the press, in view of the decision in *Mutual Film Corp.* v. *Ohio Industrial Comm'n,* 236 U. S. 230. *Id.*, at 255–256, 258–260, 260–262, 101 N. E. 2d 670–674. The two dissenting judges, after dealing with a matter of local law not reviewable here, found that the standard "sacrilegious" is unconstitutionally vague, and, finally, that the constitutional guarantee of freedom of speech applied equally to motion pictures and prevented this censorship. 303 N. Y. 242, 264, 101 N. E. 2d 665, 675. Both State courts, as did this Court, viewed "The Miracle."

Arguments by the parties and in briefs *amici* invite us to pursue to their farthest reach the problems in which this case is involved. Positions are advanced so absolute and abstract that in any event they could not properly determine this controversy. See *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341, 346–348. We are asked to decide this case by choosing between two mutually exclusive alternatives: that motion pictures may be subjected to unrestricted censorship, or that they

must be allowed to be shown under any circumstances. But only the tyranny of absolutes would rely on such alternatives to meet the problems generated by the need to accommodate the diverse interests affected by the motion pictures in compact modern communities. It would startle Madison and Jefferson and George Mason, could they adjust themselves to our day, to be told that the freedom of speech which they espoused in the Bill of Rights authorizes a showing of "The Miracle" from windows facing St. Patrick's Cathedral in the forenoon of Easter Sunday,[26] just as it would startle them to be told that any picture, whatever its theme and its expression, could be barred from being commercially exhibited. The general principle of free speech, expressed in the First Amendment as to encroachments by Congress, and included as it is in the Fourteenth Amendment, binding on the States, must be placed in its historical and legal contexts. The Constitution, we cannot recall too often, is an organism, not merely a literary composition.

If the New York Court of Appeals had given "sacrilegious" the meaning it has had in Catholic thought since St. Thomas Aquinas formulated its scope, and had sustained a finding by the Board of Regents that "The Miracle" came within that scope, this Court would have to meet some of the broader questions regarding the relation to the motion picture industry of the guarantees of the First Amendment so far as reflected in the Fourteenth. But the New York court did not confine "sacrilegious" within such technical, Thomist limits, nor within any specific, or even approximately specified, limits. It may fairly be said that that court deemed "sacrilegious" a self-defining term, a word that carries a well-known, settled meaning in the common speech of men.

[26] That such offensive exploitation of modern means of publicity is not a fanciful hypothesis, see N. Y. Times, April 14, 1952, p. 1, col. 4.

So far as the Court of Appeals sought to support its notion that "sacrilegious" has the necessary precision of meaning which the Due Process Clause enjoins for statutes regulating men's activities, it relied on this definition from Funk & Wagnalls' Dictionary: "The act of violating or profaning anything sacred." But this merely defines by turning an adjective into a noun and bringing in two new words equally undefined. It leaves wide open the question as to what persons, doctrines or things are "sacred." It sheds no light on what representations on the motion picture screen will constitute "profaning" those things which the State censors find to be "sacred."

To criticize or assail religious doctrine may wound to the quick those who are attached to the doctrine and profoundly cherish it. But to bar such pictorial discussion is to subject non-conformists to the rule of sects.

Even in *Mutual Film Corp.* v. *Ohio Industrial Comm'n*, 236 U. S. 230, it was deemed necessary to find that the terms "educational, moral, amusing or harmless" do not leave "decision to arbitrary judgment." Such general words were found to "get precision from the sense and experience of men." *Id.*, at 245, 246. This cannot be said of "sacrilegious." If there is one thing that the history of religious conflicts shows, it is that the term "sacrilegious"—if by that is implied offense to the deep convictions of members of different sects, which is what the Court of Appeals seems to mean so far as it means anything precisely—does not gain "precision from the sense and experience of men."

The vast apparatus of indices and digests, which mirrors our law, affords no clue to a judicial definition of sacrilege. Not one case, barring the present, has been uncovered which considers the meaning of the term in any context. Nor has the practice under the New York law contributed light. The Motion Picture Division of the Education Department does not support with ex-

planatory statements its action on any specific motion picture, which we are advised is itself not made public. Of the fifty-odd reported appeals to the Board of Regents from denials of licenses by the Division, only three concern the category "sacrilegious." [27] In these cases, as in others under the Act, the Board's reported opinion confines itself to a bare finding that the film was or was not "sacrilegious," without so much as a description of the allegedly offensive matter, or even of the film as a whole to enlighten the inquirer. Well-equipped law libraries are not niggardly in their reflection of "the sense and experience of men," but we must search elsewhere for any which gives to "sacrilege" its meaning.

Sacrilege,[28] as a restricted ecclesiastical concept, has a long history. Naturally enough, religions have sought to protect their priests and anointed symbols from physical injury.[29] But history demonstrates that the term is hopelessly vague when it goes beyond such ecclesiastical definiteness and is used at large as the basis for punishing deviation from doctrine.

Etymologically "sacrilege" is limited to church-robbing: *sacer,* sacred, and *legere,* to steal or pick out. But we are

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[27] *In the Matter of "The Puritan,"* 60 N. Y. St. Dept. 163 (1939); *In the Matter of "Polygamy,"* 60 N. Y. St. Dept. 217 (1939); *In the Matter of "Monja y Casada—Virgen y Martir"* (*"Nun and Married—Virgin and Martyr"*), 52 N. Y. St. Dept. 488 (1935).

[28] Since almost without exception "sacrilegious" is defined in terms of "sacrilege," our discussion will be directed to the latter term. See Bailey, Universal Etymological English Dictionary (London, 1730), "Sacrilegious"—"of, pertaining to, or guilty of Sacrilege"; Funk & Wagnalls' New Standard Dictionary (1937), "Sacrilegious"—"Having committed or being ready to commit sacrilege. Of the nature of sacrilege; as, *sacrilegious* deeds."

[29] For general discussions of "sacrilege," see Encyclopaedia of Religion and Ethics (Hastings ed., 1921), "Sacrilege" and "Tabu"; Rev. Thomas Slater, A Manual of Moral Theology (1908), 226–230; The Catholic Encyclopedia (1912), "Sacrilege"; and Encyclopaedia Britannica, "Sacrilege."

told that "already in Cicero's time it had grown to include in popular speech any insult or injury to [sacred things]." [30] "In primitive religions [sacrilege is] inclusive of almost every serious offence even in fields now regarded as merely social or political . . . ." [31] The concept of "tabu" in primitive society is thus close to that of "sacrilege." [32] And in "the Theodosian Code the various crimes which are accounted sacrilege include—apostasy, heresy, schism, Judaism, paganism, attempts against the immunity of churches and clergy or privileges of church courts, the desecration of sacraments, etc., and even Sunday. Along with these crimes against religion went treason to the emperor, offences against the laws, especially counterfeiting, defraudation in taxes, seizure of confiscated property, evil conduct of imperial officers, etc." [33] During the Middle Ages the Church considerably delimited the application of the term. St. Thomas Aquinas classified the objects of "sacrilege" as persons, places, and thing.[34] The injuries which would constitute

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[30] Encyclopaedia Britannica (1951), "Sacrilege."

[31] *Ibid.*

[32] See Encyclopaedia of Religion and Ethics (Hastings ed., 1921), "Tabu."

[33] Encyclopaedia Britannica (1951), "Sacrilege."

[34] St. Thomas Aquinas, Summa Theologica, part II–II, question 99. The modern Codex Juris Canonici does not give any definition of "sacrilege," but merely says it "shall be punished by the Ordinary in proportion to the gravity of the fault, without prejudice to the penalties established by law . . . ." See Bouscaren and Ellis, Canon Law (1946), 857. 2 Woywod, A Practical Commentary on the Code of Canon Law (1929), par. 2178, 477–478, thus defines sacrilege: "Sacrilege consists in the unworthy use or treatment of sacred things and sacred persons. Certain things are of their nature sacred (e. g., the Sacraments); others become so by blessing or consecration legitimately bestowed on things or places by authority of the Church. Persons are rendered sacred by ordination or consecration or by other forms of dedication to the divine service by authority of the Church (e. g., by first tonsure, by religious profession)."

"sacrilege" received specific and detailed illustration.[35] This teaching of Aquinas is, I believe, still substantially the basis of the official Catholic doctrine of sacrilege. Thus, for the Roman Catholic Church, the term came to have a fairly definite meaning, but one, in general, limited to protecting things physical against injurious acts.[36] Apostasy, heresy, and blasphemy coexisted as religious crimes alongside sacrilege; they were peculiarly in the realm of religious dogma and doctrine, as "sacrilege" was not. It is true that Spelman, writing "The History and Fate of Sacrilege" in 1632, included in "sacrilege" acts whereby "the very Deity is invaded, profaned, or robbed of its glory . . . . In this high sin are blasphemers,

[35] After his method of raising objections and then refuting them, St. Thomas Aquinas defends including within the proscription of "sacrilege," anyone "who disagree[s] about the sovereign's decision, and doubt[s] whether the person chosen by the sovereign be worthy of honor" and "any man [who] shall allow the Jews to hold public offices." Summa Theologica, part II–II, question 99, art. 1.

[36] Rev. Thomas Slater, S. J., A Manual of Moral Theology (1908), c. VI, classifies and illustrates the modern theological view of "sacrilege":

Sacrilege against sacred persons: to use physical violence against a member of the clergy; to violate "the privilege of immunity of the clergy from civil jurisdiction, as far as this is still in force"; to violate a vow of chastity.

Sacrilege against sacred places: to violate the immunity of churches and other sacred places "as far as this is still in force"; to commit a crime such as homicide, suicide, bloody attack there; to break by sexual act a vow of chastity there; to bury an infidel, heretic, or excommunicate in churches or cemeteries canonically established; or to put the sacred place to a profane use, as a secular courtroom, public market, banquet hall, stable, etc.

Sacrilege against sacred things: to treat with irreverence, contempt, or obscenity the sacraments (particularly the Eucharist), Holy Scriptures, relics, sacred images, etc., to steal sacred things, or profane things from sacred places; to commit simony; or to steal, confiscate, or damage wilfully ecclesiastical property. See also, The Catholic Encyclopedia, "Sacrilege."

sorcerers, witches, and enchanters." [37] But his main theme was the "spoil of church lands done by Henry VIII" and the misfortunes that subsequently befell the families of the recipients of former ecclesiastical property as divine punishment.

To the extent that English law took jurisdiction to punish "sacrilege," the term meant the stealing from a church, or otherwise doing damage to church property.[38] This special protection against "sacrilege," that is, property damage, was granted only to the Established Church.[39] Since the repeal less than a century ago of the English law punishing "sacrilege" against the property of the Established Church, religious property has received little special protection. The property of all sects has had substantially the same protection as is accorded non-religious property.[40] At no time up to the present has English law known "sacrilege" to be used in any wider sense than the physical injury to church property. It is true that, at times in the past, English law has

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[37] Sir Henry Spelman, The History and Fate of Sacrilege (2d ed., 1853), 121–122. Two priests of the Anglican Church prepared a long prefatory essay to bring Spelman's data up to the date of publication of the 1853 edition. Their essay shows their understanding also of "sacrilege" in the limited sense. *Id.*, at 1–120.

[38] 2 Russell, Crime (10th ed., 1950), 975–976; Stephen, A Digest of the Criminal Law (9th ed., 1950), 348–349. See 23 Hen. VIII, c. 1, § III; 1 Edw. VI, c. 12, § X; 1 Mary, c. 3, §§ IV–VI.

[39] 7 & 8 Geo. IV, c. 29, § X, which the marginal note summarized as "Sacrilege, when capital," read: "if any Person shall break and enter any Church or Chapel, and steal therein any Chattel . . . [he] shall suffer Death as a Felon." This statute was interpreted to apply only to buildings of the established church. *Rex* v. *Nixon*, 7 Car. & P. 442 (1836).

[40] 7 & 8 Geo. IV, c. 29, § X, was repealed by 24 & 25 Vict., c. 95. The Larceny Act and the Malicious Injuries to Property Act, both of 1861, treated established church property substantially the same as all other property. 24 & 25 Vict., c. 96, § 50; c. 97, §§ 1, 11, 39, superseded by Larceny Act, 1916, 6 & 7 Geo. V, c. 50, § 24.

taken jurisdiction to punish departures from accepted dogma or religious practice or the expression of particular religious opinions, but never have these "offenses" been denominated "sacrilege." Apostasy, heresy, offenses against the Established Church, blasphemy, profanation of the Lord's Day, etc., were distinct criminal offenses, characterized by Blackstone as "offences against God and religion." [41] These invidious reflections upon religious susceptibilities were not covered under sacrilege as they might be under the Court of Appeals' opinion. Anyone doubting the dangerous uncertainty of the New York definition, which makes "sacrilege" overlap these other "offenses against religion," need only read Blackstone's account of the broad and varying content given each of these offenses.

A student of English lexicography would despair of finding the meaning attributed to "sacrilege" by the New York court.[42] Most dictionaries define the concept in the limited sense of the physical abuse of physical objects. The definitions given for "sacrilege" by two dictionaries published in 1742 and 1782 are typical. Bailey's defined it as "the stealing of Sacred Things, Church Robbing; an Alienation to Laymen, and to profane and common Purposes, of what was given to religious Persons, and to pious Uses." [43] Barclay's said it is "the crime of taking any thing dedicated to divine worship, or profaning any thing sacred," where "to profane" is defined "to apply any thing sacred to common uses. To be irreverent to sacred persons or things." [44] The

[41] Blackstone, bk. IV, c. 4, 41–64.

[42] Compare the definitions of "sacrilege" and "blasphemy" in the dictionaries, starting with Cockeram's 1651 edition, which are collected in the Appendix, *post*, p. 533.

[43] Bailey, An Universal Etymological English Dictionary (London, 1742), "Sacrilege."

[44] Barclay, A Complete and Universal English Dictionary (London, 1782), "Sacrilege."

same dictionaries defined "blasphemy," a peculiarly verbal offense, in much broader terms than "sacrilege," indeed in terms which the New York court finds encompassed by "sacrilegious." For example, Barclay said "blasphemy" is "an offering some indignity to God, any person of the Trinity, any messengers from God, his holy writ, or the doctrines of revelation." [45] It is hardly necessary to comment that the limits of this definition remain too uncertain to justify constraining the creative efforts of the imagination by fear of pains and penalties imposed by a necessarily subjective censorship. It is true that some earlier dictionaries assigned to "sacrilege" the broader meaning of "abusing Sacraments or holy Mysteries," [46] but the broader meaning is more indefinite, not less. Noah Webster first published his American Dictionary in 1828. Both it and the later dictionaries published by the Merriam Company, Webster's International Dictionary and Webster's New International Dictionary, have gone through dozens of editions and printings, revisions and expansions. In all editions throughout 125 years, these American dictionaries have defined "sacrilege" and "sacrilegious" to echo substantially the narrow, technical definitions from the earlier British dictionaries collected in the Appendix, *post*, p. 533.[47]

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[45] *Id.*, "Blasphemy."

[46] Thomas Blount, Glossographia (3d ed., London, 1670).

[47] Webster's Compendious Dictionary of the English Language (1806): "Sacrilege"—"the robbery of a church or chapel." "Sacrilegious"—"violating a thing made sacred."

Webster's American Dictionary (1828): "Sacrilege"—"The crime of violating or profaning sacred things; or the alienating to laymen or to common purposes what has been appropriated or consecrated to religious persons or uses." "Sacrilegious"—"Violating sacred things; polluted with the crime of sacrilege."

Webster's International Dictionary (G. & C. Merriam & Co., 1890): "Sacrilege"—"The sin or crime of violating or profaning sacred things; the alienating to laymen, or to common purposes,

The New York Court of Appeals' statement that the dictionary "furnishes a clear definition," justifying the vague scope it gave to "sacrilegious," surely was made without regard to the lexicographic history of the term. As a matter of fact, the definition from Funk & Wagnalls' used by the Court of Appeals is taken straight from 18th Century dictionaries, particularly Doctor Johnson's.[48] In light of that history it would seem that the Funk &

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what has been appropriated or consecrated to religious persons or uses." "Sacrilegious"—"violating sacred things; polluted with sacrilege; involving sacrilege; profane; impious."

Webster's New International Dictionary (G. & C. Merriam Co., 1st ed., 1909): "Sacrilege"—"The sin or crime of violating or profaning sacred things; specif., the alienating to laymen, or to common purposes, what has been appropriated or consecrated to religious persons or uses." "Sacrilegious"—"Violating sacred things; polluted with, or involving, sacrilege; impious." Repeated in the 1913, 1922, 1924, 1928, 1933 printings, among others.

Webster's New International Dictionary (G. & C. Merriam Co., 2d ed., 1934): "Sacrilege"—"The crime of stealing, misusing, violating, or desecrating that which is sacred, or holy, or dedicated to sacred uses. Specif.: **a** *R. C. Ch.* The sin of violating the conditions for a worthy reception of a sacrament. **b** Robbery from a church; also, that which is stolen. **c** Alienation to laymen, or to common purposes, of what has been appropriated or consecrated to religious persons or uses." "Sacrilegious"—"Committing sacrilege; characterized by or involving sacrilege; polluted with sacrilege; as, *sacrilegious* robbers, depredations, or acts." Repeated in the 1939, 1942, 1944, 1949 printings, among others.

[48] Funk & Wagnalls' Standard Dictionary of the English Language, which was first copyrighted in 1890, defined sacrilege as follows in the 1895 printing: "**1.** The act of violating or profaning anything sacred. **2.** *Eng. Law* (1) The larceny of consecrated things from a church; the breaking into a church with intent to commit a felony, or breaking out after a felony. (2) Formerly, the selling to a layman of property given to pious uses." This definition remained unchanged through many printings of that dictionary. The current printing of Funk & Wagnalls' New Standard Dictionary of the English Language, first copyrighted in 1913, carries exactly the same definition of "sacrilege" except that the first definition has been expanded to read: "The

Wagnalls' definition uses "sacrilege" in its historically restricted meaning, which was not, and could hardly have been, the basis for condemning "The Miracle." If the New York court reads the Funk & Wagnalls' definition in a broader sense, in a sense for which history and experience provide no gloss, it inevitably left the censor free to judge by whatever dogma he deems "sacred" and to ban whatever motion pictures he may assume would "profane" religious doctrine widely enough held to arouse protest.

Examination of successive editions of the Encyclopaedia Britannica over nearly two centuries up to the present day gives no more help than the dictionaries. From 1768 to the eleventh edition in 1911, merely a brief dictionary-type definition was given for "sacrilege." [49] The eleventh edition, which first published a longer article, was introduced as follows: "the violation or profanation of sacred things, a crime of varying scope in different religions. It is naturally much more general and accounted more dreadful in those primitive religions in

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act of violating or profaning anything sacred, including sacramental vows."

Funk & Wagnalls' Standard Dictionary (1895) defined "to profane" as "1. To treat with irreverence or abuse; make common or unholy; desecrate; pollute. 2. Hence, to put to a wrong or degrading use; debase." The New Standard Dictionary adds a third meaning: "3. To vulgarize; give over to the crowd."

[49] Encyclopaedia Britannica, 2d ed., 1782: "Sacrilege"—"the crime of profaning sacred things, or those devoted to the service of God."

3d ed., 1797: "Sacrilege"—"the crime of profaning sacred things, or things devoted to God; or of alienating to laymen, for common purposes, what was given to religious persons and pious uses."

8th ed., 1859: "Sacrilege"—same as 3d ed., 1797.

9th ed., 1886: "Sacrilege"—A relatively short article the author of which quite apparently had a restricted definition for "sacrilege": "robbery of churches," "breaking or defacing of an altar, crucifix, or cross," etc.

which cultural objects play so great a part, than in more highly spiritualized religions where they tend to disappear. But wherever the idea of sacred exists, sacrilege is possible." [50] The article on "sacrilege" in the current edition of the Encyclopaedia Britannica is substantially the same as that in the 1911 edition.

History teaches us the indefiniteness of the concept "sacrilegious" in another respect. In the case of most countries and times where the concept of sacrilege has been of importance, there has existed an established church or a state religion. That which was "sacred," and so was protected against "profaning," was designated in each case by ecclesiastical authority. What might have been definite when a controlling church imposed a detailed scheme of observances becomes impossibly confused and uncertain when hundreds of sects, with widely disparate and often directly conflicting ideas of sacredness, enjoy, without discrimination and in equal measure, constitutionally guaranteed religious freedom. In the Rome of the late emperors, the England of James I, or the Geneva of Calvin, and today in Roman Catholic Spain, Mohammedan Saudi Arabia, or any other country with a monolithic religion, the category of things sacred might have clearly definable limits. But in America the multiplicity of the ideas of "sacredness" held with equal but conflicting fervor by the great number of religious groups makes the term "sacrilegious" too indefinite to satisfy constitutional demands based on reason and fairness.

If "sacrilegious" bans more than the physical abuse of sacred persons, places, or things, if it permits censorship of religious opinions, which is the effect of the holding below, the term will include what may be found to be "blasphemous." England's experience with that treacherous word should give us pause, apart from our

[50] Encyclopaedia Britannica (11th ed., 1911), "Sacrilege."

requirements for the separation of Church and State. The crime of blasphemy in Seventeenth Century England was the crime of dissenting from whatever was the current religious dogma.[51] King James I's "Book of Sports" was first required reading in the churches; later all copies were consigned to the flames. To attack the mass was once blasphemous; to perform it became so. At different times during that century, with the shifts in the attitude of government towards particular religious views, persons who doubted the doctrine of the Trinity (*e. g.*, Unitarians, Universalists, etc.) or the divinity of Christ, observed the Sabbath on Saturday, denied the possibility of witchcraft, repudiated child baptism or urged methods of baptism other than sprinkling, were charged as blasphemers, or their books were burned or banned as blasphemous. Blasphemy was the chameleon phrase which meant the criticism of whatever the ruling authority of the moment established as orthodox religious doctrine.[52] While it is true that blasphemy prosecutions

[51] Schroeder, Constitutional Free Speech (1919), 178–373, makes a lengthy review of "Prosecutions for Crimes Against Religion." The examples in the text are from Schroeder. See also Encyclopaedia of the Social Sciences, "Blasphemy"; Encyclopaedia of Religion and Ethics, "Blasphemy"; Nokes, A History of the Crime of Blasphemy (1928).

[52] 1 Yorke, The Life of Lord Chancellor Hardwicke (1913), 80, writes thus of the prosecution of Thomas Woolston for blasphemy: "The offence, in the first place, consisted in the publication in 1725 of a tract entitled *A Moderator between an Infidel and an Apostate*, in which the author questioned the historical accuracy of the Resurrection and the Virgin Birth. Such speculations, however much they might offend the religious feeling of the nation, would not now arouse apprehensions in the civil government, or incur legal penalties; but at the time of which we are writing, when the authority of government was far less stable and secure and rested on far narrower foundations than at present, such audacious opinions were considered, not without some reason, as a menace, not only to religion but to the state."

have continued in England—although in lessening numbers—into the present century,[53] the existence there of an established church gives more definite contours to the crime in England than the term "sacrilegious" can possibly have in this country. Moreover, the scope of the English common-law crime of blasphemy has been considerably limited by the declaration that "if the decencies of controversy are observed, even the fundamentals of religion may be attacked," [54] a limitation which the New York court has not put upon the Board of Regents' power to declare a motion picture "sacrilegious."

In *Cantwell* v. *Connecticut,* 310 U. S. 296, 310, Mr. Justice Roberts, speaking for the whole Court, said: "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor." Conduct and beliefs dear to one may seem the rankest "sacrilege" to another. A few examples suffice to show the difficulties facing a conscientious censor or motion picture producer or distributor in determining what the New York statute condemns as sacrilegious. A motion picture portraying Christ as divine—for example, a movie showing medieval Church art—would offend the religious opinions of the members of several Protestant denominations who do not believe in the Trinity, as well as those of a non-Christian faith. Conversely, one showing Christ as merely an ethical teacher could not but offend millions of Christians of many denominations. Which is "sacrilegious"? The doctrine of transubstantiation, and the veneration of relics or particular stone and wood embodiments of saints or divinity, both sacred to

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[53] See, *e. g., Rex* v. *Boulter,* 72 J. P. 188 (1908); *Bowman* v. *Secular Society, Ltd.,* [1917] A. C. 406.

[54] *Reg.* v. *Ramsay,* 15 Cox's C. C. 231, 238 (1883) (Lord Coleridge's charge to the jury); *Bowman* v. *Secular Society, Ltd.,* [1917] A. C. 406.

Catholics, are offensive to a great many Protestants, and therefore for them sacrilegious in the view of the New York court. Is a picture treating either subject, whether sympathetically, unsympathetically, or neutrally, "sacrilegious"? It is not a sufficient answer to say that "sacrilegious" is definite, because all subjects that in any way might be interpreted as offending the religious beliefs of any one of the 300 sects of the United States [55] are banned in New York. To allow such vague, undefinable powers of censorship to be exercised is bound to have stultifying consequences on the creative process of literature and art—for the films are derived largely from literature. History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men. We not only do not know but cannot know what is condemnable by "sacrilegious." And if we cannot tell, how are those to be governed by the statute to tell?

It is this impossibility of knowing how far the form of words by which the New York Court of Appeals explained "sacrilegious" carries the proscription of religious subjects that makes the term unconstitutionally vague.[56] To stop short of proscribing all subjects that might conceivably be interpreted to be religious, inevitably creates a situation whereby the censor bans only that against which

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[55] The latest available statistics of the Bureau of the Census give returns from 256 denominations; 57 other denominations, which did not report, are listed. Bureau of the Census, Religious Bodies: 1936, Vol. I, iii, 7.

[56] It is not mere fantasy to suggest that the effect of a ban of the "sacrilegious" may be to ban all motion pictures dealing with any subject that might be deemed religious by any sect. The industry's self-censorship has already had a distorting influence on the portrayal of historical figures. "Pressure forced deletion of the clerical background of Cardinal Richelieu from *The Three Musketeers*. The [Motion Picture Production] code provision appealed to was the section providing that ministers should not be portrayed as villains." Note,

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there is a substantial outcry from a religious group. And that is the fair inference to be drawn, as a matter of experience, from what has been happening under the New York censorship. Consequently the film industry, normally not guided by creative artists, and cautious in putting large capital to the hazards of courage, would be governed by its notions of the feelings likely to be aroused by diverse religious sects, certainly the powerful ones. The effect of such demands upon art and upon those whose function is to enhance the culture of a society need not be labored.

To paraphrase Doctor Johnson, if nothing may be shown but what licensors may have previously approved, power, the yea-or-nay-saying by officials, becomes the standard of the permissible. Prohibition through words that fail to convey what is permitted and what is prohibited for want of appropriate objective standards, offends Due Process in two ways. First, it does not sufficiently apprise those bent on obedience of law of what may reasonably be foreseen to be found illicit by the law-enforcing authority, whether court or jury or administrative agency. Secondly, where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative. On the basis of such a portmanteau word as "sacrilegious," the judiciary has no standards with which to judge the validity of administrative action which necessarily involves, at least in large measure, subjective determinations. Thus, the administrative first step becomes the last step.

"Motion Pictures and the First Amendment," 60 Yale L. J. 696, 716, n. 42.

The press recently reported that plans are being made to film a "Life of Martin Luther." N. Y. Times, April 27, 1952, § 2, p. 5, col. 7. Could Luther be sympathetically portrayed and not appear "sacrilegious" to some; or unsympathetically, and not to others?

From all that has been said one is compelled to conclude that the term "sacrilegious" has come down the stream of time encrusted with a specialized, strictly confined meaning, pertaining to things in space not things in the mind. The New York Court of Appeals did not give the term this calculable content. It applied it to things in the mind, and things in the mind so undefined, so at large, as to be more patently in disregard of the requirement for definiteness, as the basis of proscriptions and legal sanctions for their disobedience, than the measures that were condemned as violative of Due Process in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233; *Connally* v. *General Construction Co.*, 269 U. S. 385; *Winters* v. *New York*, 333 U. S. 507; *Kunz* v. *New York*, 340 U. S. 290. This principle is especially to be observed when what is so vague seeks to fetter the mind and put within unascertainable bounds the varieties of religious experience.

APPENDIX TO OPINION OF MR. JUSTICE FRANKFURTER.*

Cockeram, English Dictionarie (10th ed., London, 1651).

Blasphemy: No entry.

Sacrilege: "The robbing of a Church, the stealing of holy things, abusing of Sacraments or holy Mysteries."

Sacrilegious: "Abominable, very wicked."

Blount, Glossographia (3d ed., London, 1670).

Blasphemy: No entry.

Sacrilege: "the robbing a Church, or other holy consecrated place, the stealing holy things, or abusing Sacraments or holy Mysteries."

Sacrilegious: "that robs the Church; wicked, extremely bad."

*See Mathews, A Survey of English Dictionaries (1933).

Blount, A Law-Dictionary (London, 1670).
Blasphemy: No entry.
Sacrilege: No entry.

Phillips, The New World of Words (3d ed., London, 1671).
Blasphemy: "an uttering of reproachfull words, tending either to the dishonour of God, or to the hurt and disgrace of any mans name and credit."
Sacrilegious: "committing Sacriledge, *i. e.* a robbing of Churches, or violating of holy things."

Cowel, The Interpreter of Words and Terms (Manley ed., London, 1701).
Blasphemy: No entry.
Sacrilege: "an Alienation to Lay-Men, and to profane or common purposes, of what was given to Religious Persons, and to Pious Uses, etc."

Rastell, Law Terms (London, 1708).
Blasphemy: No entry.
Sacrilege: "is, when one steals any Vessels, Ornaments, or Goods of Holy Church, which is felony, 3 Cro. 153, 154."

Kersey, A General English Dictionary (3d ed., London, 1721).
Blasphemy: "an uttering of reproachful Words, that tend to the Dishonour of God, &c."
Sacrilege: "the stealing of Sacred Things, Church robbing."

Cocker, English Dictionary (London, 1724).
Blasphemy: No entry.
Sacrilege: "robbing the Church, or what is dedicated thereto."

Bailey, Universal Etymological English Dictionary (London, 1730).
Blasphemy: "an uttering of reproachful words tending to the dishonour of God, &c. vile, base language."

Sacrilege: "the stealing of sacred Things, Church-Robbing; the Crime of profaning sacred Things, or alienating to Laymen, or common Uses, what was given to pious Uses and religious Persons."

Coles, An English Dictionary (London, 1732).

Blasphemy: "reproach."

Sacrilege: "the robbing of God, the church, &c."

Bullokar, The English Expositor (14th ed., London, 1731).

Blasphemy: No entry.

Sacrilege: "The Robbing of a Church; the Stealing of holy things, or Abusing of Sacraments or holy Mysteries."

Defoe, A Compleat English Dictionary (Westminster, 1735).

Blasphemy: "vile or opprobrious Language, tending to the Dishonour of God."

Sacrilege: "the stealing of sacred Things, Church robbing."

Bailey, An Universal Etymological English Dictionary (London, 1742).

Blasphemy: "Cursing and Swearing, vile reproachful Language, tending to the Dishonour of God."

Sacrilege: "the stealing of Sacred Things, Church Robbing; an Alienation to Laymen, and to profane and common Purposes, of what was given to religious Persons, and to pious Uses."

Martin, A New Universal English Dictionary (London, 1754).

Blasphemy: "cursing, vile language tending to the dishonour of God or religion."

Sacrilege: "the stealing things out of a holy place, or the profaning things devoted to God."

Johnson, A Dictionary of the English Language (2d ed., London, 1755).

Blasphemy: "strictly and properly, is an offering of some indignity, or injury, unto God himself, either by words or writing."

Sacrilege: "The crime of appropriating to himself what is devoted to religion; the crime of robbing heaven; the crime of violating or profaning things sacred."

Rider, A New Universal English Dictionary (London, 1759).

Blasphemy: "an offering some indignity to God, any person of the Trinity, any messengers from God; his holy writ, or the doctrines of revelation, either by speaking or writing any thing ill of them, or ascribing any thing ill to them inconsistent with their natures and the reverence we owe them."

Sacrilege: "the crime of taking any thing dedicated to divine worship. The crime of profaning any thing sacred."

Profane: "to apply any thing sacred to common use. To be irreverent to sacred persons or things. To put to a wrong use."

Gordon and Marchant, A New Complete English Dictionary (London, 1760).

Blasphemy: "is an offering some indignity to God himself."

Sacrilege: "is the crime of appropriating to himself what is devoted to religion; the crime of robbing Heaven."

Buchanan, A New English Dictionary (London, 1769).

Blasphemy: "Language tending to the dishonour of God."

Sacrilege: "The stealing things out of a holy place."

Cunningham, A New and Complete Law-Dictionary (London, 1771).

Blasphemy: A long definition reading in part: "Is an injury offered to God, by denying that which is due and belonging to him, or attributing to him what is not agreeable to his nature."

Sacrilege: "Is church robbery, or a taking of things out of a holy place; as where a person steals any vessels, ornaments, or goods of the church. And it is said to be a robbery of God, at least of what is dedicated to his service. 2 Cro. 153, 154.

". . . an alienation to lay-men, and to profane or common purposes, of what was given to religious persons, and to pious uses."

Kenrick, A New Dictionary of the English Language (London, 1773).

Blasphemy: "Treating the name and attributes of the Supreme Being with insult and indignity."

Sacrilege: "The crime of appropriating to himself what is devoted to religion; *the crime of robbing heaven,* says Johnson; the crime of violating or profaning things sacred."

Profane: "To violate; to pollute.—To put to wrong use."

Ash, The New and Complete Dictionary of the English Language (London, 1775).

Blasphemy: "The act of speaking or writing reproachfully of the Divine Being, the act of attributing to the creature that which belongs to the Creator."

Sacrilege: "The act of appropriating to one's self what is devoted to religion, the crime of violating sacred things."

Dyche, A New General English Dictionary (London, 1777).

Blasphemy: "the reproaching or dishonouring God, religion, and holy things."

Sacrilege: "the stealing or taking away those things that were appropriated to religious uses or designs."

Sacrilegious: "of a profane, thievish nature, sort, or disposition."

Barclay, A Complete and Universal English Dictionary (London, 1782).

Blasphemy: "an offering some indignity to God, any person of the Trinity, any messengers from God, his holy writ, or the doctrines of revelation."

Sacrilege: "the crime of taking any thing dedicated to divine worship, or profaning any thing sacred."

Profane: "to apply any thing sacred to common use. To be irreverent to sacred persons or things."

Lemon, English Etymology (London, 1783).

Blaspheme: "*to speak evil of any one; to injure his fame,* or *reputation.*"

Sacrilege: No entry.

Entick, New Spelling Dictionary (London, 1786).

Blasphemy: "indignity offered to God."

Blasphemer: "one who abuses God."

Sacrilege: "the robbery of a church or chapel."

Sacrilegious: "violating a thing made sacred."

Burn, A New Law Dictionary (Dublin, 1792).

Blasphemy: "See Prophaneness."

Profaneness: A long definition, not reproduced here.

Sacrilege: "robbing of the church, or stealing things out of a sacred place."

Sheridan, A Complete Dictionary of the English Language (6th ed., Phila., 1796).

Blasphemy: "Offering of some indignity to God."

Sacrilege: "The crime of robbing a church."

Scott, Dictionary of the English Language (Edinburgh, 1797).

Blasphemy: "indignity offered to God."

Sacrilege: "the robbery of a church, &c."

Richardson, A New Dictionary of the English Language (London, 1839).

Blasphemy: "To attack, assail, insult, (the name, the attributes, the ordinances, the revelations, the will or government of God.)"

Sacrilege: "to take away, to steal any thing *sacred,* or consecrated, or dedicated to holy or religious uses."

Bell, A Dictionary and Digest of the Law of Scotland (Edinburgh, 1861).

Blasphemy: "is the denying or vilifying of the Deity, by speech or writing."

Sacrilege: "is any violation of things dedicated to the offices of religion."

Staunton, An Ecclesiastical Dictionary (N. Y., 1861).

Blasphemy: A long entry.

Sacrilege: "The act of violating or subjecting sacred things to profanation; or the desecration of objects consecrated to God. Thus, the robbing of churches or of graves, the abuse of sacred vessels and altars by employing them for unhallowed purposes, the plundering and misappropriation of alms and donations, are acts of sacrilege, which in the ancient Church were punished with great severity."

Bouvier, A Law Dictionary (11th ed., Phila., 1866).

Blasphemy: "To attribute to God that which is contrary to his nature, and does not belong to him, and to deny what does; or it is a false reflection uttered with a malicious design of reviling God."

Sacrilege: "The act of stealing from the temples or churches dedicated to the worship of God, articles consecrated to divine uses."

Shipley, A Glossary of Ecclesiastical Terms (London, 1872).

Blasphemy: "Denying the existence or providence of God; contumelous reproaches of Jesus Christ; profane scoffing at the holy Scriptures, or exposing any part thereof to contempt or ridicule."

Sacrilege: "The profanation or robbery of persons or things which have been solemnly dedicated to the service of God. *v.* 24 & 25 Vict. c. 96, s. 50."

Brown, A Law Dictionary (Sprague ed., Albany, 1875).

Blasphemy: "To revile at or to deny the truth of Christianity as by law established, is a blasphemy, and as such is punishable by the common law. . . ."

Sacrilege: "A desecration of any thing that is holy. The alienation of lands which were given to religious purposes to laymen, or to profane and common purposes, was also termed sacrilege."

ROTH *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 582. Argued April 22, 1957.—Decided June 24, 1957.*

1. In the *Roth* case, the constitutionality of 18 U. S. C. § 1461, which makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character," and Roth's conviction thereunder for mailing an obscene book and obscene circulars and advertising, are sustained. Pp. 479–494.
2. In the *Alberts* case, the constitutionality of § 311 of West's California Penal Code Ann., 1955, which, *inter alia,* makes it a misdemeanor to keep for sale, or to advertise, material that is "obscene or indecent," and Alberts' conviction thereunder for lewdly keeping for sale obscene and indecent books and for writing, composing, and publishing an obscene advertisement of them, are sustained. Pp. 479–494.
3. Obscenity is not within the area of constitutionally protected freedom of speech or press—either (1) under the First Amendment, as to the Federal Government, or (2) under the Due Process Clause of the Fourteenth Amendment, as to the States. Pp. 481–485.

   (a) In the light of history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. Pp. 482–483.

   (b) The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. P. 484.

   (c) All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests; but implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. Pp. 484–485.

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*Together with No. 61, *Alberts* v. *California,* appeal from the Superior Court of California, Los Angeles County, Appellate Department, argued and decided on the same dates.

4. Since obscenity is not protected, constitutional guaranties were not violated in these cases merely because, under the trial judges' instructions to the juries, convictions could be had without proof either that the obscene material would perceptibly create a clear and present danger of antisocial conduct, or probably would induce its recipients to such conduct. *Beauharnais* v. *Illinois,* 343 U. S. 250. Pp. 485–490.

   (a) Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest—*i. e.,* material having a tendency to excite lustful thoughts. P. 487.

   (b) It is vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest. Pp. 487–488.

   (c) The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. Pp. 488–489.

   (d) In these cases, both trial courts sufficiently followed the proper standard and used the proper definition of obscenity. Pp. 489–490.

5. When applied according to the proper standard for judging obscenity, 18 U. S. C. § 1461, which makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character," does not (1) violate the freedom of speech or press guaranteed by the First Amendment, or (2) violate the constitutional requirements of due process by failing to provide reasonably ascertainable standards of guilt. Pp. 491–492.

6. When applied according to the proper standard for judging obscenity, § 311 of West's California Penal Code Ann., 1955, which, *inter alia,* makes it a misdemeanor to keep for sale or to advertise material that is "obscene or indecent," does not (1) violate the freedom of speech or press guaranteed by the Fourteenth Amendmend against encroachment by the States, or (2) violate the constitutional requirements of due process by failing to provide reasonably ascertainable standards of guilt. 491–492.

7. The federal obscenity statute, 18 U. S. C. § 1461, punishing the use of the mails for obscene material, is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7; and it

does not unconstitutionally encroach upon the powers reserved to the States by the Ninth and Tenth Amendments. Pp. 492–493.

8. The California obscenity statute here involved is not repugnant to Art. I, § 8, cl. 7, since it does not impose a burden upon, or interfere with, the federal postal functions—even when applied to a mail-order business. Pp. 493–494.

237 F. 2d 796, affirmed.

138 Cal. App. 2d Supp. 909, 292 P. 2d 90, affirmed.

David von G. Albrecht and *O. John Rogge* argued the cause for petitioner in No. 582. With them on the brief were *David P. Siegel, Peter Belsito* and *Murray A. Gordon.*

Stanley Fleishman argued the cause for appellant in No. 61. With him on the brief were *Sam Rosenwein* and *William B. Murrish.*

Roger D. Fisher argued the cause for the United States in No. 582. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Olney.*

Fred N. Whichello and *Clarence A. Linn,* Assistant Attorney General of California, argued the cause for appellee in No. 61. With them on the brief were *Edmund G. Brown,* Attorney General, *William B. McKesson* and *Lewis Watnick.*

Briefs of *amici curiae* urging reversal were filed in No. 582 by *Morris L. Ernst, Harriett F. Pilpel* and *Nancy F. Wechsler,* for Ernst, *Irwin Karp* and *Osmond K. Fraenkel,* for the Authors League of America, Inc., *Abe Fortas, William L. McGovern, Abe Krash* and *Maurice Rosenfield,* for the Greenleaf Publishing Co. et al., *Horace S. Manges,* for the American Book Publishers Council, Inc., and *Emanuel Redfield,* for the American Civil Liberties Union.

A. L. Wirin filed a brief for the American Civil Liberties Union, Southern California Branch, as *amicus curiae,* in support of appellant in No. 61.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The constitutionality of a criminal obscenity statute is the question in each of these cases. In *Roth,* the primary constitutional question is whether the federal obscenity statute [1] violates the provision of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." In *Alberts,* the primary constitutional question is whether the obscenity provisions of the California Penal Code [2] invade the freedoms of speech and press as they may be incorporated in

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[1] The federal obscenity statute provided, in pertinent part:

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—

. . . . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . . whether sealed or unsealed . . .

. . . . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1461.

The 1955 amendment of this statute, 69 Stat. 183, is not applicable to this case.

[2] The California Penal Code provides, in pertinent part:

"Every person who wilfully and lewdly, either:

. . . . . .

"3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or other-

the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment.

Other constitutional questions are: whether these statutes violate due process,[3] because too vague to support conviction for crime; whether power to punish speech and press offensive to decency and morality is in the States alone, so that the federal obscenity statute violates the Ninth and Tenth Amendments (raised in *Roth*); and whether Congress, by enacting the federal obscenity statute, under the power delegated by Art. I, § 8, cl. 7, to establish post offices and post roads, pre-empted the regulation of the subject matter (raised in *Alberts*).

Roth conducted a business in New York in the publication and sale of books, photographs and magazines. He used circulars and advertising matter to solicit sales. He was convicted by a jury in the District Court for the Southern District of New York upon 4 counts of a 26-count indictment charging him with mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute. His conviction was affirmed by the Court of Appeals for the Second Circuit.[4] We granted certiorari.[5]

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wise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

"4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . .

. . . . . .

"6. . . . is guilty of a misdemeanor. . . ." West's Cal. Penal Code Ann., 1955, § 311.

[3] In *Roth*, reliance is placed on the Due Process Clause of the Fifth Amendment, and in *Alberts*, reliance is placed upon the Due Process Clause of the Fourteenth Amendment.

[4] 237 F. 2d 796.

[5] 352 U. S. 964. Petitioner's application for bail was granted by MR. JUSTICE HARLAN in his capacity as Circuit Justice for the Second Circuit. 1 L. Ed. 2d 34, 77 Sup. Ct. 17.

Alberts conducted a mail-order business from Los Angeles. He was convicted by the Judge of the Municipal Court of the Beverly Hills Judicial District (having waived a jury trial) under a misdemeanor complaint which charged him with lewdly keeping for sale obscene and indecent books, and with writing, composing and publishing an obscene advertisement of them, in violation of the California Penal Code. The conviction was affirmed by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.[6] We noted probable jurisdiction.[7]

The dispositive question is whether obscenity is utterance within the area of protected speech and press.[8] Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press. *Ex parte Jackson,* 96 U. S. 727, 736–737; *United States* v. *Chase,* 135 U. S. 255, 261; *Robertson* v. *Baldwin,* 165 U. S. 275, 281; *Public Clearing House* v. *Coyne,* 194 U. S. 497, 508; *Hoke* v. *United States,* 227 U. S. 308, 322; *Near* v. *Minnesota,* 283 U. S. 697, 716; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572; *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 158; *Winters* v. *New York,* 333 U. S. 507, 510; *Beauharnais* v. *Illinois,* 343 U. S. 250, 266.[9]

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[6] 138 Cal. App. 2d Supp. 909, 292 P. 2d 90. This is the highest state appellate court available to the appellant. Cal. Const., Art. VI, § 5; see *Edwards* v. *California,* 314 U. S. 160.

[7] 352 U. S. 962.

[8] No issue is presented in either case concerning the obscenity of the material involved.

[9] See also the following cases in which convictions under obscenity statutes have been reviewed: *Grimm* v. *United States,* 156 U. S. 604; *Rosen* v. *United States,* 161 U. S. 29; *Swearingen* v. *United States,*

The guaranties of freedom of expression [10] in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel,[11] and all of those States made either blasphemy or profanity, or both, statutory crimes.[12] As early as

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161 U. S. 446; *Andrews* v. *United States,* 162 U. S. 420; *Price* v. *United States,* 165 U. S. 311; *Dunlop* v. *United States,* 165 U. S. 486; *Bartell* v. *United States,* 227 U. S. 427; *United States* v. *Limehouse,* 285 U. S. 424.

[10] Del. Const., 1792, Art. I, § 5; Ga. Const., 1777, Art. LXI; Md. Const., 1776, Declaration of Rights, § 38; Mass. Const., 1780, Declaration of Rights, Art. XVI; N. H. Const., 1784, Art. I, § XXII; N. C. Const., 1776, Declaration of Rights, Art. XV; Pa. Const., 1776, Declaration of Rights, Art. XII; S. C. Const., 1778, Art. XLIII; Vt. Const., 1777, Declaration of Rights, Art. XIV; Va. Bill of Rights, 1776, § 12.

[11] Act to Secure the Freedom of the Press (1804), 1 Conn. Pub. Stat. Laws 355 (1808); Del. Const., 1792, Art. I, § 5; Ga. Penal Code, Eighth Div., § VIII (1817), Digest of the Laws of Ga. 364 (Prince 1822); Act of 1803, c. 54, II Md. Public General Laws 1096 (Poe 1888); *Commonwealth* v. *Kneeland,* 37 Mass. 206, 232 (1838); Act for the Punishment of Certain Crimes Not Capital (1791), N. H. Laws 1792, 253; Act Respecting Libels (1799), N. J. Rev. Laws 411 (1800); *People* v. *Croswell,* 3 Johns. (N. Y.) 337 (1804); Act of 1803, c. 632, 2 Laws of N. C. 999 (1821); Pa. Const., 1790, Art. IX, § 7; R. I. Code of Laws (1647), Proceedings of the First General Assembly and Code of Laws 44–45 (1647); R. I. Const., 1842, Art. I, § 20; Act of 1804, 1 Laws of Vt. 366 (Tolman 1808); *Commonwealth* v. *Morris,* 1 Brock. & Hol. (Va.) 176 (1811).

[12] Act for the Punishment of Divers Capital and Other Felonies, Acts and Laws of Conn. 66, 67 (1784); Act Against Drunkenness, Blasphemy, §§ 4, 5 (1737), 1 Laws of Del. 173, 174 (1797); Act to Regulate Taverns (1786), Digest of the Laws of Ga. 512, 513 (Prince 1822); Act of 1723, c. 16, § 1, Digest of the Laws of Md. 92 (Herty 1799); General Laws and Liberties of Mass. Bay, c. XVIII, § 3 (1646), Mass. Bay Colony Charters & Laws 58 (1814); Act of 1782, c. 8, Rev. Stat. of Mass. 741, § 15 (1836); Act of 1798, c. 33, §§ 1, 3, Rev. Stat. of Mass. 741, § 16 (1836); Act for the Punishment of Certain Crimes Not Capital (1791), N. H. Laws 1792, 252, 256; Act

1712, Massachusetts made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" in imitation or mimicking of religious services. Acts and Laws of the Province of Mass. Bay, c. CV, § 8 (1712), Mass. Bay Colony Charters & Laws 399 (1814). Thus, profanity and obscenity were related offenses.

In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais* v. *Illinois,* 343 U. S. 250, 266. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.[13]

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for the Punishment of Profane Cursing and Swearing (1791), N. H. Laws 1792, 258; Act for Suppressing Vice and Immorality, §§ VIII, IX (1798), N. J. Rev. Laws 329, 331 (1800); Act for Suppressing Immorality, § IV (1788), 2 Laws of N. Y. 257, 258 (Jones & Varick 1777–1789); *People* v. *Ruggles,* 8 Johns. (N. Y.) 290 (1811); Act . . . for the More Effectual Suppression of Vice and Immorality, § III (1741), 1 N. C. Laws 52 (Martin Rev. 1715–1790); Act to Prevent the Grievous Sins of Cursing and Swearing (1700), II Statutes at Large of Pa. 49 (1700–1712); Act for the Prevention of Vice and Immorality, § II (1794), 3 Laws of Pa. 177, 178 (1791–1802); Act to Reform the Penal Laws, §§ 33, 34 (1798), R. I. Laws 1798, 584, 595; Act for the More Effectual Suppressing of Blasphemy and Prophaneness (1703), Laws of S. C. 4 (Grimké 1790); Act, for the Punishment of Certain Capital, and Other High Crimes and Misdemeanors, § 20 (1797), 1 Laws of Vt. 332, 339 (Tolman 1808); Act, for the Punishment of Certain Inferior Crimes and Misdemeanors, § 20 (1797), 1 Laws of Vt. 352, 361 (Tolman 1808); Act for the Effectual Suppression of Vice, § 1 (1792), Acts of General Assembly of Va. 286 (1794).

[13] Act Concerning Crimes and Punishments, § 69 (1821), Stat. Laws of Conn. 109 (1824); *Knowles* v. *State,* 3 Day (Conn.) 103 (1808);

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:

> "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." 1 Journals of the Continental Congress 108 (1774).

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.[14] But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for

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Rev. Stat. of 1835, c. 130, § 10, Rev. Stat. of Mass. 740 (1836); *Commonwealth* v. *Holmes,* 17 Mass. 335 (1821); Rev. Stat. of 1842, c. 113, § 2, Rev. Stat. of N. H. 221 (1843); Act for Suppressing Vice and Immorality, § XII (1798), N. J. Rev. Laws 329, 331 (1800); *Commonwealth* v. *Sharpless,* 2 S. & R. (Pa.) 91 (1815).

[14] *E. g., United States* v. *Harriss,* 347 U. S. 612; *Breard* v. *Alexandria,* 341 U. S. 622; *Teamsters Union* v. *Hanke,* 339 U. S. 470; *Kovacs* v. *Cooper,* 336 U. S. 77; *Prince* v. *Massachusetts,* 321 U. S. 158; *Labor Board* v. *Virginia Elec. & Power Co.,* 314 U. S. 469; *Cox* v. *New Hampshire,* 312 U. S. 569; *Schenck* v. *United States,* 249 U. S. 47.

that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations,[15] in the obscenity laws of all of the 48 States,[16] and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.[17] This is the same judgment expressed by this Court in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572:

> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .*" (Emphasis added.)

We hold that obscenity is not within the area of constitutionally protected speech or press.

It is strenuously urged that these obscenity statutes offend the constitutional guaranties because they punish

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[15] Agreement for the Suppression of the Circulation of Obscene Publications, 37 Stat. 1511; Treaties in Force 209 (U. S. Dept. State, October 31, 1956).

[16] Hearings before Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, pursuant to S. Res. 62, 84th Cong., 1st Sess. 49–52 (May 24, 1955).

Although New Mexico has no general obscenity statute, it does have a statute giving to municipalities the power "to prohibit the sale or exhibiting of obscene or immoral publications, prints, pictures, or illustrations." N. M. Stat. Ann., 1953, §§ 14–21–3, 14–21–12.

[17] 5 Stat. 548, 566; 11 Stat. 168; 13 Stat. 504, 507; 17 Stat. 302; 17 Stat. 598; 19 Stat. 90; 25 Stat. 187, 188; 25 Stat. 496; 26 Stat. 567, 614–615; 29 Stat. 512; 33 Stat. 705; 35 Stat. 1129, 1138; 41 Stat. 1060; 46 Stat. 688; 48 Stat. 1091, 1100; 62 Stat. 768; 64 Stat. 194; 64 Stat. 451; 69 Stat. 183; 70 Stat. 699.

incitation to impure sexual *thoughts,* not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts.* In *Roth,* the trial judge instructed the jury: "The words 'obscene, lewd and lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts.*" (Emphasis added.) In *Alberts,* the trial judge applied the test laid down in *People* v. *Wepplo,* 78 Cal. App. 2d Supp. 959, 178 P. 2d 853, namely, whether the material has "a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires." (Emphasis added.) It is insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct,[18] or will probably induce its recipients to such conduct.[19] But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais* v. *Illinois, supra,* at 266:

> "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech,

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[18] *Schenck* v. *United States,* 249 U. S. 47. This approach is typified by the opinion of Judge Bok (written prior to this Court's opinion in *Dennis* v. *United States,* 341 U. S. 494) in *Commonwealth* v. *Gordon,* 66 Pa. D. & C. 101, aff'd, *sub nom. Commonwealth* v. *Feigenbaum,* 166 Pa. Super. 120, 70 A. 2d 389.

[19] *Dennis* v. *United States,* 341 U. S. 494. This approach is typified by the concurring opinion of Judge Frank in the *Roth* case, 237 F. 2d, at 801. See also Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295 (1954).

for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest.[20] The portrayal of sex, *e. g.*, in art, literature and scientific works,[21] is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. As to all such problems,

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[20] *I. e.*, material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines *prurient*, in pertinent part, as follows:

". . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . ."

Pruriency is defined, in pertinent part, as follows:

". . . Quality of being prurient; lascivious desire or thought. . . ."

See also *Mutual Film Corp.* v. *Industrial Comm'n*, 236 U. S. 230, 242, where this Court said as to motion pictures: ". . . They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to*. . . ." (Emphasis added.)

We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A. L. I., Model Penal Code, § 207.10 (2) (Tent. Draft No. 6, 1957), *viz.*:

". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ." See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*

[21] See, *e. g.*, *United States* v. *Dennett*, 39 F. 2d 564.

this Court said in *Thornhill* v. *Alabama,* 310 U. S. 88, 101–102:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times.* . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.*" (Emphasis added.)

The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth.[22] Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.[23] It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated

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[22] Madison's Report on the Virginia Resolutions, 4 Elliot's Debates 571.

[23] See note 14, *supra.*

excerpt upon particularly susceptible persons. *Regina* v. *Hicklin,* [1868] L. R. 3 Q. B. 360.[24] Some American courts adopted this standard [25] but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[26] The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.

Both trial courts below sufficiently followed the proper standard. Both courts used the proper definition of obscenity. In addition, in the *Alberts* case, in ruling on a motion to dismiss, the trial judge indicated that, as the

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[24] But see the instructions given to the jury by Mr. Justice Stable in *Regina* v. *Martin Secker Warburg,* [1954] 2 All Eng. 683 (C. C. C.).

[25] *United States* v. *Kennerley,* 209 F. 119; *MacFadden* v. *United States,* 165 F. 51; *United States* v. *Bennett,* 24 Fed. Cas. 1093; *United States* v. *Clarke,* 38 F. 500; *Commonwealth* v. *Buckley,* 200 Mass. 346, 86 N. E. 910.

[26] *E. g., Walker* v. *Popenoe,* 80 U. S. App. D. C. 129, 149 F. 2d 511; *Parmelee* v. *United States,* 72 App. D. C. 203, 113 F. 2d 729; *United States* v. *Levine,* 83 F. 2d 156; *United States* v. *Dennett,* 39 F. 2d 564; *Khan* v. *Feist, Inc.,* 70 F. Supp. 450, aff'd, 165 F. 2d 188; *United States* v. *One Book Called "Ulysses,"* 5 F. Supp. 182, aff'd, 72 F. 2d 705; *American Civil Liberties Union* v. *Chicago,* 3 Ill. 2d 334, 121 N. E. 2d 585; *Commonwealth* v. *Isenstadt,* 318 Mass. 543, 62 N. E. 2d 840; *Missouri* v. *Becker,* 364 Mo. 1079, 272 S. W. 2d 283; *Adams Theatre Co.* v. *Keenan,* 12 N. J. 267, 96 A. 2d 519; *Bantam Books, Inc.* v. *Melko,* 25 N. J. Super. 292, 96 A. 2d 47; *Commonwealth* v. *Gordon,* 66 Pa. D. & C. 101, aff'd, *sub nom. Commonwealth* v. *Feigenbaum,* 166 Pa. Super. 120, 70 A. 2d 389; cf. *Roth* v. *Goldman,* 172 F. 2d 788, 794–795 (concurrence).

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trier of facts, he was judging each item as a whole as it would affect the normal person,[27] and in *Roth,* the trial judge instructed the jury as follows:

> ". . . The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. . . .
>
> "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.
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> . . . . .
>
> "In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children."

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[27] In *Alberts,* the contention that the trial judge did not read the materials in their entirety is not before us because not fairly comprised within the questions presented. U. S. Sup. Ct. Rules, 15 (1)(c)(1).

It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process. *Winters* v. *New York,* 333 U. S. 507. The federal obscenity statute makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character." [28] The California statute makes punishable, *inter alia,* the keeping for sale or advertising material that is "obscene or indecent." The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.

Many decisions have recognized that these terms of obscenity statutes are not precise.[29] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . . [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." *United States* v. *Petrillo,* 332 U. S. 1, 7–8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark ". . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . . That there may be marginal cases in which it is difficult to determine the side of the line on

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[28] This Court, as early as 1896, said of the federal obscenity statute: ". . . Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious." *Rosen* v. *United States,* 161 U. S. 29, 42.

[29] *E. g., Roth* v. *Goldman,* 172 F. 2d 788, 789; *Parmelee* v. *United States,* 72 App. D. C. 203, 204, 113 F. 2d 729, 730; *United States* v. *4200 Copies International Journal,* 134 F. Supp. 490, 493; *United States* v. *One Unbound Volume,* 128 F. Supp. 280, 281.

which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ." *Id.*, at 7. See also *United States* v. *Harriss*, 347 U. S. 612, 624, n. 15; *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 340; *United States* v. *Ragen*, 314 U. S. 513, 523–524; *United States* v. *Wurzbach*, 280 U. S. 396; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497; *Fox* v. *Washington*, 236 U. S. 273; *Nash* v. *United States*, 229 U. S. 373.[30]

In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.

Roth's argument that the federal obscenity statute unconstitutionally encroaches upon the powers reserved by the Ninth and Tenth Amendments to the States and to the people to punish speech and press where offensive to decency and morality is hinged upon his contention that obscenity is expression not excepted from the sweep of the provision of the First Amendment that "*Congress* shall make *no law* . . . abridging the freedom of speech, or of the press . . . ." (Emphasis added.) That argument falls in light of our holding that obscenity is not expression protected by the First Amendment.[31] We

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[30] It is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. *Dunlop* v. *United States*, 165 U. S. 486, 499–500.

[31] For the same reason, we reject, in this case, the argument that there is greater latitude for state action under the word "liberty" under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment.

therefore hold that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7.[32] In *United Public Workers* v. *Mitchell*, 330 U. S. 75, 95–96, this Court said:

> ". . . The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. . . ."

Alberts argues that because his was a mail-order business, the California statute is repugnant to Art. I, § 8, cl. 7, under which the Congress allegedly pre-empted the regulatory field by enacting the federal obscenity statute punishing the mailing or advertising by mail of obscene material. The federal statute deals only with actual

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[32] In *Public Clearing House* v. *Coyne*, 194 U. S. 497, 506–508, this Court said:

"The constitutional principles underlying the administration of the Post Office Department were discussed in the opinion of the court in *Ex parte Jackson*, 96 U. S. 727, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded . . . . It may . . . refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy . . . . For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. . . ."

mailing; it does not eliminate the power of the state to punish "keeping for sale" or "advertising" obscene material. The state statute in no way imposes a burden or interferes with the federal postal functions. ". . . The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. . . ." *Railway Mail Assn.* v. *Corsi,* 326 U. S. 88, 96.

The judgments are

Affirmed.

MR. CHIEF JUSTICE WARREN, concurring in the result.

I agree with the result reached by the Court in these cases, but, because we are operating in a field of expression and because broad language used here may eventually be applied to the arts and sciences and freedom of communication generally, I would limit our decision to the facts before us and to the validity of the statutes in question as applied.

Appellant Alberts was charged with wilfully, unlawfully and lewdly disseminating obscene matter. Obscenity has been construed by the California courts to mean having a substantial tendency to corrupt by arousing lustful desires. *People* v. *Wepplo,* 78 Cal. App. 2d Supp. 959, 178 P. 2d 853. Petitioner Roth was indicted for unlawfully, wilfully and knowingly mailing obscene material that was calculated to corrupt and debauch the minds and morals of those to whom it was sent. Each was accorded all the protections of a criminal trial. Among other things, they contend that the statutes under which they were convicted violate the constitutional guarantees of freedom of speech, press and communication.

That there is a social problem presented by obscenity is attested by the expression of the legislatures of the forty-eight States as well as the Congress. To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments.

The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.

The personal element in these cases is seen most strongly in the requirement of *scienter*. Under the California law, the prohibited activity must be done "wilfully and lewdly." The federal statute limits the crime to acts done "knowingly." In his charge to the jury, the district judge stated that the matter must be "calculated" to corrupt or debauch. The defendants in both these cases were engaged in the business of purveying textual or

graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide.

I agree with the Court's decision in its rejection of the other contentions raised by these defendants.

MR. JUSTICE HARLAN, concurring in the result in No. 61, and dissenting in No. 582.

I regret not to be able to join the Court's opinion. I cannot do so because I find lurking beneath its disarming generalizations a number of problems which not only leave me with serious misgivings as to the future effect of today's decisions, but which also, in my view, call for different results in these two cases.

I.

My basic difficulties with the Court's opinion are threefold. First, the opinion paints with such a broad brush that I fear it may result in a loosening of the tight reins which state and federal courts should hold upon the enforcement of obscenity statutes. Second, the Court fails to discriminate between the different factors which, in my opinion, are involved in the constitutional adjudication of state and federal obscenity cases. Third, relevant distinctions between the two obscenity statutes here involved, and the Court's own definition of "obscenity," are ignored.

In final analysis, the problem presented by these cases is how far, and on what terms, the state and federal governments have power to punish individuals for disseminating books considered to be undesirable because of their

nature or supposed deleterious effect upon human conduct. Proceeding from the premise that "no issue is presented in either case, concerning the obscenity of the material involved," the Court finds the "dispositive question" to be "whether obscenity is utterance within the area of protected speech and press," and then holds that "obscenity" is not so protected because it is "utterly without redeeming social importance." This sweeping formula appears to me to beg the very question before us. The Court seems to assume that "obscenity" is a peculiar *genus* of "speech and press," which is as distinct, recognizable, and classifiable as poison ivy is among other plants. On this basis the *constitutional* question before us simply becomes, as the Court says, whether "obscenity," as an abstraction, is protected by the First and Fourteenth Amendments, and the question whether a *particular* book may be suppressed becomes a mere matter of classification, of "fact," to be entrusted to a fact-finder and insulated from independent constitutional judgment. But surely the problem cannot be solved in such a generalized fashion. Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.

I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as "obscene," for, if "obscenity" is to be suppressed, the

question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind. Many juries might find that Joyce's "Ulysses" or Bocaccio's "Decameron" was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are "utterly without redeeming social importance." In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based. I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field and encourage them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.

My second reason for dissatisfaction with the Court's opinion is that the broad strides with which the Court has proceeded has led it to brush aside with perfunctory ease the vital constitutional considerations which, in my opinion, differentiate these two cases. It does not seem to matter to the Court that in one case we balance the power of a State in this field against the restrictions of the Fourteenth Amendment, and in the other the power of the Federal Government against the limitations of the First Amendment. I deal with this subject more particularly later.

Thirdly, the Court has not been bothered by the fact that the two cases involve different statutes. In California the book must have a "tendency to deprave or corrupt its readers"; under the federal statute it must tend "to stir sexual impulses and lead to sexually impure

thoughts." [1] The two statutes do not seem to me to present the same problems. Yet the Court compounds confusion when it superimposes on these two statutory definitions a third, drawn from the American Law Institute's Model Penal Code, Tentative Draft No. 6: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest." The bland assurance that this definition is the same as the ones with which we deal flies in the face of the authors' express rejection of the "deprave and corrupt" and "sexual thoughts" tests:

> "Obscenity [in the Tentative Draft] is defined in terms of material which appeals predominantly to prurient interest in sexual matters and which goes beyond customary freedom of expression in these matters. We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is

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[1] In *Alberts* v. *California,* the state definition of "obscenity" is, of course, binding on us. The definition there used derives from *People* v. *Wepplo,* 78 Cal. App. 2d Supp. 959, 178 P. 2d 853, the question being whether the material has "a substantive tendency to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desire."

In *Roth* v. *United States,* our grant of certiorari was limited to the question of the constitutionality of the statute, and did not encompass the correctness of the definition of "obscenity" adopted by the trial judge as a matter of statutory construction. We must therefore assume that the trial judge correctly defined that term, and deal with the constitutionality of the statute as construed and applied in this case.

The two definitions do not seem to me synonymous. Under the federal definition it is enough if the jury finds that the book as a whole leads to certain thoughts. In California, the further inference must be drawn that such thoughts will have a substantive "tendency to deprave or corrupt"—*i. e.,* that the thoughts induced by the material will affect character and action. See American Law Institute, Model Penal Code, Tentative Draft No. 6, § 207.10 (2), Comments, p. 10.

> unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties. We likewise reject the common definition of obscene as that which 'tends to corrupt or debase.' If this means anything different from tendency to arouse lustful thought and desire, it suggests that change of character or actual misbehavior follows from contact with obscenity. Evidence of such consequences is lacking . . . . On the other hand, 'appeal to prurient interest' refers to qualities of the material itself: the capacity to attract individuals eager for a forbidden look . . . ." [2]

As this passage makes clear, there is a significant distinction between the definitions used in the prosecutions before us, and the American Law Institute formula. If, therefore, the latter is the correct standard, as my Brother BRENNAN elsewhere intimates,[3] then these convictions should surely be reversed. Instead, the Court merely assimilates the various tests into one indiscriminate potpourri.

I now pass to the consideration of the two cases before us.

II.

I concur in the judgment of the Court in No. 61, *Alberts* v. *California.*

The question in this case is whether the defendant was deprived of liberty without due process of law when he was convicted for selling certain materials found by the judge to be obscene because they would have a "tendency

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[2] *Ibid.*

[3] See dissenting opinion of MR. JUSTICE BRENNAN in *Kingsley Books, Inc.* v. *Brown,* No. 107, *ante,* p. 447.

to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desire."

In judging the constitutionality of this conviction, we should remember that our function in reviewing state judgments under the Fourteenth Amendment is a narrow one. We do not decide whether the policy of the State is wise, or whether it is based on assumptions scientifically substantiated. We can inquire only whether the state action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power. See Jackson, J., dissenting in *Beauharnais* v. *Illinois*, 343 U. S. 250, 287. The States' power to make printed words criminal is, of course, confined by the Fourteenth Amendment, but only insofar as such power is inconsistent with our concepts of "ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 324–325.

What, then, is the purpose of this California statute? Clearly the state legislature has made the judgment that printed words *can* "deprave or corrupt" the reader—that words can incite to antisocial or immoral action. The assumption seems to be that the distribution of certain types of literature will induce criminal or immoral sexual conduct. It is well known, of course, that the validity of this assumption is a matter of dispute among critics, sociologists, psychiatrists, and penologists. There is a large school of thought, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime, or delinquency. Others disagree. Clearly it is not our function to decide this question. That function belongs to the state legislature. Nothing in the Constitution requires California to accept as truth the most advanced and sophisticated psychiatric opinion. It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the

moral fabric of society. In fact the very division of opinion on the subject counsels us to respect the choice made by the State.

Furthermore, even assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the States may be protected by the prohibition placed on such materials. The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. And the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity.

Above all stands the realization that we deal here with an area where knowledge is small, data are insufficient, and experts are divided. Since the domain of sexual morality is pre-eminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality. It seems to me that nothing in the broad and flexible command of the Due Process Clause forbids California to prosecute one who sells books whose dominant tendency might be to "deprave or corrupt" a reader. I agree with the Court, of course, that the books must be judged as a whole and in relation to the normal adult reader.

What has been said, however, does not dispose of the case. It still remains for us to decide whether the state court's determination that this material should be suppressed is consistent with the Fourteenth Amendment; and that, of course, presents a federal question as to which we, and not the state court, have the ultimate responsibility. And so, in the final analysis, I concur in the judgment because, upon an independent perusal of the material involved, and in light of the considerations dis-

cussed above, I cannot say that its suppression would so interfere with the communication of "ideas" in any proper sense of that term that it would offend the Due Process Clause. I therefore agree with the Court that appellant's conviction must be affirmed.

III.

I dissent in No. 582, *Roth* v. *United States.*

We are faced here with the question whether the federal obscenity statute, as construed and applied in this case, violates the First Amendment to the Constitution. To me, this question is of quite a different order than one where we are dealing with state legislation under the Fourteenth Amendment. I do not think it follows that state and federal powers in this area are the same, and that just because the State may suppress a particular utterance, it is automatically permissible for the Federal Government to do the same. I agree with Mr. Justice Jackson that the historical evidence does not bear out the claim that the Fourteenth Amendment "incorporates" the First in any literal sense. See *Beauharnais* v. *Illinois, supra.* But laying aside any consequences which might flow from that conclusion, cf. Mr. Justice Holmes in *Gitlow* v. *New York,* 268 U. S. 652, 672,[4] I prefer to rest my views about this case on broader and less abstract grounds.

The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many

[4] "The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States."

instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must needs often produce different results. Whether a particular limitation on speech or press is to be upheld because it subserves a paramount governmental interest must, to a large extent, I think, depend on whether that government has, under the Constitution, a direct substantive interest, that is, the power to act, in the particular area involved.

The Federal Government has, for example, power to restrict seditious speech directed against it, because that Government certainly has the substantive authority to protect itself against revolution. Cf. *Pennsylvania* v. *Nelson,* 350 U. S. 497. But in dealing with obscenity we are faced with the converse situation, for the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric.[5]

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[5] The hoary dogma of *Ex parte Jackson,* 96 U. S. 727, and *Public Clearing House* v. *Coyne,* 194 U. S. 497, that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated. See Brandeis, J., dissenting, in *Milwaukee Social Democratic Publishing Co.* v. *Burleson,* 255 U. S. 407, 430–433; Holmes, J., dissenting, in *Leach* v. *Carlile,* 258 U. S. 138, 140; *Cates* v. *Haderline,* 342 U. S. 804, reversing 189 F. 2d 369; *Door* v. *Donaldson,* 90 U. S. App. D. C. 188, 195 F. 2d 764.

What Mr. Justice Jackson said in *Beauharnais, supra,* 343 U. S., at 294–295, about criminal libel is equally true of obscenity:

> "The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms. Criminality of defamation is predicated upon power either to protect the private right to enjoy integrity of reputation or the public right to tranquillity. Neither of these are objects of federal cognizance except when necessary to the accomplishment of some delegated power . . . . When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquillity to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests."

Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. "State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation." [6] Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be

[6] Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 493.

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classed as obscene in another.[7] And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

Quite a different situation is presented, however, where the Federal Government imposes the ban. The danger is perhaps not great if the people of one State, through their legislature, decide that "Lady Chatterley's Lover" goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted. The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both the letter and spirit of the First Amendment.

I judge this case, then, in view of what I think is the attenuated federal interest in this field, in view of the very real danger of a deadening uniformity which can result from nation-wide federal censorship, and in view of the

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[7] To give only a few examples: Edmund Wilson's "Memoirs of Hecate County" was found obscene in New York, see *Doubleday & Co.* v. *New York*, 335 U. S. 848; a bookseller indicted for selling the same book was acquitted in California. "God's Little Acre" was held to be obscene in Massachusetts, not obscene in New York and Pennsylvania.

fact that the constitutionality of this conviction must be weighed against the First and not the Fourteenth Amendment. So viewed, I do not think that this conviction can be upheld. The petitioner was convicted under a statute which, under the judge's charge,[8] makes it criminal to sell books which "tend to stir sexual impulses and lead to sexually impure thoughts." I cannot agree that any book which tends to stir sexual impulses and lead to sexually impure thoughts necessarily is "utterly without redeeming social importance." Not only did this charge fail to measure up to the standards which I understand the Court to approve, but as far as I can see, much of the great literature of the world could lead to conviction under such a view of the statute. Moreover, in no event do I think that the limited federal interest in this area can extend to mere "thoughts." The Federal Government has no business, whether under the postal or commerce power, to bar the sale of books because they might lead to any kind of "thoughts." [9]

It is no answer to say, as the Court does, that obscenity is not protected speech. The point is that this statute, as here construed, defines obscenity so widely that it encompasses matters which might very well be protected speech. I do not think that the federal statute can be constitutionally construed to reach other than what the Government has termed as "hard-core" pornography. Nor do I think the statute can fairly be read as directed

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[8] While the correctness of the judge's charge is not before us, the question is necessarily subsumed in the broader question involving the constitutionality of the statute as applied in this case.

[9] See American Law Institute, Model Penal Code, Tentative Draft No. 6, § 207.10, Comments, p. 20: "As an independent goal of penal legislation, repression of sexual thoughts and desires is hard to support. Thoughts and desires not manifested in overt antisocial behavior are generally regarded as the exclusive concern of the individual and his spiritual advisors."

only at *persons* who are engaged in the business of catering to the prurient minded, even though their wares fall short of hard-core pornography. Such a statute would raise constitutional questions of a different order. That being so, and since in my opinion the material here involved cannot be said to be hard-core pornography, I would reverse this case with instructions to dismiss the indictment.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

When we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. I do not think we can approve that standard and be faithful to the command of the First Amendment, which by its terms is a restraint on Congress and which by the Fourteenth is a restraint on the States.

In the *Roth* case the trial judge charged the jury that the statutory words "obscene, lewd and lascivious" describe "that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts." He stated that the term "filthy" in the statute pertains "to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arouse a feeling of disgust and revulsion." He went on to say that the material "must be calculated to corrupt and debauch the minds and morals" of "the average person in the community," not those of any particular class. "You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards."

The trial judge who, sitting without a jury, heard the *Alberts* case and the appellate court that sustained the

judgment of conviction, took California's definition of "obscenity" from *People* v. *Wepplo,* 78 Cal. App. 2d Supp. 959, 961, 178 P. 2d 853, 855. That case held that a book is obscene "if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire."

By these standards punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment. Even the ill-starred *Dennis* case conceded that speech to be punishable must have some relation to action which could be penalized by government. *Dennis* v. *United States,* 341 U. S. 494, 502–511. Cf. Chafee, The Blessings of Liberty (1956), p. 69. This issue cannot be avoided by saying that obscenity is not protected by the First Amendment. The question remains, what is the constitutional test of obscenity?

The tests by which these convictions were obtained require only the arousing of sexual thoughts. Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways. Nearly 30 years ago a questionnaire sent to college and normal school women graduates asked what things were most stimulating sexually. Of 409 replies, 9 said "music"; 18 said "pictures"; 29 said "dancing"; 40 said "drama"; 95 said "books"; and 218 said "man." Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 73.

The test of obscenity the Court endorses today gives the censor free range over a vast domain. To allow the State to step in and punish mere speech or publication that the judge or the jury thinks has an *undesirable* impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment. As recently stated by two of our outstanding authorities on obscenity, "The danger of influencing a change in the current moral standards of the community, or of shocking

or offending readers, or of stimulating sex thoughts or desires apart from objective conduct, can never justify the losses to society that result from interference with literary freedom." Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 387.

If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. But it is by no means clear that obscene literature, as so defined, is a significant factor in influencing substantial deviations from the community standards.

> "There are a number of reasons for real and substantial doubts as to the soundness of that hypothesis. (1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus, even assuming that reading sometimes has an adverse effect upon moral conduct, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency, but the Gluecks gave no consideration to the type of reading material, if any, read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth—the very

> group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence, and so much more potent in their effect, that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates [*sic*] the relative unimportance of literature in sex thoughts as compared with other factors in society." Lockhart & McClure, *op. cit. supra,* pp. 385–386.

The absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has an impact on action that the government can control.

As noted, the trial judge in the *Roth* case charged the jury in the alternative that the federal obscenity statute outlaws literature dealing with sex which offends "the common conscience of the community." That standard is, in my view, more inimical still to freedom of expression.

The standard of what offends "the common conscience of the community" conflicts, in my judgment, with the command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or

of the press." Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?

Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like, provided the matter relates to "sexual impurity" or has a tendency "to excite lustful thoughts." This is community censorship in one of its worst forms. It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win. If experience in this field teaches anything, it is that "censorship of obscenity has almost always been both irrational and indiscriminate." Lockhart & McClure, *op. cit. supra,* at 371. The test adopted here accentuates that trend.

I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct.

I can understand (and at times even sympathize) with programs of civic groups and church groups to protect and defend the existing moral standards of the community. I can understand the motives of the Anthony Comstocks who would impose Victorian standards on the community. When speech alone is involved, I do not think that government, consistently with the First Amendment, can become the sponsor of any of these movements. I do not think that government, consistently with the First Amendment, can throw its weight behind one school or another. Government should be

concerned with antisocial conduct, not with utterances. Thus, if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. In other words, literature should not be suppressed merely because it offends the moral code of the censor.

The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed.

The Court today suggests a third standard. It defines obscene material as that "which deals with sex in a manner appealing to prurient interest." * Like the standards applied by the trial judges below, that standard does not require any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit. Under the First Amendment, that standard is no more valid than those which the courts below adopted.

I do not think that the problem can be resolved by the Court's statement that "obscenity is not expression pro-

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*The definition of obscenity which the Court adopts seems in substance to be that adopted by those who drafted the A. L. I., Model Penal Code. § 207.10 (2) (Tentative Draft No. 6, 1957).

"Obscenity is defined in terms of material which appeals predominantly to prurient interest in sexual matters and which goes beyond customary freedom of expression in these matters. We reject the prevailing tests of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties." *Id.*, at 10.

tected by the First Amendment." With the exception of *Beauharnais* v. *Illinois,* 343 U. S. 250, none of our cases has resolved problems of free speech and free press by placing any form of expression beyond the pale of the absolute prohibition of the First Amendment. Unlike the law of libel, wrongfully relied on in *Beauharnais,* there is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment. In fact, the first reported court decision in this country involving obscene literature was in 1821. Lockhart & McClure, *op. cit. supra,* at 324, n. 200. I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the Court that a particular form of that expression has "no redeeming social importance." The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position.

Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 498; *Labor Board* v. *Virginia Power Co.,* 314 U. S. 469, 477–478. As a people, we cannot afford to relax that standard. For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless.

I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.

Syllabus.

UNITED STATES v. O'BRIEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 232. Argued January 24, 1968.—Decided May 27, 1968.*

O'Brien burned his Selective Service registration certificate before a sizable crowd in order to influence others to adopt his antiwar beliefs. He was indicted, tried, and convicted for violating 50 U. S. C. App. § 462 (b), a part of the Universal Military Training and Service Act, subdivision (3) of which applies to any person "who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate . . . ," the words italicized herein having been added by amendment in 1965. The District Court rejected O'Brien's argument that the amendment was unconstitutional because it was enacted to abridge free speech and served no legitimate legislative purpose. The Court of Appeals held the 1965 Amendment unconstitutional under the First Amendment as singling out for special treatment persons engaged in protests, on the ground that conduct under the 1965 Amendment was already punishable since a Selective Service System regulation required registrants to keep their registration certificates in their "personal possession at all times," 32 CFR § 1617.1, and wilful violation of regulations promulgated under the Act was made criminal by 50 U. S. C. App. § 462 (b)(6). The court, however, upheld O'Brien's conviction under § 462 (b)(6), which in its view made violation of the nonpossession regulation a lesser included offense of the crime defined by the 1965 Amendment. *Held:*

1. The 1965 Amendment to 50 U. S. C. App. § 462 (b)(3) is constitutional as applied in this case. Pp. 375, 376–382.

(a) The 1965 Amendment plainly does not abridge free speech on its face. P. 375.

(b) When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. P. 376.

(c) A governmental regulation is sufficiently justified if it is within the constitutional power of the Government and furthers

*Together with No. 233, *O'Brien* v. *United States,* also on certiorari to the same court.

an important or substantial governmental interest unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to that interest. The 1965 Amendment meets all these requirements. P. 377.

(d) The 1965 Amendment came within Congress' "broad and sweeping" power to raise and support armies and make all laws necessary to that end. P. 377.

(e) The registration certificate serves purposes in addition to initial notification, *e. g.*, it proves that the described individual has registered for the draft; facilitates communication between registrants and local boards; and provides a reminder that the registrant must notify his local board of changes in address or status. The regulatory scheme involving the certificates includes clearly valid prohibitions against alteration, forgery, or similar deceptive misuse. Pp. 378–380.

(f) The pre-existence of the nonpossession regulation does not negate Congress' clear interest in providing alternative statutory avenues of prosecution to assure its interest in preventing destruction of the Selective Service certificates. P. 380.

(g) The governmental interests protected by the 1965 Amendment and the nonpossession regulation, though overlapping, are not identical. Pp. 380–381.

(h) The 1965 Amendment is a narrow and precisely drawn provision which specifically protects the Government's substantial interest in an efficient and easily administered system for raising armies. Pp. 381–382.

(i) O'Brien was convicted only for the wilful frustration of that governmental interest. The noncommunicative impact of his conduct for which he was convicted makes his case readily distinguishable from *Stromberg* v. *California*, 283 U. S. 359 (1931). P. 382.

2. The 1965 Amendment is constitutional as enacted. Pp. 382–385.

(a) Congress' purpose in enacting the law affords no basis for declaring an otherwise constitutional statute invalid. *McCray* v. *United States*, 195 U. S. 27 (1904). Pp. 383–384.

(b) *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936) and *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), distinguished. Pp. 384–385.

376 F. 2d 538, vacated; judgment and sentence of District Court reinstated.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Vinson, Francis X. Beytagh, Jr., Beatrice Rosenberg,* and *Jerome M. Feit.*

Marvin M. Karpatkin argued the cause for respondent in No. 232 and petitioner in No. 233. With him on the brief were *Howard S. Whiteside, Melvin L. Wulf,* and *Rhoda H. Karpatkin.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal Bureau of Investigation, witnessed the event.[1] Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts.[2] He did not contest the fact

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[1] At the time of the burning, the agents knew only that O'Brien and his three companions had burned small white cards. They later discovered that the card O'Brien burned was his registration certificate, and the undisputed assumption is that the same is true of his companions.

[2] He was sentenced under the Youth Corrections Act, 18 U. S. C. § 5010 (b), to the custody of the Attorney General for a maximum period of six years for supervision and treatment.

that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."

The indictment upon which he was tried charged that he "willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462 (b)." Section 462 (b) is part of the Universal Military Training and Service Act of 1948. Section 462 (b)(3), one of six numbered subdivisions of § 462 (b), was amended by Congress in 1965, 79 Stat. 586 (adding the words italicized below), so that at the time O'Brien burned his certificate an offense was commited by any person,

> "who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate . . . ." (Italics supplied.)

In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose.[3] The District Court rejected these arguments, holding that the statute on its face did not abridge First Amendment rights, that the court was not competent to inquire into the motives of Congress in enacting the 1965 Amendment, and that the

[3] The issue of the constitutionality of the 1965 Amendment was raised by counsel representing O'Brien in a pretrial motion to dismiss the indictment. At trial and upon sentencing, O'Brien chose to represent himself. He was represented by counsel on his appeal to the Court of Appeals.

Amendment was a reasonable exercise of the power of Congress to raise armies.

On appeal, the Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech.[4] At the time the Amendment was enacted, a regulation of the Selective Service System required registrants to keep their registration certificates in their "personal possession at all times." 32 CFR § 1617.1 (1962).[5] Wilful violations of regulations promulgated pursuant to the Universal Military Training and Service Act were made criminal by statute. 50 U. S. C. App. § 462 (b)(6). The Court of Appeals, therefore, was of the opinion that conduct punishable under the 1965 Amendment was already punishable under the nonpossession regulation, and consequently that the Amendment served no valid purpose; further, that in light of the prior regulation, the Amendment must have been "directed at public as distinguished from private destruction." On this basis, the court concluded that the 1965 Amendment ran afoul of the First Amendment by singling out persons engaged in protests for special treatment. The court ruled, however, that O'Brien's conviction should be affirmed under the statutory provision, 50 U. S. C. App. § 462 (b)(6), which in its view made violation of the nonpossession regulation a crime, because it regarded such violation to be a lesser included offense of the crime defined by the 1965 Amendment.[6]

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[4] *O'Brien* v. *United States*, 376 F. 2d 538 (C. A. 1st Cir. 1967).

[5] The portion of 32 CFR relevant to the instant case was revised as of January 1, 1967. Citations in this opinion are to the 1962 edition which was in effect when O'Brien committed the crime, and when Congress enacted the 1965 Amendment.

[6] The Court of Appeals nevertheless remanded the case to the District Court to vacate the sentence and resentence O'Brien. In

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The Government petitioned for certiorari in No. 232, arguing that the Court of Appeals erred in holding the statute unconstitutional, and that its decision conflicted with decisions by the Courts of Appeals for the Second [7] and Eighth Circuits [8] upholding the 1965 Amendment against identical constitutional challenges. O'Brien cross-petitioned for certiorari in No. 233, arguing that the Court of Appeals erred in sustaining his conviction on the basis of a crime of which he was neither charged nor tried. We granted the Government's petition to resolve the conflict in the circuits, and we also granted O'Brien's cross-petition. We hold that the 1965 Amendment is constitutional both as enacted and as applied. We therefore vacate the judgment of the Court of Appeals and reinstate the judgment and sentence of the District Court without reaching the issue raised by O'Brien in No. 233.

I.

When a male reaches the age of 18, he is required by the Universal Military Training and Service Act to register with a local draft board.[9] He is assigned a Selective Service number,[10] and within five days he is issued a

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the court's view, the district judge might have considered the violation of the 1965 Amendment as an aggravating circumstance in imposing sentence. The Court of Appeals subsequently denied O'Brien's petition for a rehearing, in which he argued that he had not been charged, tried, or convicted for nonpossession, and that nonpossession was not a lesser included offense of mutilation or destruction. *O'Brien* v. *United States,* 376 F. 2d 538, 542 (C. A. 1st Cir. 1967).

[7] *United States* v. *Miller,* 367 F. 2d 72 (C. A. 2d Cir. 1966), cert. denied, 386 U. S. 911 (1967).

[8] *Smith* v. *United States,* 368 F. 2d 529 (C. A. 8th Cir. 1966).

[9] See 62 Stat. 605, as amended, 65 Stat. 76, 50 U. S. C. App. § 453; 32 CFR § 1613.1 (1962).

[10] 32 CFR § 1621.2 (1962).

registration certificate (SSS Form No. 2).[11] Subsequently, and based on a questionnaire completed by the registrant,[12] he is assigned a classification denoting his eligibility for induction,[13] and "[a]s soon as practicable" thereafter he is issued a Notice of Classification (SSS Form No. 110).[14] This initial classification is not necessarily permanent,[15] and if in the interim before induction the registrant's status changes in some relevant way, he may be reclassified.[16] After such a reclassification, the local board "as soon as practicable" issues to the registrant a new Notice of Classification.[17]

Both the registration and classification certificates are small white cards, approximately 2 by 3 inches. The registration certificate specifies the name of the registrant, the date of registration, and the number and address of the local board with which he is registered. Also inscribed upon it are the date and place of the registrant's birth, his residence at registration, his physical description, his signature, and his Selective Service number. The Selective Service number itself indicates his State of registration, his local board, his year of birth, and his chronological position in the local board's classification record.[18]

The classification certificate shows the registrant's name, Selective Service number, signature, and eligibility classification. It specifies whether he was so classified by his local board, an appeal board, or the President. It

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[11] 32 CFR § 1613.43a (1962).
[12] 32 CFR §§ 1621.9, 1623.1 (1962).
[13] 32 CFR §§ 1623.1, 1623.2 (1962).
[14] 32 CFR § 1623.4 (1962).
[15] 32 CFR § 1625.1 (1962).
[16] 32 CFR §§ 1625.1, 1625.2, 1625.3, 1625.4, and 1625.11 (1962).
[17] 32 CFR § 1625.12 (1962).
[18] 32 CFR § 1621.2 (1962).

contains the address of his local board and the date the certificate was mailed.

Both the registration and classification certificates bear notices that the registrant must notify his local board in writing of every change in address, physical condition, and occupational, marital, family, dependency, and military status, and of any other fact which might change his classification. Both also contain a notice that the registrant's Selective Service number should appear on all communications to his local board.

Congress demonstrated its concern that certificates issued by the Selective Service System might be abused well before the 1965 Amendment here challenged. The 1948 Act, 62 Stat. 604, itself prohibited many different abuses involving "any registration certificate, . . . or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder . . . ." 62 Stat. 622. Under §§ 12 (b)(1)–(5) of the 1948 Act, it was unlawful (1) to transfer a certificate to aid a person in making false identification; (2) to possess a certificate not duly issued with the intent of using it for false identification; (3) to forge, alter, "or in any manner" change a certificate or any notation validly inscribed thereon; (4) to photograph or make an imitation of a certificate for the purpose of false identification; and (5) to possess a counterfeited or altered certificate. 62 Stat. 622. In addition, as previously mentioned, regulations of the Selective Service System required registrants to keep both their registration and classification certificates in their personal possession at all times. 32 CFR § 1617.1 (1962) (Registration Certificates); [19] 32 CFR § 1623.5

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[19] 32 CFR § 1617.1 (1962), provides, in relevant part:

"Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2)

(1962) (Classification Certificates).[20] And § 12 (b)(6) of the Act, 62 Stat. 622, made knowing violation of any provision of the Act or rules and regulations promulgated pursuant thereto a felony.

By the 1965 Amendment, Congress added to § 12 (b)(3) of the 1948 Act the provision here at issue, subjecting to criminal liability not only one who "forges, alters, or in any manner changes" but also one who "knowingly destroys, [or] knowingly mutilates" a certificate. We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. Amended § 12 (b)(3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. Compare *Stromberg* v. *California,* 283 U. S. 359 (1931).[21] A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.

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prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form No. 2) in his personal possession shall be prima facie evidence of his failure to register."

[20] 32 CFR § 1623.5 (1962), provides, in relevant part:

"Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No. 2), a valid Notice of Classification (SSS Form No. 110) issued to him showing his current classification."

[21] See text, *infra,* at 382.

O'Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We consider these arguments separately.

II.

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling;[22] substantial;[23] subordi-

[22] *NAACP* v. *Button,* 371 U. S. 415, 438 (1963); see also *Sherbert* v. *Verner,* 374 U. S. 398, 403 (1963).

[23] *NAACP* v. *Button,* 371 U. S. 415, 444 (1963); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 464 (1958).

nating;[24] paramount;[25] cogent;[26] strong.[27] Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to § 12 (b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. *Lichter* v. *United States,* 334 U. S. 742, 755–758 (1948); *Selective Draft Law Cases,* 245 U. S. 366 (1918); see also *Ex parte Quirin,* 317 U. S. 1, 25–26 (1942). The power of Congress to classify and conscript manpower for military service is "beyond question." *Lichter* v. *United States, supra,* at 756; *Selective Draft Law Cases, supra.* Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation

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[24] *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1960).

[25] *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945); see also *Sherbert* v. *Verner,* 374 U. S. 398, 406 (1963).

[26] *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1960).

[27] *Sherbert* v. *Verner,* 374 U. S. 398, 408 (1963).

to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

O'Brien's argument to the contrary is necessarily premised upon his unrealistic characterization of Selective Service certificates. He essentially adopts the position that such certificates are so many pieces of paper designed to notify registrants of their registration or classification, to be retained or tossed in the wastebasket according to the convenience or taste of the registrant. Once the registrant has received notification, according to this view, there is no reason for him to retain the certificates. O'Brien notes that most of the information on a registration certificate serves no notification purpose at all; the registrant hardly needs to be told his address and physical characteristics. We agree that the registration certificate contains much information of which the registrant needs no notification. This circumstance, however, does not lead to the conclusion that the certificate serves no purpose, but that, like the classification certificate, it serves purposes in addition to initial notification. Many of these purposes would be defeated by the certificates' destruction or mutilation. Among these are:

1. The registration certificate serves as proof that the individual described thereon has registered for the draft. The classification certificate shows the eligibility classification of a named but undescribed individual. Voluntarily displaying the two certificates is an easy and painless way for a young man to dispel a question as to whether he might be delinquent in his Selective Service obligations. Correspondingly, the availability of the certificates for such display relieves the Selective Service System of the administrative burden it would otherwise have in verifying the registration and classification of all suspected delinquents. Further, since both certificates are in the nature of "receipts" attesting that the regis-

trant has done what the law requires, it is in the interest of the just and efficient administration of the system that they be continually available, in the event, for example, of a mix-up in the registrant's file. Additionally, in a time of national crisis, reasonable availability to each registrant of the two small cards assures a rapid and uncomplicated means for determining his fitness for immediate induction, no matter how distant in our mobile society he may be from his local board.

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned. To begin with, each certificate bears the address of the registrant's local board, an item unlikely to be committed to memory. Further, each card bears the registrant's Selective Service number, and a registrant who has his number readily available so that he can communicate it to his local board when he supplies or requests information can make simpler the board's task in locating his file. Finally, a registrant's inquiry, particularly through a local board other than his own, concerning his eligibility status is frequently answerable simply on the basis of his classification certificate; whereas, if the certificate were not reasonably available and the registrant were uncertain of his classification, the task of answering his questions would be considerably complicated.

3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status. The smooth functioning of the system requires that local boards be continually aware of the status and whereabouts of registrants, and the destruction of certificates deprives the system of a potentially useful notice device.

4. The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of certifi-

cates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them. And we are unpersuaded that the pre-existence of the nonpossession regulations in any way negates this interest.

In the absence of a question as to multiple punishment, it has never been suggested that there is anything improper in Congress' providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest. Compare the majority and dissenting opinions in *Gore* v. *United States,* 357 U. S. 386 (1958).[28] Here, the pre-existing avenue of prosecution was not even statutory. Regulations may be modified or revoked from time to time by administrative discretion. Certainly, the Congress may change or supplement a regulation.

Equally important, a comparison of the regulations with the 1965 Amendment indicates that they protect overlapping but not identical governmental interests, and that they reach somewhat different classes of wrongdoers.[29] The gravamen of the offense defined by the statute is the deliberate rendering of certificates unavailable for the various purposes which they may serve. Whether registrants keep their certificates in their per-

[28] Cf. *Milanovich* v. *United States,* 365 U. S. 551 (1961); *Heflin* v. *United States,* 358 U. S. 415 (1959); *Prince* v. *United States,* 352 U. S. 322 (1957).

[29] Cf. *Milanovich* v. *United States,* 365 U. S. 551 (1961); *Heflin* v. *United States,* 358 U. S. 415 (1959); *Prince* v. *United States,* 352 U. S. 322 (1957).

sonal possession at all times, as required by the regulations, is of no particular concern under the 1965 Amendment, as long as they do not mutilate or destroy the certificates so as to render them unavailable. Although as we note below we are not concerned here with the nonpossession regulations, it is not inappropriate to observe that the essential elements of nonpossession are not identical with those of mutilation or destruction. Finally, the 1965 Amendment, like § 12 (b) which it amended, is concerned with abuses involving *any* issued Selective Service certificates, not only with the registrant's own certificates. The knowing destruction or mutilation of someone else's certificates would therefore violate the statute but not the nonpossession regulations.

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. Compare *Sherbert* v. *Verner,* 374 U. S. 398, 407–408 (1963), and the cases cited therein. The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommuni-

cative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg* v. *California,* 283 U. S. 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also, *NLRB* v. *Fruit & Vegetable Packer Union,* 377 U. S. 58, 79 (1964) (concurring opinion).

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended § 462 (b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

III.

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of

speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.

It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:

> "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray* v. *United States,* 195 U. S. 27, 56 (1904).

This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in *Arizona* v. *California,* 283 U. S. 423, 455 (1931).

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature,[30] because the benefit to sound decision-making in

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[30] The Court may make the same assumption in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose. The principal class of cases is readily apparent—those in which statutes have been challenged as bills of attainder. This Court's decisions have defined a bill of attainder as a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial. In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements—specificity in identification, punishment, and lack of a judicial trial—are contained in the statute. The inquiry into whether the challenged statute contains the necessary element of punishment has on occasion led the Court to examine the legislative motive in

this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

O'Brien's position, and to some extent that of the court below, rest upon a misunderstanding of *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), and *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). These cases stand, not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. Thus, in *Grosjean* the Court, having concluded that the right of publications to be free from certain kinds of taxes was a freedom of the press protected by the First Amendment, struck down a statute which on its face did nothing other than impose

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enacting the statute. See, *e. g.*, *United States* v. *Lovett*, 328 U. S. 303 (1946). Two other decisions not involving a bill of attainder analysis contain an inquiry into legislative purpose or motive of the type that O'Brien suggests we engage in in this case. *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 169–184 (1963); *Trop* v. *Dulles*, 356 U. S. 86, 95–97 (1958). The inquiry into legislative purpose or motive in *Kennedy* and *Trop*, however, was for the same limited purpose as in the bill of attainder decisions—*i. e.*, to determine whether the statutes under review were punitive in nature. We face no such inquiry in this case. The 1965 Amendment to § 462 (b) was clearly penal in nature, designed to impose criminal punishment for designated acts.

just such a tax. Similarly, in *Gomillion,* the Court sustained a complaint which, if true, established that the "inevitable effect," 364 U. S., at 341, of the redrawing of municipal boundaries was to deprive the petitioners of their right to vote for no reason other than that they were Negro. In these cases, the purpose of the legislation was irrelevant, because the inevitable effect—the "necessary scope and operation," *McCray* v. *United States,* 195 U. S. 27, 59 (1904)—abridged constitutional rights. The statute attacked in the instant case has no such inevitable unconstitutional effect, since the destruction of Selective Service certificates is in no respect inevitably or necessarily expressive. Accordingly, the statute itself is constitutional.

We think it not amiss, in passing, to comment upon O'Brien's legislative-purpose argument. There was little floor debate on this legislation in either House. Only Senator Thurmond commented on its substantive features in the Senate. 111 Cong. Rec. 19746, 20433. After his brief statement, and without any additional substantive comments, the bill, H. R. 10306, passed the Senate. 111 Cong. Rec. 20434. In the House debate only two Congressmen addressed themselves to the Amendment—Congressmen Rivers and Bray. 111 Cong. Rec. 19871, 19872. The bill was passed after their statements without any further debate by a vote of 393 to 1. It is principally on the basis of the statements by these three Congressmen that O'Brien makes his congressional-"purpose" argument. We note that if we were to examine legislative purpose in the instant case, we would be obliged to consider not only these statements but also the more authoritative reports of the Senate and House Armed Services Committees. The portions of those reports explaining the purpose of the Amendment are reproduced in the Appendix in their entirety. While both reports make clear a concern with the "defiant"

destruction of so-called "draft cards" and with "open" encouragement to others to destroy their cards, both reports also indicate that this concern stemmed from an apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System.

IV.

Since the 1965 Amendment to § 12 (b)(3) of the Universal Military Training and Service Act is constitutional as enacted and as applied, the Court of Appeals should have affirmed the judgment of conviction entered by the District Court. Accordingly, we vacate the judgment of the Court of Appeals, and reinstate the judgment and sentence of the District Court. This disposition makes unnecessary consideration of O'Brien's claim that the Court of Appeals erred in affirming his conviction on the basis of the nonpossession regulation.[31]

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

APPENDIX TO OPINION OF THE COURT.

PORTIONS OF THE REPORTS OF THE COMMITTEES ON ARMED SERVICES OF THE SENATE AND HOUSE EXPLAINING THE 1965 AMENDMENT.

The "Explanation of the Bill" in the Senate Report is as follows:

"Section 12 (b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides, among other things, that a person who forges, alters, or changes

[31] The other issues briefed by O'Brien were not raised in the petition for certiorari in No. 232 or in the cross-petition in No. 233. Accordingly, those issues are not before the Court.

a draft registration certificate is subject to a fine of not more than $10,000 or imprisonment of not more than 5 years, or both. There is no explicit prohibition in this section against the knowing destruction or mutilation of such cards.

"The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.

"For a person to be subject to fine or imprisonment the destruction or mutilation of the draft card must be 'knowingly' done. This qualification is intended to protect persons who lose or mutilate draft cards accidentally." S. Rep. No. 589, 89th Cong., 1st Sess. (1965). And the House Report explained:

"Section 12 (b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides that a person who forges, alters, or in any manner changes his draft registration card, or any notation duly and validly inscribed thereon, will be subject to a fine of $10,000 or imprisonment of not more than 5 years. H. R. 10306 would amend this provision to make it apply also to those persons who knowingly destroy or knowingly mutilate a draft registration card.

"The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

"While the present provisions of the Criminal Code with respect to the destruction of Government property

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may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished.

"To this end, H. R. 10306 makes specific that knowingly mutilating or knowingly destroying a draft card constitutes a violation of the Universal Military Training and Service Act and is punishable thereunder; and that a person who does so destroy or mutilate a draft card will be subject to a fine of not more than $10,000 or imprisonment of not more than 5 years." H. R. Rep. No. 747, 89th Cong., 1st Sess. (1965).

MR. JUSTICE HARLAN, concurring.

The crux of the Court's opinion, which I join, is of course its general statement, *ante,* at 377, that:

> "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker"

from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card.

MR. JUSTICE DOUGLAS, dissenting.

The Court states that the constitutional power of Congress to raise and support armies is "broad and sweeping" and that Congress' power "to classify and conscript manpower for military service is 'beyond question.'" This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war. The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war.[1] That question has not been briefed nor was it presented in oral argument; but it is, I submit, a question upon which the litigants and the country are entitled to a ruling. I have discussed in *Holmes* v. *United States, post,* p. 936, the nature of the legal issue and it will be seen from my dissenting opinion in that case that this Court has never ruled on

[1] Neither of the decisions cited by the majority for the proposition that Congress' power to conscript men into the armed services is "'beyond question'" concerns peacetime conscription. As I have shown in my dissenting opinion in *Holmes* v. *United States, post,* p. 936, the *Selective Draft Law Cases,* 245 U. S. 366, decided in 1918, upheld the constitutionality of a conscription act passed by Congress more than a month after war had been declared on the German Empire and which was then being enforced in time of war. *Lichter* v. *United States,* 334 U. S. 742, concerned the constitutionality of the Renegotiation Act, another wartime measure, enacted by Congress over the period of 1942–1945 (*id.,* at 745, n. 1) and applied in that case to excessive war profits made in 1942–1943 (*id.,* at 753). War had been declared, of course, in 1941 (55 Stat. 795). The Court referred to Congress' power to raise armies in discussing the "background" (334 U. S., at 753) of the Renegotiation Act, which it upheld as a valid exercise of the War Power.

the question. It is time that we made a ruling. This case should be put down for reargument and heard with *Holmes* v. *United States* and with *Hart* v. *United States*, *post*, p. 956, in which the Court today denies certiorari.[2]

The rule that this Court will not consider issues not raised by the parties is not inflexible and yields in "exceptional cases" (*Duignan* v. *United States*, 274 U. S. 195, 200) to the need correctly to decide the case before the court. *E. g.*, *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Terminiello* v. *Chicago*, 337 U. S. 1.

In such a case it is not unusual to ask for reargument (*Sherman* v. *United States*, 356 U. S. 369, 379, n. 2, Frankfurter, J., concurring) even on a constitutional question not raised by the parties. In *Abel* v. *United States*, 362 U. S. 217, the petitioner had conceded that an administrative deportation arrest warrant would be valid for its limited purpose even though not supported by a sworn affidavit stating probable cause; but the Court ordered reargument on the question whether the warrant had been validly issued in petitioner's case. 362 U. S., at 219, n., par. 1; 359 U. S. 940. In *Lustig* v. *United States*, 338 U. S. 74, the petitioner argued that an exclusionary rule should apply to the fruit of an unreasonable search by state officials solely because they acted in concert with federal officers (see *Weeks* v. *United States*, 232 U. S. 383; *Byars* v. *United States*, 273 U. S. 28). The Court ordered reargument on the question raised in a then pending case, *Wolf* v. *Colorado*, 338 U. S. 25: applicability of the Fourth Amendment to the States. U. S. Sup. Ct. Journal, October Term, 1947, p. 298. In *Donaldson* v. *Read Magazine*, 333 U. S. 178, the only issue presented,

[2] Today the Court also denies stays in *Shiffman* v. *Selective Service Board No. 5*, and *Zigmond* v. *Selective Service Board No. 16*, *post*, p. 930, where punitive delinquency regulations are invoked against registrants, decisions that present a related question.

according to both parties, was whether the record contained sufficient evidence of fraud to uphold an order of the Postmaster General. Reargument was ordered on the constitutional issue of abridgment of First Amendment freedoms. 333 U. S., at 181–182; Journal, October Term, 1947, p. 70. Finally, in *Musser* v. *Utah,* 333 U. S. 95, 96, reargument was ordered on the question of unconstitutional vagueness of a criminal statute, an issue not raised by the parties but suggested at oral argument by Justice Jackson. Journal, October Term, 1947, p. 87.

These precedents demonstrate the appropriateness of restoring the instant case to the calendar for reargument on the question of the constitutionality of a peacetime draft and having it heard with *Holmes* v. *United States* and *Hart* v. *United States.*

BRANDENBURG *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 492. Argued February 27, 1969.—Decided June 9, 1969.

Appellant, a Ku Klux Klan leader, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions refined the statute's definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action. *Held:* Since the statute, by its words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, it falls within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Whitney* v. *California*, 274 U. S. 357, overruled.

Reversed.

Allen Brown argued the cause for appellant. With him on the briefs were *Norman Dorsen, Melvin L. Wulf, Eleanor Holmes Norton,* and *Bernard A. Berkman.*

Leonard Kirschner argued the cause for appellee. With him on the brief was *Melvin G. Rueger.*

Paul W. Brown, Attorney General of Ohio, *pro se,* and *Leo J. Conway,* Assistant Attorney General, filed a brief for the Attorney General as *amicus curiae.*

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety

of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Ohio Rev. Code Ann. § 2923.13. He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, *sua sponte,* "for the reason that no substantial constitutional question exists herein." It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U. S. 948 (1968). We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present

other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews.[1] Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

> "This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.
>
> "We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

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[1] The significant portions that could be understood were:
"How far is the nigger going to—yeah."
"This is what we are going to do to the niggers."
"A dirty nigger."
"Send the Jews back to Israel."
"Let's give them back to the dark garden."
"Save America."
"Let's go back to constitutional betterment."
"Bury the niggers."
"We intend to do our part."
"Give us our state rights."
"Freedom for the whites."
"Nigger will have to fight for every inch he gets from now on."

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omittted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figure in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code §§ 11400–11402, the text of which is quite similar to that of the laws of Ohio. *Whitney* v. *California,* 274 U. S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. Cf. *Fiske* v. *Kansas,* 274 U. S. 380 (1927). But *Whitney* has been thoroughly discredited by later decisions. See *Dennis* v. *United States,* 341 U. S. 494, at 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[2] As we.

[2] It was on the theory that the Smith Act, 54 Stat. 670, 18 U. S. C. § 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. *Dennis* v. *United States,* 341 U. S. 494 (1951). That this was the basis for *Dennis* was emphasized in *Yates* v. *United States,* 354 U. S. 298, 320–324 (1957), in which the Court overturned con-

said in *Noto* v. *United States*, 367 U. S. 290, 297–298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." See also *Herndon* v. *Lowry*, 301 U. S. 242, 259–261 (1937); *Bond* v. *Floyd*, 385 U. S. 116, 134 (1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. *Yates* v. *United States*, 354 U. S. 298 (1957); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931). See also *United States* v. *Robel*, 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime

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victions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

in terms of mere advocacy not distinguished from incitement to imminent lawless action.[3]

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.[4] Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney* v. *California, supra,* cannot be supported, and that decision is therefore overruled.

Reversed.

MR. JUSTICE BLACK, concurring.

I agree with the views expressed by MR. JUSTICE DOUGLAS in his concurring opinion in this case that the "clear and present danger" doctrine should have no place

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[3] The first count of the indictment charged that appellant "did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform . . . ." The second count charged that appellant "did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism . . . ." The trial judge's charge merely followed the language of the indictment. No construction of the statute by the Ohio courts has brought it within constitutionally permissible limits. The Ohio Supreme Court has considered the statute in only one previous case, *State* v. *Kassay*, 126 Ohio St. 177, 184 N. E. 521 (1932), where the constitutionality of the statute was sustained.

[4] Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action, for as Chief Justice Hughes wrote in *De Jonge* v. *Oregon, supra,* at 364: "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." See also *United States* v. *Cruikshank,* 92 U. S. 542, 552 (1876); *Hague* v. *CIO,* 307 U. S. 496, 513, 519 (1939); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 460–461 (1958).

in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites *Dennis* v. *United States,* 341 U. S. 494 (1951), but does not indicate any agreement on the Court's part with the "clear and present danger" doctrine on which *Dennis* purported to rely.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I desire to enter a *caveat.*

The "clear and present danger" test was adumbrated by Mr. Justice Holmes in a case arising during World War I—a war "declared" by the Congress, not by the Chief Executive. The case was *Schenck* v. *United States,* 249 U. S. 47, 52, where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was tendered as a defense. Mr. Justice Holmes in rejecting that defense said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Frohwerk v. *United States,* 249 U. S. 204, also authored by Mr. Justice Holmes, involved prosecution and punishment for publication of articles very critical of the war effort in World War I. *Schenck* was referred to as a conviction for obstructing security "by words of persuasion." *Id.,* at 206. And the conviction in *Frohwerk* was sustained because "the circulation of the paper was

in quarters where a little breath would be enough to kindle a flame." *Id.*, at 209.

Debs v. *United States*, 249 U. S. 211, was the third of the trilogy of the 1918 Term. Debs was convicted of speaking in opposition to the war where his "opposition was so expressed that its natural and intended effect would be to obstruct recruiting." *Id.*, at 215.

> "If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief." *Ibid.*

In the 1919 Term, the Court applied the *Schenck* doctrine to affirm the convictions of other dissidents in World War I. *Abrams* v. *United States*, 250 U. S. 616, was one instance. Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, dissented. While adhering to *Schenck*, he did not think that on the facts a case for overriding the First Amendment had been made out:

> "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." *Id.*, at 628.

Another instance was *Schaefer* v. *United States*, 251 U. S. 466, in which Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented. A third was *Pierce* v. *United States*, 252 U. S. 239, in which again Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented.

Those, then, were the World War I cases that put the gloss of "clear and present danger" on the First Amendment. Whether the war power—the greatest leveler of them all—is adequate to sustain that doctrine is debat-

able. The dissents in *Abrams, Schaefer,* and *Pierce* show how easily "clear and present danger" is manipulated to crush what Brandeis called "[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions" by argument and discourse (*Pierce* v. *United States, supra,* at 273) even in time of war. Though I doubt if the "clear and present danger" test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.

The Court quite properly overrules *Whitney* v. *California,* 274 U. S. 357, which involved advocacy of ideas which the majority of the Court deemed unsound and dangerous.

Mr. Justice Holmes, though never formally abandoning the "clear and present danger" test, moved closer to the First Amendment ideal when he said in dissent in *Gitlow* v. *New York,* 268 U. S. 652, 673:

> "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

We have never been faithful to the philosophy of that dissent.

The Court in *Herndon* v. *Lowry,* 301 U. S. 242, overturned a conviction for exercising First Amendment rights to incite insurrection because of lack of evidence of incitement. *Id.,* at 259–261. And see *Hartzel* v. *United States,* 322 U. S. 680. In *Bridges* v. *California,* 314 U. S. 252, 261–263, we approved the "clear and present danger" test in an elaborate dictum that tightened it and confined it to a narrow category. But in *Dennis* v. *United States,* 341 U. S. 494, we opened wide the door, distorting the "clear and present danger" test beyond recognition.[1]

In that case the prosecution dubbed an agreement to teach the Marxist creed a "conspiracy." The case was submitted to a jury on a charge that the jury could not convict unless it found that the defendants "intended to overthrow the Government 'as speedily as circumstances would permit.'" *Id.,* at 509–511. The Court sustained convictions under that charge, construing it to mean a determination of "'whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'"[2] *Id.,* at 510, quoting from *United States* v. *Dennis,* 183 F. 2d 201, 212.

Out of the "clear and present danger" test came other offspring. Advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution. *Yates* v. *United States,* 354 U. S. 298, 318. But an "active" member, who has a guilty knowledge and intent of the aim to overthrow the Government

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[1] See McKay, The Preference For Freedom, 34 N. Y. U. L. Rev. 1182, 1203–1212 (1959).

[2] See *Feiner* v. *New York,* 340 U. S. 315, where a speaker was arrested for arousing an audience when the only "clear and present danger" was that the hecklers in the audience would break up the meeting.

by violence, *Noto* v. *United States,* 367 U. S. 290, may be prosecuted. *Scales* v. *United States,* 367 U. S. 203, 228. And the power to investigate, backed by the powerful sanction of contempt, includes the power to determine which of the two categories fits the particular witness. *Barenblatt* v. *United States,* 360 U. S. 109, 130. And so the investigator roams at will through all of the beliefs of the witness, ransacking his conscience and his innermost thoughts.

Judge Learned Hand, who wrote for the Court of Appeals in affirming the judgment in *Dennis,* coined the "not improbable" test, 183 F. 2d 201, 214, which this Court adopted and which Judge Hand preferred over the "clear and present danger" test. Indeed, in his book, The Bill of Rights 59 (1958), in referring to Holmes' creation of the "clear and present danger" test, he said, "I cannot help thinking that for once Homer nodded."

My own view is quite different. I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it.

When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the *status quo* that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

Action is often a method of expression and within the protection of the First Amendment.

Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted?

Suppose one rips his own Bible to shreds to celebrate his departure from one "faith" and his embrace of atheism. May he be indicted?

Last Term the Court held in *United States* v. *O'Brien,* 391 U. S. 367, 382, that a registrant under Selective Service who burned his draft card in protest of the war in Vietnam could be prosecuted. The First Amendment was tendered as a defense and rejected, the Court saying:

> "The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration." 391 U. S., at 377–378.

But O'Brien was not prosecuted for not having his draft card available when asked for by a federal agent. He was indicted, tried, and convicted for burning the card. And this Court's affirmance of that conviction was not, with all respect, consistent with the First Amendment.

The act of praying often involves body posture and movement as well as utterances. It is nonetheless protected by the Free Exercise Clause. Picketing, as we have said on numerous occasions, is "free speech plus." See *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769, 775 (DOUGLAS, J., concurring); *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 501; *Hughes* v. *Superior Court,* 339 U. S. 460, 465; *Labor Board* v. *Fruit Packers,* 377 U. S. 58, 77 (BLACK, J., concurring), and *id.,* at 93 (HARLAN, J., dissenting); *Cox* v. *Louisiana,* 379 U. S. 559, 578 (opinion of BLACK, J.); *Food Employees* v. *Logan Plaza,* 391 U. S. 308, 326 (DOUGLAS, J., concurring). That means that it can be regulated when it comes to the "plus" or "action" side of the protest. It can be regulated as to

the number of pickets and the place and hours (see *Cox* v. *Louisiana, supra*), because traffic and other community problems would otherwise suffer.

But none of these considerations are implicated in the symbolic protest of the Vietnam war in the burning of a draft card.

One's beliefs have long been thought to be sanctuaries which government could not invade. *Barenblatt* is one example of the ease with which that sanctuary can be violated. The lines drawn by the Court between the criminal act of being an "active" Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

This is, however, a classic case where speech is brigaded with action. See *Speiser* v. *Randall*, 357 U. S. 513, 536–537 (DOUGLAS, J., concurring). They are indeed inseparable and a prosecution can be launched for the overt

acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in *Yates* and advocacy of political action as in *Scales*. The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.[3]

[3] See MR. JUSTICE BLACK, dissenting, in *Communications Assn.* v. *Douds*, 339 U. S. 382, 446, 449 *et seq.*

U.S. Supreme Court

BUCKLEY v. VALEO, 424 U.S. 1 (1976)

424 U.S. 1

BUCKLEY ET AL. v. VALEO, SECRETARY OF THE UNITED STATES SENATE, ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 75-436.

Argued November 10, 1975.
Decided January 30, 1976.*

[Footnote *] Together with No. 75-437, Buckley et al. v. Valeo, Secretary of the United States Senate, et al., on appeal from the United States District Court for the District of Columbia.

The Federal Election Campaign Act of 1971 (Act), as amended in 1974, (a) limits political contributions to candidates for federal elective office by an individual or a group to $1,000 and by a political committee to $5,000 to any single candidate per election, with an overall annual limitation of $25,000 by an individual contributor; (b) limits expenditures by individuals or groups "relative to a clearly identified candidate" to $1,000 per candidate per election, and by a candidate from his personal or family funds to various specified annual amounts depending upon the federal office sought, and restricts overall general election and primary campaign expenditures by candidates to various specified amounts, again depending upon the federal office sought; (c) requires political committees to keep detailed records of contributions and expenditures, including the name and address of each individual contributing in excess of $10, and his occupation and

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principal place of business if his contribution exceeds $100, and to file quarterly reports with the Federal Election Commission disclosing the source of every contribution exceeding $100 and the recipient and purpose of every expenditure over $100, and also requires every individual or group, other than a candidate or political committee, making contributions or expenditures exceeding $100 "other than by contribution to a political committee or candidate" to file a statement with the Commission; and (d) creates the eight-member Commission as the administering agency with recordkeeping, disclosure, and investigatory functions and extensive rulemaking, adjudicatory, and enforcement powers, and consisting of two members appointed by the President pro tempore of the Senate, two by the Speaker of the House, and two by the President (all subject to confirmation by both Houses of Congress), and the Secretary of the Senate and the Clerk

of the House as ex officio nonvoting members. Subtitle H of the Internal Revenue Code of 1954 (IRC), as amended in 1974, provides for public financing of Presidential nominating conventions and general election and primary campaigns from general revenues and allocates such funding to conventions and general election campaigns by establishing three categories: (1) "major" parties (those whose candidate received 25% or more of the vote in the most recent election), which receive full funding, (2) "minor" parties (those whose candidate received at least 5% but less than 25% of the votes at the last election), which receive only a percentage of the funds to which the major parties are entitled; and (3) "new" parties (all other parties), which are limited to receipt of post-election funds or are not entitled to any funds if their candidate receives less than 5% of the vote. A primary candidate for the Presidential nomination by a political party who receives more than $5,000 from private sources (counting only the first $250 of each contribution) in each of at least 20 States is eligible for matching public funds. Appellants (various federal officeholders and candidates, supporting political organizations, and others) brought suit against appellees (the Secretary of the Senate, Clerk of the House, Comptroller General, Attorney General, and the Commission) seeking declaratory and injective relief against the above statutory provisions on various constitutional grounds. The Court of Appeals, on certified questions from the District Court, upheld all but one of the statutory provisions. A three-judge District Court upheld the constitutionality of Subtitle H. Held:

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1. This litigation presents an Art. III "case or controversy," since the complaint discloses that at least some of the appellants have a sufficient "personal stake" in a determination of the constitutional validity of each of the challenged provisions to present "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241. Pp. 11-12.

2. The Act's contribution provisions are constitutional, but the expenditure provisions violate the First Amendment. Pp. 12-59.

(a) The contribution provisions, along with those covering disclosure, are appropriate legislative weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions, and the ceilings imposed accordingly serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion. Pp. 23-38.

(b) The First Amendment requires the invalidation of the Act's independent expenditure ceiling, its limitation on a candidate's expenditures from his own personal funds, and its ceilings on overall campaign expenditures, since those provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate. Pp. 39-59.

3. The Act's disclosure and recordkeeping provisions are constitutional. Pp. 60-84.
(a) The general disclosure provisions, which serve substantial governmental interests in informing the electorate and preventing the corruption of the political process, are not overbroad insofar as they apply to contributions to minor parties and independent candidates. No blanket exemption for minor parties is warranted since such parties in order to prove injury as a result of application to them of the disclosure provisions need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals in violation of their First Amendment associational rights. Pp. 64-74.
(b) The provision for disclosure by those who make independent

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contributions and expenditures, as narrowly construed to apply only (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent to some person other than a candidate or political committee and (2) when they make an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate is not unconstitutionally vague and does not constitute a prior restraint but is a reasonable and minimally restrictive method of furthering First Amendment values by public exposure of the federal election system. Pp. 74-82.
(c) The extension of the recordkeeping provisions to contributions as small as those just above $10 and the disclosure provisions to contributions above $100 is not on this record overbroad since it cannot be said to be unrelated to the informational and enforcement goals of the legislation. Pp. 82-84.

4. Subtitle H of the IRC is constitutional. Pp. 85-109.
(a) Subtitle H is not invalid under the General Welfare Clause but, as a means to reform the electoral process, was clearly a choice within the power granted to Congress by the Clause to decide which expenditures will promote the general welfare. Pp. 90-92.
(b) Nor does Subtitle H violate the First Amendment. Rather than abridging, restricting, or censoring speech, it represents an effort to use public money to facilitate and enlarge public discussion and participation in the electoral process. Pp. 92-93.
(c) Subtitle H, being less burdensome than ballot-access regulations and having been enacted in furtherance of vital governmental interests in relieving major-party candidates from the rigors of soliciting private contributions, in not funding candidates who lack significant public support, and in eliminating reliance on large private contributions for funding of conventions and campaigns, does not invidiously discriminate against minor and new parties in violation of the Due Process Clause of the Fifth Amendment. Pp. 93-108.
(d) Invalidation of the spending-limit provisions of the Act does not render Subtitle H unconstitutional, but the Subtitle is severable from such provisions and is not dependent upon the existence of a generally applicable expenditure limit. Pp. 108-109.

5. The Commission's composition as to all but its investigative and informative powers violates Art. II, 2, cl. 2. With respect to the Commission's powers, all of which are ripe for review,

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to enforce the Act, including primary responsibility for bringing civil actions against violators, to make rules for carrying out the Act, to temporarily disqualify federal candidates for failing to file required reports, and to authorize convention expenditures in excess of the specified limits, the provisions of the Act vesting such powers in the Commission and the prescribed method of appointment of members of the Commission to the extent that a majority of the voting members are appointed by the President pro tempore of the Senate and the Speaker of the House, violate the Appointments Clause, which provides in pertinent part that the President shall nominate, and with the Senate's advice and consent appoint, all "Officers of the United States," whose appointments are not otherwise provided for, but that Congress may vest the appointment of such inferior officers, as it deems proper, in the President alone, in the courts, or in the heads of departments. Hence (though the Commission's past acts are accorded de facto validity and a stay is granted permitting it to function under the Act for not more than 30 days), the Commission, as presently constituted, may not because of that Clause exercise such powers, which can be exercised only by "Officers of the United States" appointed in conformity with the Appointments Clause, although it may exercise such investigative and informative powers as are in the same category as those powers that Congress might delegate to one of its own committees. Pp. 109-143.

No. 75-436, 171 U.S. App. D.C. 172, 519 F.2d 821, affirmed in part and reversed in part; No. 75-437, 401 F. Supp. 1235, affirmed.

Per curiam opinion, in the "case or controversy" part of which (post, pp. 11-12) all participating Members joined; and as to all other Parts of which BRENNAN, STEWART, and POWELL, JJ., joined; MARSHALL, J., joined in all but Part I-C-2; BLACKMUN, J., joined in all but Part I-B; REHNQUIST, J., joined in all but Part III-B-1; BURGER, C. J., joined in Parts I-C and IV (except insofar as it accords de facto validity for the Commission's past acts); and WHITE, J., joined in Part III. BURGER, C. J., post, p. 235, WHITE, J., post, p. 257, MARSHALL, J., post, p. 286, BLACKMUN, J., post, p. 290, and REHNQUIST, J., post, p. 290, filed opinions concurring in part and dissenting in part. STEVENS, J., took no part in the consideration or decision of the cases.
Ralph K. Winter, Jr., pro hac vice, Joel M. Gora, and

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Brice M. Clagett argued the cause for appellants. With them on the briefs was Melvin L. Wulf.

Deputy Solicitor General Friedman, Archibald Cox, Lloyd N. Cutler, and Ralph S. Spritzer argued the cause for appellees. With Mr. Friedman on the brief for appellees Levi and the Federal Election Commission were Attorney General Levi, pro se, Solicitor General Bork, and Louis F. Claiborne. With Mr. Cutler on the brief for appellees Center for Public Financing of Elections et al. were Paul J. Mode, Jr., William T. Lake, Kenneth J. Guido, Jr., and Fred Wertheimer. With Mr. Spritzer on the brief for appellee Federal Election Commission was Paul Bender. Attorney General Levi, pro se, Solicitor General Bork, and Deputy Solicitor General Randolph filed a brief for appellee Levi and for the United States as amicus curiae.Fn
Fn

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Thomas F. Monaghan filed a brief for James B. Longley as amicus curiae urging reversal. Mr. Cox filed a brief for Hugh Scott et al. as amici curiae urging affirmance.

Briefs of amici curiae were filed by Jerome B. Falk, Jr., Daniel H. Lowenstein, Howard F. Sachs, and Guy L. Heinemann for the California Fair Political Practices Commission et al.; by Lee Metcalf, pro se, and G. Roger King for Mr. Metcalf; by Vincent Hallinan for the Socialist Labor Party; by Marguerite M. Buckley for the Los Angeles County Central Committee of the Peace and Freedom Party; and by the Committee for Democratic Election Laws.

PER CURIAM.
These appeals present constitutional challenges to the key provisions of the Federal Election Campaign Act of 1971 (Act), and related provisions of the Internal Revenue Code of 1954, all as amended in 1974.[Footnote 1]

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The Court of Appeals, in sustaining the legislation in large part against various constitutional challenges,[Footnote 2] viewed it as "by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress." 171 U.S. App. D.C. 172, 182, 519 F.2d 821, 831 (1975). The statutes at issue summarized in broad terms, contain the following provisions: (a) individual political contributions are limited to $1,000 to any single candidate per election, with an overall annual limitation of $25,000 by any contributor; independent expenditures by individuals and groups "relative to a clearly identified candidate" are limited to $1,000 a year; campaign spending by candidates for various federal offices and spending for national conventions by political parties are subject to prescribed limits; (b) contributions and expenditures above certain threshold levels must be reported and publicly disclosed; (c) a system for public funding of Presidential campaign activities is established by Subtitle H of the Internal Revenue Code;[Footnote

3] and (d) a Federal Election Commission is established to administer and enforce the legislation.

This suit was originally filed by appellants in the United States District Court for the District of Columbia. Plaintiffs included a candidate for the Presidency of the United States, a United States Senator who is a candidate for re-election, a potential contributor, the

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Committee for a Constitutional Presidency - McCarthy '76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, Inc., the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc. The defendants included the Secretary of the United States Senate and the Clerk of the United States House of Representatives, both in their official capacities and as ex officio members of the Federal Election Commission. The Commission itself was named as a defendant. Also named were the Attorney General of the United States and the Comptroller General of the United States.

Jurisdiction was asserted under 28 U.S.C. 1331, 2201, and 2202, and 315 (a) of the Act, 2 U.S.C. 437h (a) (1970 ed., Supp. IV).[Footnote 4] The complaint sought both a

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declaratory judgment that the major provisions of the Act were unconstitutional and an injunction against enforcement of those provisions. Appellants requested the convocation of a three-judge District Court as to all matters and also requested certification of constitutional questions to the Court of Appeals, pursuant to the terms of 315 (a). The District Judge denied the application for a three-judge court and directed that the case be transmitted to the Court of Appeals. That court entered an order stating that the case was "preliminarily deemed" to be properly certified under 315 (a). Leave to intervene was granted to various groups and individuals.[Footnote 5] After considering matters regarding factfinding procedures, the Court of Appeals entered an order en banc remanding the case to the District Court to (1) identify the constitutional issues in the complaint; (2) take whatever evidence was found necessary in addition to the submissions suitably dealt with by way of judicial notice; (3) make findings of fact with reference to those issues; and (4) certify the constitutional questions arising from the foregoing steps to the Court of Appeals.[Footnote 6] On remand, the District

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Judge entered a memorandum order adopting extensive findings of fact and transmitting the augmented record back to the Court of Appeals.

On plenary review, a majority of the Court of Appeals rejected, for the most part, appellants' constitutional attacks. The court found "a clear and compelling interest," 171 U.S. App. D.C., at 192, 519 F.2d, at 841, in preserving the integrity of the electoral process. On that basis, the court upheld, with one exception,[Footnote 7] the substantive provisions of the Act with respect to contributions, expenditures, and disclosure. It also sustained the constitutionality of the newly established Federal Election Commission. The court concluded that, notwithstanding the manner of selection of its members and the breadth of its powers, which included nonlegislative functions, the Commission is a constitutionally authorized agency created to perform primarily legislative functions.[Footnote 8]

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The provisions for public funding of the three stages of the Presidential selection process were upheld as a valid exercise of congressional power under the General Welfare Clause of the Constitution, Art. I, 8.

In this Court, appellants argue that the Court of Appeals failed to give this legislation the critical scrutiny demanded under accepted First Amendment and equal protection principles. In appellants' view, limiting the use of money for political purposes constitutes a restriction on communication violative of the First Amendment, since virtually all meaningful political communications in the modern setting involve the expenditure of money. Further, they argue that the reporting and disclosure provisions of the Act unconstitutionally impinge on their right to freedom of association. Appellants also view the federal subsidy provisions of Subtitle H as violative of the General Welfare Clause, and as inconsistent with the First and Fifth Amendments. Finally, appellants renew their attack on the Commission's composition and powers.

At the outset we must determine whether the case before us presents a "case or controversy" within the meaning of Art. III of the Constitution. Congress may not, of course, require this Court to render opinions in matters which are not "cases or controversies." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937). We must therefore decide whether appellants have the "personal stake in the outcome of the controversy" necessary to meet the requirements of Art. III. Baker v. Carr, 369 U.S. 186, 204 (1962). It is clear that Congress, in enacting

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2 U.S.C. 437h (1970 ed., Supp. IV),[Footnote 9] intended to provide judicial review to the extent permitted by Art. III. In our view, the complaint in this case demonstrates that at least some of the appellants have a sufficient "personal stake"[Footnote 10] in a determination of the constitutional validity of each of the challenged provisions to present "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be

upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, supra, at 241.[Footnote 11]

I. CONTRIBUTION AND EXPENDITURE LIMITATIONS

The intricate statutory scheme adopted by Congress to regulate federal election campaigns includes restrictions

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on political contributions and expenditures that apply broadly to all phases of and all participants in the election process. The major contribution and expenditure limitations in the Act prohibit individuals from contributing more than $25,000 in a single year or more than $1,000 to any single candidate for an election campaign[Footnote 12] and from spending more than $1,000 a year "relative to a clearly identified candidate."[Footnote 13] Other provisions restrict a candidate's use of personal and family resources in his campaign[Footnote 14] and limit the overall amount that can be spent by a candidate in campaigning for federal office.[Footnote 15]

The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case.[Footnote 16] Thus, the critical constitutional

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questions presented here go not to the basic power of Congress to legislate in this area, but to whether the specific legislation that Congress has enacted interferes with First Amendment freedoms or invidiously discriminates against nonincumbent candidates and minor parties in contravention of the Fifth Amendment.

A. General Principles

The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). Although First Amendment protections are not confined to "the exposition of ideas," Winters v. New York, 333 U.S. 507, 510 (1948), "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . . ." Mills v. Alabama, 384 U.S. 214, 218 (1966). This no more than

reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates

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for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

The First Amendment protects political association as well as political expression. The constitutional right of association explicated in NAACP v. Alabama, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "`freedom to associate with others for the common advancement of political beliefs and ideas,'" a freedom that encompasses "`[t]he right to associate with the political party of one's choice.'" Kusper v. Pontikes, 414 U.S. 51, 56, 57 (1973), quoted in Cousins v. Wigoda, 419 U.S. 477, 487 (1975).

It is with these principles in mind that we consider the primary contentions of the parties with respect to the Act's limitations upon the giving and spending of money in political campaigns. Those conflicting contentions could not more sharply define the basic issues before us. Appellees contend that what the Act regulates is conduct, and that its effect on speech and association is incidental at most. Appellants respond that contributions and expenditures are at the very core of political speech, and that the Act's limitations thus constitute restraints on First Amendment liberty that are both gross and direct.

In upholding the constitutional validity of the Act's contribution and expenditure provisions on the ground

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that those provisions should be viewed as regulating conduct, not speech, the Court of Appeals relied upon United States v. O'Brien, 391 U.S. 367 (1968). See 171 U.S. App. D.C., at 191, 519 F.2d, at 840. The O'Brien case involved a defendant's claim that the First Amendment prohibited his prosecution for burning his draft card because his act was "`symbolic speech'" engaged in as a "`demonstration against the war and against the draft.'" 391 U.S., at 376. On the assumption that "the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the First Amendment," the Court sustained the conviction because it found "a sufficiently important governmental interest

in regulating the non-speech element" that was "unrelated to the suppression of free expression" and that had an "incidental restriction on alleged First Amendment freedoms . . . no greater than [was] essential to the furtherance of that interest." Id., at 376-377. The Court expressly emphasized that O'Brien was not a case "where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." Id., at 382.

We cannot share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in O'Brien. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non speech element or to reduce the exacting scrutiny required by the First Amendment. See Bigelow v. Virginia, 421 U.S. 809,

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820 (1975); New York Times Co. v. Sullivan, supra, at 266. For example, in Cox v. Louisiana, 379 U.S. 559 (1965), the Court contrasted picketing and parading with a newspaper comment and a telegram by a citizen to a public official. The parading and picketing activities were said to constitute conduct "intertwined with expression and association," whereas the newspaper comment and the telegram were described as a "pure form of expression" involving "free speech alone" rather than "expression mixed with particular conduct." Id., at 563-564.

Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the O'Brien test because the governmental interests advanced in support of the Act involve "suppressing communication." The interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns. Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups. Unlike O'Brien, where the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." 391 U.S., at 382.

Nor can the Act's contribution and expenditure limitations be sustained, as some of the parties suggest, by reference to the constitutional principles reflected in such

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decisions as Cox v. Louisiana, supra; Adderley v. Florida, 385 U.S. 39 (1966); and Kovacs v. Cooper, 336 U.S. 77 (1949). Those cases stand for the proposition that the government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975). In contrast to O'Brien, where the method of expression was held to be subject to prohibition, Cox, Adderley, and Kovacs involved place or manner restrictions on legitimate modes of expression - picketing, parading, demonstrating, and using a soundtruck. The critical difference between this case and those time, place, and manner cases is that the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed.[Footnote 17]

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A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.[Footnote 18] This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending "relative to a clearly identified candidate," 18 U.S.C. 608 (e) (1) (1970 ed., Supp. IV), would appear to exclude all citizens and groups except candidates, political parties, and the institutional press[Footnote 19] from any significant use of the most

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effective modes of communication.[Footnote 20] Although the Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate, they would have required restrictions in the scope of a number of past congressional and Presidential campaigns[Footnote 21] and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling.

By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication.

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A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.[Footnote 22] A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations.[Footnote 23] The overall effect of the Act's contribution

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ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates. And the Act's contribution limitations permit associations and candidates to aggregate large sums of money to

promote effective advocacy. By contrast, the Act's $1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. See NAACP v. Alabama, 357 U.S., at 460. The Act's constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression "is simultaneously an interference with the freedom of [their] adherents," Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion). See Cousins v.

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Wigoda, 419 U.S., at 487-488; NAACP v. Button, 371 U.S. 415, 431 (1963).
In sum, although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.

B. Contribution Limitations

1. The $1,000 Limitation on Contributions by Individuals and Groups to Candidates and Authorized Campaign Committees

Section 608 (b) provides, with certain limited exceptions, that "no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000." The statute defines "person" broadly to include "an individual, partnership, committee, association, corporation or any other organization or group of persons." 591 (g). The limitation reaches a gift, subscription, loan, advance, deposit of anything of value, or promise to give a contribution, made for the purpose of influencing a primary election, a Presidential preference primary, or a general election for any federal office.[Footnote 24] 591 (e) (1), (2). The

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$1,000 ceiling applies regardless of whether the contribution is given to the candidate, to a committee authorized in writing by the candidate to accept contributions on his behalf, or indirectly via earmarked gifts passed through an intermediary to the candidate. 608 (b) (4), (6).[Footnote 25] The restriction applies to aggregate amounts contributed to the candidate for each election - with primaries, runoff elections, and general elections counted separately, and all Presidential primaries held in any calendar year treated together as a single election campaign. 608 (b) (5).

Appellants contend that the $1,000 contribution ceiling unjustifiably burdens First Amendment freedoms, employs overbroad dollar limits, and discriminates against

candidates opposing incumbent officeholders and against minor-party candidates in violation of the Fifth Amendment. We address each of these claims of invalidity in turn.

(a)

As the general discussion in Part I-A, supra, indicated, the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association.

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The Court's decisions involving associational freedoms establish that the right of association is a "basic constitutional freedom," Kusper v. Pontikes, 414 U.S., at 57, that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." Shelton v. Tucker, 364 U.S. 479, 486 (1960). See, e. g., Bates v. Little Rock, 361 U.S. 516, 522-523 (1960); NAACP v. Alabama, supra, at 460-461; NAACP v. Button, supra, at 452 (Harlan, J., dissenting). In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." NAACP v. Alabama, supra, at 460-461. Yet, it is clear that "[n]either the right to associate nor the right to participate in political activities is absolute." CSC v. Letter Carriers, 413 U.S. 548, 567 (1973). Even a "`significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. Cousins v. Wigoda, supra, at 488; NAACP v. Button, supra, at 438; Shelton v. Tucker, supra, at 488.

Appellees argue that the Act's restrictions on large campaign contributions are justified by three governmental interests. According to the parties and amici, the primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office. Two "ancillary" interests underlying the Act are also allegedly furthered by the $1,000 limits on contributions. First, the limits serve to mute the voices of affluent persons and groups in the election

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process and thereby to equalize the relative ability of all citizens to affect the outcome of elections.[Footnote 26] Second, it is argued, the ceilings may to some extent act as a brake on the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money.[Footnote 27]

It is unnecessary to look beyond the Act's primary purpose - to limit the actuality and appearance of corruption resulting from large individual financial contributions - in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of

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representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.[Footnote 28]

Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. In CSC v. Letter Carriers, supra, the Court found that the danger to "fair and effective government" posed by partisan political conduct on the part of federal employees charged with administering the law was a sufficiently important concern to justify broad restrictions on the employees' right of partisan political association. Here, as there, Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." 413 U.S., at 565.[Footnote 29]

Appellants contend that the contribution limitations must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with "proven and suspected quid pro quo arrangements." But laws making criminal

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the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion,[Footnote 30] Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

The Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions - the narrow aspect of political association where the actuality and potential for corruption have been identified - while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.[Footnote 31] Significantly, the

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Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.

We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling.

(b)

Appellants' first overbreadth challenge to the contribution ceilings rests on the proposition that most large contributors do not seek improper influence over a candidate's position or an officeholder's action. Although the truth of that proposition may be assumed, it does not

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undercut the validity of the $1,000 contribution limitation. Not only is it difficult to isolate suspect contributions but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.

A second, related overbreadth claim is that the $1,000 restriction is unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder, especially in campaigns for statewide or national office. While the contribution limitation provisions might well have been structured to take account of the graduated expenditure limitations for congressional and Presidential campaigns,[Footnote 32] Congress' failure to engage in such fine tuning does not invalidate the legislation. As the Court of Appeals observed, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." 171 U.S. App. D.C., at 193, 519 F.2d, at 842. Such distinctions in degree become significant only when they can be said to amount to differences in kind. Compare Kusper v. Pontikes, 414 U.S. 51 (1973), with Rosario v. Rockefeller, 410 U.S. 752 (1973).

(c)

Apart from these First Amendment concerns, appellants argue that the contribution limitations work such an invidious discrimination between incumbents

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and challengers that the statutory provisions must be declared unconstitutional on their face.[Footnote 33] In considering this contention, it is important at the outset to note that the Act applies the same limitations on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations. Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions. Cf. James v. Valtierra, 402 U.S. 137 (1971).

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There is no such evidence to support the claim that the contribution limitations in themselves discriminate against major-party challengers to incumbents. Challengers can and often do defeat incumbents in federal elections.[Footnote 34] Major-party challengers in federal elections are usually men and women who are well known and influential in their community or State. Often such challengers are themselves incumbents in important local, state, or federal offices. Statistics in the record indicate that major-party challengers as well as incumbents are capable of raising large sums for campaigning.[Footnote 35] Indeed, a small but nonetheless significant number of challengers have in recent elections outspent their incumbent rivals.[Footnote 36] And, to the extent that incumbents generally are more likely than challengers to attract very large contributions, the Act's $1,000 ceiling has the practical effect of benefiting challengers as a class.[Footnote 37] Contrary to the broad generalization

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drawn by the appellants, the practical impact of the contribution ceilings in any given election will clearly depend upon the amounts in excess of the ceilings that, for various reasons, the candidates in that election would otherwise have received and the utility of these additional amounts to the candidates. To be sure, the limitations may have a significant effect on particular challengers or incumbents, but the record provides no basis for predicting that such adventitious factors will invariably and invidiously benefit incumbents as a class.[Footnote 38] Since the danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents, Congress had ample justification for imposing the same fundraising constraints upon both.

The charge of discrimination against minor-party and independent candidates is more troubling, but the record provides no basis for concluding that the Act invidiously

disadvantages such candidates. As noted above, the Act on its face treats all candidates equally with regard to contribution limitations. And the restriction would appear to benefit minor-party and independent candidates relative to their major-party opponents because major-party candidates receive far more money in large contributions.[Footnote 39] Although there is some

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force to appellants' response that minor-party candidates are primarily concerned with their ability to amass the resources necessary to reach the electorate rather than with their funding position relative to their major-party opponents, the record is virtually devoid of support for the claim that the $1,000 contribution limitation will have a serious effect on the initiation and scope of minor-party and independent candidacies.[Footnote 40] Moreover, any attempt

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to exclude minor parties and independents en masse from the Act's contribution limitations overlooks the fact that minor-party candidates may win elective office or have a substantial impact on the outcome of an election.[Footnote 41]

In view of these considerations, we conclude that the impact of the Act's $1,000 contribution limitation on major-party challengers and on minor-party candidates does not render the provision unconstitutional on its face.

2. The $5,000 Limitation on Contributions by Political Committees

Section 608 (b) (2) permits certain committees, designated as "political committees," to contribute up to $5,000 to any candidate with respect to any election for federal office. In order to qualify for the higher contribution ceiling, a group must have been registered with the Commission as a political committee under 2 U.S.C. 433 (1970 ed., Supp. IV) for not less than six months, have received contributions from more than 50 persons, and, except for state political party organizations, have contributed to five or more candidates for federal office. Appellants argue that these qualifications unconstitutionally discriminate against ad hoc organizations in favor of established interest groups and impermissibly burden free association. The argument is without merit. Rather than undermining freedom of association, the basic provision enhances the opportunity of bona fide groups to participate in the election process, and the registration, contribution, and candidate conditions serve the permissible purpose of preventing individuals

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from evading the applicable contribution limitations by labeling themselves committees.

3. Limitations on Volunteers' Incidental Expenses

The Act excludes from the definition of contribution "the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee." 591 (e) (5) (A). Certain expenses incurred by persons in providing volunteer services to a candidate are exempt from the $1,000 ceiling only to the extent that they do not exceed $500. These expenses are expressly limited to (1) "the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities." 591 (e) (5) (B); (2) "the sale of any food or beverage by a vendor for use in a candidate's campaign at a charge [at least equal to cost but] less than the normal comparable charge," 591 (e) (5) (C); and (3) "any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate," 591 (e) (5) (D).

If, as we have held, the basic contribution limitations are constitutionally valid, then surely these provisions are a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates. The expenditure of resources at the candidate's direction for a fundraising event at a volunteer's residence or the provision of in-kind assistance in the form of food or beverages to be resold to raise funds or consumed by the participants in such an event provides material financial assistance to a candidate. The ultimate

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effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for the fundraising event or the food. Similarly, travel undertaken as a volunteer at the direction of the candidate or his staff is an expense of the campaign and may properly be viewed as a contribution if the volunteer absorbs the fare. Treating these expenses as contributions when made to the candidate's campaign or at the direction of the candidate or his staff forecloses an avenue of abuse[Footnote 42] without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign.[Footnote 43]

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4. The $25,000 Limitation on Total Contributions During any Calendar Year

In addition to the $1,000 limitation on the nonexempt contributions that an individual may make to a particular candidate for any single election, the Act contains an overall $25,000 limitation on total contributions by an individual during any calendar year. 608 (b) (3). A contribution made in connection with an election is considered, for purposes of

this subsection, to be made in the year the election is held. Although the constitutionality of this provision was drawn into question by appellants, it has not been separately addressed at length by the parties. The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

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C. Expenditure Limitations

The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech. The most drastic of the limitations restricts individuals and groups, including political parties that fail to place a candidate on the ballot,[Footnote 44] to an expenditure of $1,000 "relative to a clearly identified candidate during a calendar year." 608 (e) (1). Other expenditure ceilings limit spending by candidates, 608 (a), their campaigns, 608 (c), and political parties in connection with election campaigns, 608 (f). It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression "at the core of our electoral process and of the First Amendment freedoms." Williams v. Rhodes, 393 U.S. 23, 32 (1968).

1. The $1,000 Limitation on Expenditures "Relative to a Clearly Identified Candidate"

Section 608 (e) (1) provides that "[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000."[Footnote 45] The plain effect of 608 (e) (1) is to

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prohibit all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations, from voicing their views "relative to a clearly identified candidate" through means that entail aggregate expenditures of more than $1,000 during a calendar year. The provision, for

example, would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement "relative to a clearly identified candidate" in a major metropolitan newspaper.[Footnote 46]

Before examining the interests advanced in support of 608 (e) (1)'s expenditure ceiling, consideration must be given to appellants' contention that the provision is unconstitutionally vague.[Footnote 47] Close examination of the

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specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests. See Smith v. Goguen, 415 U.S. 566, 573 (1974); Cramp v. Board of Public Instruction, 368 U.S. 278, 287-288 (1961); Smith v. California, 361 U.S. 147, 151 (1959).[Footnote 48] The test is whether the language of 608 (e) (1) affords the "[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S., at 438.

The key operative language of the provision limits "any expenditure . . . relative to a clearly identified candidate." Although "expenditure," "clearly identified," and "candidate" are defined in the Act, there is no definition clarifying what expenditures are "relative to" a candidate. The use of so indefinite a phrase as "relative to" a candidate fails to clearly mark the boundary between permissible and impermissible speech, unless other portions of 608 (e) (1) make sufficiently explicit the range of expenditures

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covered by the limitation. The section prohibits "any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures . . . advocating the election or defeat of such candidate, exceeds $1,000." (Emphasis added.) This context clearly permits, if indeed it does not require, the phrase "relative to" a candidate to be read to mean "advocating the election or defeat of" a candidate.[Footnote 49]

But while such a construction of 608 (e) (1) refocuses the vagueness question, the Court of Appeals was mistaken in thinking that this construction eliminates the problem of unconstitutional vagueness altogether. 171 U.S. App. D.C., at 204, 519 F.2d, at 853. For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[Footnote 50] In an analogous

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context, this Court in Thomas v. Collins, 323 U.S. 516 (1945), observed:
"[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

"Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." Id., at 535.

See also United States v. Auto. Workers, 352 U.S. 567, 595-596 (1957) (Douglas, J., dissenting); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

The constitutional deficiencies described in Thomas v. Collins can be avoided only by reading 608 (e) (1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of "clearly identified" in 608 (e) (2) requires that an explicit and unambiguous reference to the candidate appear as part of the communication.[Footnote 51] This

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is the reading of the provision suggested by the non-governmental appellees in arguing that "[f]unds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat are thus not covered." We agree that in order to preserve the provision against invalidation on vagueness grounds, 608 (e) (1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.[Footnote 52]

We turn then to the basic First Amendment question - whether 608 (e) (1), even as thus narrowly and explicitly construed, impermissibly burdens the constitutional right of free expression. The Court of Appeals summarily held the provision constitutionally valid on the ground that "section 608 (e) is a loophole-closing provision only" that is necessary to prevent circumvention of the contribution limitations. 171 U.S. App. D.C., at 204, 519 F.2d, at 853. We cannot agree.

The discussion in Part I-A, supra, explains why the Act's expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations. The markedly greater burden on basic freedoms caused by 608 (e) (1) thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of 608 (e) (1) turns

on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations

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on core First Amendment rights of political expression.

We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify 608 (e) (1)'s ceiling on independent expenditures. First, assuming, arguendo, that large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions, 608 (e) (1) does not provide an answer that sufficiently relates to the elimination of those dangers. Unlike the contribution limitations' total ban on the giving of large amounts of money to candidates, 608 (e) (1) prevents only some large expenditures. So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder. It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office. Cf. Mills v. Alabama, 384 U.S., at 220.

Second, quite apart from the shortcomings of 608 (e)

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(1) in preventing any abuses generated by large independent expenditures, the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. The parties defending 608 (e) (1) contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act.[Footnote 53] Section 608 (b)'s

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contribution ceilings rather than 608 (e) (1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. By contrast, 608 (e) (1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, 608 (e) (1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

While the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming

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the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression. For the First Amendment right to "`speak one's mind . . . on all public institutions'" includes the right to engage in "`vigorous advocacy' no less than `abstract discussion.'" New York Times Co. v. Sullivan, 376 U.S., at 269, quoting Bridges v. California, 314 U.S. 252, 270 (1941), and NAACP v. Button, 371 U.S., at 429. Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.[Footnote 54]

It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by 608 (e) (1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in

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order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure `the widest possible dissemination of information from diverse and antagonistic sources,'" and "`to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" New York Times Co. v. Sullivan, supra, at 266, 269, quoting Associated Press v. United States, 326 U.S. 1, 20 (1945), and Roth v. United States, 354 U.S., at 484. The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend

on a person's financial ability to engage in public discussion. Cf. Eastern R. Conf. v. Noerr Motors, 365 U.S. 127, 139 (1961).[Footnote 55]

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The Court's decisions in Mills v. Alabama, 384 U.S. 214 (1966), and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), held that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment. In Mills, the Court addressed the question whether "a State, consistently with the United States Constitution, can make it a crime for the editor of a daily newspaper to write and publish an editorial on election day urging people to vote a certain way on issues submitted to them." 384 U.S., at 215 (emphasis in original). We held that "no test of reasonableness can save [such] a state law from invalidation as a violation of the First Amendment." Id., at 220. Yet the prohibition of election-day editorials invalidated in Mills is clearly a lesser intrusion on constitutional freedom than a $1,000 limitation on the amount of money any person or association can spend during an entire election year in advocating the election or defeat of a candidate for public office. More recently in Tornillo, the Court held that Florida could not constitutionally require a newspaper

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to make space available for a political candidate to reply to its criticism. Yet under the Florida statute, every newspaper was free to criticize any candidate as much as it pleased so long as it undertook the modest burden of printing his reply. See 418 U.S., at 256-257. The legislative restraint involved in Tornillo thus also pales in comparison to the limitations imposed by 608 (e) (1).[Footnote 56]

For the reasons stated, we conclude that 608 (e) (1)'s independent expenditure limitation is unconstitutional under the First Amendment.

2. Limitation on Expenditures by Candidates from Personal or Family Resources

The Act also sets limits on expenditures by a candidate "from his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year." 608 (a) (1). These ceilings vary from $50,000 for Presidential or Vice Presidential candidates to $35,000 for senatorial candidates, and $25,000 for most candidates for the House of Representatives.[Footnote 57]

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The ceiling on personal expenditures by candidates on their own behalf, like the limitations on independent expenditures contained in 608 (e) (1), imposes a substantial

restraint on the ability of persons to engage in protected First Amendment expression.[Footnote 58] The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered

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opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country "public discussion is a political duty," Whitney v. California, 274 U.S. 357, 375 (1927) (concurring opinion), applies with special force to candidates for public office. Section 608 (a)'s ceiling on personal expenditures by a candidate in furtherance of his own candidacy thus clearly and directly interferes with constitutionally protected freedoms.

The primary governmental interest served by the Act - the prevention of actual and apparent corruption of the political process - does not support the limitation on the candidate's expenditure of his own personal funds. As the Court of Appeals concluded: "Manifestly, the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family." 171 U.S. App. D.C., at 206, 519 F.2d, at 855. Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed.[Footnote 59]

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The ancillary interest in equalizing the relative financial resources of candidates competing for elective office, therefore, provides the sole relevant rationale for 608 (a)'s expenditure ceiling. That interest is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights. First, the limitation may fail to promote financial equality among candidates. A candidate who spends less of his personal resources on his campaign may nonetheless outspend his rival as a result of more successful fundraising efforts. Indeed, a candidate's personal wealth may impede his efforts to persuade others that he needs their financial contributions or volunteer efforts to conduct an effective campaign. Second, and more fundamentally, the First Amendment simply cannot tolerate 608 (a)'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy. We therefore hold that 608 (a)'s restriction on a candidate's personal expenditures is unconstitutional.

3. Limitations on Campaign Expenditures

Section 608 (c) places limitations on overall campaign expenditures by candidates seeking nomination for election and election to federal office.[Footnote 60] Presidential candidates may spend $10,000,000 in seeking nomination for office and an additional $20,000,000 in the general election campaign. 608 (c) (1) (A), (B).[Footnote 61]

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The ceiling on senatorial campaigns is pegged to the size of the voting-age population of the State with minimum dollar amounts applicable to campaigns in States with small populations. In senatorial primary elections, the limit is the greater of eight cents multiplied by the voting-age population or $100,000, and in the general election the limit is increased to 12 cents multiplied by the voting-age population or $150,000. 608 (c) (1) (C), (D). The Act imposes blanket $70,000 limitations on both primary campaigns and general election campaigns for the House of Representatives with the exception that the senatorial ceiling applies to campaigns in States entitled to only one Representative. 608 (c) (1) (C)-(E). These ceilings are to be adjusted upwards at the beginning of each calendar year by the average percentage rise in the consumer price index for the 12 preceding months. 608 (d).[Footnote 62]

No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by 608 (c)'s campaign expenditure limitations. The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions. The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by 608 (c)'s campaign expenditure ceilings. The Court of Appeals' assertion that the expenditure restrictions are necessary to reduce the incentive to circumvent direct contribution limits is not persuasive. See 171 U.S.

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App. D.C., at 210, 519 F.2d, at 859. There is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions. Extensive reporting, auditing, and disclosure requirements applicable to both contributions and expenditures by political campaigns are designed to facilitate the detection of illegal contributions. Moreover, as the Court of Appeals noted, the Act permits an officeholder or successful candidate to retain contributions in excess of the expenditure ceiling and to use these funds for "any other lawful purpose." 2 U.S.C. 439a (1970 ed., Supp. IV). This provision undercuts whatever marginal role the expenditure limitations might otherwise play in enforcing the contribution ceilings.

The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns. Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support.[Footnote 63] There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate.[Footnote 64] Moreover, the equalization of permissible campaign expenditures

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might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.

The campaign expenditure ceilings appear to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns. Appellees and the Court of Appeals stressed statistics indicating that spending for federal election campaigns increased almost 300% between 1952 and 1972 in comparison with a 57.6% rise in the consumer price index during the same period. Appellants respond that during these years the rise in campaign spending lagged behind the percentage increase in total expenditures for commercial advertising and the size of the gross national product. In any event, the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people - individually as citizens and candidates and collectively as associations and political committees - who must retain control over the quantity and range of debate on public issues in a political campaign.[Footnote 65]

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For these reasons we hold that 608 (c) is constitutionally invalid.[Footnote 66]

In sum, the provisions of the Act that impose a $1,000 limitation on contributions to a single candidate, 608 (b) (1), a $5,000 limitation on contributions by a political committee to a single candidate, 608 (b) (2), and a $25,000 limitation on total contributions by an individual during any calendar year, 608 (b) (3), are constitutionally valid. These limitations, along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions. The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process

without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion. By contrast, the First Amendment requires the invalidation of the Act's independent expenditure ceiling, 608 (e) (1), its limitation on a candidate's expenditures from his own personal funds, 608 (a), and its ceilings on overall campaign expenditures, 608 (c). These provisions place substantial and direct restrictions

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on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.[Footnote 67]

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II. REPORTING AND DISCLOSURE REQUIREMENTS

Unlike the limitations on contributions and expenditures imposed by 18 U.S.C. 608 (1970 ed., Supp. IV), the disclosure requirements of the Act, 2 U.S.C. 431 et seq. (1970 ed., Supp. IV),[Footnote 68] are not challenged by appellants as per se unconstitutional restrictions on the exercise of First Amendment freedoms of speech and association.[Footnote 69] Indeed, appellants argue that "narrowly drawn disclosure requirements are the proper solution to virtually all of the evils Congress sought to remedy." Brief for Appellants 171. The particular requirements

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embodied in the Act are attacked as overbroad - both in their application to minor-party and independent candidates and in their extension to contributions as small as $11 or $101. Appellants also challenge the provision for disclosure by those who make independent contributions and expenditures, 434 (e). The Court of Appeals found no constitutional infirmities in the provisions challenged here.[Footnote 70] We affirm the determination on overbreadth and hold that 434 (e), if narrowly construed, also is within constitutional bounds.

The first federal disclosure law was enacted in 1910. Act of June 25, 1910, c. 392, 36 Stat. 822. It required political committees, defined as national committees and national congressional campaign committees of parties, and organizations operating to influence congressional elections in two or more States, to disclose names of all contributors of $100 or more; identification of recipients of expenditures of $10 or more was also required. 1, 5-6, 36 Stat. 822 824. Annual expenditures of $50 or more "for the purpose of influencing or controlling, in two or more States, the result of" a congressional election had to be reported independently if they were not made through a political committee. 7,

36 Stat. 824. In 1911 the Act was revised to include prenomination transactions such as those involved in conventions and primary campaigns. Act of Aug. 19, 1911, 2, 37 Stat. 26. See United States v. Auto. Workers, 352 U.S., at 575-576.

Disclosure requirements were broadened in the Federal Corrupt Practices Act of 1925 (Title III of the Act of Feb. 28, 1925), 43 Stat. 1070. That Act required political committees, defined as organizations that accept contributions or make expenditures "for the purpose of

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influencing or attempting to influence" the Presidential or Vice Presidential elections (a) in two or more States or (b) as a subsidiary of a national committee, 302 (c), 43 Stat. 1070, to report total contributions and expenditures, including the names and addresses of contributors of $100 or more and recipients of $10 or more in a calendar year. 305 (a), 43 Stat. 1071. The Act was upheld against a challenge that it infringed upon the prerogatives of the States in Burroughs v. United States, 290 U.S. 534 (1934). The Court held that it was within the power of Congress "to pass appropriate legislation to safeguard [a Presidential] election from the improper use of money to influence the result." Id., at 545. Although the disclosure requirements were widely circumvented,[Footnote 71] no further attempts were made to tighten them until 1960, when the Senate passed a bill that would have closed some existing loopholes. S. 2436, 106 Cong. Rec. 1193. The attempt aborted because no similar effort was made in the House.

The Act presently under review replaced all prior disclosure laws. Its primary disclosure provisions impose reporting obligations on "political committees" and candidates. "Political committee" is defined in 431 (d) as a group of persons that receives "contributions" or makes "expenditures" of over $1,000 in a calendar year. "Contributions" and "expenditures" are defined in lengthy parallel provisions similar to those in Title 18, discussed

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above.[Footnote 72] Both definitions focus on the use of money or other objects of value "for the purpose of . . . influencing" the nomination or election of any person to federal office. 431 (e) (1), (f) (1).

Each political committee is required to register with the Commission, 433, and to keep detailed records of both contributions and expenditures, 432 (c), (d). These records must include the name and address of everyone making a contribution in excess of $10, along with the date and amount of the contribution. If a person's contributions aggregate more than $100, his occupation and principal place of business are also to be included. 432 (c) (2). These files are subject to periodic audits and field investigations by the Commission. 438 (a) (8).

Each committee and each candidate also is required to file quarterly reports. 434 (a). The reports are to contain detailed financial information, including the full name, mailing address, occupation, and principal place of business of each person who has contributed over $100 in a calendar year, as well as the amount and date of the contributions. 434 (b). They are to be made available by the Commission "for public inspection and copying." 438 (a) (4). Every candidate for federal office is required to designate a "principal campaign committee," which is to receive reports of contributions and expenditures made on the candidate's behalf from other political committees and to compile and file these reports, together with its own statements, with the Commission. 432 (f).

Every individual or group, other than a political committee or candidate, who makes "contributions" or "expenditures" of over $100 in a calendar year "other than

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by contribution to a political committee or candidate" is required to file a statement with the Commission. 434 (e). Any violation of these recordkeeping and reporting provisions is punishable by a fine of not more than $1,000 or a prison term of not more than a year, or both. 441 (a).

A. General Principles

Unlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities. But we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. E. g., Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since NAACP v. Alabama we have required that the subordinating interests of the State must survive exacting scrutiny.[Footnote 73] We also have insisted that there be a "relevant correlation"[Footnote 74] or "substantial relation"[Footnote 75] between the governmental interest and the information required to be disclosed. See Pollard v. Roberts, 283 F. Supp. 248, 257 (ED Ark.) (three-judge court), aff'd, 393 U.S. 14 (1968)

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(per curiam). This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but

indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure. NAACP v. Alabama, supra, at 461. Cf. Kusper v. Pontikes, 414 U.S., at 57-58.

Appellees argue that the disclosure requirements of the Act differ significantly from those at issue in NAACP v. Alabama and its progeny because the Act only requires disclosure of the names of contributors and does not compel political organizations to submit the names of their members.[Footnote 76]

As we have seen, group association is protected because it enhances "[e]ffective advocacy." NAACP v. Alabama, supra, at 460. The right to join together "for the advancement of beliefs and ideas," ibid., is diluted if it does not include the right to pool money through contributions, for funds are often essential if "advocacy" is

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to be truly or optimally "effective." Moreover, the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for "[f]inancial transactions can reveal much about a person's activities, associations, and beliefs." California Bankers Assn. v. Shultz, 416 U.S. 21, 78-79 (1974) (POWELL, J., concurring). Our past decisions have not drawn fine lines between contributors and members but have treated them interchangeably. In Bates, for example, we applied the principles of NAACP v. Alabama and reversed convictions for failure to comply with a city ordinance that required the disclosure of "dues, assessments, and contributions paid, by whom and when paid." 361 U.S., at 518. See also United States v. Rumely, 345 U.S. 41 (1953) (setting aside a contempt conviction of an organization official who refused to disclose names of those who made bulk purchases of books sold by the organization).

The strict test established by NAACP v. Alabama is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the "free functioning of our national institutions" is involved. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 97 (1961).

The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories. First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate"[Footnote 77] in order to aid the voters in evaluating those

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who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.[Footnote 78] This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.[Footnote 79] And, as we recognized in Burroughs v. United States, 290 U.S., at 548, Congress could reasonably conclude that full disclosure during an election campaign tends "to prevent the corrupt use of money to affect elections." In enacting these requirements it may have been mindful of Mr. Justice Brandeis' advice:

"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[Footnote 80]

Third, and not least significant, recordkeeping, reporting,

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and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

The disclosure requirements, as a general matter, directly serve substantial governmental interests. In determining whether these interests are sufficient to justify the requirements we must look to the extent of the burden that they place on individual rights.

It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights, and they must be weighed carefully against the interests which Congress has sought to promote by this legislation. In this process, we note and agree with appellants' concession[Footnote 81] that disclosure requirements - certainly in most applications - appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.[Footnote 82] Appellants argue, however, that the balance tips against disclosure when it is required of contributors to certain parties and candidates. We turn now to this contention.

B. Application to Minor Parties and Independents

Appellants contend that the Act's requirements are overbroad insofar as they apply to contributions to minor

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parties and independent candidates because the governmental interest in this information is minimal and the danger of significant infringement on First Amendment rights is greatly increased.

1. Requisite Factual Showing

In NAACP v. Alabama the organization had "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," 357 U.S., at 462, and the State was unable to show that the disclosure it sought had a "substantial bearing" on the issues it sought to clarify, id., at 464. Under those circumstances, the Court held that "whatever interest the State may have in [disclosure] has not been shown to be sufficient to overcome petitioner's constitutional objections." Id., at 465.

The Court of Appeals rejected appellants' suggestion that this case fits into the NAACP v. Alabama mold. It concluded that substantial governmental interests in "informing the electorate and preventing the corruption of the political process" were furthered by requiring disclosure of minor parties and independent candidates, 171 U.S. App. D.C., at 218, 519 F.2d, at 867, and therefore found no "tenable rationale for assuming that the public interest in minority party disclosure of contributions above a reasonable cutoff point is uniformly outweighed by potential contributors' associational rights," id., at 219, 519 F.2d, at 868. The court left open the question of the application of the disclosure requirements to candidates (and parties) who could demonstrate injury of the sort at stake in NAACP v. Alabama. No record of harassment on a similar scale was found in this case.[Footnote 83] We agree with

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the Court of Appeals' conclusion that NAACP v. Alabama is inapposite where, as here, any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative.

It is true that the governmental interest in disclosure is diminished when the contribution in question is made to a minor party with little chance of winning an election. As minor parties usually represent definite and publicized viewpoints, there may be less need to inform the voters of the interests that specific candidates represent. Major parties

encompass candidates of greater diversity. In many situations the label "Republican" or "Democrat" tells a voter little. The candidate who bears it may be supported by funds from the far right, the far left, or any place in between on the political spectrum. It is less likely that a candidate of, say, the Socialist Labor Party will represent interests that cannot be discerned from the party's ideological position.

The Government's interest in deterring the "buying" of elections and the undue influence of large contributors on officeholders also may be reduced where contributions to a minor party or an independent candidate are concerned, for it is less likely that the candidate will be victorious. But a minor party sometimes can play a significant role in an election. Even when a minor-party candidate has little or no chance of winning, he may be encouraged by major-party interests in order to divert votes from other major-party contenders.[Footnote 84]

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We are not unmindful that the damage done by disclosure to the associational interests of the minor parties and their members and to supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within[Footnote 85] and without[Footnote 86] the political arena.

There could well be a case, similar to those before the Court in NAACP v. Alabama and Bates, where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied.[Footnote 87] But no appellant in this case has tendered record evidence of the sort proffered in NAACP v. Alabama. Instead, appellants primarily rely on "the clearly articulated fears of individuals, well experienced in the political process." Brief for Appellants 173. At

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best they offer the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure.[Footnote 88] On this record, the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged.

2. Blanket Exemption

Appellants agree that "the record here does not reflect the kind of focused and insistent harassment of contributors and members that existed in the NAACP cases." Ibid. They

argue, however, that a blanket exemption for minor parties is necessary lest irreparable injury be done before the required evidence can be gathered.

Those parties that would be sufficiently "minor" to be exempted from the requirements of 434 could be defined, appellants suggest, along the lines used for public-financing purposes, see Part III-A, infra, as those who received less than 25% of the vote in past elections. Appellants do not argue that this line is constitutionally required. They suggest as an alternative defining "minor parties" as those that do not qualify for automatic ballot access under state law. Presumably, other criteria, such as current political strength (measured by polls or petition), age, or degree of organization, could also be used.[Footnote 89]

The difficulty with these suggestions is that they reflect only a party's past or present political strength and

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that is only one of the factors that must be considered. Some of the criteria are not precisely indicative of even that factor. Age,[Footnote 90] or past political success, for instance, may typically be associated with parties that have a high probability of success. But not all long-established parties are winners - some are consistent losers - and a new party may garner a great deal of support if it can associate itself with an issue that has captured the public's imagination. None of the criteria suggested is precisely related to the other critical factor that must be considered, the possibility that disclosure will impinge upon protected associational activity.

An opinion dissenting in part from the Court of Appeals' decision concedes that no one line is "constitutionally required."[Footnote 91] It argues, however, that a flat exemption for minor parties must be carved out, even along arbitrary lines, if groups that would suffer impermissibly from disclosure are to be given any real protection. An approach that requires minor parties to submit evidence that the disclosure requirements cannot constitutionally be applied to them offers only an illusory safeguard, the argument goes, because the "evils" of "chill and harassment . . . are largely incapable of formal proof."[Footnote 92] This dissent expressed its concern that a minor party, particularly a

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new party, may never be able to prove a substantial threat of harassment, however real that threat may be, because it would be required to come forward with witnesses who are too fearful to contribute but not too fearful to testify about their fear. A strict requirement that chill and harassment be directly attributable to the specific disclosure from which the exemption is sought would make the task even more difficult.

We recognize that unduly strict requirements of proof could impose a heavy burden, but it does not follow that a blanket exemption for minor parties is necessary. Minor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim. The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.

Where it exists the type of chill and harassment identified in NAACP v. Alabama can be shown. We cannot assume that courts will be insensitive to similar showings when made in future cases. We therefore conclude that a blanket exemption is not required.

C. Section 434 (e)

Section 434 (e) requires "[e]very person (other than a political committee or candidate) who makes contributions

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or expenditures" aggregating over $100 in a calendar year "other than by contribution to a political committee or candidate" to file a statement with the Commission.[Footnote 93] Unlike the other disclosure provisions, this section does not seek the contribution list of any association. Instead, it requires direct disclosure of what an individual or group contributes or spends.

In considering this provision we must apply the same strict standard of scrutiny, for the right of associational privacy developed in NAACP v. Alabama derives from the rights of the organization's members to advocate their personal points of view in the most effective way. 357 U.S., at 458, 460. See also NAACP v. Button, 371 U.S., at 429-431; Sweezy v. New Hampshire, 354 U.S., at 250.

Appellants attack 434 (e) as a direct intrusion on privacy of belief, in violation of Talley v. California, 362 U.S. 60 (1960), and as imposing "very real, practical burdens . . . certain to deter individuals from making expenditures for their independent political speech" analogous to those held to be impermissible in Thomas v. Collins, 323 U.S. 516 (1945).

1. The Role of 434 (e)

The Court of Appeals upheld 434 (e) as necessary to enforce the independent-expenditure ceiling imposed by 18 U.S.C. 608 (e) (1) (1970 ed., Supp. IV). It said:

"If . . . Congress has both the authority and a compelling interest to regulate independent expenditures under section 608 (e), surely it can require that there be disclosure to prevent misuse of the spending channel." 171 U.S. App. D.C., at 220 519 F.2d, at 869.

We have found that 608 (e) (1) unconstitutionally infringes

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upon First Amendment rights.[Footnote 94] If the sole function of 434 (e) were to aid in the enforcement of that provision, it would no longer serve any governmental purpose.

But the two provisions are not so intimately tied. The legislative history on the function of 434 (e) is bare, but it was clearly intended to stand independently of 608 (e) (1). It was enacted with the general disclosure provisions in 1971 as part of the original Act,[Footnote 95] while 608 (e) (1) was part of the 1974 amendments.[Footnote 96] Like the other disclosure provisions, 434 (e) could play a role in the enforcement of the expanded contribution and expenditure limitations included in the 1974 amendments, but it also has independent functions. Section 434 (e) is part of Congress' effort to achieve "total disclosure" by reaching "every kind of political activity"[Footnote 97] in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible. The provision is responsive to the legitimate fear that efforts would be made, as they had been in the past,[Footnote 98] to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act.

2. Vagueness Problems

In its effort to be all-inclusive, however, the provision raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties[Footnote 99] and fear of incurring these sanctions

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may deter those who seek to exercise protected First Amendment rights.

Section 434 (e) applies to "[e]very person . . . who makes contributions or expenditures." "Contributions" and "expenditures" are defined in parallel provisions in terms of the use of money or other valuable assets "for the purpose of . . . influencing" the nomination or

election of candidates for federal office.[Footnote 100] It is the ambiguity of this phrase that poses constitutional problems.

Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S. 612, 617 (1954). See also Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Where First Amendment rights are involved, an even "greater degree of specificity" is required. Smith v. Goguen, 415 U.S., at 573. See Grayned v. City of Rockford, 408 U.S. 104, 109 (1972); Kunz v. New York, 340 U.S. 290 (1951).

There is no legislative history to guide us in determining the scope of the critical phrase "for the purpose of . . . influencing." It appears to have been adopted without comment from earlier disclosure Acts.[Footnote 101] Congress "has voiced its wishes in [most] muted strains," leaving us to draw upon "those common-sense assumptions that must be made in determining direction without a compass." Rosado v. Wyman, 397 U.S. 397, 412 (1970). Where the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute,

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if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness. United States v. Harriss, supra, at 618; United States v. Rumely, 345 U.S., at 45.

In enacting the legislation under review Congress addressed broadly the problem of political campaign financing. It wished to promote full disclosure of campaign-oriented spending to insure both the reality and the appearance of the purity and openness of the federal election process.[Footnote 102] Our task is to construe "for the purpose of . . . influencing," incorporated in 434 (e) through the definitions of "contributions" and "expenditures," in a manner that precisely furthers this goal.

In Part I we discussed what constituted a "contribution" for purposes of the contribution limitations set forth in 18 U.S.C. 608 (b) (1970 ed., Supp. IV).[Footnote 103] We construed that term to include not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate. The definition of "contribution" in 431 (e) for disclosure purposes parallels the definition in Title 18 almost word for word, and we construe the former provision as we have the latter. So defined, "contributions" have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.

When we attempt to define "expenditure" in a similarly narrow way we encounter line-drawing problems

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of the sort we faced in 18 U.S.C. 608 (e) (1) (1970 ed., Supp. IV). Although the phrase, "for the purpose of . . . influencing" an election or nomination, differs from the language used in 608 (e) (1), it shares the same potential for encompassing both issue discussion and advocacy of a political result.[Footnote 104] The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures,"[Footnote 105] and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly.[Footnote 106] To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

But when the maker of the expenditure is not within these categories - when it is an individual other than a candidate or a group other than a "political committee"[Footnote 107]

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- the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of 434 (e) is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of 608 (e) - to reach only funds used for communications that expressly advocate[Footnote 108] the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.

In summary, 434 (e), as construed, imposes independent reporting requirements on individuals and groups that are not candidates or political committees only in the following circumstances: (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.

Unlike 18 U.S.C. 608 (e) (1) (1970 ed., Supp. IV), 434 (e), as construed, bears a sufficient relationship to a substantial governmental interest. As narrowed, 434 (e), like 608 (e) (1), does not reach all partisan discussion for it only requires disclosure of those

expenditures that expressly advocate a particular election result. This might have been fatal if the only purpose of 434 (e)

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were to stem corruption or its appearance by closing a loophole in the general disclosure requirements. But the disclosure provisions, including 434 (e), serve another, informational interest, and even as construed 434 (e) increases the fund of information concerning those who support the candidates. It goes beyond the general disclosure requirements to shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures or of contributions to an individual or group not itself required to report the names of its contributors. By the same token, it is not fatal that 434 (e) encompasses purely independent expenditures uncoordinated with a particular candidate or his agent. The corruption potential of these expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies.

Section 434 (e), as we have construed it, does not contain the infirmities of the provisions before the Court in Talley v. California, 362 U.S. 60 (1960), and Thomas v. Collins, 323 U.S. 516 (1945). The ordinance found wanting in Talley forbade all distribution of handbills that did not contain the name of the printer, author, or manufacturer, and the name of the distributor. The city urged that the ordinance was aimed at identifying those responsible for fraud, false advertising, and libel, but the Court found that it was "in no manner so limited." 362 U.S., at 64. Here, as we have seen, the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced. Thomas held unconstitutional a prior restraint in the form of a registration requirement for labor organizers.

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The Court found the State's interest insufficient to justify the restrictive effect of the statute. The burden imposed by 434 (e) is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view.[Footnote 109]

D. Thresholds

Appellants' third contention, based on alleged overbreadth, is that the monetary thresholds in the recordkeeping and reporting provisions lack a substantial nexus with the claimed governmental interests, for the amounts involved are too low even to attract the attention of the candidate, much less have a corrupting influence.

The provisions contain two thresholds. Records are to be kept by political committees of the names and addresses of those who make contributions in excess of $10, 432 (c) (2), and these records are subject to Commission audit, 438 (a) (8). If a person's contributions to a committee or candidate aggregate more than $100, his name and address, as well as his occupation and principal place of business, are to be included in reports filed by committees and candidates with the Commission, 434 (b) (2), and made available for public inspection, 438 (a) (4).

The Court of Appeals rejected appellants' contention that these thresholds are unconstitutional. It found the challenge on First Amendment grounds to the $10 threshold to be premature, for it could "discern no basis in the statute for authorizing disclosure outside the Commission

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. . ., and hence no substantial `inhibitory effect' operating upon" appellants. 171 U.S. App. D.C., at 216, 519 F.2d, at 865. The $100 threshold was found to be within the "reasonable latitude" given the legislature "as to where to draw the line." Ibid. We agree.

The $10 and $100 thresholds are indeed low. Contributors of relatively small amounts are likely to be especially sensitive to recording or disclosure of their political preferences. These strict requirements may well discourage participation by some citizens in the political process, a result that Congress hardly could have intended. Indeed, there is little in the legislative history to indicate that Congress focused carefully on the appropriate level at which to require recording and disclosure. Rather, it seems merely to have adopted the thresholds existing in similar disclosure laws since 1910.[Footnote 110] But we cannot require Congress to establish that it has chosen the highest reasonable threshold. The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion. We cannot say, on this bare record, that the limits designated are wholly without rationality.[Footnote 111]

We are mindful that disclosure serves informational functions, as well as the prevention of corruption and the enforcement of the contribution limitations. Congress is not required to set a threshold that is tailored only to the latter goals. In addition, the enforcement

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goal can never be well served if the threshold is so high that disclosure becomes equivalent to admitting violation of the contribution limitations.

The $10 recordkeeping threshold, in a somewhat similar fashion, facilitates the enforcement of the disclosure provisions by making it relatively difficult to aggregate secret contributions in amounts that surpass the $100 limit. We agree with the Court of

Appeals that there is no warrant for assuming that public disclosure of contributions between $10 and $100 is authorized by the Act. Accordingly, we do not reach the question whether information concerning gifts of this size can be made available to the public without trespassing impermissibly on First Amendment rights. Cf. California Bankers Assn. v. Shultz, 416 U.S., at 56-57.[Footnote 112]

In summary, we find no constitutional infirmities in the recordkeeping, reporting, and disclosure provisions of the Act.[Footnote 113]

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III. PUBLIC FINANCING OF PRESIDENTIAL ELECTION CAMPAIGNS

A series of statutes[Footnote 114] for the public financing of Presidential election campaigns produced the scheme now found in 6096 and Subtitle H of the Internal Revenue

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Code of 1954, 26 U.S.C. 6096, 9001-9012, 9031-9042 (1970 ed., Supp. IV).[Footnote 115] Both the District Court, 401 F. Supp. 1235, and the Court of Appeals, 171 U.S. App. D.C., at 229-238, 519 F.2d, at 878-887, sustained Subtitle H against a constitutional attack.[Footnote 116] Appellants renew their challenge here, contending that the legislation violates the First and Fifth Amendments. We find no merit in their claims and affirm.

A. Summary of Subtitle H

Section 9006 establishes a Presidential Election Campaign Fund (Fund), financed from general revenues in the aggregate amount designated by individual taxpayers, under 6096, who on their income tax returns may authorize payment to the Fund of one dollar of their tax liability in the case of an individual return or two dollars in the case of a joint return. The Fund consists of three separate accounts to finance (1) party nominating conventions, 9008 (a), (2) general election campaigns, 9006 (a), and (3) primary campaigns, 9037 (a).[Footnote 117]

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Chapter 95 of Title 26, which concerns financing of party nominating conventions and general election campaigns, distinguishes among "major," "minor," and "new" parties. A major party is defined as a party whose candidate for President in the most recent election

received 25% or more of the popular vote. 9002 (6). A minor party is defined as a party whose candidate received at least 5% but less than 25% of the vote at the most recent election. 9002 (7). All other parties are new parties, 9002 (8), including both newly created parties and those receiving less than 5% of the vote in the last election.[Footnote 118]

Major parties are entitled to $2,000,000 to defray their national committee Presidential nominating convention expenses, must limit total expenditures to that amount, 9008 (d),[Footnote 119] and may not use any of this money to benefit a particular candidate or delegate, 9008 (c).

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A minor party receives a portion of the major-party entitlement determined by the ratio of the votes received by the party's candidate in the last election to the average of the votes received by the major parties' candidates. 9008 (b) (2). The amounts given to the parties and the expenditure limit are adjusted for inflation, using 1974 as the base year. 9008 (b) (5). No financing is provided for new parties, nor is there any express provision for financing independent candidates or parties not holding a convention.

For expenses in the general election campaign, 9004 (a) (1) entitles each major-party candidate to $20,000,000.[Footnote 120] This amount is also adjusted for inflation. See 9004 (a) (1). To be eligible for funds the candidate[Footnote 121] must pledge not to incur expenses in excess of the entitlement under 9004 (a) (1) and not to accept private contributions except to the extent that the fund is insufficient to provide the full entitlement. 9003 (b) Minor-party candidates are also entitled to funding, again based on the ratio of the vote received by the party's candidate in the preceding election to the average of the major-party candidates. 9004 (a) (2) (A). Minor-party candidates must certify that they will not incur campaign expenses in excess of the major-party entitlement and

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that they will accept private contributions only to the extent needed to make up the difference between that amount and the public funding grant. 9003 (c). New-party candidates receive no money prior to the general election, but any candidate receiving 5% or more of the popular vote in the election is entitled to post-election payments according to the formula applicable to minor-party candidates. 9004 (a) (3). Similarly, minor-party candidates are entitled to post-election funds if they receive a greater percentage of the average major-party vote than their party's candidate did in the preceding election; the amount of such payments is the difference between the entitlement based on the preceding election and that based on the actual vote in the current election. 9004 (a) (3). A further eligibility requirement for minor- and new-party candidates is that the

candidate's name must appear on the ballot, or electors pledged to the candidate must be on the ballot, in at least 10 States. 9002 (2) (B).

Chapter 96 establishes a third account in the Fund, the Presidential Primary Matching Payment Account. 9037 (a). This funding is intended to aid campaigns by candidates seeking Presidential nomination "by a political party," 9033 (b) (2), in "primary elections," 9032 (7).[Footnote 122] The threshold eligibility requirement is that the candidate raise at least $5,000 in each of 20 States, counting only the first $250 from each person contributing to the candidate. 9033 (b) (3), (4). In addition, the candidate must agree to abide by the spending limits in 9035. See 9033 (b) (1).[Footnote 123] Funding is

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provided according to a matching formula: each qualified candidate is entitled to a sum equal to the total private contributions received, disregarding contributions from any person to the extent that total contributions to the candidate by that person exceed $250. 9034 (a). Payments to any candidate under Chapter 96 may not exceed 50% of the overall expenditure ceiling accepted by the candidate. 9034 (b).

B. Constitutionality of Subtitle H

Appellants argue that Subtitle H is invalid (1) as "contrary to the `general welfare,'" Art. I, 8, (2) because any scheme of public financing of election campaigns is inconsistent with the First Amendment, and (3) because Subtitle H invidiously discriminates against certain interests in violation of the Due Process Clause of the Fifth Amendment. We find no merit in these contentions.

Appellants'"general welfare" contention erroneously treats the General Welfare Clause as a limitation upon congressional power. It is rather a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause. M`Culloch v. Maryland, 4 Wheat. 316, 420 (1819). Congress has power to regulate Presidential elections and primaries, United States v. Classic, 313 U.S. 299 (1941); Burroughs v. United States, 290 U.S. 534 (1934); and public financing of Presidential elections as a means to reform the electoral process was clearly a choice within the granted power. It is for Congress to decide which expenditures will promote the general welfare: "[T]he power of Congress to authorize expenditure of public moneys for public purposes is not

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limited by the direct grants of legislative power found in the Constitution." United States v. Butler, 297 U.S. 1, 66 (1936). See Helvering v. Davis, 301 U.S. 619, 640-641 (1937). Any limitations upon the exercise of that granted power must be found elsewhere in the

Constitution. In this case, Congress was legislating for the "general welfare" - to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising. See S. Rep. No. 93-689, Pp. 1-10 (1974). Whether the chosen means appear "bad," "unwise," or "unworkable" to us is irrelevant; Congress has concluded that the means are "necessary and proper" to promote the general welfare, and we thus decline to find this legislation without the grant of power in Art. I, 8.

Appellants' challenge to the dollar check-off provision (6096) fails for the same reason. They maintain that Congress is required to permit taxpayers to designate particular candidates or parties as recipients of their money. But the appropriation to the Fund in 9006 is like any other appropriation from the general revenue except that its amount is determined by reference to the aggregate of the one-and two-dollar authorization on taxpayers' income tax returns. This detail does not constitute the appropriation any less an appropriation by Congress.[Footnote 124] The fallacy of appellants' argument is therefore apparent;

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every appropriation made by Congress uses public money in a manner to which some taxpayers object.[Footnote 125]

Appellants next argue that "by analogy" to the Religion Clauses of the First Amendment public financing of election campaigns, however meritorious, violates the First Amendment. We have, of course, held that the Religion Clauses - "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" - require Congress, and the States through the Fourteenth Amendment, to remain neutral in matters of religion. E. g., Abington School Dist. v. Schempp, 374 U.S. 203, 222-226 (1963). The government may not aid one religion to the detriment of others or impose a burden on one religion that is not imposed on others, and may not even aid all religions. E. g., Everson v. Board of Education, 330 U.S. 1, 15-16 (1947). See Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 96 (1961). But the analogy is patently inapplicable to our issue here. Although "Congress shall make no law . . . abridging the freedom of speech, or the press," Subtitle H is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public

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discussion and participation in the electoral process, goals vital to a self-governing people.[Footnote 126] Thus, Subtitle H furthers, not abridges, pertinent First Amendment values.[Footnote 127] Appellants argue, however, that as constructed public financing invidiously discriminates in violation of the Fifth Amendment. We turn therefore to that argument.

Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n. 2 (1975), and cases cited. In several situations concerning the electoral process, the principle has been

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developed that restrictions on access to the electoral process must survive exacting scrutiny. The restriction can be sustained only if it furthers a "vital" governmental interest, American Party of Texas v. White, 415 U.S. 767, 780-781 (1974), that is "achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity." Lubin v. Panish, 415 U.S. 709, 716 (1974). See American Party of Texas v. White, supra, at 780; Storer v. Brown, 415 U.S. 724, 729-730 (1974). These cases, however, dealt primarily with state laws requiring a candidate to satisfy certain requirements in order to have his name appear on the ballot. These were, of course, direct burdens not only on the candidate's ability to run for office but also on the voter's ability to voice preferences regarding representative government and contemporary issues. In contrast, the denial of public financing to some Presidential candidates is not restrictive of voters' rights and less restrictive of candidates'.[Footnote 128] Subtitle H does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice; the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to

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raise private contributions. Any disadvantage suffered by operation of the eligibility formulae under Subtitle H is thus limited to the claimed denial of the enhancement of opportunity to communicate with the electorate that the formulae afford eligible candidates. But eligible candidates suffer a countervailing denial. As we more fully develop later, acceptance of public financing entails voluntary acceptance of an expenditure ceiling. Non-eligible candidates are not subject to that limitation.[Footnote 129] Accordingly, we conclude that public financing is generally less restrictive of access to the electoral process than the ballot-access regulations dealt with in prior cases.[Footnote 130] In any event, Congress enacted Subtitle H in furtherance of sufficiently important governmental interests and has

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not unfairly or unnecessarily burdened the political opportunity of any party or candidate.

It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest. S. Rep. No. 93-689, pp. 4-5 (1974). In addition, the limits on contributions necessarily

increase the burden of fundraising, and Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions. See id., at 5. The States have also been held to have important interests in limiting places on the ballot to those candidates who demonstrate substantial popular support. E. g., Storer v. Brown, supra, at 736; Lubin v. Panish, supra, at 718-719; Jenness v. Fortson, 403 U.S. 431, 442 (1971); Williams v. Rhodes, 393 U.S., at 31-33. Congress' interest in not funding hopeless candidacies with large sums of public money, S. Rep. No. 93-689, supra, at 7, necessarily justifies the withholding of public assistance from candidates without significant public support. Thus, Congress may legitimately require "some preliminary showing of a significant modicum of support," Jenness v. Fortson, supra, at 442, as an eligibility requirement for public funds. This requirement also serves the important public interest against providing artificial incentives to "splintered parties and unrestrained factionalism." Storer v. Brown, supra, at 736; S. Rep. No. 93-689, supra, at 8; H. R. Rep. No. 93-1239, p. 13 (1974). Cf. Bullock v. Carter, 405 U.S. 134, 145 (1972).

At the same time Congress recognized the constitutional restraints against inhibition of the present opportunity of minor parties to become major political entities if they obtain widespread support. S. Rep. No. 93-689, supra, at 8-10; H. R. Rep. No. 93-1239, supra, at 13. As

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the Court of Appeals said, "provisions for public funding of Presidential campaigns . . . could operate to give an unfair advantage to established parties, thus reducing, to the nation's detriment. . . . the `potential fluidity of American political life.'" 171 U.S. App. D.C., at 231, 519 F.2d, at 880, quoting from Jenness v. Fortson, supra, at 439.

1. General Election Campaign Financing

Appellants insist that Chapter 95 falls short of the constitutional requirement in that its provisions supply larger, and equal, sums to candidates of major parties, use prior vote levels as the sole criterion for pre-election funding, limit new-party candidates to post-election funds, and deny any funds to candidates of parties receiving less than 5% of the vote. These provisions, it is argued, are fatal to the validity of the scheme, because they work invidious discrimination against minor and new parties in violation of the Fifth Amendment. We disagree.[Footnote 131]

As conceded by appellants, the Constitution does not require Congress to treat all declared candidates the same for public financing purposes. As we said in Jenness v. Fortson, "there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. . . . Sometimes the grossest discrimination can lie in treating

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things that are different as though they were exactly alike, a truism well illustrated in Williams v. Rhodes, supra." 403 U.S., at 441-442. Since the Presidential elections of 1856 and 1860, when the Whigs were replaced as a major party by the Republicans, no third party has posed a credible threat to the two major parties in Presidential elections.[Footnote 132] Third parties have been completely incapable of matching the major parties' ability to raise money and win elections. Congress was, of course, aware of this fact of American life, and thus was justified in providing both major parties full funding and all other parties only a percentage of the major-party entitlement.[Footnote 133] Identical treatment of all parties, on the other hand, "would not only make it easy to raid the United States Treasury, it would also artificially foster the proliferation of splinter parties." 171 U.S. App. D.C., at 231, 519 F.2d, at 881. The Constitution does not require the Government to "finance the efforts of every nascent political group," American Party of Texas v. White, 415 U.S., at 794, merely because Congress chose to finance the efforts of the major parties.

Furthermore, appellants have made no showing that

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the election funding plan disadvantages nonmajor parties by operating to reduce their strength below that attained without any public financing. First, such parties are free to raise money from private sources,[Footnote 134] and by our holding today new parties are freed from any expenditure limits, although admittedly those limits may be a largely academic matter to them. But since any major-party candidate accepting public financing of a campaign voluntarily assents to a spending ceiling, other candidates will be able to spend more in relation to the major-party candidates. The relative position of minor parties that do qualify to receive some public funds because they received 5% of the vote in the previous Presidential election is also enhanced. Public funding for candidates of major parties is intended as a substitute for private contributions; but for minor-party candidates[Footnote 135] such assistance may be viewed as a supplement to private contributions since these candidates may continue to solicit private funds up to the applicable spending limit. Thus, we conclude that the general election funding system does not work an invidious discrimination against candidates of nonmajor parties.

Appellants challenge reliance on the vote in past elections as the basis for determining eligibility. That challenge is foreclosed, however, by our holding in Jenness v. Fortson, 403 U.S., at 439-440, that popular vote totals in the last election are a proper measure of public support.

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And Congress was not obliged to select instead from among appellants' suggested alternatives. Congress could properly regard the means chosen as preferable, since the

alternative of petition drives presents cost and administrative problems in validating signatures, and the alternative of opinion polls might be thought inappropriate since it would involve a Government agency in the business of certifying polls or conducting its own investigation of support for various candidates, in addition to serious problems with reliability.[Footnote 136]

Appellants next argue, relying on the ballot-access decisions of this Court, that the absence of any alternative means of obtaining pre-election funding renders the scheme unjustifiably restrictive of minority political interests. Appellants' reliance on the ballot-access decisions is misplaced. To be sure, the regulation sustained in Jenness v. Fortson, for example, incorporated alternative means of qualifying for the ballot, 403 U.S., at 440, and the lack of an alternative was a defect in the scheme struck down in Lubin v. Panish, 415 U.S., at 718. To

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suggest, however, that the constitutionality of Subtitle H therefore hinges solely on whether some alternative is afforded overlooks the rationale of the operative constitutional principles. Our decisions finding a need for an alternative means turn on the nature and extent of the burden imposed in the absence of available alternatives. We have earlier stated our view that Chapter 95 is far less burdensome upon and restrictive of constitutional rights than the regulations involved in the ballot-access cases. See supra, at 94-95. Moreover, expenditure limits for major parties and candidates may well improve the chances of nonmajor parties and their candidates to receive funds and increase their spending. Any risk of harm to minority interests is speculative due to our present lack of knowledge of the practical effects of public financing and cannot overcome the force of the governmental interests against use of public money to foster frivolous candidacies, create a system of splintered parties, and encourage unrestrained factionalism.

Appellants' reliance on the alternative-means analyses of the ballot-access cases generally fails to recognize a significant distinction from the instant case. The primary goal of all candidates is to carry on a successful campaign by communicating to the voters persuasive reasons for electing them. In some of the ballot-access cases the States afforded candidates alternative means for qualifying for the ballot, a step in any campaign that, with rare exceptions, is essential to successful effort. Chapter 95 concededly provides only one method of obtaining pre-election financing; such funding is, however, not as necessary as being on the ballot. See n. 128, supra. Plainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, and this avenue is still open to all candidates. And, after all, the important achievements of minority

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political groups in furthering the development of American democracy[Footnote 137] were accomplished without the help of public funds. Thus, the limited participation or nonparticipation of nonmajor parties or candidates in public funding does not unconstitutionally disadvantage them.

Of course, nonmajor parties and their candidates may qualify for post-election participation in public funding and in that sense the claimed discrimination is not total. Appellants contend, however, that the benefit of any such participation is illusory due to 9004 (c), which bars the use of the money for any purpose other than paying campaign expenses or repaying loans that had been used to defray such expenses. The only meaningful use for post-election funds is thus to repay loans; but loans, except from national banks, are "contributions" subject to the general limitations on contributions, 18 U.S.C. 591 (e) (1970 ed., Supp. IV). Further, they argue, loans are not readily available to nonmajor parties or candidates before elections to finance their campaigns. Availability of post-election funds therefore assertedly gives them nothing. But in the nature of things the willingness of lenders to make loans will depend upon the pre-election probability that the candidate and his party will attract 5% or more of the voters. When a reasonable prospect of such support appears, the party and candidate may be an acceptable loan risk since the prospect of post-election participation in public funding will be good.[Footnote 138]

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Finally, appellants challenge the validity of the 5% threshold requirement for general election funding. They argue that, since most state regulations governing ballot access have threshold requirements well below 5%, and because in their view the 5% requirement here is actually stricter than that upheld in Jenness v. Fortson, 403 U.S. 431 (1971),[Footnote 139] the requirement is unreasonable. We have already concluded that the restriction under Chapter 95 is generally less burdensome than ballot-access regulations. Supra, at 94-95. Further, the Georgia provision sustained in Jenness required the candidate to obtain the signatures of 5% of all eligible voters, without regard to party. To be sure, the public funding formula does not permit anyone who voted for another party in the last election to be part of a candidate's 5%. But under Chapter 95 a Presidential candidate needs only 5% or more of the actual vote, not the larger universe of eligible voters. As a result, we cannot say that Chapter 95 is numerically more, or less, restrictive than the regulation in Jenness. In any event, the choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make. See Louisville Gas Co. v. Coleman, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting); n. 111, supra. Without any doubt a range of formulations would sufficiently protect the public fisc and not foster factionalism, and would also recognize the public interest in the fluidity of our political

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affairs. We cannot say that Congress' choice falls without the permissible range.[Footnote 140]

2. Nominating Convention Financing

The foregoing analysis and reasoning sustaining general election funding apply in large part to convention funding under Chapter 95 and suffice to support our rejection of appellants' challenge to these provisions. Funding of party conventions has increasingly been derived from large private contributions, see H. R. Rep. No. 93-1239, p. 14 (1974), and the governmental interest in eliminating this reliance is as vital as in the case of private contributions to individual candidates. The expenditure limitations on major parties participating in public financing enhance the ability of nonmajor parties to increase their spending relative to the major parties; further, in soliciting private contributions to finance conventions, parties are not subject to the $1,000 contribution limit pertaining to candidates.[Footnote 141] We therefore conclude that appellants' constitutional challenge to the

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provisions for funding nominating conventions must also be rejected.

3. Primary Election Campaign Financing

Appellants' final challenge is to the constitutionality of Chapter 96, which provides funding of primary campaigns. They contend that these provisions are constitutionally invalid (1) because they do not provide funds for candidates not running in party primaries[Footnote 142] and (2) because the eligibility formula actually increases the influence of money on the electoral process. In not providing assistance to candidates who do not enter party primaries, Congress has merely chosen to limit at this time the reach of the reforms encompassed in Chapter 96. This Congress could do without constituting the reforms a constitutionally invidious discrimination. The governing principle was stated in Katzenbach v. Morgan, 384 U.S. 641, 657 (1966):

"[I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a `statute is not invalid under the Constitution because it might have gone farther than it did,' Roschen v. Ward, 279 U.S. 337, 339, that a legislature need not `strike at all evils at the same time,' Semler v. Dental Examiners, 294 U.S. 608, 610, and that `reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical Co., 348 U.S. 483, 489."[Footnote 143]

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The choice to limit matching funds to candidates running in primaries may reflect that concern about large private contributions to candidates centered on primary races and that there is no historical evidence of similar abuses involving contributions to candidates who engage in petition drives to qualify for state ballots. Moreover, assistance to candidates and nonmajor parties forced to resort to petition drives to gain ballot access implicates the policies against fostering frivolous candidacies, creating a system of splintered parties, and encouraging unrestrained factionalism.

The eligibility requirements in Chapter 96 are surely not an unreasonable way to measure popular support for a candidate, accomplishing the objective of limiting subsidization to those candidates with a substantial chance of being nominated. Counting only the first $250 of each contribution for eligibility purposes requires candidates to solicit smaller contributions from numerous people. Requiring the money to come from citizens of a minimum number of States eliminates candidates whose appeal is limited geographically; a President is elected not by popular vote, but by winning the popular vote in enough States to have a majority in the Electoral College.[Footnote 144]

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We also reject as without merit appellants' argument that the matching formula favors wealthy voters and candidates. The thrust of the legislation is to reduce financial barriers[Footnote 145] and to enhance the importance of smaller contributions.[Footnote 146] Some candidates undoubtedly could raise large sums of money and thus have little need for public funds, but candidates with lesser fundraising capabilities will gain substantial benefits from matching funds. In addition, one eligibility requirement for

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matching funds is acceptance of an expenditure ceiling, and candidates with little fundraising ability will be able to increase their spending relative to candidates capable of raising large amounts in private funds.

For the reasons stated, we reject appellants' claims that Subtitle H is facially unconstitutional.[Footnote 147]

C. Severability

The only remaining issue is whether our holdings invalidating 18 U.S.C. 608 (a), (c), and (e) (1) (1970 ed., Supp. IV) require the conclusion that Subtitle H is unconstitutional. There is, of course, a relationship between the spending limits in 608 (c) and the public financing provisions; the expenditure limits accepted by a candidate to be eligible for public funding are identical to the limits in 608 (c). But we have no difficulty in

concluding that Subtitle H is severable. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Champlin

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Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932). Our discussion of "what is left" leaves no doubt that the value of public financing is not dependent on the existence of a generally applicable expenditure limit. We therefore hold Subtitle H severable from those portions of the legislation today held constitutionally infirm.

IV. THE FEDERAL ELECTION COMMISSION

The 1974 amendments to the Act create an eight-member Federal Election Commission (Commission) and vest in it primary and substantial responsibility for administering and enforcing the Act. The question that we address in this portion of the opinion is whether, in view of the manner in which a majority of its members are appointed, the Commission may under the Constitution exercise the powers conferred upon it. We find it unnecessary to parse the complex statutory provisions in order to sketch the full sweep of the Commission's authority. It will suffice for present purposes to describe what appear to be representative examples of its various powers.

Chapter 14 of Title 2[Footnote 148] makes the Commission the principal repository of the numerous reports and statements which are required by that chapter to be filed by those engaging in the regulated political activities. Its duties under 438 (a) with respect to these reports and statements include filing and indexing, making them available for public inspection, preservation, and auditing and field investigations. It is directed to "serve as a national clearinghouse for information in respect to the administration of elections." 438 (b).

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Beyond these recordkeeping, disclosure, and investigative functions, however, the Commission is given extensive rulemaking and adjudicative powers. Its duty under 438 (a) (10) is "to prescribe suitable rules and regulations to carry out the provisions of . . . chapter 14.." Under 437d (a) (8) the Commission is empowered to make such rules "as are necessary to carry out the provisions of this Act."[Footnote 149] Section 437d (a) (9) authorizes it to "formulate general policy with respect to the administration of this Act" and enumerated sections of Title 18's Criminal Code,[Footnote 150] as to all of which provisions the Commission "has primary jurisdiction with respect to [their] civil enforcement." 437c (b).[Footnote 151] The Commission is authorized under 437f (a) to render advisory opinions with respect to activities possibly violating the Act, the Title 18

sections, or the campaign funding provisions of Title 26,[Footnote 152] the effect of which is that "[n]otwithstanding

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any other provision of law, any person with respect to whom an advisory opinion is rendered . . . who acts in good faith in accordance with the provisions and findings [thereof] shall be presumed to be in compliance with the [statutory provision] with respect to which such advisory opinion is rendered." 437f (b). In the course of administering the provisions for Presidential campaign financing, the Commission may authorize convention expenditures which exceed the statutory limits. 26 U.S.C. 9008 (d) (3) (1970 ed., Supp. IV).

The Commission's enforcement power is both direct and wide ranging. It may institute a civil action for (i) injunctive or other relief against "any acts or practices which constitute or will constitute a violation of this Act," 437g (a) (5); (ii) declaratory or injunctive relief "as may be appropriate to implement or con[s]true any provisions" of Chapter 95 of Title 26, governing administration of funds for Presidential election campaigns and national party conventions, 26 U.S.C. 9011 (b) (1) (1970 ed., Supp. IV); and (iii) "such injunctive relief as is appropriate to implement any provision" of Chapter 96 of Title 26, governing the payment of matching funds for Presidential primary campaigns, 26 U.S.C. 9040 (c) (1970 ed., Supp. IV). If after the Commission's post-disbursement audit of candidates receiving payments under Chapter 95 or 96 it finds an overpayment, it is empowered to seek repayment of all funds due the Secretary of the Treasury. 26 U.S.C. 9010 (b), 9040 (b) (1970 ed., Supp. IV). In no respect do the foregoing civil actions require the concurrence of or participation by the Attorney General; conversely, the decision not to seek judicial relief in the above respects would appear to rest solely with the Commission.[Footnote 153] With respect to the

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referenced Title 18 sections, 437g (a) (7) provides that if, after notice and opportunity for a hearing before it, the Commission finds an actual or threatened criminal violation, the Attorney General "upon request by the Commission . . . shall institute a civil action for relief." Finally, as "[a]dditional enforcement authority," 456 (a) authorizes the Commission, after notice and opportunity for hearing, to make "a finding that a person . . . while a candidate for Federal office, failed to file" a required report of contributions or expenditures. If that finding is made within the applicable limitations period

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for prosecutions, the candidate is thereby "disqualified from becoming a candidate in any future election for Federal office for a period of time beginning on the date of such

finding and ending one year after the expiration of the term of the Federal office for which such person was a candidate."[Footnote 154]

The body in which this authority is reposed consists of eight members.[Footnote 155] The Secretary of the Senate and the Clerk of the House of Representatives are ex officio members of the Commission without the right to vote. Two members are appointed by the President pro tempore of the Senate "upon the recommendations of the majority leader of the Senate and the minority leader of the Senate."[Footnote 156] Two more are to be appointed by the Speaker of the House of Representatives, likewise upon the recommendations of its respective majority and minority leaders. The remaining two members are appointed by the President. Each of the six voting members of the Commission must be confirmed by the majority of both Houses of Congress, and each of the three appointing authorities is forbidden to choose both of their appointees from the same political party.

A. Ripeness

Appellants argue that given the Commission's extensive powers the method of choosing its members under 437c (a) (1) runs afoul of the separation of powers embedded in the Constitution, and urge that as presently constituted the Commission's "existence be held unconstitutional by this Court." Before embarking on this or any

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related inquiry, however, we must decide whether these issues are properly before us. Because of the Court of Appeals' emphasis on lack of "ripeness" of the issue relating to the method of appointment of the members of the Commission, we find it necessary to focus particularly on that consideration in this section of our opinion.

We have recently recognized the distinction between jurisdictional limitations imposed by Art. III and "[p]roblems of prematurity and abstractness" that may prevent adjudication in all but the exceptional case. Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972). In Regional Rail Reorganization Act Cases, 419 U.S. 102, 140 (1974), we stated that "ripeness is peculiarly a question of timing," and therefore the passage of months between the time of the decision of the Court of Appeals and our present ruling is of itself significant. We likewise observed in the Reorganization Act Cases:

"Thus, occurrence of the conveyance allegedly violative of Fifth Amendment rights is in no way hypothetical or speculative. Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." Id., at 143.

The Court of Appeals held that of the five specific certified questions directed at the Commission's authority, only its powers to render advisory opinions and to authorize

excessive convention expenditures were ripe for adjudication. The court held that the remaining aspects of the Commission's authority could not be adjudicated because "[in] its present stance, this litigation does not present the court with the concrete facts that are necessary

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to an informed decision."[Footnote 157] 171 U.S. App. D.C., at 244, 519 F.2d, at 893.

Since the entry of judgment by the Court of Appeals,

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the Commission has undertaken to issue rules and regulations under the authority of 438 (a) (10). While many of its other functions remain as yet unexercised, the date of their all but certain exercise is now closer

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by several months than it was at the time the Court of Appeals ruled. Congress was understandably most concerned with obtaining a final adjudication of as many issues as possible litigated pursuant to the provisions of 437h. Thus, in order to decide the basic question whether the Act's provision for appointment of the members of the Commission violates the Constitution, we believe we are warranted in considering all of those aspects of the Commission's authority which have been presented by the certified questions.[Footnote 158]

Party litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights. Palmore v. United States, 411 U.S. 389 (1973); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Coleman v. Miller, 307 U.S. 433 (1939). In Glidden, of course, the challenged adjudication had already taken place, whereas in this case appellants' claim is of impending future rulings and determinations by the Commission. But this is a question of ripeness, rather than lack of case or controversy under Art. III, and for the reasons to which we have previously

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adverted we hold that appellants' claims as they bear upon the method of appointment of the Commission's members may be presently adjudicated.

B. The Merits

Appellants urge that since Congress has given the Commission wide-ranging rulemaking and enforcement powers with respect to the substantive provisions of the Act, Congress is precluded under the principle of separation of powers from vesting in itself the authority to appoint those who will exercise such authority. Their argument is based on the language of Art. II, 2, cl. 2, of the Constitution, which provides in pertinent part as follows:
"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Appellants' argument is that this provision is the exclusive method by which those charged with executing the laws of the United States may be chosen. Congress, they assert, cannot have it both ways. If the Legislature wishes the Commission to exercise all of the conferred powers, then its members are in fact "Officers of the United States" and must be appointed under the Appointments Clause. But if Congress insists upon retaining the power to appoint, then the members of the Commission may not discharge those many functions of the Commission which can be performed only by "Officers of

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the United States," as that term must be construed within the doctrine of separation of powers.

Appellee Commission and amici in support of the Commission urge that the Framers of the Constitution, while mindful of the need for checks and balances among the three branches of the National Government, had no intention of denying to the Legislative Branch authority to appoint its own officers. Congress, either under the Appointments Clause or under its grants of substantive legislative authority and the Necessary and Proper Clause in Art. I, is in their view empowered to provide for the appointment to the Commission in the manner which it did because the Commission is performing "appropriate legislative functions."

The majority of the Court of Appeals recognized the importance of the doctrine of separation of powers which is at the heart of our Constitution, and also recognized the principle enunciated in Springer v. Philippine Islands, 277 U.S. 189 (1928), that the Legislative Branch may not exercise executive authority by retaining the power to appoint those who will execute its laws. But it described appellants' argument based upon Art. II, 2, cl. 2, as "strikingly syllogistic," and concluded that Congress had sufficient authority under the Necessary and Proper Clause of Art. I of the Constitution not only to establish the Commission but to appoint the Commission's members. As we have earlier noted, it upheld the constitutional validity of congressional vesting of certain authority in

the Commission, and concluded that the question of the constitutional validity of the vesting of its remaining functions was not yet ripe for review. The three dissenting judges in the Court of Appeals concluded that the method of appointment for the Commission did violate the doctrine of separation of powers.

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1. Separation of Powers

We do not think appellants' arguments based upon Art. II, 2, cl. 2, of the Constitution may be so easily dismissed as did the majority of the Court of Appeals. Our inquiry of necessity touches upon the fundamental principles of the Government established by the Framers of the Constitution, and all litigants and all of the courts which have addressed themselves to the matter start on common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another.

James Madison, writing in the Federalist No. 47,[Footnote 159] defended the work of the Framers against the charge that these three governmental powers were not entirely separate from one another in the proposed Constitution. He asserted that while there was some admixture, the Constitution was nonetheless true to Montesquieu's well-known maxim that the legislative, executive, and judicial departments ought to be separate and distinct:

"The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. `When the legislative and executive powers are united in the same person or body,' says he, `there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.' Again: `Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.' Some of these reasons

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are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author."[Footnote 160]

Yet it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government. The President is a participant in the lawmaking process by virtue of his authority to veto bills enacted by Congress. The Senate is a

participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President. The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.

Mr. Chief Justice Taft, writing for the Court in Hampton & Co. v. United States, 276 U.S. 394 (1928), after stating the general principle of separation of powers found in the United States Constitution, went on to observe:

"[T]he rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power

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and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." Id., at 406.

More recently, Mr. Justice Jackson, concurring in the opinion and the judgment of the Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952), succinctly characterized this understanding:

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other. As Madison put it in Federalist No. 51:

"This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the

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several offices in such a manner as that each may be a check on the other - that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State."[Footnote 161]

This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it. The Court has held that executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution. United States v. Ferreira, 13 How. 40 (1852); Hayburn's Case, 2 Dall. 409 (1792). The Court has held that the President may not execute and exercise legislative authority belonging only to Congress. Youngstown Sheet & Tube Co. v. Sawyer, supra. In the course of its opinion in that case, the Court said:

"In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a law-maker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that `All legislative Powers herein granted shall be vested in a Congress of the United States . . . .'" 343 U.S., at 587-588.

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More closely in point to the facts of the present case is this Court's decision in Springer v. Philippine Islands, 277 U.S. 189 (1928), where the Court held that the legislature of the Philippine Islands could not provide for legislative appointment to executive agencies.

2. The Appointments Clause

The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787. Article I, 1, declares: "All legislative Powers herein granted shall be vested in a Congress of the United States." Article II, 1, vests the executive power "in a President of the United States of America," and Art. III, 1, declares that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The further concern of the Framers of the Constitution with maintenance of the separation of powers is found in the so-called "Ineligibility" and "Incompatibility" Clauses contained in Art. I, 6:

"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;

and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

It is in the context of these cognate provisions of the document that we must examine the language of Art. II. 2, cl. 2, which appellants contend provides the only authorization for appointment of those to whom substantial executive or administrative authority is given

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by statute. Because of the importance of its language, we again set out the provision:

"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing "Officers of the United States," but the drafters had a less frivolous purpose in mind. This conclusion is supported by language from United States v. Germaine, 99 U.S. 508, 509-510 (1879):

"The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt." (Emphasis supplied.)

We think that the term "Officers of the United States"

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as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in United States v. Germaine, supra, is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by 2, cl. 2, of that Article.

If "all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment," United States v. Germaine, supra, it is difficult to see how the members of the Commission may escape inclusion. If a postmaster first class, Myers v. United States, 272 U.S. 52 (1926), and the clerk of a district court, Ex parte Hennen, 13 Pet. 230 (1839), are inferior officers of the United States within the meaning of the Appointments Clause, as they are, surely the Commissioners before us are at the very least such "inferior Officers" within the meaning of that Clause.[Footnote 162]

Although two members of the Commission are initially selected by the President, his nominations are subject to confirmation not merely by the Senate, but by the House of Representatives as well. The remaining four voting members of the Commission are appointed by the President pro tempore of the Senate and by the Speaker of the House. While the second part of the Clause

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authorizes Congress to vest the appointment of the officers described in that part in "the Courts of Law, or in the Heads of Departments," neither the Speaker of the House nor the President pro tempore of the Senate comes within this language.

The phrase "Heads of Departments," used as it is in conjunction with the phrase "Courts of Law," suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch. While the Clause expressly authorizes Congress to vest the appointment of certain officers in the "Courts of Law," the absence of similar language to include Congress must mean that neither Congress nor its officers were included within the language "Heads of Departments" in this part of cl. 2.

Thus with respect to four of the six voting members of the Commission, neither the President, the head of any department, nor the Judiciary has any voice in their selection.

The Appointments Clause specifies the method of appointment only for "Officers of the United States" whose appointment is not "otherwise provided for" in the Constitution. But there is no provision of the Constitution remotely providing any alternative means for the selection of the members of the Commission or for anybody like them. Appellee Commission has argued, and the Court of Appeals agreed, that the Appointments Clause of Art. II should not be read to exclude the "inherent power of Congress" to appoint its own officers to perform functions necessary to that body as an institution. But there is no need to read the Appointments Clause contrary to its plain language in order to reach the result sought by the Court of Appeals. Article I, 3, cl. 5, expressly authorizes the selection of the President pro tempore of the Senate, and 2, cl. 5, of that Article provides

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for the selection of the Speaker of the House. Ranking nonmembers, such as the Clerk of the House of Representatives, are elected under the internal rules of each House[Footnote 163] and are designated by statute as "officers of the Congress."[Footnote 164] There is no occasion for us to decide whether any of these member officers are "Officers of the United States" whose "appointment" is otherwise provided for within the meaning of the Appointments Clause, since even if they were such officers their appointees would not be. Contrary to the fears expressed by the majority of the Court of Appeals, nothing in our holding with respect to Art. II, 2, cl. 2, will deny to Congress "all power to appoint its own inferior officers to carry out appropriate legislative functions."[Footnote 165]

Appellee Commission and amici contend somewhat obliquely that because the Framers had no intention of relegating Congress to a position below that of the co-equal Judicial and Executive Branches of the National Government, the Appointments Clause must somehow be read to include Congress or its officers as among those

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in whom the appointment power may be vested. But the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.[Footnote 166] The debates during the Convention, and the evolution of the draft version of the Constitution, seem to us to lend considerable support to our reading of the language of the Appointments Clause itself.

An interim version of the draft Constitution had vested in the Senate the authority to appoint Ambassadors, public Ministers, and Judges of the Supreme Court, and the language of Art. II as finally adopted is a distinct change in this regard. We believe that it was a deliberate change made by the Framers with the intent to deny Congress any authority itself to appoint those who were "Officers of the United States." The debates on the floor of the Convention reflect at least in part the way the change came about.

On Monday, August 6, 1787, the Committee on Detail to which had been referred the entire draft of the Constitution reported its draft to the Convention, including the following two articles that bear on the question before us:[Footnote 167]

Article IX, 1: "The Senate of the United States shall have power . . . to appoint Ambassadors, and Judges of the Supreme Court."

Article X, 2: "[The President] shall commission all

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the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution."

It will be seen from a comparison of these two articles that the appointment of Ambassadors and Judges of the Supreme Court was confided to the Senate, and that the authority to appoint - not merely nominate, but to actually appoint - all other officers was reposed in the President.

During a discussion of a provision in the same draft from the Committee on Detail which provided that the "Treasurer" of the United States should be chosen by both Houses of Congress, Mr. Read moved to strike out that clause, "leaving the appointment of the Treasurer as of other officers to the Executive."[Footnote 168] Opposition to Read's motion was based, not on objection to the principle of executive appointment, but on the particular nature of the office of the "Treasurer."[Footnote 169]

On Thursday, August 23, the Convention voted to insert after the word "Ambassadors" in the text of draft Art. IX the words "and other public Ministers." Immediately afterwards, the section as amended was referred to the "Committee of Five."[Footnote 170] The following day the Convention took up Art. X. Roger Sherman objected to the draft language of 2 because it conferred too much power on the President, and proposed to insert after the words "not otherwise provided for by this Constitution" the words "or by law." This motion was defeated by a vote of nine States to one.[Footnote 171] On September

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3 the Convention debated the Ineligibility and Incompatibility Clauses which now appear in Art. I, and made the Ineligibility Clause somewhat less stringent.[Footnote 172]

Meanwhile, on Friday, August 31, a motion had been carried without opposition to refer such parts of the Constitution as had been postponed or not acted upon to a Committee of Eleven. Such reference carried with it both Arts. IX and X. The following week the Committee of Eleven made its report to the Convention, in which the present language of Art. II, 2, cl. 2, dealing with the authority of the President to nominate is found, virtually word for word, as 4 of Art. X.[Footnote 173] The same Committee also reported a revised article concerning the Legislative Branch to the Convention. The changes are obvious. In the final version, the Senate is shorn of its power to appoint Ambassadors and Judges of the Supreme Court. The President is given, not the power to appoint public officers of the United States, but only the right to nominate them, and a provision is inserted by virtue of which Congress may require Senate confirmation of his nominees.

It would seem a fair surmise that a compromise had been made. But no change was made in the concept of the term "Officers of the United States," which since it had first

appeared in Art. X had been taken by all concerned to embrace all appointed officials exercising responsibility under the public laws of the Nation.

Appellee Commission and amici urge that because of what they conceive to be the extraordinary authority reposed in Congress to regulate elections, this case stands on a different footing than if Congress had exercised its legislative authority in another field. There is, of course, no doubt that Congress has express authority to regulate

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congressional elections, by virtue of the power conferred in Art. I, 4.[Footnote 174] This Court has also held that it has very broad authority to prevent corruption in national Presidential elections. Burroughs v. United States, 290 U.S. 534 (1934). But Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, M`Culloch v. Maryland, 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction. We see no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers.

The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause. Unless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the Clause. Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary. No class or type of officer is excluded because of its special functions. The President appoints judicial as well as executive officers. Neither has it been disputed - and apparently

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it is not now disputed - that the Clause controls the appointment of the members of a typical administrative agency even though its functions, as this Court recognized in Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935), may be "predominantly quasi-judicial and quasi-legislative" rather than executive. The Court in that case carefully emphasized that although the members of such agencies were to be independent of the Executive in their day-to-day operations, the Executive was not excluded from selecting them. Id., at 625-626.

Appellees argue that the legislative authority conferred upon the Congress in Art. I, 4, to regulate "the Times, places and Manner of holding Elections for Senators and

Representatives" is augmented by the provision in 5 that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." Section 5 confers, however, not a general legislative power upon the Congress, but rather a power "judicial in character" upon each House of the Congress. Barry v. United States ex rel. Cunningham, 279 U.S. 597, 613 (1929). The power of each House to judge whether one claiming election as Senator or Representative has met the requisite qualifications, Powell v. McCormack, 395 U.S. 486 (1969), cannot reasonably be translated into a power granted to the Congress itself to impose substantive qualifications on the right to so hold such office. Whatever power Congress may have to legislate, such qualifications must derive from 4, rather than 5, of Art. I.

Appellees also rely on the Twelfth Amendment to the Constitution insofar as the authority of the Commission to regulate practices in connection with the Presidential election is concerned. This Amendment provides that certificates of the votes of the electors be "sealed [and]

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directed to the President of the Senate," and that the "President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." The method by which Congress resolved the celebrated disputed Hayes-Tilden election of 1876, reflected in 19 Stat. 227, supports the conclusion that Congress viewed this Amendment as conferring upon its two Houses the same sort of power "judicial in character," Barry v. United States ex rel. Cunningham, supra, at 613, as was conferred upon each House by Art. I, 5, with respect to elections of its own members.

We are also told by appellees and amici that Congress had good reason for not vesting in a Commission composed wholly of Presidential appointees the authority to administer the Act, since the administration of the Act would undoubtedly have a bearing on any incumbent President's campaign for re-election. While one cannot dispute the basis for this sentiment as a practical matter, it would seem that those who sought to challenge incumbent Congressmen might have equally good reason to fear a Commission which was unduly responsive to members of Congress whom they were seeking to unseat. But such fears, however rational, do not by themselves warrant a distortion of the Framers' work.

Appellee Commission and amici finally contend, and the majority of the Court of Appeals agreed with them, that whatever shortcomings the provisions for the appointment of members of the Commission might have under Art. II, Congress had ample authority under the Necessary and Proper Clause of Art. I to effectuate this result. We do not agree. The proper inquiry when considering the Necessary and Proper Clause is not the authority of Congress to create an office or a commission, which is broad indeed, but rather its authority to provide

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that its own officers may make appointments to such office or commission.

So framed, the claim that Congress may provide for this manner of appointment under the Necessary and Proper Clause of Art. I stands on no better footing than the claim that it may provide for such manner of appointment because of its substantive authority to regulate federal elections. Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

The trilogy of cases from this Court dealing with the constitutional authority of Congress to circumscribe the President's power to remove officers of the United States is entirely consistent with this conclusion. In Myers v. United States, 272 U.S. 52 (1926), the Court held that Congress could not by statute divest the President of the power to remove an officer in the Executive Branch whom he was initially authorized to appoint. In explaining its reasoning in that case, the Court said:

"The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were

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to act for him under his direction in the execution of the laws.

. . . . .

"Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, i. e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers - a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . . ." Id., at 117, 163-164.

In the later case of Humphrey's Executor, where it was held that Congress could circumscribe the President's power to remove members of independent regulatory agencies, the Court was careful to note that it was dealing with an agency intended to be independent of executive authority "except in its selection." 295 U.S. at 625 (emphasis in original). Wiener v. United States, 357 U.S. 349 (1958), which applied the holding in Humphrey's Executor to a member of the War Claims Commission, did not question in

any respect that members of independent agencies are not independent of the Executive with respect to their appointments.

This conclusion is buttressed by the fact that Mr. Justice Sutherland, the author of the Court's opinion in Humphrey's Executor, likewise wrote the opinion for the Court in Springer v. Philippine Islands, 277 U.S. 189 (1928), in which it was said:

"Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; though the case might be different if the additional duties

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were devolved upon an appointee of the executive." Id., at 202.

3. The Commission's Powers

Thus, on the assumption that all of the powers granted in the statute may be exercised by an agency whose members have been appointed in accordance with the Appointments Clause,[Footnote 175] the ultimate question is which, if any, of those powers may be exercised by the present voting Commissioners, none of whom was appointed as provided by that Clause. Our previous description of the statutory provisions, see supra, at 109-113, disclosed that the Commission's powers fall generally into three categories: functions relating to the flow of necessary information - receipt, dissemination, and investigation; functions with respect to the Commission's task of fleshing out the statute - rulemaking and advisory opinions; and functions necessary to ensure compliance with the statute and rules - informal procedures, administrative determinations and hearings, and civil suits.

Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them. Kilbourn v. Thompson, 103 U.S. 168 (1881); McGrain v. Daugherty,

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273 U.S. 135 (1927); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). As this Court stated in McGrain, supra, at 175:

"A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information - which not

infrequently is true - recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry - with enforcing process - was regarded and employed as a necessary and appropriate attribute of the power to legislate - indeed, was treated as inhering in it."

But when we go beyond this type of authority to the more substantial powers exercised by the Commission, we reach a different result. The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, 3.

Congress may undoubtedly under the Necessary and Proper Clause create "offices" in the generic sense and provide such method of appointment to those "offices" as it chooses. But Congress' power under that Clause

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is inevitably bounded by the express language of Art. II, 2, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be "Officers of the United States." They may, therefore, properly perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not "Officers of the United States."

This Court observed more than a century ago with respect to litigation conducted in the courts of the United States:

"Whether tested, therefore, by the requirements of the Judiciary Act, or by the usage of the government, or by the decisions of this court, it is clear that all such suits, so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General." Confiscation Cases, 7 Wall. 454, 458-459 (1869).

The Court echoed similar sentiments 59 years later in Springer v. Philippine Islands, 277 U.S., at 202, saying:

"Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this Court. Myers v. United States, 272 U.S. 52.

"Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; though the

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case might be different if the additional duties were devolved upon an appointee of the executive."

We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, 2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are "Officers of the United States" within the language of that section.

All aspects of the Act are brought within the Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself. These functions, exercised free from day-to-day supervision of either Congress[Footnote 176] or the Executive Branch, are more legislative and judicial in nature than are the Commission's

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enforcement powers, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. Congress viewed these broad powers as essential to effective and impartial administration of the entire substantive framework of the Act. Yet each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law. While the President may not insist that such functions be delegated to an appointee of his removable at will, Humphrey's Executor v. United States, 295 U.S. 602 (1935), none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public law to allow it to be performed by the present Commission. These administrative functions may therefore be exercised only by persons who are "Officers of the United States."[Footnote 177]

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It is also our view that the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date, including its administration of those provisions, upheld today, authorizing the public financing of federal elections. The past acts of the Commission are therefore accorded de facto validity, just as we have recognized should be the case with respect to legislative acts

performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan. Connor v. Williams, 404 U.S. 549, 550-551 (1972). See Ryan v. Tinsley, 316 F.2d 430, 431-432 (CA10 1963); Schaefer v. Thomson, 251 F. Supp. 450, 453 (Wyo. 1965), aff'd sub nom. Harrison v. Schaeffer, 383 U.S. 269 (1966). Cf. City of Richmond v. United States, 422 U.S. 358, 379 (1975) (BRENNAN, J., dissenting). We also draw on the Court's practice in

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the apportionment and voting rights cases and stay, for a period not to exceed 30 days, the Court's judgment insofar as it affects the authority of the Commission to exercise the duties and powers granted it under the Act. This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act. Cf. Georgia v. United States, 411 U.S. 526, 541 (1973); Fortson v. Morris, 385 U.S. 231, 235 (1966); Maryland Comm. v. Tawes, 377 U.S. 656, 675-676 (1964).

CONCLUSION

In summary,[Footnote 178] we sustain the individual contribution limits, the disclosure and reporting provisions, and the public financing scheme. We conclude, however, that the limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm. Finally, we hold that most of the powers conferred by the Act upon the Federal Election Commission can be exercised only by "Officers of the United States," appointed in conformity with Art. II, 2, cl. 2, of the Constitution, and therefore cannot be exercised by the Commission as presently constituted.

In No. 75-436, the judgment of the Court of Appeals

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is affirmed in part and reversed in part. The judgment of the District Court in No. 75-437 is affirmed. The mandate shall issue forthwith, except that our judgment is stayed, for a period not to exceed 30 days, insofar as it affects the authority of the Commission to exercise the duties and powers granted it under the Act.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of these cases.

APPENDIX TO PER CURIAM OPINION*
TITLE 2. THE CONGRESS
CHAPTER 14 - FEDERAL ELECTION CAMPAIGNS
SUBCHAPTER I. - DISCLOSURE OF FEDERAL CAMPAIGN FUNDS

431. Definitions.
When used in this subchapter and subchapter II of this chapter -

(a) "election" means -
(1) a general, special, primary, or runoff election;
(2) a convention or caucus of a political party held to nominate a candidate;
(3) a primary election held for the selection of delegates to a national nominating convention of a political party; and
(4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President;

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(b) "candidate" means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, if he has -
(1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, to Federal office; or
(2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

(c) "Federal office" means the office of President or Vice President of the United States; or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

(d) "political committee" means any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

(e) "contribution" -
(1) means a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of -
(A) influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party; or

(B) influencing the result of an election held for the expression of a preference for the nomination of persons for election to the office of President of the United States;

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(2) means a contract, promise, or agreement, expressed or implied, whether or not legally enforceable, to make a contribution for such purposes;
(3) means funds received by a political committee which are transferred to such committee from another political committee or other source;
(4) means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose; but
(5) does not include -
(A) the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee;
(B) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities;
(C) the sale of any food or beverage by a vendor for use in a candidate's campaign at a charge less than the normal comparable charge, if such charge for use in a candidate's campaign is at least equal to the cost of such food or beverage to the vendor;
(D) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate;
(E) the payment by a State or local committee of a political party of the costs of preparation,

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display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of three or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or other similar types of general public political advertising; or
(F) any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of the last paragraph of section 610 of Title 18, would not constitute an expenditure by such corporation or labor organization;
to the extent that the cumulative value of activities by any individual on behalf of any candidate under each of clauses (B), (C), and (D) does not exceed $500 with respect to any election;

(f) "expenditure" -
(1) means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for the purpose of -
(A) influencing the nomination for election, or the election, of any person to Federal office, or to the office of presidential and vice presidential elector; or
(B) influencing the results of a primary election held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for

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the nomination of persons for election to the office of President of the United States;
(2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure;
(3) means the transfer of funds by a political committee to another political committee; but
(4) does not include -
(A) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;
(B) nonpartisan activity designed to encourage individuals to register to vote or to vote;
(C) any communication by any membership organization or corporation to its members or stockholders, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any person to Federal office;
(D) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities if the cumulative value of such activities by such individual on behalf of any candidate do [sic] not exceed $500 with respect to any election;
(E) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate if the cumulative amount for such individual incurred with respect to such candidate

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does not exceed $500 with respect to any election;
(F) any communication by any person which is not made for the purpose of influencing the nomination for election, or election, of any person to Federal office; or
(G) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of three or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs

incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines or other similar types of general public political advertising; or
(H) any payment made or obligation incurred by a corporation or a labor organization which, under the provisions of the last paragraph of section 610 of Title 18, would not constitute an expenditure by such corporation or labor organization;

(g) "Commission" means the Federal Election Commission;

(h) "person" means an individual, partnership, committee, association, corporation, labor organization, and any other organization or group of persons;

(i) "State" means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

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(j) "identification" means -
(1) in the case of an individual, his full name and the full address of his principal place of residence; and
(2) in the case of any other person, the full name and address of such person;

(k) "national committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission;

(l) "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission;

(m) "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office, whose name appears on the election ballot as the candidate of such association, committee, or organization; and

(n) "principal campaign committee" means the principal campaign committee designated by a candidate under section 432 (f) (1) of this title.

432. Organization of political committees.

(a) Chairman; treasurer; vacancies; official authorizations. Every political committee shall have a chairman and a treasurer. No contribution and no expenditure shall be accepted or made by or on behalf of a political committee at a time when there is a vacancy in the office of chairman or treasurer thereof. No expenditure shall be made for

or on behalf of a political committee without the authorization of its chairman or treasurer, or their designated agents.

(b) Account of contributions; segregated funds.

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Every person who receives a contribution in excess of $10 for a political committee shall, on demand of the treasurer, and in any event within 5 days after receipt of such contribution, render to the treasurer a detailed account thereof, including the amount of the contribution and the identification of the person making such contribution, and the date on which received. All funds of a political committee shall be segregated from, and may not be commingled with, any personal funds of officers, members, or associates of such committee.

(c) Recordkeeping. It shall be the duty of the treasurer of a political committee to keep a detailed and exact account of -
(1) all contributions made to or for such committee;
(2) the identification of every person making a contribution in excess of $10, and the date and amount thereof and, if a person's contributions aggregate more than $100, the account shall include occupation, and the principal place of business (if any);
(3) all expenditures made by or on behalf of such committee; and
(4) the identification of every person to whom any expenditure is made, the date and amount thereof and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made.

(d) Receipts; preservation. It shall be the duty of the treasurer to obtain and keep a receipted bill, stating the particulars, for every expenditure made by or on behalf of a political committee in excess of $100 in amount, and for any such expenditure in a lesser amount, if the aggregate amount of such expenditures to the same person during a calendar year exceeds $100. The treasurer

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shall preserve all receipted bills and accounts required to be kept by this section for periods of time to be determined by the Commission.

(e) Unauthorized activities; notice. Any political committee which solicits or receives contributions or makes expenditures on behalf of any candidate that is not authorized in writing by such candidate to do so shall include a notice on the face or front page of all literature and advertisements published in connection with such candidate's campaign by such committee or on its behalf stating that the committee is not authorized by such candidate and that such candidate is not responsible for the activities of such committee.

(f) Principal campaign committees; one candidate limitation; office of President: national committee for candidate; duties.
(1) Each individual who is a candidate for Federal office (other than the office of Vice President of the United States) shall designate a political committee to serve as his principal campaign committee. No political committee may be designated as the principal campaign committee of more than one candidate, except that the candidate for the office of President of the United States nominated by a political party may designate the national committee of such political party as his principal campaign committee. Except as provided in the preceding sentence, no political committee which supports more than one candidate may be designated as a principal campaign committee.
(2) Notwithstanding any other provision of this subchapter, each report or statement of contributions received or expenditures made by a political committee (other than a principal campaign committee) which is required to be filed with the Commission under this subchapter shall be filed instead with the principal campaign

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committee for the candidate on whose behalf such contributions are accepted or such expenditures are made.
(3) It shall be the duty of each principal campaign committee to receive all reports and statements required to be filed with it under paragraph (2) of this subsection and to compile and file such reports and statements, together with its own reports and statements, with the Commission in accordance with the provisions of this subchapter.

433. Registration of political committees.

(a) Statements of organization. Each political committee which anticipates receiving contributions or making expenditures during the calendar year in an aggregate amount exceeding $1,000 shall file with the Commission a statement of organization, within 10 days after its organization or, if later, 10 days after the date on which it has information which causes the committee to anticipate it will receive contributions or make expenditures in excess of $1,000. Each such committee in existence at the date of enactment of this Act shall file a statement of organization with the Commission at such time as it prescribes.

(b) Contents of statements. The statement of organization shall include -
(1) the name and address of the committee;
(2) the names, addresses, and relationships of affiliated or connected organizations;
(3) the area, scope, or jurisdiction of the committee;
(4) the name, address, and position of the custodian of books and accounts;
(5) the name, address, and position of other principal officers, including officers and members of the finance committee, if any;

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(6) the name, address, office sought, and party affiliation of -
(A) each candidate whom the committee is supporting; and
(B) any other individual, if any, whom the committee is supporting for nomination for election, or election, to any public office whatever; or, if the committee is supporting the entire ticket of any party, the name of the party;
(7) a statement whether the committee is a continuing one;
(8) the disposition of residual funds which will be made in the event of dissolution;
(9) a listing of all banks, safety deposit boxes, or other repositories used;
(10) a statement of the reports required to be filed by the committee with State or local officers, and, if so, the names, addresses, and positions of such persons; and
(11) such other information as shall be required by the Commission.

(c) Information changes; report. Any change in information previously submitted in a statement of organization shall be reported to the Commission within a 10-day period following the change.

(d) Disbanding of political committees or contributions and expenditures below prescribed ceiling; notice. Any committee which, after having filed one or more statements of organization, disbands or determines it will no longer receive contributions or make expenditures during the calendar year in an aggregate amount exceeding $1,000 shall so notify the Commission.

(e) Filing reports and notifications with appropriate principal campaign committees. In the case of a political

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committee which is not a principal campaign committee, reports and notifications required under this section to be filed with the Commission shall be filed instead with the appropriate principal campaign committee.

434. Reports by political committees and candidates.

(a) Receipts and expenditures; completion date, exception.
(1) Except as provided by paragraph (2), each treasurer of a political committee supporting a candidate or candidates for election to Federal office, and each candidate for election to such office, shall file with the Commission reports of receipts and expenditures on forms to be prescribed or approved by it. The reports referred to in the preceding sentence shall be filed as follows:
(A) (i) In any calendar year in which an individual is a candidate for Federal office and an election for such Federal office is held in such year, such reports shall be filed not later than the 10th day before the date on which such election is held and shall be complete as of the 15th day before the date of such election; except that any such report filed by

registered or certified mail must be postmarked not later than the close of the 12th day before the date of such election.
(ii) such reports shall be filed not later than the 30th day after the day of such election and shall be complete as of the 20th day after the date of such election.
(B) In any other calendar year in which an individual is a candidate for Federal office, such reports shall be filed after December 31 of such calendar year, but not later than January 31 of the following calendar year and shall be complete as of the close of the calendar year with respect to which the report is filed.

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(C) Such reports shall be filed not later than the 10th day following the close of any calendar quarter in which the candidate or political committee concerned received contributions in excess of $1,000, or made expenditures in excess of $1,000, and shall be complete as of the close of such calendar quarter; except that any such report required to be filed after December 31 of any calendar year with respect to which a report is required to be filed under subparagraph (B) shall be filed as provided in such subparagraph.
(D) When the last day for filing any quarterly report required by subparagraph (C) occurs within 10 days of an election, the filing of such quarterly report shall be waived and superseded by the report required by subparagraph (A) (i).
Any contribution of $1,000 or more received after the 15th day, but more than 48 hours, before any election shall be reported within 48 hours after its receipt.
(2) Each treasurer of a political committee which is not a principal campaign committee shall file the reports required under this section with the appropriate principal campaign committee.
(3) Upon a request made by a presidential candidate or a political committee which operates in more than one State, or upon its own motion, the Commission may waive the reporting dates set forth in paragraph (1) (other than the reporting date set forth in paragraph (1) (B)), and require instead that such candidate or political committee file reports not less frequently than monthly. The Commission may not require a presidential candidate or a political committee operating in more than one State to file more than 12 reports (not counting any report referred to in paragraph (1) (B)) during any calendar year. If the Commission acts on its own motion
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under this paragraph with respect to a candidate or a political committee, such candidate or committee may obtain judicial review in accordance with the provisions of chapter 7 of Title 5.

(b) Contents of reports. Each report under this section shall disclose -
(1) the amount of cash on hand at the beginning of the reporting period;
(2) the full name and mailing address (occupation and the principal place of business, if any) of each person who has made one or more contributions to or for such committee or candidate (including the purchase of tickets for events such as dinners, luncheons, rallies, and similar fundraising events) within the calendar year in an aggregate amount or value in excess of $100, together with the amount and date of such contributions;

(3) the total sum of individual contributions made to or for such committee or candidate during the reporting period and not reported under paragraph (2);
(4) the name and address of each political committee or candidate from which the reporting committee or the candidate received, or to which that committee or candidate made, any transfer of funds, together with the amounts and dates of all transfers;
(5) each loan to or from any person within the calendar year in an aggregate amount or value in excess of $100, together with the full names and mailing addresses (occupations and the principal places of business, if any) of the lender, endorsers, and guarantors, if any, and the date and amount of such loans;
(6) the total amount of proceeds from -

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(A) the sale of tickets to each dinner, luncheon, rally, and other fundraising event;
(B) mass collections made at such events; and
(C) sales of items such as political campaign pins, buttons, badges, flags, emblems, hats, banners, literature, and similar materials;
(7) each contribution, rebate, refund, or other receipt in excess of $100 not otherwise listed under paragraphs (2) through (6);
(8) the total sum of all receipts by or for such committee or candidate during the reporting period, together with total expenditures less transfers between political committees which support the same candidate and which do not support more than one candidate;
(9) the identification of each person to whom expenditures have been made by such committee or on behalf of such committee or candidate within the calendar year in an aggregate amount or value in excess of $100, the amount, date, and purpose of each such expenditure and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made;
(10) the identification of each person to whom an expenditure for personal services, salaries, and reimbursed expenses in excess of $100 has been made, and which is not otherwise reported, including the amount, date, and purpose of such expenditure;
(11) the total sum of expenditures made by such committee or candidate during the calendar year, together with total receipts less transfers between political committees which support the same candidate and which do not support more than one candidate;

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(12) the amount and nature of debts and obligations owed by or to the committee, in such form as the supervisory officer may prescribe and a continuous reporting of their debts and obligations after the election at such periods as the Commission may require until such debts and obligations are extinguished, together with a statement as to the circumstances and conditions under which any such debt or obligation is extinguished and the consideration therefor; and
(13) such other information as shall be required by the Commission.

(c) Cumulative reports for calendar year; amounts for unchanged items carried forward; statement of inactive status. The reports required to be filed by subsection (a) of this section shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward. If no contributions or expenditures have been accepted or expended during a calendar year, the treasurer of the political committee or candidate shall file a statement to that effect.

(d) Members of Congress; reporting exemption. This section does not require a Member of the Congress to report, as contributions received or as expenditures made, the value of photographic, matting, or recording services furnished to him by the Senate Recording Studio, the House Recording Studio, or by an individual whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives and who furnishes such services as his primary duty as an employee of the Senate or House of Representatives, or if such services were paid for by the Republican or Democratic Senatorial Campaign Committee, the Democratic National Congressional

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Committee, or the National Republican Congressional Committee. This subsection does not apply to such recording services furnished during the calendar year before the year in which the Member's term expires.

(e) Reports by other than political committees. Every person (other than a political committee or candidate) who makes contributions or expenditures, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 within a calendar year shall file with the Commission a statement containing the information required by this section. Statements required by this subsection shall be filed on the dates on which reports by political committees are filed but need not be cumulative.

437a. Reports by certain persons; exemptions.

Any person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate shall file reports with the Commission as if such person were a political committee. The reports filed by such person shall set forth the source of the funds used in carrying out any activity described in the preceding sentence in the same detail as if the funds were contributions within the

meaning of section 431 (e) of this title, and payments of such funds in the same detail as if they were expenditures within the meaning of section 431 (f) of this title. The provisions

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of this section do not apply to any publication or broadcast of the United States Government or to any news story, commentary, or editorial distributed through the facilities of a broadcasting station or a bona fide newspaper, magazine, or other periodical publication. A news story, commentary, or editorial is not considered to be distributed through a bona fide newspaper, magazine, or other periodical publication if -
(1) such publication is primarily for distribution to individuals affiliated by membership or stock ownership with the person (other than an individual) distributing it or causing it to be distributed, and not primarily for purchase by the public at newsstands or paid by subscription; or
(2) the news story, commentary, or editorial is distributed by a person (other than an individual) who devotes a substantial part of his activities to attempting to influence the outcome of elections, or to influence public opinion with respect to matters of national or State policy or concern.

437c. Federal Election Commission.

(a) Establishment; membership; term of office; vacancies; qualifications; compensation; chairman and vice chairman.
(1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives, ex officio and without the right to vote, and six members appointed as follows:
(A) two shall be appointed, with the confirmation of a majority of both Houses of the Congress, by the President pro tempore of the Senate upon the recommendations of the majority leader of the Senate and the minority leader of the Senate;

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(B) two shall be appointed, with the confirmation of a majority of both Houses of the Congress, by the Speaker of the House of Representatives, upon the recommendations of the majority leader of the House and the minority leader of the House; and
(C) two shall be appointed, with the confirmation of a majority of both Houses of the Congress, by the President of the United States.
A member appointed under subparagraph (A), (B), or (C) shall not be affiliated with the same political party as the other member appointed under such paragraph.
(2) Members of the Commission shall serve for terms of 6 years, except that of the members first appointed -

(A) one of the members appointed under paragraph (1) (A) shall be appointed for a term ending on the April 30 first occurring more than 6 months after the date on which he is appointed;
(B) one of the members appointed under paragraph (1) (B) shall be appointed for a term ending 1 year after the April 30 on which the term of the member referred to in subparagraph (A) of this paragraph ends;
(C) one of the members appointed under paragraph (1) (C) shall be appointed for a term ending 2 years thereafter;
(D) one of the members appointed under paragraph (1) (A) shall be appointed for a term ending 3 years thereafter;
(E) one of the members appointed under paragraph (1) (B) shall be appointed for a term ending 4 years thereafter; and
(F) one of the members appointed under paragraph

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(1) (C) shall be appointed for a term ending 5 years thereafter.
An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he succeeds. Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.
(3) Members shall be chosen on the basis of their maturity, experience, integrity, impartiality, and good judgment and shall be chosen from among individuals who, at the time of their appointment, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Government of the United States.
(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall receive compensation equivalent to the compensation paid at level IV of the Executive Schedule (5 U.S.C. 5315).
(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year. No member may serve as chairman more often than once during any term of office to which he is appointed. The chairman and the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman, or in the event of a vacancy in such office.

(b) Administration, enforcement, and formulation of policy; primary jurisdiction of civil enforcement.
The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to this Act and sections 608, 610, 611, 613, 614, 615, 616,

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and 617 of Title 18. The Commission has primary jurisdiction with respect to the civil enforcement of such provisions.

(c) Voting requirement; nondelegation of function.
All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this subchapter shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his vote or any decisionmaking authority or duty vested in the Commission by the provisions of this subchapter.

(d) Meetings.
The Commission shall meet at least once each month and also at the call of any member.

(e) Rules for conduct of activities; seal, judicial notice; principal office.
The Commission shall prepare written rules for the conduct of its activities, shall have an official seal which shall be judicially noticed, and shall have its principal office in or near the District of Columbia (but it may meet or exercise any of its powers anywhere in the United States).

(f) Staff director and general counsel: appointment and compensation; appointment and compensation of personnel and procurement of intermittent services by staff director; use of assistance, personnel, and facilities of Federal agencies and departments.
(1) The Commission shall have a staff director and a general counsel who shall be appointed by the Commission. The staff director shall be paid at a rate not to exceed the rate of basic pay in effect for level IV of the Executive Schedule (5 U.S.C. 5315). The general counsel shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5316). With the approval of the

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Commission, the staff director may appoint and fix the pay of such additional personnel as he considers desirable.
(2) With the approval of the Commission, the staff director may procure temporary and intermittent services to the same extent as is authorized by section 3109 (b) of Title 5, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-15 of the general schedule (5 U.S.C. 5332).
(3) In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities, of other agencies and departments of the United States Government. The heads of such agencies and departments may make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

437d. Powers of Commission.

(a) Specific enumeration.
The Commission has the power -
(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe; and such submission shall be made within such a reasonable period of time and under oath or otherwise as the Commission may determine;
(2) to administer oaths or affirmations;
(3) to require by subpena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;
(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has

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the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3) of this subsection;
(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;
(6) to initiate (through civil proceedings for injunctive, declaratory, or other appropriate relief), defend, or appeal any civil action in the name of the Commission for the purpose of enforcing the provisions of this Act, through its general counsel;
(7) to render advisory opinions under section 437 of this title;
(8) to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of Title 5, as are necessary to carry out the provisions of this Act;
(9) to formulate general policy with respect to the administration of this Act and sections 608, 610, 611, 613, 614, 615, 616, and 617 of Title 18;
(10) to develop prescribed forms under subsection (a) (1) of this section; and
(11) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

(b) Judicial orders for compliance with subpenas and orders of Commission; contempt of court.
Any United States district court within the jurisdiction of which any inquiry is carried on, may, upon petition by the Commission, in case of refusal to obey a subpena or order of the Commission issued under subsection (a) of this section, issue an order requiring compliance therewith. Any failure to obey the order of the

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court may be punished by the court as a contempt thereof.

(c) Civil liability for disclosure of information.
No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

(d) Transmittal to Congress: Budget estimates or requests and legislative recommendations; prior transmittal to Congress: legislative recommendations.
(1) Whenever the Commission submits any budget estimate or request to the President of the United States or the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to the Congress.
(2) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation, requested by the Congress or by any Member of the Congress, to the President of the United States or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress or to the Member requesting the same. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation, to any office or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

437e. Reports to President and Congress.

The Commission shall transmit reports to the President of the United States and to each House of the Congress no later than March 31 of each year. Each such report shall contain a detailed statement with respect to the activities of the Commission in carrying out its duties under this subchapter, together with recommendations

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for such legislative or other action as the Commission considers appropriate.
437f. Advisory opinions.

(a) Written requests; written opinions within reasonable time; specific transactions or activities constituting violations of provisions.
Upon written request to the Commission by any individual holding Federal office, any candidate for Federal office, or any political committee, the Commission shall render an advisory opinion, in writing, within a reasonable time with respect to whether any specific transaction or activity by such individual, candidate, or political committee would constitute a violation of this Act, of chapter 95 or chapter 96 of Title 26 or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18.

(b) Presumption of compliance with provisions based on good faith actions.
Notwithstanding any other provision of law, any person with respect to whom an advisory opinion is rendered under subsection (a) of this section who acts in good faith in accordance with the provisions and findings of such advisory opinion shall be presumed to be in compliance with the provision of this Act, of chapter 95 or chapter 96 of Title 26, or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18, with respect to which such advisory opinion is rendered.

(c) Requests made public; transmittal to Commission of comments of interested parties with respect to such requests.
Any request made under subsection (a) shall be made public by the Commission. The Commission shall before rendering an advisory opinion with respect to such request, provide any interested party with an opportunity to transmit written comments to the Commission with respect to such request.

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437g. Enforcement.

(a) Violations; complaints and referrals; notification and investigation by Commission: venue, judicial orders; referral to law enforcement authorities: civil actions by Attorney General: venue, judicial orders, bond; subpenas; review by courts of appeals: time for petition, finality of judgment; review by Supreme Court; docket: advancement and priorities.
(1) (A) Any person who believes a violation of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18 has occurred may file a complaint with the Commission.
(B) In any case in which the Clerk of the House of Representatives or the Secretary of the Senate (who receive reports and statements as custodian for the Commission) has reason to believe a violation of this act or section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18 has occurred he shall refer such apparent violation to the Commission.
(2) The Commission upon receiving any complaint under paragraph (1) (A), or a referral under paragraph (1) (B), or if it has reason to believe that any person has committed a violation of any such provision, shall notify the person involved of such apparent violation and shall -
(A) report such apparent violation to the Attorney General; or
(B) make an investigation of such apparent violation.
(3) Any investigation under paragraph (2) (B) shall be conducted expeditiously and shall include an investigation of reports and statements filed by any complainant under this subchapter, if such complainant is a candidate. Any notification or investigation made under paragraph (2) shall not be made public by the Commission or by

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any other person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.
(4) The Commission shall, at the request of any person who receives notice of an apparent violation under paragraph (2), conduct a hearing with respect to such apparent violation.
(5) If the Commission determines, after investigation, that there is reason to believe that any person has engaged, or is about to engage in any acts or practices which constitute or will constitute a violation of this Act, it may endeavor to correct such violation by informal methods of conference, conciliation, and persuasion. If the Commission fails to correct the violation through informal methods, it may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business. Upon a proper showing that such person has engaged or is about to engage in such acts or practices, the court shall grant a permanent or temporary injunction, restraining order, or other order.
(6) The Commission shall refer apparent violations to the appropriate law enforcement authorities to the extent that violations of provisions of chapter 29 of Title 18 are involved, or if the Commission is unable to correct apparent violations of this Act under the authority given it by paragraph (5), or if the Commission determines that any such referral is appropriate.
(7) Whenever in the judgment of the Commission, after affording due notice and an opportunity for a hearing, any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18,

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upon request by the Commission the Attorney General on behalf of the United States shall institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the person is found, resides, or transacts business. Upon a proper showing that such person has engaged or is about to engage in such acts or practices, a permanent or temporary injunction, restraining order, or other order shall be granted without bond by such court.
(8) In any action brought under paragraph (5) or (7) of this subsection, subpenas for witnesses who are required to attend a United States district court may run into any other district.
(9) Any party aggrieved by an order granted under paragraph (5) or (7) of this subsection may, at any time within 60 days after the date of entry thereof, file a petition with the United States court of appeals for the circuit in which such order was issued for judicial review of such order.
(10) The judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district Court shall be final, subject to review by the Supreme Court

of the United States upon certiorari or certification as provided in section 1254 of Title 28.
(11) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(b) Reports of Attorney General to Commission respecting action taken; reports of Commission respecting status of referrals.
In any case in which the Commission refers an apparent violation to the Attorney General, the Attorney

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General shall respond by report to the Commission with respect to any action taken by the Attorney General regarding such apparent violation. Each report shall be transmitted no later than 60 days after the date the Commission refers any apparent violation, and at the close of every 30-day period thereafter until there is final disposition of such apparent violation. The Commission may from time to time prepare and publish reports on the status of such referrals.

437h. Judicial review.

(a) Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc.
The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18. The district court immediately shall certify all questions of constitutionality of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18, to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) Appeal to Supreme Court; time for appeal.
Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) Advancement on appellate docket and expedited deposition of certified questions.

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It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

438. Administrative and judicial provisions.

(a) Federal Election Commission; duties.
It shall be the duty of the Commission -
(1) Forms. To develop and furnish to the person required by the provisions of this Act prescribed forms for the making of the reports and statements required to be filed with it under this subchapter;
(2) Manual for uniform bookkeeping and reporting methods. To prepare, publish, and furnish to the person required to file such reports and statements a manual setting forth recommended uniform methods of bookkeeping and reporting;
(3) Filing, coding, and cross-indexing system. To develop a filing, coding, and cross-indexing system consonant with the purposes of this subchapter;
(4) Public inspection; copies; sale or use restrictions. To make the reports and statements filed with it available for public inspection and copying, commencing as soon as practicable but not later than the end of the second day following the day during which it was received, and to permit copying of any such report or statement by hand or by duplicating machine, as requested by any person, at the expense of such person: Provided, That any information copied from such reports and statements shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose;
(5) Preservation of reports and statements. To preserve such reports and statements for a period of

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10 years from date of receipt, except that reports and statements relating solely to candidates for the House of Representatives shall be preserved for only 5 years from the date of receipt;
(6) Index of reports and statements; publication in Federal Register. To compile and maintain a cumulative index of reports and statements filed with it, which shall be published in the Federal Register at regular intervals and which shall be available for purchase directly or by mail for a reasonable price;
(7) Special reports; publication. To prepare and publish from time to time special reports listing those candidates for whom reports were filed as required by this subchapter and those candidates for whom such reports were not filed as so required;
(8) Audits; investigations. To make from time to time audits and field investigations with respect to reports and statements filed under the provisions of this subchapter, and with respect to alleged failures to file any report or statement required under the provisions of this subchapter;

(9) Enforcement authorities; reports of violations. To report apparent violations of law to the appropriate law enforcement authorities; and
(10) Rules and regulations. To prescribe suitable rules and regulations to carry out the provisions of this subchapter, in accordance with the provisions of subsection (c) of this section.

(b) Commission; duties: national clearinghouse for information; studies, scope, publication, copies to general public at cost. It shall be the duty of the Commission to serve as a national clearinghouse for information in respect to the administration of elections. In carrying out its duties under this subsection, the Commission shall enter into contracts for the purpose of conducting independent

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studies of the administration of elections. Such studies shall include, but shall not be limited to, studies of -
(1) the method of selection of, and the type of duties assigned to, officials and personnel working on boards of elections;
(2) practices relating to the registration of voters; and
(3) voting and counting methods.
Studies made under this subsection shall be published by the Commission and copies thereof shall be made available to the general public upon the payment of the cost thereof.

(c) Proposed rules or regulations; statement, transmittal to Congress; Presidential elections and Congressional elections; "legislative days" defined.
(1) The Commission, before prescribing any rule or regulation under this section, shall transmit a statement with respect to such rule or regulation to the Senate or the House of Representatives, as the case may be, in accordance with the provisions of this subsection. Such statement shall set forth the proposed rule or regulation and shall contain a detailed explanation and justification of such rule or regulation.
(2) If the appropriate body of the Congress which receives a statement from the Commission under this subsection does not, through appropriate action, disapprove the proposed rule or regulation set forth in such statement no later than 30 legislative days after receipt of such statement, then the Commission may prescribe such rule or regulation. In the case of any rule or regulation proposed to deal with reports or statements required to be filed under this subchapter by a candidate for the office of President

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of the United States, and by political committees supporting such a candidate both the Senate and the House of Representatives shall have the power to disapprove such

proposed rule or regulation. The Commission may not prescribe any rule or regulation which is disapproved under this paragraph.
(3) If the Commission proposes to prescribe any rule or regulation dealing with reports or statements required to be filed under this subchapter by a candidate for the office of Senator, and by political committees supporting such candidate, it shall transmit such statement to the Senate. If the Commission proposes to prescribe any rule or regulation dealing with reports or statements required to be filed under this subchapter by a candidate for the office of Representative, Delegate, or Resident Commissioner, and by political committees supporting such candidate, it shall transmit such statement to the House of Representatives. If the Commission proposes to prescribe any rule or regulation dealing with reports or statements required to be filed under this subchapter by a candidate for the office of President of the United States, and by political committees supporting such candidate it shall transmit such statement to the House of Representatives and the Senate.
(4) For purposes of this subsection, the term "legislative days" does not include, with respect to statements transmitted to the Senate, any calendar day on which the Senate is not in session, and with respect to statements transmitted to the House of Representatives, any calendar day on which the House of Representatives is not in session, and with respect to statements transmitted to both such bodies, any calendar day on which both Houses of the Congress are not in session.

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(d) Rules and regulations; issuance; custody of reports and statements; Congressional cooperation.
(1) The Commission shall prescribe suitable rules and regulations to carry out the provisions of this subchapter, including such rules and regulations as may be necessary to require that -
(A) reports and statements required to be filed under this subchapter by a candidate for the office of Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, and by political committees supporting such candidate, shall be received by the Clerk of the House of Representatives as custodian for the Commission;
(B) reports and statements required to be filed under this subchapter by a candidate for the office of Senator, and by political committees supporting such candidate, shall be received by the Secretary of the Senate as custodian for the Commission; and
(C) the Clerk of the House of Representatives and the Secretary of the Senate, as custodians for the Commission, each shall make the reports and statements received by him available for public inspection and copying in accordance with paragraph (4) of subsection (a) of this section, and preserve such reports and statements in accordance with paragraph (5) of subsection (a) of this section.
(2) It shall be the duty of the Clerk of the House of Representatives and the Secretary of the Senate to cooperate with the Commission in carrying out its duties under this Act and to furnish such services and facilities as may be required in accordance with this section.

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439. Statements filed with State officers.

(a) "Appropriate State" defined. A copy of each statement required to be filed with the Commission by this subchapter shall be filed with the Secretary of State (or, if there is no office of Secretary of State, the equivalent State officer) of the appropriate State. For purposes of this subsection, the term "appropriate State" means -
(1) for reports relating to expenditures and contributions in connection with the campaign for nomination for election, or election, of a candidate to the office of President or Vice President of the United States, each State in which an expenditure is made by him or on his behalf, and
(2) for reports relating to expenditures and contributions in connection with the campaign for nomination for election, or election, of a candidate to the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, the State in which he seeks election.

(b) Duties of State officers. It shall be the duty of the Secretary of State, or the equivalent State officer, under subsection (a) of this section -
(1) to receive and maintain in an orderly manner all reports and statements required by this subchapter to be filed with him;
(2) to preserve such reports and statements for a period of 10 years from date of receipt, except that reports and statements relating solely to candidates for the House of Representatives shall be preserved for only 5 years from the date of receipt;
(3) to make the reports and statements filed with him available for public inspection and copying during regular office hours, commencing as soon

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as practicable but not later than the end of the day during which it was received, and to permit copying of any such report or statement by hand or by duplicating machine, requested by any person, at the expense of such person; and
(4) to compile and maintain a current list of all statements or parts of statements pertaining to each candidate.

439a. Use of contributed amounts for certain purposes; rules of Commission.

Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his activities as a holder of Federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred by him in connection with his duties as a holder of Federal office, may be contributed by him to any organization described in section 170 (c) of Title 26, or may be used for any other lawful purpose. To the extent any such contribution, amount

contributed, or expenditure thereof is not otherwise required to be disclosed under the provisions of this subchapter, such contribution, amount contributed, or expenditure shall be fully disclosed in accordance with rules promulgated by the Commission. The Commission is authorized to prescribe such rules as may be necessary to carry out the provisions of this section.

441. Penalties for violations.

(a) Any person who violates any of the provisions of this subchapter shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.

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(b) In case of any conviction under this subchapter, where the punishment inflicted does not include imprisonment, such conviction shall be deemed a misdemeanor conviction only.

SUBCHAPTER II. - GENERAL PROVISIONS

454. Partial invalidity.

If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby.

456. Additional enforcement authority.

(a) Findings, after notice and hearing, or failure to file timely reports; disqualification for prescribed period from candidacy in future Federal elections.
In any case in which the Commission, after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5, makes a finding that a person who, while a candidate for Federal office, failed to file a report required by subchapter I of this chapter, and such finding is made before the expiration of the time within which the failure to file such report may be prosecuted as a violation of such subchapter I, such person shall be disqualified from becoming a candidate in any future election for Federal office for a period of time beginning on the date of such finding and ending one year after the expiration of the term of the Federal office for which such person was a candidate.

(b) Judicial review of findings.
Any finding by the Commission under subsection (a) of this section shall be subject to judicial review in accordance with the provisions of chapter 7 of Title 5.

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TITLE 18. CRIMES AND CRIMINAL PROCEDURE
CHAPTER 29 - ELECTIONS AND POLITICAL ACTIVITIES

591. Definitions.

Except as otherwise specifically provided, when used in this section and in sections 597, 599, 600, 602, 608, 610, 611, 614, 615, and 617 of this title -

(a) "election" means -
(1) a general, special, primary, or runoff election,
(2) a convention or caucus of a political party held to nominate a candidate,
(3) a primary election held for the selection of delegates to a national nominating convention of a political party, or
(4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President;

(b) a "candidate" means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, to Federal office, if he has -
(1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, or
(2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

(c) "Federal office" means the office of President or Vice President of the United States, or Senator

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or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

(d) "political committee" means any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

(e) "contribution" -
(1) means a gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business, which

shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance thereof that each endorser or guarantor bears to the total number of endorsers or guarantors), made for the purpose of influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States;
(2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for such purposes;
(3) means funds received by a political committee which are transferred to such committee from another political committee or other source;

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(4) means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose; but
(5) does not include -
(A) the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee;
(B) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities;
(C) the sale of any food or beverage by a vendor for use in a candidate's campaign at a charge less than the normal comparable charge, if such charge for use in a candidate's campaign is at least equal to the cost of such food or beverage to the vendor;
(D) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate; or
(E) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample

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ballot, or other printed listing, of three or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines or other similar types of general public political advertising; to the extent that the cumulative value of activities by any person on behalf of any candidate under each of clauses (B), (C), and (D) does not exceed $500 with respect to any election;

(f) "expenditure" -
(1) means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States;
(2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and
(3) means the transfer of funds by a political committee to another political committee; but

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(4) does not include -
(A) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;
(B) nonpartisan activity designed to encourage individuals to register to vote or to vote;
(C) any communication by any membership organization or corporation to its members or stockholders, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any person to Federal office;
(D) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities;
(E) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate;
(F) any communication by any person which is not made for the purpose of influencing the nomination for election, or election, of any person to Federal office;
(G) the payment by a State or local committee of a political party of the costs of

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preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of three or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines or other similar types of general public political advertising;

(H) any costs incurred by a candidate in connection with the solicitation of contributions by such candidate, except that this clause shall not apply with respect to costs incurred by a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 608 (c) of this title; or
(I) any costs incurred by a political committee (as such term is defined by section 608 (b) (2) of this title) with respect to the solicitation of contributions to such political committee or to any general political fund controlled by such political committee, except that this clause shall not apply to exempt costs incurred with respect to the solicitation of contributions to any such political committee made through broadcasting stations, newspapers, magazines, outdoor advertising facilities, and

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other similar types of general public political advertising;
to the extent that the cumulative value of activities by any individual on behalf of any candidate under each of clauses (D) or (E) does not exceed $500 with respect to any election;

(g) "person" and "whoever" mean an individual, partnership, committee, association, corporation, or any other organization or group of persons;

(h) "State" means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(i) "political party" means any association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization;

(j) "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Federal Election Commission;

(k) "national committee" means the organization which, by virtue of the bylaws of the political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Federal Election Commission established under section 437c (a) of Title 2; and

(l) "principal campaign committee" means the principal campaign committee designated by a candidate under section 432 (f) (1) of Title 2.

608. Limitations on contributions and expenditures.

(a) Personal funds of candidate and family.
(1) No candidate may make expenditures from

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his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year for nomination for election, or for election, to Federal office in excess of, in the aggregate -
(A) $50,000, in the case of a candidate for the office of President or Vice President of the United States;
(B) $35,000, in the case of a candidate for the office of Senator or for the office of Representative from a State which is entitled to only one Representative; or
(C) $25,000, in the case of a candidate for the office of Representative, or Delegate or Resident Commissioner, in any other State.
For purposes of this paragraph, any expenditure made in a year other than the calendar year in which the election is held with respect to which such expenditure was made, is considered to be made during the calendar year in which such election is held.
(2) For purposes of this subsection, "immediate family" means a candidate's spouse, and any child, parent, grandparent, brother, or sister of the candidate, and the spouses of such persons.
(3) No candidate or his immediate family may make loans or advances from their personal funds in connection with his campaign for nomination for election, or for election, to Federal office unless such loan or advance is evidenced by a written instrument fully disclosing the terms and conditions of such loan or advance.
(4) For purposes of this subsection, any such loan or advance shall be included in computing the total amount of such expenditures only to the extent

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of the balance of such loan or advance outstanding and unpaid.

(b) Contributions by persons and committees.
(1) Except as otherwise provided by paragraphs (2) and (3), no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000.
(2) No political committee (other than a principal campaign committee) shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $5,000. Contributions by the national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States shall not exceed the limitation imposed by the preceding sentence with respect to any other candidate for Federal office. For purposes of this paragraph, the term "political committee" means an organization registered as a political committee under section 433, Title 2, United States Code, for a period of not less than 6 months which has received contributions from more than 50 persons and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.
(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made in a year other than the calendar year in which the election is held with respect to which such contribution

was made, is considered to be made during the calendar year in which such election is held.
(4) For purposes of this subsection -
(A) contributions to a named candidate made

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to any political committee authorized by such candidate, in writing, to accept contributions on his behalf shall be considered to be contributions made to such candidate; and
(B) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.
(5) The limitations imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.
(6) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(c) Limitations on expenditures.
(1) No candidate shall make expenditures in excess of -
(A) $10,000,000, in the case of a candidate for nomination for election to the office of President of the United States, except that

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the aggregate of expenditures under this subparagraph in any one State shall not exceed twice the expenditure limitation applicable in such State to a candidate for nomination for election to the office of Senator, Delegate, or Resident Commissioner, as the case may be;
(B) $20,000,000, in the case of a candidate for election to the office of President of the United States;
(C) in the case of any campaign for nomination for election by a candidate for the office of Senator or by a candidate for the office of Representative from a State which is entitled to only one Representative, the greater of -
(i) 8 cents multiplied by the voting age population of the State (as certified under subsection (g)); or

(ii) $100,000;
(D) in the case of any campaign for election by a candidate for the office of Senator or by a candidate for the office of Representative from a State which is entitled to only one Representative, the greater of -
(i) 12 cents multiplied by the voting age population of the State (as certified under subsection (g)); or
(ii) $150,000;
(E) $70,000, in the case of any campaign for nomination for election, or for election, by a candidate for the office of Representative in any other State, Delegate from the District of Columbia, or Resident Commissioner; or
(F) $15,000, in the case of any campaign for nomination for election, or for election, by

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a candidate for the office of Delegate from Guam or the Virgin Islands.
(2) For purposes of this subsection -
(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and
(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by -
(i) an authorized committee or any other agent of the candidate for the purposes of making any expenditure; or
(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.
(3) The limitations imposed by subparagraphs (C), (D), (E), and (F) of paragraph (1) of this subsection shall apply separately with respect to each election.
(4) The Commission shall prescribe rules under which any expenditure by a candidate for presidential nomination for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(d) Adjustment of limitations based on price index.
(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary

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data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the per centum difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by

subsection (c) and subsection (f) shall be increased by such per centum difference. Each amount so increased shall be the amount in effect for such calendar year.
(2) For purposes of paragraph (1) -
(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items - United States city average) published monthly by the Bureau of Labor Statistics; and
(B) the term "base period" means the calendar year 1974.

(e) Expenditure relative to clearly identified candidate.
(1) No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (c) (2) (B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.
(2) For purposes of paragraph (1) -
(A) "clearly identified" means -
(i) the candidate's name appears;
(ii) a photograph or drawing of the candidate appears; or

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(iii) the identity of the candidate is apparent by unambiguous reference; and
(B) "expenditure" does not include any payment made or incurred by a corporation or a labor organization which, under the provisions of the last paragraph of section 610, would not constitute an expenditure by such corporation or labor organization.

(f) Exceptions for national and State committees.
(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.
(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (g)). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.
(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for

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Federal office in a State who is affiliated with such party which exceeds -
(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of -
(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (g)); or
(ii) $20,000; and
(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(g) Voting age population estimates. During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(h) Knowing violations. No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(i) Penalties. Any person who violates any provision of this section shall be fined not more than $25,000 or imprisoned not more than 1 year, or both.

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610. Contributions or expenditures by national banks, corporations or labor organizations.

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $25,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than 1 year, or both; and if the violation was willful, shall be fined not more than $50,000 or imprisoned not more than 2 years or both.

For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose,

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in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: Provided, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

611. Contributions by Government contractors.

Whoever -
(a) entering into any contract with the United States or any department or agency thereof either

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for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof or for selling any land or building to the United States or any department or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of -

(1) the completion of performance under, or

(2) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land or buildings,

directly or indirectly makes any contribution of money or other thing of value, or promises expressly or impliedly to make any such contribution, to any political party, committee, or candidate for public office or to any person for any political purpose or use; or

(b) knowingly solicits any such contribution from any such person for any such purpose during any such period; shall be fined not more than $25,000 or imprisoned not more than 5 years, or both.

This section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any separate segregated fund by any corporation or labor organization for the purpose of influencing the nomination for election, or election, of any person to Federal office, unless the provisions of section 610 of this title prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, such fund.

For purposes of this section, the term "labor organization"

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has the meaning given it by section 610 of this title.

TITLE 26. INTERNAL REVENUE CODE

6096. Designation by individuals.

(a) In general. Every individual (other than a non-resident alien) whose income tax liability for the taxable year is $1 or more may designate that $1 shall be paid over to the Presidential Election Campaign Fund in accordance with the provisions of section 9006 (a). In the case of a joint return of husband and wife having an income tax liability of $2 or more, each spouse may designate that $1 shall be paid to the fund.

(b) Income tax liability. For purposes of subsection (a), the income tax liability for an individual for any taxable year is the amount of the tax imposed by chapter 1 on such

individual for such taxable year (as shown on his return), reduced by the sum of the credits (as shown in his return) allowable under sections 33, 37, 38, 40, and 41.

(c) Manner and time of designation. A designation under subsection (a) may be made with respect to any taxable year -
(1) at the time of filing the return of the tax imposed by chapter 1 for such taxable year, or
(2) at any other time (after the time of filing the return of the tax imposed by chapter 1 for such taxable year) specified in regulations prescribed by the Secretary or his delegate.
Such designation shall be made in such manner as the Secretary or his delegate prescribes by regulations except that, if such designation is made at the time of filing the return of the tax imposed by chapter 1 for such taxable year, such designation shall be made either on the
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first page of the return or on the page bearing the taxpayer's signature.

CHAPTER 95 - PRESIDENTIAL ELECTION CAMPAIGN FUND

9001. Short title.

This chapter may be cited as the "Presidential Election Campaign Fund Act."

9002. Definitions.

For purposes of this chapter -
(1) The term "authorized committee" means, with respect to the candidates of a political party for President and Vice President of the United States, any political committee which is authorized in writing by such candidates to incur expenses to further the election of such candidates. Such authorization shall be addressed to the chairman of such political committee, and a copy of such authorization shall be filed by such candidates with the Commission. Any withdrawal of any authorization shall also be in writing and shall be addressed and filed in the same manner as the authorization.
(2) The term "candidate" means, with respect to any presidential election, an individual who -
(A) has been nominated for election to the office of President of the United States or the office of Vice President of the United States by a major party, or
(B) has qualified to have his name on the election ballot (or to have the names of electors pledged to him on the election ballot) as the candidate of a political party for election to either such office in 10 or more States.
For purposes of paragraphs (6) and (7) of this section and purposes of section 9004 (a) (2), the term "candidate" means, with respect to any preceding presidential

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election, an individual who received popular votes for the office of President in such election.
(3) The term "Commission" means the Federal Election Commission established by section 437c (a) (1) of Title 2, United States Code.
(4) The term "eligible candidates" means the candidates of a political party for President and Vice President of the United States who have met all applicable conditions for eligibility to receive payments under this chapter set forth in section 9003.
(5) The term "fund" means the Presidential Election Campaign Fund established by section 9006 (a).
(6) The term "major party" means, with respect to any presidential election, a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 25 percent or more of the total number of popular votes received by all candidates for such office.
(7) The term "minor party" means, with respect to any presidential election, a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office.
(8) The term "new party" means, with respect to any presidential election, a political party which is neither a major party nor a minor party.
(9) The term "political committee" means any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office.

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(10) The term "presidential election" means the election of presidential and vice-presidential electors.
(11) The term "qualified campaign expense" means an expense -
(A) incurred -
(i) by the candidate of a political party for the office of President to further his election to such office or to further the election of the candidate of such political party for the office of Vice President, or both,
(ii) by the candidate of a political party for the office of Vice President to further his election to such office or to further the election of the candidate of such political party for the office of President, or both, or
(iii) by an authorized committee of the candidates of a political party for the offices of President and Vice President to further the election of either or both of such candidates to such offices;
(B) incurred within the expenditure report period (as defined in paragraph (12)), or incurred before the beginning of such period to the extent such expense is for property, services, or facilities used during such period; and
(C) neither the incurring nor payment of which constitutes a violation of any law of the United States or of the State in which such expense is incurred or paid.

An expense shall be considered as incurred by a candidate or an authorized committee if it is incurred by a person authorized by such candidate or such committee, as the case may be, to incur such expense on behalf of such candidate or such committee. If an authorized committee of the candidates of a political party for

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President and vice President of the United States also incurs expenses to further the election of one or more other individuals to Federal, State, or local elective public office, expenses incurred by such committee which are not specifically to further the election of such other individual or individuals shall be considered as incurred to further the election of such candidates for President and Vice President in such proportion as the Commission prescribes by rules or regulations.

(12) The term "expenditure report period" with respect to any presidential election means -

(A) in the case of a major party, the period beginning with the first day of September before the election, or, if earlier, with the date on which such major party at its national convention nominated its candidate for election to the office of President of the United States, and ending 30 days after the date of the presidential election; and

(B) in the case of a party which is not a major party, the same period as the expenditure report period of the major party which has the shortest expenditure report period for such presidential election under subparagraph (A).

9003. Condition for eligibility for payments.

(a) In general. In order to be eligible to receive any payments under section 9006, the candidates of a political party in a presidential election shall, in writing -

(1) agree to obtain and furnish to the Commission such evidence as it may request of the qualified campaign expenses of such candidates;

(2) agree to keep and furnish to the Commission such records, books, and other information as it may request; and

(3) agree to an audit and examination by the

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Commission under section 9007 and to pay any amounts required to be paid under such section.

(b) Major parties. In order to be eligible to receive any payments under section 9006, the candidates of a major party in a presidential election shall certify to the Commission, under penalty of perjury, that -

(1) such candidates and their authorized committees will not incur qualified campaign expenses in excess of the aggregate payments to which they will be entitled under section 9004; and
(2) no contributions to defray qualified campaign expenses have been or will be accepted by such candidates or any of their authorized committees except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006 (d), and no contributions to defray expenses which would be qualified campaign expenses but for subparagraph (C) of section 9002 (11) have been or will be accepted by such candidates or any of their authorized committees.
Such certification shall be made within such time prior to the day of the presidential election as the Commission shall prescribe by rules or regulations.

(c) Minor and new parties. In order to be eligible to receive any payments under section 9006, the candidates of a minor or new party in a presidential election shall certify to the Commission, under penalty of perjury, that -
(1) such candidates and their authorized committees will not incur qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party are entitled under section 9004; and

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(2) such candidates and their authorized committees will accept and expend or retain contributions to defray qualified campaign expenses only to the extent that the qualified campaign expenses incurred by such candidates and their authorized committees certified to under paragraph (1) exceed the aggregate payments received by such candidates out of the fund pursuant to section 9006.
Such certification shall be made within such time prior to the day of the presidential election as the Commission shall prescribe by rules or regulations.

9004. Entitlement of eligible candidates to payments.

(a) In general. Subject to the provisions of this chapter -
(1) The eligible candidates of each major party in a presidential election shall be entitled to equal payments under section 9006 in an amount which, in the aggregate, shall not exceed the expenditure limitations applicable to such candidates under section 608 (c) (1) (B) of Title 18, United States Code.
(2) (A) The eligible candidates of a minor party in a presidential election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed under paragraph (1) for a major party as number of popular votes received by the candidate for President of the minor party, as such candidate, in the preceding presidential election bears to the average number of popular votes received by the candidates for President of the major parties in the preceding presidential election.

(B) If the candidate of one or more political parties (not including a major party) for the office of President was a candidate for such office in the preceding presidential election and received 5 percent

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or more but less than 25 percent of the total number of popular votes received by all candidates for such office, such candidate and his running mate for the office of Vice President, upon compliance with the provisions of section 9003 (a) and (c), shall be treated as eligible candidates entitled to payments under section 9006 in an amount computed as provided in subparagraph (A) by taking into account all the popular votes received by such candidate for the office of President in the preceding presidential election. If eligible candidates of a minor party are entitled to payments under this subparagraph, such entitlement shall be reduced by the amount of the entitlement allowed under subparagraph (A).

(3) The eligible candidates of a minor party or a new party in a presidential election whose candidate for President in such election receives, as such candidate, 5 percent or more of the total number of popular votes cast for the office of President in such election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed under paragraph (1) for a major party as the number of popular votes received by such candidate in such election bears to the average number of popular votes received in such election by the candidates for President of the major parties. In the case of eligible candidates entitled to payments under paragraph (2), the amount allowable under this paragraph shall be limited to the amount, if any, by which the entitlement under the preceding sentence exceeds the amount of the entitlement under paragraph (2).

(b) Limitations. The aggregate payments to which the eligible candidates of a political party shall be entitled

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under subsections (a) (2) and (3) with respect to a presidential election shall not exceed an amount equal to the lower of -

(1) the amount of qualified campaign expenses incurred by such eligible candidates and their authorized committees, reduced by the amount of contributions to defray qualified campaign expenses received and expended or retained by such eligible candidates and such committees; or

(2) the aggregate payments to which the eligible candidates of a major party are entitled under subsection (a) (1), reduced by the amount of contributions described in paragraph (1) of this subsection.

(c) Restrictions. The eligible candidates of a political party shall be entitled to payments under subsection (a) only -

(1) to defray qualified campaign expenses incurred by such eligible candidates or their authorized committees; or
(2) to repay loans the proceeds of which were used to defray such qualified campaign expenses, or otherwise to restore funds (other than contributions to defray qualified campaign expenses received and expended by such candidates or such committees) used to defray such qualified campaign expenses.

9005. Certification by Commission.

(a) Initial certifications. Not later than 10 days after the candidates of a political party for President and Vice President of the United States have met all applicable conditions for eligibility to receive payments under this chapter set forth in section 9003, the Commission shall certify to the Secretary for payment to such eligible candidates under section 9006 payment in full of amounts to which such candidates are entitled under section 9004.

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(b) Finality of certifications and determinations. Initial certifications by the Commission under subsection (a), and all determinations made by it under this chapter shall be final and conclusive, except to the extent that they are subject to examination and audit by the Commission under section 9007 and judicial review under section 9011.

9006. Payments to eligible candidates.

(a) Establishment of campaign fund. There is hereby established on the books of the Treasury of the United States a special fund to be known as the "Presidential Election Campaign Fund." The Secretary shall, from time to time, transfer to the fund an amount not in excess of the sum of the amounts designated (subsequent to the previous Presidential election) to the fund by individuals under section 6096. There is appropriated to the fund for each fiscal year, out of amounts in the general fund of the Treasury not otherwise appropriated, an amount equal to the amounts so designated during each fiscal year, which shall remain available to the fund without fiscal year limitation.

(b) Transfer to the general fund. If, after a Presidential election and after all eligible candidates have been paid the amount which they are entitled to receive under this chapter, there are moneys remaining in the fund, the Secretary shall transfer the moneys so remaining to the general fund of the Treasury.

(c) Payments from the fund. Upon receipt of a certification from the Commission under section 9005 for payment to the eligible candidates of a political party, the Secretary shall pay to such candidates out of the fund the amount certified by the Commission. Amounts paid to any such candidates shall be under the control of such candidates.

(d) Insufficient amounts in fund. If at the time of a

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certification by the Commission under section 9005 for payment to the eligible candidates of a political party, the Secretary or his delegate determines that the moneys in the fund are not, or may not be, sufficient to satisfy the full entitlements of the eligible candidates of all political parties, he shall withhold from such payment such amount as he determines to be necessary to assure that the eligible candidates of each political party will receive their pro rata share of their full entitlement. Amounts withheld by reason of the preceding sentence shall be paid when the Secretary or his delegate determines that there are sufficient moneys in the fund to pay such amounts, or portions thereof, to all eligible candidates from whom amounts have been withheld, but, if there are not sufficient moneys in the fund to satisfy the full entitlement of the eligible candidates of all political parties, the amounts so withheld shall be paid in such manner that the eligible candidates of each political party receive their pro rata share of their full entitlement.

9007. Examinations and audits; repayments.

(a) Examinations and audits. After each presidential election, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of the candidates of each political party for President and Vice President.

(b) Repayments.
(1) If the Commission determines that any portion of the payments made to the eligible candidates of a political party under section 9006 was in excess of the aggregate payments to which candidates were entitled under section 9004, it shall so notify such candidates, and such candidates shall pay to the Secretary an amount equal to such portion.
(2) If the Commission determines that the eligible candidates of a political party and their authorized

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committees incurred qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party were entitled under section 9004, it shall notify such candidates of the amount of such excess and such candidates shall pay to the Secretary an amount equal to such amount.
(3) If the Commission determines that the eligible candidates of a major party or any authorized committee of such candidates accepted contributions (other than contributions to make up deficiencies in payments out of the fund on account of the application of section 9006 (d)) to defray qualified campaign expenses (other than qualified campaign expenses with respect to which payment is required under paragraph (2)), it shall notify

such candidates of the amount of the contributions so accepted, and such candidates shall pay to the Secretary an amount equal to such amount.
(4) If the Commission determines that any amount of any payment made to the eligible candidates of a political party under section 9006 was used for any purpose other than -
(A) to defray the qualified campaign expenses with respect to which such payment was made; or
(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used to defray such qualified campaign expenses,
it shall notify such candidates of the amount so used, and such candidates shall pay to the Secretary an amount equal to such amount.
(5) No payment shall be required from the eligible

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candidates of a political party under this subsection to the extent that such payment, when added to other payments required from such candidates under this subsection, exceeds the amount of payments received by such candidates under section 9006.

(c) Notification. No notification shall be made by the Commission under subsection (b) with respect to a presidential election more than 3 years after the day of such election.

(d) Deposit of repayments. All payments received by the Secretary under subsection (b) shall be deposited by him in the general fund of the Treasury.

9008. Payments for presidential nominating conventions.

(a) Establishment of accounts. The Secretary shall maintain in the fund, in addition to any account which he maintains under section 9006 (a), a separate account for the national committee of each major party and minor party. The Secretary shall deposit in each such account an amount equal to the amount which each such committee may receive under subsection (b). Such deposits shall be drawn from amounts designated by individuals under section 6096 and shall be made before any transfer is made to any account for any eligible candidate under section 9006 (a).

(b) Entitlement to payments from the fund.
(1) Major parties. Subject to the provisions of this section, the national committee of a major party shall be entitled to payments under paragraph (3), with respect to any presidential nominating convention, in amounts which, in the aggregate, shall not exceed $2 million.
(2) Minor parties. Subject to the provisions of this section, the national committee of a minor party

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shall be entitled to payments under paragraph (3), with respect to any presidential nominating convention, in amounts which, in the aggregate, shall not exceed an amount which bears the same ratio to the amount the national committee of a major party is entitled to receive under paragraph (1) as the number of popular votes received by the candidate for President of the minor party, as such candidate, in the preceding presidential election bears to the average number of popular votes received by the candidates for President of the United States of the major parties in the preceding presidential election.

(3) Payments. Upon receipt of certification from the Commission under subsection (g), the Secretary shall make payments from the appropriate account maintained under subsection (a) to the national committee of a major party or minor party which elects to receive its entitlement under this subsection. Such payments shall be available for use by such committee in accordance with the provisions of subsection (c).

(4) Limitation. Payments to the national committee of a major party or minor party under this subsection from the account designated for such committee shall be limited to the amounts in such account at the time of payment.

(5) Adjustment of entitlements. The entitlements established by this subsection shall be adjusted in the same manner as expenditure limitations established by section 608 (c) and section 608 (f) of Title 18, United States Code, are adjusted pursuant to the provisions of section 608 (d) of such title.

(c) Use of funds. No part of any payment made under subsection (b) shall be used to defray the expenses

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of any candidate or delegate who is participating in any presidential nominating convention. Such payments shall be used only -

(1) to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) by or on behalf of the national committee receiving such payments; or

(2) to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds (other than contributions to defray such expenses received by such committee) used to defray such expenses.

(d) Limitation of expenditures.

(1) Major parties. Except as provided by paragraph (3), the national committee of a major party may not make expenditures with respect to a presidential nominating convention which, in the aggregate, exceed the amount of payments to which such committee is entitled under subsection (b) (1).

(2) Minor parties. Except as provided by paragraph (3), the national committee of a minor party may not make expenditures with respect to a presidential nominating convention which, in the aggregate, exceed the amount of the entitlement of the national committee of a major party under subsection (b) (1).

(3) Exception. The Commission may authorize the national committee of a major party or minor party to make expenditures which, in the aggregate, exceed the limitation established by paragraph (1) or paragraph (2) of this subsection. Such authorization shall be based upon a determination by the Commission that, due to extraordinary and unforeseen circumstances, such expenditures are necessary

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to assure the effective operation of the presidential nominating convention by such committee.

(e) Availability of payments. The national committee of a major party or minor party may receive payments under subsection (b) (3) beginning on July 1 of the calendar year immediately preceding the calendar year in which a presidential nominating convention of the political party involved is held.

(f) Transfer to the fund. If, after the close of a presidential nominating convention and after the national committee of the political party involved has been paid the amount which it is entitled to receive under this section, there are moneys remaining in the account of such national committee, the Secretary shall transfer the moneys so remaining to the fund.

(g) Certification by Commission. Any major party or minor party may file a statement with the Commission in such form and manner and at such times as it may require, designating the national committee of such party. Such statement shall include the information required by section 433 (b) of Title 2, United States Code, together with such additional information as the Commission may require. Upon receipt of a statement filed under the preceding sentences, the Commission promptly shall verify such statement according to such procedures and criteria as it may establish and shall certify to the Secretary for payment in full to any such committee of amounts to which such committee may be entitled under subsection (b). Such certifications shall be subject to an examination and audit which the Commission shall conduct no later than December 31 of the calendar year in which the presidential nominating convention involved is held.

(h) Repayments. The Commission shall have the same authority to require repayments from the national

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committee of a major party or a minor party as it has with respect to repayments from any eligible candidate under section 9007 (b). The provisions of section 9007 (c) and section 9007 (d) shall apply with respect to any repayment required by the Commission under this subsection.

9009. Reports to Congress; regulations.

(a) Reports. The Commission shall, as soon as practicable after each presidential election, submit a full report to the Senate and House of Representatives setting forth -
(1) the qualified campaign expenses (shown in such detail as the Commission determines necessary) incurred by the candidates of each political party and their authorized committees;
(2) the amounts certified by it under section 9005 for payment to eligible candidates of each political party;
(3) the amount of payments, if any, required from such candidates under section 9007, and the reasons for each payment required;
(4) the expenses incurred by the national committee of a major party or minor party with respect to a presidential nominating convention;
(5) the amounts certified by it under section 9008 (g) for payment to each such committee; and
(6) the amount of payments, if any, required from such committees under section 9008 (h), and the reasons for each such payment.
Each report submitted pursuant to this section shall be printed as a Senate document.

(b) Regulations, etc. The Commission is authorized to prescribe such rules and regulations in accordance with the provisions of subsection (c), to conduct such

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examinations and audits (in addition to the examinations and audits required by section 9007 (a)), to conduct such investigations, and to require the keeping and submission of such books, records, and information, as it deems necessary to carry out the functions and duties imposed on it by this chapter.

(c) Review of regulations.
(1) The Commission, before prescribing any rule or regulation under subsection (b), shall transmit a statement with respect to such rule or regulation to the Senate and to the House of Representatives, in accordance with the provisions of this subsection. Such statement shall set forth the proposed rule or regulation and shall contain a detailed explanation and justification of such rule or regulation.
(2) If either such House does not, through appropriate action, disapprove the proposed rule or regulation set forth in such statement no later than 30 legislative days after receipt of such statement, then the Commission may prescribe such rule or regulation. The Commission may not prescribe any rule or regulation which is disapproved by either such House under this paragraph.
(3) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

9010. Participation by Commission in judicial proceedings.

(a) Appearance by counsel. The Commission is authorized to appear in and defend against any action filed under section 9011, either by attorneys employed in its office or by counsel whom it may appoint without regard to the provisions of Title 5, United States Code, governing appointments in the competitive service, and

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whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title.

(b) Recovery of certain payments. The Commission is authorized through attorneys and counsel described in subsection (a) to appear in the district courts of the United States to seek recovery of any amounts determined to be payable to the Secretary as a result of examination and audit made pursuant to section 9007.

(c) Declaratory and injunctive relief. The Commission is authorized through attorneys and counsel described in subsection (a) to petition the courts of the United States for declaratory or injunctive relief concerning any civil matter covered by the provisions of this subtitle or section 6096. Upon application of the Commission an action brought pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d) Appeal. The Commission is authorized on behalf of the United States to appeal from, and to petition the Supreme Court for certiorari to review, judgments or decrees entered with respect to actions in which it appears pursuant to the authority provided in this section.

9011. Judicial review.

(a) Review of certification, determination, or other action by the Commission. Any certification, determination, or other action by the Commission made or taken pursuant to the provisions of this chapter shall be subject to review by the United States Court of Appeals for

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the District of Columbia upon petition filed in such Court by any interested person. Any petition filed pursuant to this section shall be filed within 30 days after the certification, determination, or other action by the Commission for which review is sought.

(b) Suits to implement chapter.
(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe 1a any provisions of this chapter.
(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

9012. Criminal penalties.

(a) Excess expenses.
(1) It shall be unlawful for an eligible candidate of a political party for President and Vice President in a presidential election or any of his authorized committees knowingly and willfully to incur qualified

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campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party are entitled under section 9004 with respect to such election. It shall be unlawful for the national committee of a major party or minor party knowingly and willfully to incur expenses with respect to a presidential nominating convention in excess of the expenditure limitation applicable with respect to such committee under section 9008 (d), unless the incurring of such expenses is authorized by the Commission under section 9008 (d) (3).
(2) Any person who violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than 1 year or both. In the case of a violation by an authorized committee, any officer or member of such committee who knowingly and willfully consents to such violation shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

(b) Contributions.
(1) It shall be unlawful for an eligible candidate of a major party in a presidential election or any of his authorized committees knowingly and willfully to accept any contribution to defray qualified campaign expenses, except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006 (d), or to defray expenses which would be qualified campaign expenses but for subparagraph (C) of section 9002 (11).
(2) It shall be unlawful for an eligible candidate of a political party (other than a major party) in a presidential election or any of his authorized committees knowingly and willfully to accept and expend or retain contributions to defray qualified

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campaign expenses in an amount which exceeds the qualified campaign expenses incurred with respect to such election by such eligible candidate and his authorized committees.
(3) Any person who violates paragraph (1) or (2) shall be fined not more than $5,000, or imprisoned not more than 1 year, or both. In the case of a violation by an authorized committee, any officer or member of such committee who knowingly and willfully consents to such violation shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

(c) Unlawful use of payments.
(1) It shall be unlawful for any person who receives any payment under section 9006, or to whom any portion of any payment received under such section is transferred, knowingly and willfully to use, or authorize the use of, such payment or such portion for any purpose other than -
(A) to defray the qualified campaign expenses with respect to which such payment was made; or
(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray such qualified campaign expenses.
(2) It shall be unlawful for the national committee of a major party or minor party which receives any payment under section 9008 (b) (3) to use, or authorize the use of, such payment for any purpose other than a purpose authorized by section 9008 (c).
(3) Any person who violates paragraph (1) shall

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be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(d) False statements, etc.
(1) It shall be unlawful for any person knowingly and willfully -

(A) to furnish any false, fictitious, or fraudulent evidence, books, or information to the Commission under this subtitle, or to include in any evidence, books, or information so furnished any misrepresentation of a material fact, or to falsify or conceal any evidence, books, or information relevant to a certification by the Commission or an examination and audit by the Commission under this chapter; or
(B) to fail to furnish to the Commission any records, books, or information requested by it for purposes of this chapter.
(2) Any person who violates paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(e) Kickbacks and illegal payments.
(1) It shall be unlawful for any person knowingly and willfully to give or accept any kickback or any illegal payment in connection with any qualified campaign expense of eligible candidates or their authorized committees. It shall be unlawful for the national committee of a major party or minor party knowingly and willfully to give or accept any kickback or any illegal payment in connection with any expense incurred by such committee with respect to a presidential nominating convention.
(2) Any person who violates paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

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(3) In addition to the penalty provided by paragraph (2), any person who accepts any kickback or illegal payment in connection with any qualified campaign expense of eligible candidates or their authorized committees, or in connection with any expense incurred by the national committee of a major party or minor party with respect to a presidential nominating convention, shall pay to the Secretary, for deposit in the general fund of the Treasury, an amount equal to 125 percent of the kickback or payment received.

(f) Unauthorized expenditures and contributions.
(1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.
(2) This subsection shall not apply to -
(A) expenditures by a broadcaster regulated by the Federal Communications Commission, or by a periodical publication, in reporting the news or in taking editorial positions; or
(B) expenditures by any organization described in section 501 (c) which is exempt from tax under section 501 (a) in communicating to its members the views of that organization.

(3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and

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any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

(g) Unauthorized disclosure of information.
(1) It shall be unlawful for any individual to disclose any information obtained under the provisions of this chapter except as may be required by law.
(2) Any person who violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

CHAPTER 96 - PRESIDENTIAL PRIMARY MATCHING PAYMENT ACCOUNT

9031. Short title.

This chapter may be cited as the "Presidential Primary Matching Payment Account Act."

9032. Definitions.

For the purposes of this chapter -
(1) The term "authorized committee" means, with respect to the candidates of a political party for President and Vice President of the United States, any political committee which is authorized in writing by such candidates to incur expenses to further the election of such candidates. Such authorization shall be addressed to the chairman of such political committee, and a copy of such authorization shall be filed by such candidates with the Commission. Any withdrawal of any authorization shall also be in writing and shall be addressed and filed in the same manner as the authorization.
(2) The term "candidate" means an individual who seeks nomination for election to be President of the United States. For purposes of this paragraph,

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an individual shall be considered to seek nomination for election if he -
(A) takes the action necessary under the law of a State to qualify himself for nomination for election;
(B) receives contributions or incurs qualified campaign expenses; or

(C) gives his consent for any other person to receive contributions or to incur qualified campaign expenses on his behalf.
(3) The term "Commission" means the Federal Election Commission established by section 437c (a) (1) of Title 2, United States Code.
(4) Except as provided by section 9034 (a), the term "contribution" -
(A) means a gift, subscription, loan, advance, or deposit of money, or anything of value, the payment of which was made on or after the beginning of the calendar year immediately preceding the calendar year of the presidential election with respect to which such gift, subscription, loan, advance, or deposit of money, or anything of value, is made for the purpose of influencing the result of a primary election;
(B) means a contract, promise, or agreement, whether or not legally enforceable, to make a contribution for any such purpose;
(C) means funds received by a political committee which are transferred to that committee from another committee; and
(D) means the payment by any person other than a candidate, or his authorized committee, of compensation for the personal services of another person which are rendered to the candidate or committee without charge; but

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(E) does not include -
(i) except as provided in subparagraph (D), the value of personal services rendered to or for the benefit of a candidate by an individual who receives no compensation for rendering such service to or for the benefit of the candidate; or
(ii) payments under section 9037.
(5) The term "matching payment account" means the Presidential Primary Matching Payment Account established under section 9037 (a).
(6) The term "matching payment period" means the period beginning with the beginning of the calendar year in which a general election for the office of President of the United States will be held and ending on the date on which the national convention of the party whose nomination a candidate seeks nominates its candidate for the office of President of the United States, or, in the case of a party which does not make such nomination by national convention, ending on the earlier of -
(A) the date such party nominates its candidate for the office of President of the United States; or
(B) the last day of the last national convention held by a major party during such calendar year.
(7) The term "primary election" means an election, including a runoff election or a nominating convention or caucus held by a political party, for the selection of delegates to a national nominating convention of a political party, or for the expression of a preference for the nomination of persons for election to the office of President of the United States.

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(8) The term "political committee" means any individual, committee, association, or organization (whether or not incorporated) which accepts contributions or incurs qualified campaign expenses for the purpose of influencing, or attempting to influence, the nomination of any person for election to the office of President of the United States.
(9) The term "qualified campaign expense" means a purchase, payment, distribution, loan, advance, deposit, or gift of money or of anything of value -
(A) incurred by a candidate, or by his authorized committee, in connection with his campaign for nomination for election; and
(B) neither the incurring nor payment of which constitutes a violation of any law of the United States or of the State in which the expense is incurred or paid.
For purposes of this paragraph, an expense is incurred by a candidate or by an authorized committee if it is incurred by a person specifically authorized in writing by the candidate or committee, as the case may be, to incur such expense on behalf of the candidate or the committee.
(10) The term "State" means each State of the United States and the District of Columbia.

9033. Eligibility for payments.

(a) Conditions. To be eligible to receive payments under section 9037, a candidate shall, in writing -
(1) agree to obtain and furnish to the Commission any evidence it may request of qualified campaign expenses;
(2) agree to keep and furnish to the Commission any records, books, and other information it may request; and
(3) agree to an audit and examination by the

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Commission under section 9038 and to pay any amounts required to be paid under such section.

(b) Expense limitation; declaration of intent; minimum contributions. To be eligible to receive payments under section 9037, a candidate shall certify to the Commission that -
(1) the candidate and his authorized committees will not incur qualified campaign expenses in excess of the limitation on such expenses under section 9035;
(2) the candidate is seeking nomination by a political party for election to the office of President of the United States;
(3) the candidate has received matching contributions which in the aggregate, exceed $5,000 in contributions from residents of each of at least 20 States; and
(4) the aggregate of contributions certified with respect to any person under paragraph (3) does not exceed $250.

9034. Entitlement of eligible candidates to payments.

(a) In general. Every candidate who is eligible to receive payments under section 9033 is entitled to payments under section 9037 in an amount equal to the amount of each contribution received by such candidate on or after the beginning of the calendar year immediately preceding the calendar year of the presidential election with respect to which such candidate is seeking nomination, or by his authorized committees, disregarding any amount of contributions from any person to the extent that the total of the amounts contributed by such person on or after the beginning of such preceding calendar year exceeds $250. For purposes of this subsection and section 9033 (b), the term "contribution" means a gift of money made by a written instrument which identifies

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the person making the contribution by full name and mailing address, but does not include a subscription, loan, advance, or deposit of money, or anything of value or anything described in subparagraph (B), (C), or (D) of section 9032 (4).

(b) Limitations. The total amount of payments to which a candidate is entitled under subsection (a) shall not exceed 50 percent of the expenditure limitation applicable under section 608 (c) (1) (A) of Title 18, United States Code.

9035. Qualified campaign expense limitation.

No candidate shall knowingly incur qualified campaign expenses in excess of the expenditure limitation applicable under section 608 (c) (1) (A) of Title 18, United States Code.

9036. Certification by Commission.

(a) Initial certifications. Not later than 10 days after a candidate establishes his eligibility under section 9033 to receive payments under section 9037, the Commission shall certify to the Secretary for payment to such candidate under section 9037 payment in full of amounts to which such candidate is entitled under section 9034. The Commission shall make such additional certifications as may be necessary to permit candidates to receive payments for contributions under section 9037.

(b) Finality of determinations. Initial certifications by the Commission under subsection (a), and all determinations made by it under this chapter, are final and conclusive, except to the extent that they are subject to examination and audit by the Commission under section 9038 and judicial review under section 9041.

9037. Payments to eligible candidates.

(a) Establishment of account. The Secretary shall maintain in the Presidential Election Campaign Fund

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established by section 9006 (a), in addition to any account which he maintains under such section, a separate account to be known as the Presidential Primary Matching Payment Account. The Secretary shall deposit into the matching payment account, for use by the candidate of any political party who is eligible to receive payments under section 9033, the amount available after the Secretary determines that amounts for payments under section 9006 (c) and for payments under section 9008 (b) (3) are available for such payments.

(b) Payments from the matching payment account. Upon receipt of a certification from the Commission under section 9036, but not before the beginning of the matching payment period, the Secretary or his delegate shall promptly transfer the amount certified by the Commission from the matching payment account to the candidate. In making such transfers to candidates of the same political party, the Secretary or his delegate shall seek to achieve an equitable distribution of funds available under subsection (a), and the Secretary or his delegate shall take into account, in seeking to achieve an equitable distribution, the sequence in which such certifications are received.

9038. Examinations and audits; repayments.

(a) Examinations and audits. After each matching payment period, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who received payments under section 9037.

(b) Repayments.
(1) If the Commission determines that any portion of the payments made to a candidate from the matching payment account was in excess of the aggregate amount of payments to which such candidate was entitled under section 9034, it shall

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notify the candidate, and the candidate shall pay to the Secretary or his delegate an amount equal to the amount of excess payments.
(2) If the Commission determines that any amount of any payment made to a candidate from the matching payment account was used for any purpose other than -
(A) to defray the qualified campaign expenses with respect to which such payment was made; or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray qualified campaign expenses;
it shall notify such candidate of the amount so used, and the candidate shall pay to the Secretary or his delegate an amount equal to such amount.
(3) Amounts received by a candidate from the matching payment account may be retained for the liquidation of all obligations to pay qualified campaign expenses incurred for a period not exceeding 6 months after the end of the matching payment period. After all obligations have been liquidated, that portion of any unexpended balance remaining in the candidate's accounts which bears the same ratio to the total unexpended balance as the total amount received from the matching payment account bears to the total of all deposits made into the candidate's accounts shall be promptly repaid to the matching payment account.

(c) Notification. No notification shall be made by the Commission under subsection (b) with respect to a matching payment period more than 3 years after the end of such period.

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(d) Deposit of repayments. All payments received by the Secretary or his delegate under subsection (b) shall be deposited by him in the matching payment account.

9039. Reports to Congress; regulations.

(a) Reports. The Commission shall, as soon as practicable after each matching payment period, submit a full report to the Senate and House of Representatives setting forth -
(1) the qualified campaign expenses (shown in such detail as the Commission determines necessary) incurred by the candidates of each political party and their authorized committees;
(2) the amounts certified by it under section 9036 for payment to each eligible candidate; and
(3) the amount of payments, if any, required from candidates under section 9038, and the reasons for each payment required.
Each report submitted pursuant to this section shall be printed as a Senate document.

(b) Regulations, etc. The Commission is authorized to prescribe rules and regulations in accordance with the provisions of subsection (c), to conduct examinations and audits (in addition to the examinations and audits required by section 9038 (a)), to conduct investigations, and to require the keeping and submission of any books, records, and information, which it determines to be necessary to carry out its responsibilities under this chapter.

(c) Review of regulations.
(1) The Commission, before prescribing any rule or regulation under subsection (b), shall transmit a statement with respect to such rule or regulation to the Senate and to the House of Representatives,

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in accordance with the provisions of this subsection. Such statement shall set forth the proposed rule or regulation and shall contain a detailed explanation and justification of such rule or regulation.
(2) If either such House does not, through appropriate action, disapprove the proposed rule or regulation set forth in such statement no later than 30 legislative days after receipt of such statement, then the Commission may prescribe such rule or regulation. The Commission may not prescribe any rule or regulation which is disapproved by either such House under this paragraph.
(3) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

9040. Participation by Commission in judicial proceedings.

(a) Appearance by counsel. The Commission is authorized to appear in and defend against any action instituted under this section, either by attorneys employed in its office or by counsel whom it may appoint without regard to the provisions of Title 5, United States Code, governing appointments in the competitive service, and whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title.

(b) Recovery of certain payments. The Commission is authorized, through attorneys and counsel described in subsection (a), to institute actions in the district courts of the United States to seek recovery of any amounts determined to be payable to the Secretary or his delegate as a result of an examination and audit made pursuant to section 9038.

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(c) Injunctive relief. The Commission is authorized, through attorneys and counsel described in subsection (a), to petition the courts of the United States for such injunctive relief as is appropriate to implement any provision of this chapter.

(d) Appeal. The Commission is authorized on behalf of the United States to appeal from, and to petition the Supreme Court for certiorari to review, judgments or decrees entered with respect to actions in which it appears pursuant to the authority provided in this section.

9041. Judicial review.

(a) Review of agency action by the Commission. Any agency action by the Commission made under the provisions of this chapter shall be subject to review by the United States Court of Appeals for the District of Columbia Circuit upon petition filed in such court within 30 days after the agency action by the Commission for which review is sought.

(b) Review procedures. The provisions of chapter 7 of Title 5, United States Code, apply to judicial review of any agency action, as defined in section 551 (13) of Title 5, United States Code, by the Commission.

9042. Criminal penalties.

(a) Excess campaign expenses. Any person who violates the provisions of section 9035 shall be fined not more than $25,000, or imprisoned not more than 5 years, or both. Any officer or member of any political committee who knowingly consents to any expenditure in violation of the provisions of section 9035 shall be fined not more than $25,000, or imprisoned not more than 5 years, or both.

(b) Unlawful use of payments.
(1) It is unlawful for any person who receives any payment under section 9037, or to whom any portion

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of any such payment is transferred, knowingly and willfully to use, or authorize the use of, such payment or such portion for any purpose other than -
(A) to defray qualified campaign expenses; or
(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray qualified campaign expenses.
(2) Any person who violates the provisions of paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(c) False statements, etc.
(1) It is unlawful for any person knowingly and willfully -
(A) to furnish any false, fictitious, or fraudulent evidence, books, or information to the Commission under this chapter, or to include in any evidence, books, or information so furnished any misrepresentation of a material fact, or to falsify or conceal any evidence, books, or information relevant to a certification by the Commission or an examination and audit by the Commission under this chapter; or
(B) to fail to furnish to the Commission any records, books, or information requested by it for purposes of this chapter.

(2) Any person who violates the provisions of paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(d) Kickbacks and illegal payments.
(1) It is unlawful for any person knowingly and willfully to give or accept any kickback or any illegal

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payment in connection with any qualified campaign expense of a candidate, or his authorized committees, who receives payments under section 9037.
(2) Any person who violates the provisions of paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.
(3) In addition to the penalty provided by paragraph (2), any person who accepts any kickback or illegal payment in connection with any qualified campaign expense of a candidate or his authorized committees shall pay to the Secretary for deposit in the matching payment account, an amount equal to 125 percent of the kickback or payment received.

FOOTNOTES

Footnote 1 Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263. The pertinent portions of the legislation are set forth in the Appendix to this opinion.

Footnote 2 171 U.S. App. D.C. 172, 519 F.2d 821 (1975).

Footnote 3 The Revenue Act of 1971, Title VIII, 85 Stat. 562, as amended, 87 Stat. 138, and further amended by the Federal Election Campaign Act Amendments of 1974, 403 et seq., 88 Stat. 1291. This subtitle consists of two parts: Chapter 95 deals with funding national party conventions and general election campaigns for president, and Chapter 96 deals with matching funds for Presidential primary campaigns.

Footnote 4 " 437h. Judicial review.
"(a) . . .
"The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18. The district court immediately shall certify all questions of constitutionality of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18, to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.
"(b) . . .
"Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.
"(c) . . .
"It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite

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to the greatest possible extent the disposition of any matter certified under subsection (a) of this section."

Footnote 5 Center for Public Financing of Elections, Common Cause, the League of Women Voters of the United States, Chellis O'Neal Gregory, Norman F. Jacknis, Louise D. Wides, Daniel R. Noyes, Mrs. Edgar B. Stern, Charles P. Taft, John W. Gardner, and Ruth Clusen.

Footnote 6 The Court of Appeals also suggested in its en banc order that the issues arising under Subtitle H (relating to the public financing of Presidential campaigns) might require, under 26 U.S.C. 9011 (b) (1970 ed., Supp. IV), a different mode of review from the other issues raised in the case. The court suggested that a three-judge District Court should consider the constitutionality of these provisions in order to protect against the contingency that this Court might eventually hold these issues to be subject to determination by a three-judge court, either under 9011 (b), or 28 U.S.C. 2282,

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2284. 171 U.S. App. D.C. 168, 170, 519 F.2d 817, 819 (1975). The case was argued simultaneously to both the Court of Appeals, sitting en banc, and a three-judge District Court. The three-judge court limited its consideration to issues under Subtitle H. The three-judge court adopted the Court of Appeals' opinion on these questions in toto and simply entered an order with respect to those matters. 401 F. Supp. 1235. Thus, two judgments are before us - one from each court - upholding the constitutionality of Subtitle H, though the two cases before the Court will generally be referred to hereinafter in the singular. Since the jurisdiction of this Court to hear at least one of the appeals is clear, we need not resolve the jurisdictional ambiguities that occasioned the joint sitting of the Court of Appeals and the three-judge court.

Footnote 7 The court held one provision, 437a, unconstitutionally vague and overbroad on the ground that the provision is "`susceptible to a reading necessitating reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance.'" 171 U.S. App. D.C., at 183, 519 F.2d, at 832. No appeal has been taken from that holding.
Footnote 8 The court recognized that some of the powers delegated to the

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Commission, when exercised in a concrete context, may be predominantly executive or judicial or unrelated to the Commission's legislative function; however, since the Commission had not yet exercised most of these challenged powers, consideration of the constitutionality of those grants of authority was postponed. See n. 157, infra.

Footnote 9 See n. 4, supra.

Footnote 10 This Court has held, for instance, that an organization "may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure . . . of their affiliation." NAACP v. Alabama, 357 U.S. 449, 458 (1958). See also Bates v. Little Rock, 361 U.S. 516, 523 n. 9 (1960). Similarly, parties with sufficient concrete interests at stake have been held to have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights. Palmore v. United

States, 411 U.S. 389 (1973); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Coleman v. Miller, 307 U.S. 433 (1939).

Footnote 11 Accordingly, the two relevant certified questions are answered as follows:
1. Does the first sentence of 315 (a) of the Federal Election Campaign Act, as amended, 2 U.S.C. 437h (a) (1970 ed., Supp. IV), in the context of this action, require courts of the United States to render advisory opinions in violation of the "case or controversy" requirement of Article III, 2, of the Constitution of the United States? NO.
2. Has each of the plaintiffs alleged sufficient injury to his constitutional rights enumerated in the following questions to create a constitutional "case or controversy" within the judicial power under Article III? YES.

Footnote 12 See 18 U.S.C. 608 (b) (1), (3) (1970 ed., Supp. IV). set forth in the Appendix, infra, at 189. An organization registered as a political committee for not less than six months which has received contributions from at least 50 persons and made contributions to at least five candidates may give up to $5,000 to any candidate for any election. 18 U.S.C. 608 (b) (2) (1970 ed., Supp. IV), set forth in the Appendix, infra, at 189. Other groups are limited to making contributions of $1,000 per candidate per election.

Footnote 13 See 18 U.S.C. 608 (e) (1970 ed., Supp. IV), set forth in the Appendix, infra, at 193-194.

Footnote 14 See 18 U.S.C. 608 (a) (1970 ed., Supp. IV), set forth in the Appendix, infra, at 187-189.

Footnote 15 See 18 U.S.C. 608 (c) (1970 ed., Supp. IV), set forth in the Appendix, infra, at 190-192.

Footnote 16 Article I, 4, of the Constitution grants Congress the power to regulate elections of members of the Senate and House of Representatives. See Smiley v. Holm, 285 U.S. 355 (1932); Ex parte Yarbrough, 110 U.S. 651 (1884). Although the Court at one time indicated that party primary contests were not "elections" within the meaning of Art. I, 4, Newberry v. United States, 256 U.S. 232 (1921), it later held that primary elections were within the Constitution's grant of authority to Congress. United States v.

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Classic, 313 U.S. 299 (1941). The Court has also recognized broad congressional power to legislate in connection with the elections of the president and Vice President. Burroughs v. United States, 290 U.S. 534 (1934). See Part III, infra.

Footnote 17 The nongovernmental appellees argue that just as the decibels emitted by a sound truck can be regulated consistently with the First Amendment, Kovacs v. Cooper, 336 U.S. 77 (1949), the Act may restrict the volume of dollars in political campaigns

without impermissibly restricting freedom of speech. See Freund, Commentary in A. Rosenthal, Federal Regulation of Campaign Finance: Some Constitutional Questions 72 (1971). This comparison underscores a fundamental misconception. The decibel restriction upheld in Kovacs limited the manner of operating a soundtruck, but not the extent of its proper use. By contrast, the Act's dollar ceilings restrict the extent of the reasonable use of virtually every means of communicating information. As the Kovacs Court emphasized, the nuisance ordinance only barred soundtrucks from broadcasting "in a loud and raucous manner on the streets," 336 U.S., at 89, and imposed "no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers," or by soundtrucks operating at a reasonable volume. Ibid. See Saia v. New York, 334 U.S. 558, 561-562 (1948).

Footnote 18 Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.

Footnote 19 Political parties that fail to qualify a candidate for a position on the ballot are classified as "persons" and are subject to the $1,000 independent expenditure ceiling. See 18 U.S.C. 591 (g), (i), 608 (e) (1), (f) (1970 ed., Supp. IV). Institutional press facilities owned or controlled by candidates or political parties are also subject to expenditure limits under the Act. See 18 U.S.C. 591 (f) (4) (A), 608 (c) (2) (B), (e) (1) (1970 ed., Supp. IV).
Unless otherwise indicated all subsequent statutory citations in Part I of this opinion are to Title 18 of the United States Code, 1970 edition, Supplement IV.

Footnote 20 The record indicates that, as of January 1, 1975, one full-page advertisement in a daily edition of a certain metropolitan newspaper cost $6,971.04 - almost seven times the annual limit on expenditures "relative to" a particular candidate imposed on the vast majority of individual citizens and associations by 608 (e) (1)

Footnote 21 The statistical findings of fact agreed to by the parties in the District Court indicate that 17 of 65 major-party senatorial candidates in 1974 spent more than the combined primary-election, general-election, and fundraising limitations imposed by the Act. 591 (f) (4) (H), 608 (c) (1) (C), (D). The 1972 senatorial figures showed that 18 of 66 major-party candidates exceeded the Act's limitations. This figure may substantially underestimate the number of candidates who exceeded the limits provided in the Act, since the Act imposes separate ceilings for the primary election, the general election, and fundraising, and does not permit the limits to be aggregated. 608 (c) (3). The data for House of Representatives elections are also skewed, since statistics reflect a combined $168,000 limit instead of separate $70,000 ceilings for primary and general elections with up to an additional 20% permitted for fundraising. 591 (f) (4) (H), 608 (c) (1) (E). Only 22 of the 810 major-party House candidates in 1974 and 20 of the 816 major-party candidates in 1972 exceeded the $168,000 figure. Both Presidential candidates in 1972 spent in excess of the combined Presidential expenditure ceilings. 608 (c) (1) (A), (B).

Footnote 22 Other factors relevant to an assessment of the "intensity" of the support indicated by a contribution include the contributor's financial ability and his past contribution history.

Footnote 23 Statistical findings agreed to by the parties reveal that approximately 5.1% of the $73,483,613 raised by the 1,161 candidates for Congress in 1974 was obtained in amounts in excess of $1,000. In 1974, two major-party senatorial candidates, Ramsey Clark and

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Senator Charles Mathias, Jr., operated large-scale campaigns on contributions raised under a voluntarily imposed $100 contribution limitation.

Footnote 24 The Act exempts from the contribution ceiling the value of all volunteer services provided by individuals to a candidate or a political committee and excludes the first $500 spent by volunteers on certain categories of campaign-related activities. 591 (e) (5) (A)-(D). See infra, at 36-37.
The Act does not define the phrase - "for the purpose of influencing" an election - that determines when a gift, loan, or advance constitutes a contribution. Other courts have given that phrase a narrow meaning to alleviate various problems in other contexts. See United States v. National Comm. for Impeachment, 469 F.2d 1135, 1139-1142 (CA2 1972); American Civil Liberties Union v.

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Jennings, 366 F. Supp. 1041, 1055-1057 (DC 1973) (three-judge court), vacated as moot sub nom. Staats v. American Civil Liberties Union, 422 U.S. 1030 (1975). The use of the phrase presents fewer problems in connection with the definition of a contribution because of the limiting connotation created by the general understanding of what constitutes a political contribution. Funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary constitute a contribution. In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the Act.

Footnote 25 Expenditures by persons and associations that are "authorized or requested" by the candidate or his agents are treated as contributions under the Act. See n. 53, infra.

Footnote 26 Contribution limitations alone would not reduce the greater potential voice of affluent persons and well-financed groups, who would remain free to spend unlimited sums directly to promote candidates and policies they favor in an effort to persuade voters.

Footnote 27 Yet, a ceiling on the size of contributions would affect only indirectly the costs of political campaigns by making it relatively more difficult for candidates to raise large amounts of money. In 1974, for example, 94.9% of the funds raised by candidates for Congress came from contributions of $1,000 or less, see n. 23, supra. Presumably, some or all of the contributions in excess of $1,000 could have been replaced through efforts to raise additional contributions from persons giving less than $1,000. It is the Act's campaign expenditure limitations, 608 (c), not the contribution limits, that directly address the overall scope of federal election spending.

Footnote 28 The Court of Appeals' opinion in this case discussed a number of the abuses uncovered after the 1972 elections. See 171 U.S. App. D.C., at 190-191, and nn. 36-38, 519 F.2d, at 839-840, and nn. 36-38.

Footnote 29 Although the Court in Letter Carriers found that this interest was constitutionally sufficient to justify legislation prohibiting federal employees from engaging in certain partisan political activities, it was careful to emphasize that the limitations did not restrict an employee's right to express his views on political issues and candidates. 413 U.S., at 561, 568, 575-576, 579. See n. 54, infra.

Footnote 30 The Act's disclosure provisions are discussed in Part II, infra.

Footnote 31 While providing significant limitations on the ability of all individuals and groups to contribute large amounts of money to candidates, the Act's contribution ceilings do not foreclose the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents or the proliferation of political funds each authorized under the Act to contribute to candidates. As a prime example, 610 permits corporations and labor unions to establish segregated funds to solicit voluntary contributions to be utilized for political purposes. Corporate and union resources without limitation may be employed to administer these funds and to solicit contributions from employees, stockholders, and union members. Each separate fund may contribute up to $5,000 per candidate per election so long as the fund qualifies as a political committee under 608 (b) (2). See S. Rep. No. 93-1237, pp. 50-52

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(1974); Federal Election Commission, Advisory Opinion 1975-23, 40 Fed. Reg. 56584 (1975).

The Act places no limit on the number of funds that may be formed through the use of subsidiaries or divisions of corporations, or of local and regional units of a national labor union. The potential for proliferation of these sources of contributions is not insignificant. In 1972, approximately 1,824,000 active corporations filed federal income tax returns. Internal Revenue Service, Preliminary Statistics of Income 1972, Corporation Income Tax Returns, p. 1 (pub. 159 (11-74)). (It is not clear whether this total includes subsidiary corporations where the parent filed a consolidated return.) In the same year, 71,409 local

unions were chartered by national unions. Department of Labor, Bureau of Labor Statistics, Directory of National Unions and Employee Associations 1973, p. 87 (1974). The Act allows the maximum contribution to be made by each unit's fund provided the decision or judgment to contribute to particular candidates is made by the fund independently of control or direction by the parent corporation or the national or regional union. See S. Rep. No. 93-1237, pp. 51-52 (1974).

Footnote 32 The Act's limitations applicable to both campaign expenditures and a candidate's personal expenditures on his own behalf are scaled to take account of the differences in the amounts of money required for congressional and Presidential campaigns. See 608 (a) (1), (c) (1) (A)-(E).

Footnote 33 In this discussion, we address only the argument that the contribution limitations alone impressibly discriminate against non-incumbents. We do not address the more serious argument that these limitations, in combination with the limitation on expenditures by individuals and groups, the limitation on a candidate's use of his own personal and family resources, and the overall ceiling on campaign expenditures invidiously discriminate against major-party challengers and minor-party candidates. Since an incumbent is subject to these limitations to the same degree as his opponent, the Act, on its face, appears to be even-handed. The appearance of fairness, however, may not reflect political reality. Although some incumbents are defeated in every congressional election, it is axiomatic that an incumbent usually begins the race with significant advantages. In addition to the factors of voter recognition and the status accruing to holding federal office, the incumbent has access to substantial resources provided by the Government. These include local and Washington offices, staff support, and the franking privilege. Where the incumbent has the support of major special-interest groups which have the flexibility described in n. 31, supra, and is further supported by the media, the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge.
However, since we decide in Part I-C, infra, that the ceilings on independent expenditures, on the candidate's expenditures from his personal funds, and on overall campaign expenditures are unconstitutional under the First Amendment, we need not express any opinion with regard to the alleged invidious discrimination resulting from the full sweep of the legislation as enacted.

Footnote 34 In 1974, for example, 40 major-party challengers defeated incumbent members of the House of Representatives in the general election. Four incumbent Senators were defeated by major-party challengers in the 1974 primary and general election campaigns.

Footnote 35 In the 1974 races for the House of Representatives, three of the 22 major-party candidates exceeding the combined expenditure limits contained in the Act were challengers to incumbents and nine were candidates in races not involving incumbents. The comparable 1972 statistics indicate that 14 of the 20 major-party candidates exceeding the combined limits were nonincumbents.

Footnote 36 In 1974, major-party challengers outspent House incumbents in 22% of the races, and 22 of the 40 challengers who defeated House incumbents outspent their opponents. In 1972, 24% of the major-party challengers in senatorial elections outspent their incumbent opponents. The 1974 statistics for senatorial contests reveal substantially greater financial dominance by incumbents.

Footnote 37 Of the $3,781,254 in contributions raised in 1974 by congressional candidates over and above a $1,000-per-contributor limit, almost twice as much money went to incumbents as to major-party challengers.

Footnote 38 Appellants contend that the Act discriminates against challengers, because, while it limits contributions to all candidates, the Government makes available other material resources to incumbents. See n. 33, supra. Yet, taking cognizance of the advantages and disadvantages of incumbency, there is little indication that the $1,000 contribution ceiling will consistently harm the prospects of challengers relative to incumbents.

Footnote 39 Between September 1, 1973, and December 31, 1974, major-party candidates for the House and Senate raised over $3,725,000 in contributions over and above $1,000 compared to $55,000 raised by minor-party candidates in amounts exceeding the $1,000 contribution limit.

Footnote 40 Appellant Libertarian Party, according to estimates of its national chairman, has received only 10 contributions in excess of $1,000 out of a total of 4,000 contributions. Even these 10 contributions would have been permissible under the Act if the donor did not earmark the funds for a particular candidate and did not exceed the overall $25,000 contribution ceiling for the calendar year. See 608 (b). Similarly, appellants Conservative Victory Fund and American Conservative Union have received only an insignificant portion of their funding through contributions in excess of $1,000. The affidavit of the executive director of the Conservative Victory Fund indicates that in 1974, a typical fundraising year, the Fund received approximately $152,000 through over 9,500 individual contributions. Only one of the 9,500 contributions, an $8,000 contribution earmarked for a particular candidate, exceeded $1,000. In 1972, the Fund received only three contributions in excess of $1,000, all of which might have been legal under the Act if not earmarked. And between April 7, 1972, and February 28, 1975, the American Conservative Union did not receive any aggregate contributions exceeding $1,000. Moreover, the Committee for a Constitutional Presidency - McCarthy '76, another appellant, engaged in a concerted effort to raise contributions in excess of $1,000 before the effective date of the Act but obtained only five contributions in excess of $1,000.
Although appellants claim that the $1,000 ceiling governing contributions to candidates will prevent the acquisition of seed money necessary to launch campaigns, the absence of experience under the Act prevents us from evaluating this assertion. As appellees note, it is difficult to assess the effect of the contribution ceiling on the acquisition of seed money since candidates have not previously had to make a concerted effort to raise start-up funds in small amounts.

Footnote 41 Appellant Buckley was a minor-party candidate in 1970 when he was elected to the United States Senate from the State of New York.

Footnote 42 Although expenditures incidental to volunteer services would appear self-limiting, it is possible for a worker in a candidate's campaign to generate substantial travel expenses. An affidavit submitted by Stewart Mott, an appellant, indicates that he "expended some $50,000 for personal expenses" in connection with Senator McGovern's 1972 Presidential campaign.

Footnote 43 The Act contains identical, parallel provisions pertaining to incidental volunteer expenses under the definitions of contribution and expenditure. Compare 591 (e) (5) (B)-(D) with 591 (f) (4) (D), (E). The definitions have two effects. First, volunteer expenses that are counted as contributions by the volunteer would also constitute expenditures by the candidate's campaign. Second, some volunteer expenses would qualify as contributions whereas others would constitute independent expenditures. The statute distinguishes between independent expenditures by individuals and campaign expenditures on the basis of whether the candidate, an authorized committee of the candidate, or an agent of the candidate "authorized or requested" the expenditure. See 608 (c) (2) (B) (ii), (e) (1); S. Rep. No. 93-689, p. 18 (1974); H. R. Rep. No. 93-1239, p. 6 (1974). As a result, only travel that is "authorized or requested" by the candidate or his agents would involve incidental expenses chargeable against the volunteer's contribution limit and the candidate's expenditure ceiling. See n. 53, infra. Should a person independently travel across the country to participate in a campaign, any unreimbursed travel expenses would not be treated as a contribution. This interpretation is not only consistent with the statute

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and the legislative history but is also necessary to avoid the administrative chaos that would be produced if each volunteer and candidate had to keep track of amounts spent on unsolicited travel in order to comply with the Act's contribution and expenditure ceilings and the reporting and disclosure provisions. The distinction between contributions and expenditures is also discussed at n. 53, infra, and in Part II-C-2, infra.

Footnote 44 See n. 19, supra.

Footnote 45 The same broad definition of "person" applicable to the contribution limitations governs the meaning of "person" in 608 (e) (1). The statute provides some limited exceptions through various exclusions from the otherwise comprehensive definition of "expenditure." See 591 (f). The most important exclusions are: (1) "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate," 591 (f)(4)

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(A), and (2) "any communication by any membership organization or corporation to its members or stockholders, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any person to Federal office," 591 (f)(4)(C). In addition, the Act sets substantially higher limits for personal expenditures by a candidate in connection with his own campaign, 608 (a), expenditures by national and state committees of political parties that succeed in placing a candidate on the ballot, 591 (i), 608 (f), and total campaign expenditures by candidates, 608 (c).

Footnote 46 Section 608 (i) provides that any person convicted of exceeding any of the contribution or expenditure limitations "shall be fined not more than $25,000 or imprisoned not more than one year, or both."

Footnote 47 Several of the parties have suggested that problems of ambiguity regarding the application of 608 (e) (1) to specific campaign speech could be handled by requesting advisory opinions from the Commission. While a comprehensive series of advisory opinions or a rule delineating what expenditures are "relative to a clearly identified candidate" might alleviate the provision's vagueness problems, reliance on the Commission is unacceptable because the vast majority of individuals and groups subject to criminal sanctions for violating 608 (e) (1) do not have a right to obtain an advisory opinion from the Commission. See 2 U.S.C. 437f (1970 ed., Supp. IV). Section 437f (a) of Title 2 accords only candidates, federal

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officeholders, and political committees the right to request advisory opinions and directs that the Commission "shall render an advisory opinion, in writing, within a reasonable time" concerning specific planned activities or transactions of any such individual or committee. The powers delegated to the Commission thus do not assure that the vagueness concerns will be remedied prior to the chilling of political discussion by individuals and groups in this or future election years.

Footnote 48 In such circumstances, vague laws may not only "trap the innocent by not providing fair warning" or foster "arbitrary and discriminatory application" but also operate to inhibit protected expression by inducing "citizens to `steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'" Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972), quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964), quoting Speiser v. Randall, 357 U.S. 513, 526 (1958). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 433 (1963).

Footnote 49 This interpretation of "relative to" a clearly identified candidate is supported by the discussion of 608 (e) (1) in the Senate Report, S. Rep. No. 93-689, p. 19 (1974),

the House Report, H. R. Rep. No. 93-1239, p. 7 (1974), the Conference Report, S. Conf. Rep. No. 93-1237, pp. 56-57 (1974), and the opinion of the Court of Appeals, 171 U.S. App. D.C., at 203-204, 519 F.2d, at 852-853.

Footnote 50 In connection with another provision containing the same advocacy language appearing in 608 (e) (1), the Court of Appeals concluded:
"Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections." 171 U.S. App. D.C., at 226, 519 F.2d, at 875.

Footnote 51 Section 608 (e) (2) defines "clearly identified" to require that the candidate's name, photograph or drawing, or other unambiguous reference to his identity appear as part of the communication. Such other unambiguous reference would include use of the candidate's initials (e. g., FDR), the candidate's nickname (e. g., Ike), his office (e. g., the President or the Governor of Iowa), or his status as a

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candidate (e. g., the Democratic Presidential nominee, the senatorial candidate of the Republican Party of Georgia).

Footnote 52 This construction would restrict the application of 608 (e) (1) to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

Footnote 53 Section 608 (e) (1) does not apply to expenditures "on behalf of a candidate" within the meaning of 608 (c) (2) (B). The latter subsection provides that expenditures "authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate" are to be treated as expenditures of the candidate and contributions by the person or group making the expenditure. The House and Senate Reports provide guidance in differentiating individual expenditures that are contributions and candidate expenditures under 608 (c) (2) (B) from those treated as independent expenditures subject to the 608 (e) (1) ceiling. The House Report speaks of independent expenditures as costs "incurred without the request or consent of a candidate or his agent." H. R. Rep. No. 93-1239, p. 6 (1974). The Senate Report addresses the issue in greater detail. It provides an example illustrating the distinction between "authorized or requested" expenditures excluded from 608 (e) (1) and independent expenditures governed by 608 (e) (1):
"[A] person might purchase billboard advertisements endorsing a candidate. If he does so completely on his own, and not at the request or suggestion of the candidate or his agent's [sic] that would constitute an `independent expenditure on behalf of a candidate'

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under section 614 (c) of the bill. The person making the expenditure would have to report it as such.

"However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate - just as if there had been a direct contribution enabling the candidate to place the advertisement, himself. It would be so reported by both." S. Rep. No. 93-689, p. 18 (1974).

The Conference substitute adopted the provision of the Senate bill dealing with expenditures by any person "authorized or requested" to make an expenditure by the candidate or his agents. S. Conf. Rep. No. 93-1237, p. 55 (1974). In view of this legislative history and the purposes of the Act, we find that the "authorized or requested" standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions subject to the limitations set forth in 608 (b).

Footnote 54 Appellees mistakenly rely on this Court's decision in CSC v. Letter Carriers, as supporting 608 (e) (1)'s restriction on the spending of money to advocate the election or defeat of a particular candidate. In upholding the Hatch Act's broad restrictions on the associational freedoms of federal employees, the Court repeatedly emphasized the statutory provision and corresponding regulation permitting an employee to "`[e]xpress his opinion as an individual privately and publicly on political subjects and candidates.'" 413 U.S., at 579, quoting 5 CFR 733.111 (a) (2). See 413 U.S., at 561 568, 575-576. Although the Court "unhesitatingly" found that a statute prohibiting federal employees from engaging in a wide variety of "partisan political conduct" would "unquestionably be valid," it carefully declined to endorse provisions threatening political expression. See id., at 556, 579-581. The Court did not rule on the constitutional questions presented by the regulations forbidding partisan campaign endorsements through the media and speechmaking to political gatherings because it found that these restrictions did not "make the statute substantially overbroad and so invalid on its face." Id., at 581.

Footnote 55 Neither the voting rights cases nor the Court's decision upholding the Federal Communications Commission's fairness doctrine lends support to appellees' position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society.

Cases invalidating governmentally imposed wealth restrictions on the right to vote or file as a candidate for public office rest on the conclusion that wealth "is not germane to one's ability to participate intelligently in the electoral process" and is therefore an insufficient basis on which to restrict a citizen's fundamental right to vote. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966). See Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Phoenix v. Kolodziejski, 399 U.S. 204 (1970). These voting cases and the reapportionment decisions serve to assure that citizens are accorded an equal right to vote for their representatives regardless of factors of wealth or geography. But the principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on

political expression. Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.
In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the Court upheld the political-editorial and personal-attack portions of

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the Federal Communications Commission's fairness doctrine. That doctrine requires broadcast licensees to devote programing time to the discussion of controversial issues of public importance and to present both sides of such issues. Red Lion "makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case," by demonstrating that "`it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" Columbia Broadcasting v. Democratic Comm., 412 U.S. 94, 101 (1973), quoting Red Lion Broadcasting Co., supra, at 388. Red Lion therefore undercuts appellees' claim that 608 (e) (1)'s limitations may permissibly restrict the First Amendment rights of individuals in this "traditional free speech case." Moreover, in contrast to the undeniable effect of 608 (e) (1), the presumed effect of the fairness doctrine is one of "enhancing the volume and quality of coverage" of public issues. 395 U.S., at 393.

Footnote 56 The Act exempts most elements of the institutional press, limiting only expenditures by institutional press facilities that are owned or controlled by candidates and political parties. See 591 (f) (4) (A). But, whatever differences there may be between the constitutional guarantees of a free press and of free speech, it is difficult to conceive of any principled basis upon which to distinguish 608 (e) (1)'s limitations upon the public at large and similar limitations imposed upon the press specifically.

Footnote 57 The $35,000 ceiling on expenditures by candidates for the Senate also applies to candidates for the House of Representatives from States entitled to only one Representative. 608 (a) (1) (B).
The Court of Appeals treated 608 (a) as relaxing the $1,000-per-candidate contribution limitation imposed by 608 (b) (1) so as to permit any member of the candidate's immediate family - spouse, child, grandparent, brother, sister, or spouse of such persons - to

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contribute up to the $25,000 overall annual contribution ceiling to the candidate. See 171 U.S. App. D.C., at 205, 519 F.2d, at 854. The Commission has recently adopted a similar interpretation of the provision. See Federal Election Commission, Advisory Opinion 1975-65 (Dec. 5, 1975), 40 Fed. Reg. 58393. However, both the Court of Appeals and the Commission apparently overlooked the Conference Report accompanying the final version of the Act which expressly provides for a contrary interpretation of 608 (a):

"It is the intent of the conferees that members of the immediate family of any candidate shall be subject to the contribution limitations established by this legislation. If a candidate for the office of Senator, for example, already is in a position to exercise control over funds of a member of his immediate family before he becomes a candidate, then he could draw upon these funds up to the limit of $35,000. If, however, the candidate did not have access to or control over such funds at the time he became a candidate, the immediate family member would not be permitted to grant access or control to the candidate in amounts up to $35,000, if the immediate family member intends that such amounts are to be used in the campaign of the candidate. The immediate family member would be permitted merely to make contributions to the candidate in amounts not greater than $1,000 for each election involved." S. Conf. Rep. No. 93-1237, p. 58 (1974).

Footnote 58 The Court of Appeals evidently considered the personal funds expended by the candidate on his own behalf as a contribution rather than an expenditure. See 171 U.S. App. D.C., at 205, 519 F.2d, at 854. However, unlike a person's contribution to a candidate, a candidate's expenditure of his personal funds directly facilitates his own political speech.

Footnote 59 The legislative history of the Act clearly indicates that 608 (a) was not intended to suspend the application of the $1,000 contribution limitation of 608 (b) (1) for members of the candidate's immediate family. See n. 57, supra. Although the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members, we cannot say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors.
The limitation on a candidate's expenditure of his own funds differs markedly from a limitation on family contributions both in the absence of any threat of corruption and the presence of a legislative

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restriction on the candidate's ability to fund his own communication with the voters.

Footnote 60 Expenditures made by an authorized committee of the candidate or any other agent of the candidate as well as any expenditure by any other person that is "authorized or requested" by the candidate or his agent are charged against the candidate's spending ceiling. 608 (c) (2) (B).

Footnote 61 Expenditures made by or on behalf of a Vice Presidential candidate of a political party are considered to have been made by or on behalf of the party's Presidential candidate. 608 (c) (2) (A).

Footnote 62 The campaign ceilings contained in 608 (c) would have required a reduction in the scope of a number of previous congressional campaigns and substantially limited

the overall expenditures of the two major-party Presidential candidates in 1972. See n. 21, supra.

Footnote 63 This normal relationship may not apply where the candidate devotes a large amount of his personal resources to his campaign.

Footnote 64 As an opinion dissenting in part from the decision below noted: "If a senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication? I know of none." 171 U.S. App. D.C., at 268, 519 F.2d, at 917 (Tamm, J.).

Footnote 65 For the reasons discussed in Part III, infra, Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

Footnote 66 Subtitle H of the Internal Revenue Code also established separate limitations for general election expenditures by national and state committees of political parties, 608 (f), and for national political party conventions for the nomination of Presidential candidates. 26 U.S.C. 9008 (d) (1970 ed., Supp. IV). Appellants do not challenge these ceilings on First Amendment grounds. Instead, they contend that the provisions discriminate against independent candidates and regional political parties without national committees because they permit additional spending by political parties with national committees. Our decision today holding 608 (e) (1)'s independent expenditure limitation unconstitutional and 608 (c)'s campaign expenditure ceilings unconstitutional removes the predicate for appellants' discrimination claim by eliminating any alleged advantage to political parties with national committees.

Footnote 67 Accordingly, the answers to the certified constitutional questions pertaining to the Act's contribution and expenditure limitations are as follows:
3. Does any statutory limitation, or do the particular limitations in the challenged statutes, on the amounts that individuals or organizations may contribute or expend in connection with elections for federal office violate the rights of one or more of the plaintiffs under the First, Fifth, or Ninth Amendment or the Due Process Clause of the Fifth Amendment of the Constitution of the United States?
(a) Does 18 U.S.C. 608 (a) (1970 ed., Supp. IV) violate such rights, in that it forbids a candidate or the members of his immediate family from expending personal funds in excess of the amounts specified in 18 U.S.C. 608 (a) (1) (1970 ed., Supp. IV)?
Answer: YES.
(b) Does 18 U.S.C. 608 (b) (1970 ed., Supp. IV) violate such rights, in that it forbids the solicitation, receipt or making of contributions on behalf of political candidates in excess of the amounts specified in 18 U.S.C. 608 (b) (1970 ed., Supp. IV)?
Answer: NO.
(c) Do 18 U.S.C. 591 (e) and 608 (b) (1970 ed., Supp. IV) violate such rights, in that they limit the incidental expenses which volunteers working on behalf of political candidates

may incur to the amounts specified in 18 U.S.C. 591 (e) and 608 (b) (1970 ed., Supp. IV)?
Answer: NO.
(d) Does 18 U.S.C. 608 (e) (1970 ed., Supp. IV) violate such rights, in that it limits to $1,000 the independent (not on behalf of a candidate) expenditures of any person relative to an identified candidate?
Answer: YES.
(e) Does 18 U.S.C. 608 (f) (1970 ed., Supp. IV) violate such rights, in that it limits the expenditures of national or state committees of political parties in connection with general election campaigns for federal office?
Answer: NO, as to the Fifth Amendment challenge advanced by appellants.
(f) Does 9008 of the Internal Revenue Code of 1954 violate

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such rights, in that it limits the expenditures of the national committee of a party with respect to presidential nominating conventions?
Answer: NO, as to the Fifth Amendment challenge advanced by appellants.
(h) Does 18 U.S.C. 608 (b) (2) (1970 ed., Supp. IV) violate such rights, in that it excludes from the definition of "political committee" committees registered for less than the period of time prescribed in the statute?
Answer: NO.
4. Does any statutory limitation, or do the particular limitations in the challenged statutes, on the amounts that candidates for elected federal office may expend in their campaigns violate the rights of one or more of the plaintiffs under the First or Ninth Amendment or the Due Process Clause of the Fifth Amendment?
(a) Does 18 U.S.C. 608 (c) (1970 ed., Supp. IV) violate such rights, in that it forbids expenditures by candidates for federal office in excess of the amounts specified in 18 U.S.C. 608 (c) (1970 ed., Supp. IV)?
Answer: YES.

Footnote 68 Unless otherwise indicated, all statutory citations in Part II of this opinion are to Title 2 of the United States Code, 1970 edition, Supplement IV.

Footnote 69 Appellants do contend that there should be a blanket exemption from the disclosure provisions for minor parties. See Part II-B-2, infra.

Footnote 70 The Court of Appeals' ruling that 437a is unconstitutional was not appealed. See n. 7, supra.

Footnote 71 Past disclosure laws were relatively easy to circumvent because candidates were required to report only contributions that they had received themselves or that were received by others for them with their knowledge or consent. 307, 43 Stat. 1072. The data that were reported were virtually impossible to use because there were no uniform rules for the compiling of reports or provisions for requiring corrections and additions. See

Redish, Campaign Spending Laws and the First Amendment, 46 N. Y. U. L. Rev. 900, 905 (1971).

Footnote 72 See Part I, supra. The relevant provisions of Title 2 are set forth in the Appendix to this opinion, infra, at 144 et seq.

Footnote 73 NAACP v. Alabama, 357 U.S., at 463. See also Gibson v. Florida Legislative Comm., 372 U.S. 539, 546 (1963); NAACP v. Button, 371 U.S., at 438; Bates v. Little Rock, 361 U.S., at 524.

Footnote 74 Id., at 525.

Footnote 75 Gibson v. Florida Legislative Comm., supra, at 546.

Footnote 76 The Court of Appeals held that the applicable test for evaluating the Act's disclosure requirements is that adopted in United States v. O'Brien, 391 U.S. 367 (1968), in which "`speech' and `non-speech' elements [were] combined in the same course of conduct." Id., at 376. O'Brien is appropriate, the Court of Appeals found, because the Act is directed toward the spending of money, and money introduces a nonspeech element. As the discussion in Part I-A, supra, indicates, O'Brien is inapposite, for money is a neutral element not always associated with speech but a necessary and integral part of many, perhaps most, forms of communication. Moreover, the O'Brien test would not be met, even if it were applicable. O'Brien requires that "the governmental interest [be] unrelated to the suppression of free expression." Id., at 377. The governmental interest furthered by the disclosure requirements is not unrelated to the "suppression" of speech insofar as the requirements are designed to facilitate the detection of violations of the contribution and expenditure limitations set out in 18 U.S.C. 608 (1970 ed., Supp. IV).

Footnote 77 H. R. Rep. No. 92-564, p. 4 (1971).

Footnote 78 Ibid.; S. Rep. No. 93-689, p. 2 (1974).

Footnote 79 We have said elsewhere that "informed public opinion is the most potent of all restraints upon misgovernment." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). Cf. United States v. Harriss, 347 U.S. 612, 625 (1954) (upholding disclosure requirements imposed on lobbyists by the Federal Regulation of Lobbying Act, Title III of the Legislative Reorganization Act of 1946, 60 Stat. 839).

Footnote 80 L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933).

Footnote 81 See supra, at 60.

Footnote 82 Post-election disclosure by successful candidates is suggested as a less restrictive way of preventing corrupt pressures on office-holders. Delayed disclosure of this sort would not serve the equally important informational function played by pre-

election reporting. Moreover, the public interest in sources of campaign funds is likely to be at its peak during the campaign period; that is the time when improper influences are most likely to be brought to light.

Footnote 83 Nor is this a case comparable to Pollard v. Roberts, 283 F.

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Supp. 248 (ED Ark.) (three-judge court), aff'd, 393 U.S. 14 (1968), in which an Arkansas prosecuting attorney sought to obtain, by a subpoena duces tecum, the records of a checking account (including names of individual contributors) established by a specific party, the Republican Party of Arkansas.

Footnote 84 See Developments in the Law - Elections, 88 Harv. L. Rev. 1111, 1247 n. 75 (1975).

Footnote 85 See Williams v. Rhodes, 393 U.S. 23, 32 (1968) ("There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms"); Sweezy v. New Hampshire, 354 U.S. 234, 250-251 (1957) (plurality opinion).

Footnote 86 Cf. Talley v. California, 362 U.S. 60, 64-65 (1960).

Footnote 87 Allegations made by a branch of the Socialist Workers Party in a civil action seeking to declare the District of Columbia disclosure and filing requirements unconstitutional as applied to its records were held to be sufficient to withstand a motion to dismiss in Doe v. Martin, 404 F. Supp. 753 (1975) (three-judge court). The District of Columbia provisions require every political committee to keep records of contributions of $10 or more and to report contributors of $50 or more.

Footnote 88 For example, a campaign worker who had solicited campaign funds for the Libertarian Party in New York testified that two persons solicited in a Party campaign "refused to contribute because they were unwilling for their names to be disclosed or published." None of the appellants offers stronger evidence of threats or harassment.

Footnote 89 These criteria were suggested in an opinion concurring in part and dissenting in part from the decision below. 171 U.S. App. D.C., at 258 n. 1, 519 F.2d, at 907 n. 1 (Bazelon, C. J.).

Footnote 90 Age is also underinclusive in that it would presumably leave long-established but unpopular parties subject to the disclosure requirements. The Socialist Labor Party, which is not a party to this litigation but which has filed an amicus brief in support of appellants, claims to be able to offer evidence of "direct suppression, intimidation, harassment, physical abuse, and loss of economic sustenance" relating to its

contributors. Brief for Socialist Labor Party as Amicus Curiae 6. The Party has been in existence since 1877.

Footnote 91 171 U.S. App. D.C., at 258, 519 F.2d, at 907 n. 1 (Bazelon C. J.).

Footnote 92 Id., at 260, 519 F.2d, at 909. See also Developments in the Law - Elections, 88 Harv. L. Rev. 1111, 1247-1249 (1975).

Footnote 93 See Appendix to this opinion, infra, at 160.

Footnote 94 See Part I-C-1, supra.

Footnote 95 305, 86 Stat. 16.

Footnote 96 88 Stat. 1265.

Footnote 97 S. Rep. No. 92-229, p. 57 (1971).

Footnote 98 See n. 71, supra.

Footnote 99 Section 441 (a) provides: "Any person who violates any of

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the provisions of this subchapter shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Footnote 100 431 (e), (f). See Appendix to this opinion, infra, at 145-149.

Footnote 101 See supra, at 61-63.

Footnote 102 S. Rep. No. 92-96, p. 33 (1971); S. Rep. No. 93-689, pp. 1-2 (1974).

Footnote 103 See n. 53, supra.

Footnote 104 See Part I-C-1, supra.

Footnote 105 Section 431 (d) defines "political committee" as "any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000."

Footnote 106 At least two lower courts, seeking to avoid questions of unconstitutionality, have construed the disclosure requirements imposed on "political committees" by 434 (a) to be nonapplicable to non-partisan organizations. United States v. National Comm. for Impeachment, 469 F.2d, at 1139-1142; American Civil Liberties Union v. Jennings, 366

F. Supp., at 1055-1057. See also 171 U.S. App. D.C., at 214 n. 112, 519 F.2d, at 863 n. 112.

Footnote 107 Some partisan committees - groups within the control of the candidate or primarily organized for political activities - will fall within 434 (e) because their contributions and expenditures fall in the $100-to-$1,000 range. Groups of this sort that do not have contributions and expenditures over $1,000 are not "political committees" within the definition in 431 (d); those whose transactions are not as great as $100 are not required to file statements under 434 (e).

Footnote 108 See n. 52, supra.

HUSTLER MAGAZINE, INC., ET AL. *v.* FALWELL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86–1278. Argued December 2, 1987—Decided February 24, 1988

Respondent, a nationally known minister and commentator on politics and public affairs, filed a diversity action in Federal District Court against petitioners, a nationally circulated magazine and its publisher, to recover damages for, *inter alia*, libel and intentional infliction of emotional distress arising from the publication of an advertisement "parody" which, among other things, portrayed respondent as having engaged in a drunken incestuous rendezvous with his mother in an outhouse. The jury found against respondent on the libel claim, specifically finding that the parody could not "reasonably be understood as describing actual facts . . . or events," but ruled in his favor on the emotional distress claim, stating that he should be awarded compensatory and punitive damages. The Court of Appeals affirmed, rejecting petitioners' contention that the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, must be met before respondent can recover for emotional distress. Rejecting as irrelevant the contention that, because the jury found that the parody did not describe actual facts, the ad was an opinion protected by the First Amendment to the Federal Constitution, the court ruled that the issue was whether the ad's publication was sufficiently outrageous to constitute intentional infliction of emotional distress.

Held: In order to protect the free flow of ideas and opinions on matters of public interest and concern, the First and Fourteenth Amendments prohibit public figures and public officials from recovering damages for the tort of intentional infliction of emotional distress by reason of the publication of a caricature such as the ad parody at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i. e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. The State's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. Here, respondent is clearly a "public figure" for First Amendment purposes, and the lower courts' finding that the ad parody was not reasonably believable must be accepted. "Outrageous-

ness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression, and cannot, consistently with the First Amendment, form a basis for the award of damages for conduct such as that involved here. Pp. 50–57.

797 F. 2d 1270, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 57. KENNEDY, J., took no part in the consideration or decision of the case.

Alan L. Isaacman argued the cause for petitioners. With him on the briefs was *David O. Carson.*

Norman Roy Grutman argued the cause for respondent. With him on the brief were *Jeffrey H. Daichman* and *Thomas V. Marino.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Hustler Magazine, Inc., is a magazine of nationwide circulation. Respondent Jerry Falwell, a nationally known minister who has been active as a commentator on politics and public affairs, sued petitioner and its publisher, petitioner Larry Flynt, to recover damages for invasion of

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union Foundation et al. by *Harriette K. Dorsen, John A. Powell,* and *Steven R. Shapiro;* for the Association of American Editorial Cartoonists et al. by *Roslyn A. Mazer* and *George Kaufmann;* for the Association of American Publishers, Inc., by *R. Bruce Rich;* for Home Box Office, Inc., by *P. Cameron DeVore* and *Daniel M. Waggoner;* for the Law & Humanities Institute by *Edward de Grazia;* for the Reporters Committee for Freedom of the Press et al. by *Jane E. Kirtley, Richard M. Schmidt, David Barr,* and *J. Laurent Scharff;* for Richmond Newspapers, Inc., et al. by *Alexander Wellford, David C. Kohler, Rodney A. Smolla, William A. Niese, Jeffrey S. Klein, W. Terry Maguire,* and *Slade R. Metcalf;* and for Volunteer Lawyers for the Arts, Inc., by *Irwin Karp* and *I. Fred Koenigsberg.*

privacy, libel, and intentional infliction of emotional distress. The District Court directed a verdict against respondent on the privacy claim, and submitted the other two claims to a jury. The jury found for petitioners on the defamation claim, but found for respondent on the claim for intentional infliction of emotional distress and awarded damages. We now consider whether this award is consistent with the First and Fourteenth Amendments of the United States Constitution.

The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody—not to be taken seriously." The magazine's table of contents also lists the ad as "Fiction; Ad and Personality Parody."

Soon after the November issue of Hustler became available to the public, respondent brought this diversity action in the United States District Court for the Western District of Virginia against Hustler Magazine, Inc., Larry C. Flynt, and Flynt Distributing Co., Inc. Respondent stated in his complaint that publication of the ad parody in Hustler entitled

him to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. The case proceeded to trial.[1] At the close of the evidence, the District Court granted a directed verdict for petitioners on the invasion of privacy claim. The jury then found against respondent on the libel claim, specifically finding that the ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." App. to Pet. for Cert. C1. The jury ruled for respondent on the intentional infliction of emotional distress claim, however, and stated that he should be awarded $100,000 in compensatory damages, as well as $50,000 each in punitive damages from petitioners.[2] Petitioners' motion for judgment notwithstanding the verdict was denied.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment against petitioners. *Falwell* v. *Flynt*, 797 F. 2d 1270 (1986). The court rejected petitioners' argument that the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), must be met before respondent can recover for emotional distress. The court agreed that because respondent is concededly a public figure, petitioners are "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in [respondent's] claim for libel." 797 F. 2d, at 1274. But this does not mean that a literal application of the actual malice rule is appropriate in the context of an emotional distress claim. In the court's view, the *New York Times* decision emphasized the constitutional importance not of the falsity of the statement or the defendant's disregard for the truth, but of the heightened level of culpability embodied in the requirement of "knowing . . . or reckless" conduct. Here, the *New York*

[1] While the case was pending, the ad parody was published in Hustler Magazine a second time.

[2] The jury found no liability on the part of Flynt Distributing Co., Inc. It is consequently not a party to this appeal.

Times standard is satisfied by the state-law requirement, and the jury's finding, that the defendants have acted intentionally or recklessly.[3] The Court of Appeals then went on to reject the contention that because the jury found that the ad parody did not describe actual facts about respondent, the ad was an opinion that is protected by the First Amendment. As the court put it, this was "irrelevant," as the issue is "whether [the ad's] publication was sufficiently outrageous to constitute intentional infliction of emotional distress." *Id.*, at 1276.[4] Petitioners then filed a petition for rehearing en banc, but this was denied by a divided court. Given the importance of the constitutional issues involved, we granted certiorari. 480 U. S. 945 (1987).

This case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he

[3] Under Virginia law, in an action for intentional infliction of emotional distress a plaintiff must show that the defendant's conduct (1) is intentional or reckless; (2) offends generally accepted standards of decency or morality; (3) is causally connected with the plaintiff's emotional distress; and (4) caused emotional distress that was severe. 797 F. 2d, at 1275, n. 4 (citing *Womack* v. *Eldridge*, 215 Va. 338, 210 S. E. 2d 145 (1974)).

[4] The court below also rejected several other contentions that petitioners do not raise in this appeal.

freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 503–504 (1984). We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 339 (1974). As Justice Holmes wrote, "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (dissenting opinion).

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Associated Press* v. *Walker*, decided with *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 164 (1967) (Warren, C. J., concurring in result). Justice Frankfurter put it succinctly in *Baumgartner* v. *United States*, 322 U. S. 665, 673–674 (1944), when he said that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times*, *supra*, at 270. "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts

to demonstrate the contrary." *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 274 (1971).

Of course, this does not mean that *any* speech about a public figure is immune from sanction in the form of damages. Since *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. See *Gertz*, 418 U. S., at 340, 344, n. 9. But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," *id.*, at 340, and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require "'breathing space.'" *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767, 772 (1986) (quoting *New York Times*, *supra*, at 272). This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability.

Respondent argues, however, that a different standard should apply in this case because here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication. Cf. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562 (1977) (ruling that the "actual malice" standard does not apply to the tort of appropriation of a right of publicity). In respondent's view, and in the view of the

Court of Appeals, so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison* v. *Louisiana*, 379 U. S. 64 (1964), we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment:

> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Id.*, at 73.

Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." Webster's New Unabridged Twentieth

Century Dictionary of the English Language 275 (2d ed. 1979). The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

> "The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters." Long, The Political Cartoon: Journalism's Strongest Weapon, The Quill 56, 57 (Nov. 1962).

Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date, who was associated for many years during the post-Civil War era with Harper's Weekly. In the pages of that publication Nast conducted a graphic vendetta against William M. "Boss" Tweed and his corrupt associates in New York City's "Tweed Ring." It has been described by one historian of the subject as "a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art." M. Keller, The Art and Politics of Thomas Nast 177 (1968). Another writer explains that the success of the Nast cartoon was achieved "because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners." C. Press, The Political Cartoon 251 (1981).

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of Presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal

Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. See *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action"). And, as we stated in *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978):

> "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.

> For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.*, at 745–746.

See also *Street* v. *New York*, 394 U. S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. We recognized in *Pacifica Foundation*, that speech that is "'vulgar,' 'offensive,' and 'shocking'" is "not entitled to absolute constitutional protection under all circumstances." 438 U. S., at 747. In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), we held that a State could lawfully punish an individual for the use of insulting "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.*, at 571–572. These limitations are but recognition of the observation in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 758 (1985), that this Court has "long recognized that not all speech is of equal First Amendment importance." But the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i. e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the *New York Times* standard, see *Time, Inc.* v. *Hill*, 385 U. S. 374, 390 (1967), it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.

Here it is clear that respondent Falwell is a "public figure" for purposes of First Amendment law.[5] The jury found against respondent on his libel claim when it decided that the Hustler ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." App. to Pet. for Cert. C1. The Court of Appeals interpreted the jury's finding to be that the ad parody "was not reasonably believable," 797 F. 2d, at 1278, and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE WHITE, concurring in the judgment.

As I see it, the decision in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), has little to do with this case, for here the jury found that the ad contained no assertion of fact. But I agree with the Court that the judgment below, which penalized the publication of the parody, cannot be squared with the First Amendment.

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[5] Neither party disputes this conclusion. Respondent is the host of a nationally syndicated television show and was the founder and president of a political organization formerly known as the Moral Majority. He is also the founder of Liberty University in Lynchburg, Virginia, and is the author of several books and publications. Who's Who in America 849 (44th ed. 1986–1987).

Syllabus

TEXAS v. JOHNSON

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 88–155. Argued March 21, 1989—Decided June 21, 1989

During the 1984 Republican National Convention in Dallas, Texas, respondent Johnson participated in a political demonstration to protest the policies of the Reagan administration and some Dallas-based corporations. After a march through the city streets, Johnson burned an American flag while protesters chanted. No one was physically injured or threatened with injury, although several witnesses were seriously offended by the flag burning. Johnson was convicted of desecration of a venerated object in violation of a Texas statute, and a State Court of Appeals affirmed. However, the Texas Court of Criminal Appeals reversed, holding that the State, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances. The court first found that Johnson's burning of the flag was expressive conduct protected by the First Amendment. The court concluded that the State could not criminally sanction flag desecration in order to preserve the flag as a symbol of national unity. It also held that the statute did not meet the State's goal of preventing breaches of the peace, since it was not drawn narrowly enough to encompass only those flag burnings that would likely result in a serious disturbance, and since the flag burning in this case did not threaten such a reaction. Further, it stressed that another Texas statute prohibited breaches of the peace and could be used to prevent disturbances without punishing this flag desecration.

Held: Johnson's conviction for flag desecration is inconsistent with the First Amendment. Pp. 402–420.

(a) Under the circumstances, Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment. The State conceded that the conduct was expressive. Occurring as it did at the end of a demonstration coinciding with the Republican National Convention, the expressive, overtly political nature of the conduct was both intentional and overwhelmingly apparent. Pp. 402–406.

(b) Texas has not asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression and would therefore permit application of the test set forth in *United States* v. *O'Brien*, 391 U. S. 367, whereby an important governmental interest in regulating nonspeech can justify incidental limitations on First Amendment freedoms when speech and nonspeech elements are combined in the same course of conduct. An interest in preventing breaches of the peace is not implicated on this record. Expression may not be prohib-

ited on the basis that an audience that takes serious offense to the expression may disturb the peace, since the government cannot assume that every expression of a provocative idea will incite a riot but must look to the actual circumstances surrounding the expression. Johnson's expression of dissatisfaction with the Federal Government's policies also does not fall within the class of "fighting words" likely to be seen as a direct personal insult or an invitation to exchange fisticuffs. This Court's holding does not forbid a State to prevent "imminent lawless action" and, in fact, Texas has a law specifically prohibiting breaches of the peace. Texas' interest in preserving the flag as a symbol of nationhood and national unity is related to expression in this case and, thus, falls outside the *O'Brien* test. Pp. 406–410.

(c) The latter interest does not justify Johnson's conviction. The restriction on Johnson's political expression is content based, since the Texas statute is not aimed at protecting the physical integrity of the flag in all circumstances, but is designed to protect it from intentional and knowing abuse that causes serious offense to others. It is therefore subject to "the most exacting scrutiny." *Boos* v. *Barry*, 485 U. S. 312. The government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable, even where our flag is involved. Nor may a State foster its own view of the flag by prohibiting expressive conduct relating to it, since the government may not permit designated symbols to be used to communicate a limited set of messages. Moreover, this Court will not create an exception to these principles protected by the First Amendment for the American flag alone. Pp. 410–422.

755 S. W. 2d 92, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 420. REHNQUIST, C. J., filed a dissenting opinion, in which WHITE and O'CONNOR, JJ., joined, *post*, p. 421. STEVENS, J., filed a dissenting opinion, *post*, p. 436.

Kathi Alyce Drew argued the cause for petitioner. With her on the briefs were *John Vance* and *Dolena T. Westergard.*

William M. Kunstler argued the cause for respondent. With him on the brief was *David D. Cole.**

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*Briefs of *amici curiae* urging reversal were filed for the Legal Affairs Council by *Wyatt B. Durrette, Jr.*, and *Bradley B. Cavedo;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Paul D. Kamenar.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Peter Linzer, James C. Harrington,* and

JUSTICE BRENNAN delivered the opinion of the Court.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

I

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted: "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Steven R. Shapiro; for the Christic Institute et al. by *James C. Goodale;* and for Jasper Johns et al. by *Robert G. Sugarman* and *Gloria C. Phares.*

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code Ann. § 42.09(a)(3) (1989).[1] After a trial, he was convicted, sentenced to one year in prison, and fined $2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, 706 S. W. 2d 120 (1986), but the Texas Court of Criminal Appeals reversed, 755 S. W. 2d 92 (1988), holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.

The Court of Criminal Appeals began by recognizing that Johnson's conduct was symbolic speech protected by the First Amendment: "Given the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant's act would have understood the message that appellant intended to convey. The act for which appellant was convicted was clearly 'speech' contemplated by the First Amendment." *Id.*, at 95. To justify Johnson's conviction for engaging in symbolic speech, the State asserted two interests: preserving the flag as a symbol of national unity and preventing breaches of the peace. The Court of Criminal Appeals held that neither interest supported his conviction.

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[1] Texas Penal Code Ann. § 42.09 (1989) provides in full:

"§ 42.09. Desecration of Venerated Object

"(a) A person commits an offense if he intentionally or knowingly desecrates:

"(1) a public monument;

"(2) a place of worship or burial; or

"(3) a state or national flag.

"(b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

"(c) An offense under this section is a Class A misdemeanor."

Acknowledging that this Court had not yet decided whether the Government may criminally sanction flag desecration in order to preserve the flag's symbolic value, the Texas court nevertheless concluded that our decision in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943), suggested that furthering this interest by curtailing speech was impermissible. "Recognizing that the right to differ is the centerpiece of our First Amendment freedoms," the court explained, "a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent." 755 S. W. 2d, at 97. Noting that the State had not shown that the flag was in "grave and immediate danger," *Barnette*, *supra*, at 639, of being stripped of its symbolic value, the Texas court also decided that the flag's special status was not endangered by Johnson's conduct. 755 S. W. 2d, at 97.

As to the State's goal of preventing breaches of the peace, the court concluded that the flag-desecration statute was not drawn narrowly enough to encompass only those flag burnings that were likely to result in a serious disturbance of the peace. And in fact, the court emphasized, the flag burning in this particular case did not threaten such a reaction. "'Serious offense' occurred," the court admitted, "but there was no breach of peace nor does the record reflect that the situation was potentially explosive. One cannot equate 'serious offense' with incitement to breach the peace." *Id.*, at 96. The court also stressed that another Texas statute, Tex. Penal Code Ann. § 42.01 (1989), prohibited breaches of the peace. Citing *Boos* v. *Barry*, 485 U. S. 312 (1988), the court decided that § 42.01 demonstrated Texas' ability to prevent disturbances of the peace without punishing this flag desecration. 755 S. W. 2d, at 96.

Because it reversed Johnson's conviction on the ground that § 42.09 was unconstitutional as applied to him, the state court did not address Johnson's argument that the statute was, on its face, unconstitutionally vague and overbroad. We granted certiorari, 488 U. S. 907 (1988), and now affirm.

II

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words.[2] This fact

[2] Because the prosecutor's closing argument observed that Johnson had led the protestors in chants denouncing the flag while it burned, Johnson suggests that he may have been convicted for uttering critical words rather than for burning the flag. Brief for Respondent 33–34. He relies on *Street* v. *New York*, 394 U. S. 576, 578 (1969), in which we reversed a conviction obtained under a New York statute that prohibited publicly defying or casting contempt on the flag "either by words or act" because we were persuaded that the defendant may have been convicted for his words alone. Unlike the law we faced in *Street*, however, the Texas flag-desecration statute does not on its face permit conviction for remarks critical of the flag, as Johnson himself admits. See Brief for Respondent 34. Nor was the jury in this case told that it could convict Johnson of flag desecration if it found only that he had uttered words critical of the flag and its referents.

Johnson emphasizes, though, that the jury was instructed—according to Texas' law of parties—that "'a person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.'" *Id.*, at 2, n. 2, quoting 1 Record 49. The State offered this instruction because Johnson's defense was that he was not the person who had burned the flag. Johnson did not object to this instruction at trial, and although he challenged it on direct appeal, he did so only on the ground that there was insufficient evidence to support it. 706 S. W. 2d 120, 124 (Tex. App. 1986). It is only in this Court that Johnson has argued that the law-of-parties instruction might have led the jury to convict him for his words alone. Even if we were to find that this argument is properly raised here, however, we would conclude that it has no merit in these circumstances. The instruction would not have permitted a conviction merely for the pejorative nature of Johnson's words, and those words themselves did not encourage the burning of the flag as the instruction seems to require. Given the additional fact that "the bulk of the State's

somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. See, *e. g.*, *Spence* v. *Washington*, 418 U. S. 405, 409–411 (1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, *e. g.*, *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968); *Spence*, *supra*, at 414, n. 8. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States* v. *O'Brien* for regulations of noncommunicative conduct controls. See *O'Brien*, *supra*, at 377. If it is, then we are outside of *O'Brien*'s test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.[3] See *Spence*, *supra*, at 411. A

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argument was premised on Johnson's culpability as a sole actor," *ibid.*, we find it too unlikely that the jury convicted Johnson on the basis of this alternative theory to consider reversing his conviction on this ground.

[3] Although Johnson has raised a facial challenge to Texas' flag-desecration statute, we choose to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment. Section 42.09 regulates only physical conduct with respect to the flag, not the written or spoken word, and although one violates the statute only if one "knows" that one's physical treatment of the flag "will seriously offend one or more persons likely to observe or discover his action," Tex. Penal Code Ann. § 42.09(b) (1989), this fact does not necessarily mean that the statute applies only to *expressive* conduct protected by the First Amendment. Cf. *Smith* v. *Goguen*, 415 U. S. 566, 588 (1974) (WHITE, J., concurring in judgment) (statute prohibiting "contemptuous" treatment of flag encompasses only expressive conduct). A tired person might, for example, drag a flag through the mud, knowing that this conduct is likely to offend others, and yet have no thought of expressing any idea; neither the language nor the Texas courts' interpretations of the statute precludes the possibility that such a person would be prosecuted for flag desecration. Because the prosecution of a person who had not engaged in expressive conduct would pose a different case, and because this case may be disposed of on narrower grounds, we address only Johnson's claim that § 42.09 as applied to political expression like his violates the First Amendment.

third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture. See 418 U. S., at 414, n. 8.

The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *United States* v. *O'Brien*, *supra*, at 376, we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," *Spence*, *supra*, at 409.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." 418 U. S., at 410–411. Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 505 (1969); of a sit-in by blacks in a "whites only" area to protest segregation, *Brown* v. *Louisiana*, 383 U. S. 131, 141–142 (1966); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, *Schacht* v. *United States*, 398 U. S. 58 (1970); and of picketing about a wide variety of causes, see, *e. g.*, *Food Employees* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308, 313–314 (1968); *United States* v. *Grace*, 461 U. S. 171, 176 (1983).

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, *Spence*, *supra*, at 409–410; refusing to salute the flag, *Barnette*, 319 U. S., at 632; and displaying a red flag, *Stromberg* v. *California*, 283 U. S. 359,

368–369 (1931), we have held, all may find shelter under the First Amendment. See also *Smith* v. *Goguen*, 415 U. S. 566, 588 (1974) (WHITE, J., concurring in judgment) (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct). That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood." *Id.*, at 603 (REHNQUIST, J., dissenting). Thus, we have observed:

> "[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." *Barnette*, *supra*, at 632.

Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America."

We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred. In *Spence*, for example, we emphasized that Spence's taping of a peace sign to his flag was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy." 418 U. S., at 410. The State of Washington had conceded, in fact, that Spence's conduct was a form of communication, and we stated that "the State's concession is inevitable on this record." *Id.*, at 409.

The State of Texas conceded for purposes of its oral argument in this case that Johnson's conduct was expressive conduct, Tr. of Oral Arg. 4, and this concession seems to us as

prudent as was Washington's in *Spence*. Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows: "The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism." 5 Record 656. In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication," *Spence*, 418 U. S., at 409, to implicate the First Amendment.

III

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O'Brien*, 391 U. S. at 376–377; *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984); *Dallas* v. *Stanglin*, 490 U. S. 19, 25 (1989). It may not, however, proscribe particular conduct *because* it has expressive elements. "[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." *Community for Creative Non-Violence* v. *Watt*, 227 U. S. App. D. C. 19, 55–56, 703 F. 2d 586, 622–623 (1983) (Scalia, J., dissenting) (emphasis in original), rev'd *sub nom. Clark* v. *Community for Creative Non-Violence*, *supra*. It is, in short, not simply the verbal or nonverbal nature of the expression, but the govern-

mental interest at stake, that helps to determine whether a restriction on that expression is valid.

Thus, although we have recognized that where "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," *O'Brien*, *supra*, at 376, we have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression." *Id.*, at 377; see also *Spence*, *supra*, at 414, n. 8. In stating, moreover, that *O'Brien*'s test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions," *Clark*, *supra*, at 298, we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule.

In order to decide whether *O'Brien*'s test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O'Brien*'s test applies. See *Spence*, *supra*, at 414, n. 8. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

A

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration.[4]

[4] Relying on our decision in *Boos* v. *Barry*, 485 U. S. 312 (1988), Johnson argues that this state interest is related to the suppression of free expression within the meaning of *United States* v. *O'Brien*, 391 U. S. 367 (1968). He reasons that the violent reaction to flag burnings feared by

However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, Brief for Petitioner 34–36, it admits that "no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning." *Id.*, at 34. The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat surprising given that no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to *Johnson's* conduct. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning. *Id.*, at 6–7.

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis.[5] Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or

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Texas would be the result of the message conveyed by them, and that this fact connects the State's interest to the suppression of expression. Brief for Respondent 12, n. 11. This view has found some favor in the lower courts. See *Monroe* v. *State Court of Fulton County*, 739 F. 2d 568, 574–575 (CA11 1984). Johnson's theory may overread *Boos* insofar as it suggests that a desire to prevent a violent audience reaction is "related to expression" in the same way that a desire to prevent an audience from being offended is "related to expression." Because we find that the State's interest in preventing breaches of the peace is not implicated on these facts, however, we need not venture further into this area.

[5] There is, of course, a tension between this argument and the State's claim that one need not actually cause serious offense in order to violate § 42.09. See Brief for Petitioner 44.

even stirs people to anger." *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949). See also *Cox* v. *Louisiana*, 379 U. S. 536, 551 (1965); *Tinker* v. *Des Moines Independent Community School Dist.* 393 U. S., at 508–509; *Coates* v. *Cincinnati*, 402 U. S. 611, 615 (1971); *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55–56 (1988). It would be odd indeed to conclude *both* that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection," *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 745 (1978) (opinion of STEVENS, J.), *and* that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.

Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) (reviewing circumstances surrounding rally and speeches by Ku Klux Klan). To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace," Brief for Petitioner 37, and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 574 (1942). No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs. See *id.*, at 572–573; *Cantwell* v. *Connecticut*, 310 U. S. 296, 309 (1940); *FCC* v. *Pacifica Foundation*, *supra*, at 745 (opinion of STEVENS, J.).

We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." *Brandenburg*, *supra*, at 447. And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, Tex. Penal Code Ann. § 42.01 (1989), which tends to confirm that Texas need not punish this flag desecration in order to keep the peace. See *Boos* v. *Barry*, 485 U. S., at 327–329.

B

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. 418 U. S., at 414, n. 8. We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of *O'Brien*. We are thus outside of *O'Brien*'s test altogether.

IV

It remains to consider whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction.

As in *Spence*, "[w]e are confronted with a case of prosecution for the expression of an idea through activity," and "[a]ccordingly, we must examine with particular care the inter-

ests advanced by [petitioner] to support its prosecution." 418 U. S., at 411. Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values. See, *e. g.*, *Boos* v. *Barry*, *supra*, at 318; *Frisby* v. *Schultz*, 487 U. S. 474, 479 (1988).

Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause "serious offense." If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag "when it is in such condition that it is no longer a fitting emblem for display," 36 U. S. C. § 176(k), and Texas has no quarrel with this means of disposal. Brief for Petitioner 45. The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others.[6] Texas concedes as much: "Section 42.09(b) reaches only those severe acts of physical abuse of the flag carried out in a way likely to be offensive. The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is not innocent, but rather is intentionally designed to seriously offend other individuals." *Id.*, at 44.

Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct.[7] Our decision in *Boos* v. *Barry*, *supra*,

[6] Cf. *Smith* v. *Goguen*, 415 U. S., at 590–591 (BLACKMUN, J., dissenting) (emphasizing that lower court appeared to have construed state statute so as to protect physical integrity of the flag in all circumstances); *id.*, at 597–598 (REHNQUIST, J., dissenting) (same).

[7] Texas suggests that Johnson's conviction did not depend on the onlookers' reaction to the flag burning because § 42.09 is violated only when a person physically mistreats the flag in a way that he "*knows* will seriously offend one or more persons likely to observe or discover his action." Tex.

tells us that this restriction on Johnson's expression is content based. In *Boos*, we considered the constitutionality of a law prohibiting "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" *Id.*, at 315. Rejecting the argument that the law was content neutral because it was justified by "our international law obligation to shield diplomats from speech that offends their dignity," *id.*, at 320, we held that "[t]he emotive impact of speech on its audience is not a 'secondary effect'" unrelated to the content of the expression itself. *Id.*, at 321 (plurality opinion); see also *id.*, at 334 (BRENNAN, J., concurring in part and concurring in judgment).

According to the principles announced in *Boos*, Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny." *Boos* v. *Barry*, *supra*, at 321.[8]

Penal Code Ann. § 42.09(b) (1989) (emphasis added). "The 'serious offense' language of the statute," Texas argues, "refers to an individual's intent and to the manner in which the conduct is effectuated, not to the reaction of the crowd." Brief for Petitioner 44. If the statute were aimed only at the actor's intent and not at the communicative impact of his actions, however, there would be little reason for the law to be triggered only when an audience is "likely" to be present. At Johnson's trial, indeed, the State itself seems not to have seen the distinction between knowledge and actual communicative impact that it now stresses; it proved the element of knowledge by offering the testimony of persons who had in fact been seriously offended by Johnson's conduct. *Id.*, at 6–7. In any event, we find the distinction between Texas' statute and one dependent on actual audience reaction too precious to be of constitutional significance. Both kinds of statutes clearly are aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity.

[8] Our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted. There was no evidence that Johnson himself stole the flag he burned, Tr. of Oral Arg. 17, nor did the prosecution or the arguments urged in support of it depend on

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the State emphasizes the "'special place'" reserved for the flag in our Nation. Brief for Petitioner 22, quoting *Smith* v. *Goguen*, 415 U. S., at 601 (REHNQUIST, J., dissenting). The State's argument is not that it has an interest simply in maintaining the flag as a symbol of *something*, no matter what it symbolizes; indeed, if that were the State's position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson's. Rather, the State's claim is that it has an interest in preserving the flag as a symbol of *nationhood* and *national unity*, a symbol with a determinate range of meanings. Brief for Petitioner 20–24. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.[9]

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the theory that the flag was stolen. *Ibid.* Thus, our analysis does not rely on the way in which the flag was acquired, and nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea. We also emphasize that Johnson was prosecuted *only* for flag desecration—not for trespass, disorderly conduct, or arson.

[9] Texas claims that "Texas is not endorsing, protecting, avowing or prohibiting any particular philosophy." Brief for Petitioner 29. If Texas means to suggest that its asserted interest does not prefer Democrats over Socialists, or Republicans over Democrats, for example, then it is beside the point, for Johnson does not rely on such an argument. He argues instead that the State's desire to maintain the flag as a symbol of nationhood and national unity assumes that there is only one proper view of the flag. Thus, if Texas means to argue that its interest does not prefer *any* viewpoint over another, it is mistaken; surely one's attitude toward the flag and its referents is a viewpoint.

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. See, *e. g.*, *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S., at 55–56; *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 804 (1984); *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 65, 72 (1983); *Carey* v. *Brown*, 447 U. S. 455, 462–463 (1980); *FCC* v. *Pacifica Foundation*, 438 U. S., at 745–746; *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63–65, 67–68 (1976) (plurality opinion); *Buckley* v. *Valeo*, 424 U. S. 1, 16–17 (1976); *Grayned* v. *Rockford*, 408 U. S. 104, 115 (1972); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972); *Bachellar* v. *Maryland*, 397 U. S. 564, 567 (1970); *O'Brien*, 391 U. S., at 382; *Brown* v. *Louisiana*, 383 U. S., at 142–143; *Stromberg* v. *California*, 283 U. S., at 368–369.

We have not recognized an exception to this principle even where our flag has been involved. In *Street* v. *New York*, 394 U. S. 576 (1969), we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had "failed to show the respect for our national symbol which may properly be demanded of every citizen," we concluded that "the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." *Id.*, at 593, quoting *Barnette*, 319 U. S., at 642. Nor may the government, we have held, compel conduct that would evince respect for the flag. "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.*, at 634.

In holding in *Barnette* that the Constitution did not leave this course open to the government, Justice Jackson described one of our society's defining principles in words deserving of their frequent repetition: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.*, at 642. In *Spence*, we held that the same interest asserted by Texas here was insufficient to support a criminal conviction under a flag-misuse statute for the taping of a peace sign to an American flag. "Given the protected character of [Spence's] expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts," we held, "the conviction must be invalidated." 418 U. S., at 415. See also *Goguen*, *supra*, at 588 (WHITE, J., concurring in judgment) (to convict person who had sewn a flag onto the seat of his pants for "contemptuous" treatment of the flag would be "[t]o convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas unacceptable to the controlling majority in the legislature").

In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it.[10] To bring its argument outside our

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[10] Our decision in *Halter* v. *Nebraska*, 205 U. S. 34 (1907), addressing the validity of a state law prohibiting certain commercial uses of the flag, is not to the contrary. That case was decided "nearly 20 years before the Court concluded that the First Amendment applies to the States by virtue of the Fourteenth Amendment." *Spence* v. *Washington*, 418 U. S. 405, 413, n. 7 (1974). More important, as we continually emphasized in *Halter* itself, that case involved purely commercial rather than political speech. 205 U. S., at 38, 41, 42, 45.

Nor does *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U. S. 522, 524 (1987), addressing the validity of Congress' decision to "authoriz[e] the United States Olympic Committee to prohibit

precedents, Texas attempts to convince us that even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here. See *supra*, at 402–403. In addition, both *Barnette* and *Spence* involved expressive conduct, not only verbal communication, and both found that conduct protected.

Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea.[11] If we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as

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certain commercial and promotional uses of the word 'Olympic,'" relied upon by THE CHIEF JUSTICE's dissent, *post*, at 429, even begin to tell us whether the government may criminally punish physical conduct towards the flag engaged in as a means of political protest.

[11] THE CHIEF JUSTICE's dissent appears to believe that Johnson's conduct may be prohibited and, indeed, criminally sanctioned, because "his act . . . conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways." *Post*, at 431. Not only does this assertion sit uneasily next to the dissent's quite correct reminder that the flag occupies a unique position in our society—which demonstrates that messages conveyed without use of the flag are not "just as forceful[l]" as those conveyed with it—but it also ignores the fact that, in *Spence*, *supra*, we "rejected summarily" this very claim. See 418 U. S., at 411, n. 4.

a symbol—as a substitute for the written or spoken word or a "short cut from mind to mind"—only in one direction. We would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. Indeed, in *Schacht* v. *United States*, we invalidated a federal statute permitting an actor portraying a member of one of our Armed Forces to "'wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.'" 398 U. S., at 60, quoting 10 U. S. C. §772(f). This proviso, we held, "which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment." *Id.*, at 63.

We perceive no basis on which to hold that the principle underlying our decision in *Schacht* does not apply to this case. To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do. See *Carey* v. *Brown*, 447 U. S., at 466–467.

There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons

who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas. See *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969). We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the government has a legitimate interest in making efforts to "preserv[e] the national flag as an unalloyed symbol of our country." *Spence*, 418 U. S., at 412. We reject the suggestion, urged at oral argument by counsel for Johnson, that the government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed. Tr. of Oral Arg. 38. Congress has, for example, enacted precatory regulations describing the proper treatment of the flag, see 36 U. S. C. §§ 173–177, and we cast no doubt on the legitimacy of its interest in making such recommendations. To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest. "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." *Barnette*, 319 U. S., at 640.

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires. To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an un-

known man will change our Nation's attitude towards its flag. See *Abrams* v. *United States*, 250 U. S. 616, 628 (1919) (Holmes, J., dissenting). Indeed, Texas' argument that the burning of an American flag "'is an act having a high likelihood to cause a breach of the peace,'" Brief for Petitioner 31, quoting *Sutherland* v. *DeWulf*, 323 F. Supp. 740, 745 (SD Ill. 1971) (citation omitted), and its statute's implicit assumption that physical mistreatment of the flag will lead to "serious offense," tend to confirm that the flag's special role is not in danger; if it were, no one would riot or take offense because a flag had been burned.

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring). And, precisely because it is our flag that is involved, one's response to the flag

burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

V

Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore

Affirmed.

JUSTICE KENNEDY, concurring.

I write not to qualify the words JUSTICE BRENNAN chooses so well, for he says with power all that is necessary to explain our ruling. I join his opinion without reservation, but with a keen sense that this case, like others before us from time to time, exacts its personal toll. This prompts me to add to our pages these few remarks.

The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right

in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Our colleagues in dissent advance powerful arguments why respondent may be convicted for his expression, reminding us that among those who will be dismayed by our holding will be some who have had the singular honor of carrying the flag in battle. And I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.

With all respect to those views, I do not believe the Constitution gives us the right to rule as the dissenting Members of the Court urge, however painful this judgment is to announce. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.

For all the record shows, this respondent was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statements must be to the Republic itself. But whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, dissenting.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." *New York Trust Co.* v.

Eisner, 256 U. S. 345, 349 (1921). For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

At the time of the American Revolution, the flag served to unify the Thirteen Colonies at home, while obtaining recognition of national sovereignty abroad. Ralph Waldo Emerson's "Concord Hymn" describes the first skirmishes of the Revolutionary War in these lines:

> "By the rude bridge that arched the flood
> Their flag to April's breeze unfurled,
> Here once the embattled farmers stood
> And fired the shot heard round the world."

During that time, there were many colonial and regimental flags, adorned with such symbols as pine trees, beavers, anchors, and rattlesnakes, bearing slogans such as "Liberty or Death," "Hope," "An Appeal to Heaven," and "Don't Tread on Me." The first distinctive flag of the Colonies was the "Grand Union Flag"—with 13 stripes and a British flag in the left corner—which was flown for the first time on January 2, 1776, by troops of the Continental Army around Boston. By June 14, 1777, after we declared our independence from England, the Continental Congress resolved:

> "That the flag of the thirteen United States be thirteen stripes, alternate red and white: that the union be thirteen stars, white in a blue field, representing a new constellation." 8 Journal of the Continental Congress 1774–1789, p. 464 (W. Ford ed. 1907).

One immediate result of the flag's adoption was that American vessels harassing British shipping sailed under an authorized national flag. Without such a flag, the British could treat captured seamen as pirates and hang them summarily; with a national flag, such seamen were treated as prisoners of war.

During the War of 1812, British naval forces sailed up Chesapeake Bay and marched overland to sack and burn the city of Washington. They then sailed up the Patapsco River to invest the city of Baltimore, but to do so it was first necessary to reduce Fort McHenry in Baltimore Harbor. Francis Scott Key, a Washington lawyer, had been granted permission by the British to board one of their warships to negotiate the release of an American who had been taken prisoner. That night, waiting anxiously on the British ship, Key watched the British fleet firing on Fort McHenry. Finally, at daybreak, he saw the fort's American flag still flying; the British attack had failed. Intensely moved, he began to scribble on the back of an envelope the poem that became our national anthem:

> "O say can you see by the dawn's early light
> What so proudly we hail'd at the twilight's last gleaming,
> Whose broad stripes & bright stars through the perilous fight
> O'er the ramparts we watch'd, were so gallantly streaming?
> And the rocket's red glare, the bomb bursting in air,
> Gave proof through the night that our flag was still there,
> O say does that star-spangled banner yet wave
> O'er the land of the free & the home of the brave?"

The American flag played a central role in our Nation's most tragic conflict, when the North fought against the South. The lowering of the American flag at Fort Sumter was viewed as the start of the war. G. Preble, History of the Flag of the United States of America 453 (1880). The Southern States, to formalize their separation from the Union, adopted the "Stars and Bars" of the Confederacy. The Union troops marched to the sound of "Yes We'll Rally Round The Flag Boys, We'll Rally Once Again." President Abraham Lincoln refused proposals to remove from the

American flag the stars representing the rebel States, because he considered the conflict not a war between two nations but an attack by 11 States against the National Government. *Id.*, at 411. By war's end, the American flag again flew over "an indestructible union, composed of indestructible states." *Texas* v. *White*, 7 Wall. 700, 725 (1869).

One of the great stories of the Civil War is told in John Greenleaf Whittier's poem, "Barbara Frietchie":

> "Up from the meadows rich with corn,
> Clear in the cool September morn,
> The clustered spires of Frederick stand
> Green-walled by the hills of Maryland.
> Round about them orchards sweep,
> Apple- and peach-tree fruited deep,
> Fair as a garden of the Lord
> To the eyes of the famished rebel horde,
> On that pleasant morn of the early fall
> When Lee marched over the mountain wall,—
> Over the mountains winding down,
> Horse and foot, into Frederick town.
> Forty flags with their silver stars,
> Forty flags with their crimson bars,
> Flapped in the morning wind: the sun
> Of noon looked down, and saw not one.
> Up rose old Barbara Frietchie then,
> Bowed with her fourscore years and ten;
> Bravest of all in Frederick town,
> She took up the flag the men hauled down;
> In her attic-window the staff she set,
> To show that one heart was loyal yet.
> Up the street came the rebel tread,
> Stonewall Jackson riding ahead.
> Under his slouched hat left and right
> He glanced: the old flag met his sight.
> 'Halt!'—the dust-brown ranks stood fast.
> 'Fire!'—out blazed the rifle-blast.

It shivered the window, pane and sash;
It rent the banner with seam and gash.
Quick, as it fell, from the broken staff
Dame Barbara snatched the silken scarf;
She leaned far out on the window-sill,
And shook it forth with a royal will.
'Shoot, if you must, this old gray head,
But spare your country's flag,' she said.
A shade of sadness, a blush of shame,
Over the face of the leader came;
The nobler nature within him stirred
To life at that woman's deed and word:
'Who touches a hair of yon gray head
Dies like a dog! March on!' he said.
All day long through Frederick street
Sounded the tread of marching feet:
All day long that free flag tost
Over the heads of the rebel host.
Ever its torn folds rose and fell
On the loyal winds that loved it well;
And through the hill-gaps sunset light
Shone over it with a warm good-night.
Barbara Frietchie's work is o'er,
And the Rebel rides on his raids no more.
Honor to her! and let a tear
Fall, for her sake, on Stonewall's bier.
Over Barbara Frietchie's grave,
Flag of Freedom and Union, wave!
Peace and order and beauty draw
Round thy symbol of light and law;
And ever the stars above look down
On thy stars below in Frederick town!"

In the First and Second World Wars, thousands of our countrymen died on foreign soil fighting for the American cause. At Iwo Jima in the Second World War, United States Marines fought hand to hand against thousands of

Japanese. By the time the Marines reached the top of Mount Suribachi, they raised a piece of pipe upright and from one end fluttered a flag. That ascent had cost nearly 6,000 American lives. The Iwo Jima Memorial in Arlington National Cemetery memorializes that event. President Franklin Roosevelt authorized the use of the flag on labels, packages, cartons, and containers intended for export as lend-lease aid, in order to inform people in other countries of the United States' assistance. Presidential Proclamation No. 2605, 58 Stat. 1126.

During the Korean war, the successful amphibious landing of American troops at Inchon was marked by the raising of an American flag within an hour of the event. Impetus for the enactment of the Federal Flag Desecration Statute in 1967 came from the impact of flag burnings in the United States on troop morale in Vietnam. Representative L. Mendel Rivers, then Chairman of the House Armed Services Committee, testified that "[t]he burning of the flag . . . has caused my mail to increase 100 percent from the boys in Vietnam, writing me and asking me what is going on in America." Desecration of the Flag, Hearings on H. R. 271 before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 189 (1967). Representative Charles Wiggins stated: "The public act of desecration of our flag tends to undermine the morale of American troops. That this finding is true can be attested by many Members who have received correspondence from servicemen expressing their shock and disgust of such conduct." 113 Cong. Rec. 16459 (1967).

The flag symbolizes the Nation in peace as well as in war. It signifies our national presence on battleships, airplanes, military installations, and public buildings from the United States Capitol to the thousands of county courthouses and city halls throughout the country. Two flags are prominently placed in our courtroom. Countless flags are placed by the graves of loved ones each year on what was first called

Decoration Day, and is now called Memorial Day. The flag is traditionally placed on the casket of deceased members of the Armed Forces, and it is later given to the deceased's family. 10 U. S. C. §§ 1481, 1482. Congress has provided that the flag be flown at half-staff upon the death of the President, Vice President, and other government officials "as a mark of respect to their memory." 36 U. S. C. § 175(m). The flag identifies United States merchant ships, 22 U. S. C. § 454, and "[t]he laws of the Union protect our commerce wherever the flag of the country may float." *United States* v. *Guthrie*, 17 How. 284, 309 (1855).

No other American symbol has been as universally honored as the flag. In 1931, Congress declared "The Star-Spangled Banner" to be our national anthem. 36 U. S. C. § 170. In 1949, Congress declared June 14th to be Flag Day. § 157. In 1987, John Philip Sousa's "The Stars and Stripes Forever" was designated as the national march. Pub. L. 101–186, 101 Stat. 1286. Congress has also established "The Pledge of Allegiance to the Flag" and the manner of its deliverance. 36 U. S. C. § 172. The flag has appeared as the principal symbol on approximately 33 United States postal stamps and in the design of at least 43 more, more times than any other symbol. United States Postal Service, Definitive Mint Set 15 (1988).

Both Congress and the States have enacted numerous laws regulating misuse of the American flag. Until 1967, Congress left the regulation of misuse of the flag up to the States. Now, however, 18 U. S. C. § 700(a) provides that:

> "Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

Congress has also prescribed, *inter alia*, detailed rules for the design of the flag, 4 U. S. C. § 1, the time and occasion of flag's display, 36 U. S. C. § 174, the position and manner of

its display, § 175, respect for the flag, § 176, and conduct during hoisting, lowering, and passing of the flag, § 177. With the exception of Alaska and Wyoming, all of the States now have statutes prohibiting the burning of the flag.[1] Most of the state statutes are patterned after the Uniform Flag Act of 1917, which in § 3 provides: "No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield." Proceedings of National Conference of Commissioners on Uniform State Laws 323–324 (1917). Most were passed by the States at about the time of World War I. Rosenblatt, Flag Desecration Statutes: History and Analysis, 1972 Wash. U. L. Q. 193, 197.

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[1] See Ala. Code § 13A–11–12 (1982); Ariz. Rev. Stat. Ann. § 13–3703 (1978); Ark. Code Ann. § 5–51–207 (1987); Cal. Mil. & Vet. Code Ann. § 614 (West 1988); Colo. Rev. Stat. § 18–11–204 (1986); Conn. Gen. Stat. § 53–258a (1985); Del. Code Ann., Tit. 11, § 1331 (1987); Fla. Stat. §§ 256.05–256.051, 876.52 (1987); Ga. Code Ann. § 50–3–9 (1986); Haw. Rev. Stat. § 711–1107 (1988); Idaho Code § 18–3401 (1987); Ill. Rev. Stat., ch. 1, ¶¶ 3307, 3351 (1980); Ind. Code § 35–45–1–4 (1986); Iowa Code § 32.1 (1978 and Supp. 1989); Kan. Stat. Ann. § 21–4114 (1988); Ky. Rev. Stat. Ann. § 525.110 (Michie Supp. 1988); La. Rev. Stat. Ann. § 14:116 (West 1986); Me. Rev. Stat. Ann., Tit. 1, § 254 (1979); Md. Ann. Code, Art. 27, § 83 (1988); Mass. Gen. Laws §§ 264, 265 (1987); Mich. Comp. Laws § 750.246 (1968); Minn. Stat. § 609.40 (1987); Miss. Code Ann. § 97–7–39 (1973); Mo. Rev. Stat. § 578.095 (Supp. 1989); Mont. Code Ann. § 45–8–215 (1987); Neb. Rev. Stat. § 28–928 (1985); Nev. Rev. Stat. § 201.290 (1986); N. H. Rev. Stat. Ann. § 646.1 (1986); N. J. Stat. Ann. § 2C:33–9 (West 1982); N. M. Stat. Ann. § 30–21–4 (1984); N. Y. Gen. Bus. Law § 136 (McKinney 1988); N. C. Gen. Stat. § 14–381 (1986); N. D. Cent. Code § 12.1–07–02 (1985); Ohio Rev. Code Ann. § 2927.11 (1987); Okla. Stat., Tit. 21, § 372 (1983); Ore. Rev. Stat. § 166.075 (1987); 18 Pa. Cons. Stat. § 2102 (1983); R. I. Gen. Laws § 11–15–2 (1981); S. C. Code §§ 16–17–220, 16–17–230 (1985 and Supp. 1988); S. D. Codified Laws § 22–9–1 (1988); Tenn. Code Ann. §§ 39–5–843, 39–5–847 (1982); Tex. Penal Code Ann. § 42.09 (1974); Utah Code Ann. § 76–9–601 (1978); Vt. Stat. Ann., Tit. 13, § 1903 (1974); Va. Code § 18.2–488 (1988); Wash. Rev. Code § 9.86.030 (1988); W. Va. Code § 61–1–8 (1989); Wis. Stat. § 946.05 (1985–1986).

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

More than 80 years ago in *Halter* v. *Nebraska*, 205 U. S. 34 (1907), this Court upheld the constitutionality of a Nebraska statute that forbade the use of representations of the American flag for advertising purposes upon articles of merchandise. The Court there said:

> "For that flag every true American has not simply an appreciation but a deep affection. . . . Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." *Id.*, at 41.

Only two Terms ago, in *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U. S. 522 (1987), the Court held that Congress could grant exclusive use of the word "Olympic" to the United States Olympic Committee. The Court thought that this "restrictio[n] on expressive speech properly [was] characterized as incidental to the primary congressional purpose of encouraging and rewarding the USOC's activities." *Id.*, at 536. As the Court stated, "when a word [or symbol] acquires value 'as the result of organization and the expenditure of labor, skill, and money' by an entity, that entity constitutionally may obtain a limited property right in the word [or symbol]." *Id.*, at 532, quoting *International News Service* v. *Associated Press*, 248

U. S. 215, 239 (1918). Surely Congress or the States may recognize a similar interest in the flag.

But the Court insists that the Texas statute prohibiting the public burning of the American flag infringes on respondent Johnson's freedom of expression. Such freedom, of course, is not absolute. See *Schenck* v. *United States*, 249 U. S. 47 (1919). In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), a unanimous Court said:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, at 571–572 (footnotes omitted).

The Court upheld Chaplinsky's conviction under a state statute that made it unlawful to "address any offensive, derisive or annoying word to any person who is lawfully in any street or other public place." *Id.*, at 569. Chaplinsky had told a local marshal, "'"You are a God damned racketeer" and a "damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."'" *Ibid.*

Here it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was

free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders. He did lead a march through the streets of Dallas, and conducted a rally in front of the Dallas City Hall. He engaged in a "die-in" to protest nuclear weapons. He shouted out various slogans during the march, including: "Reagan, Mondale which will it be? Either one means World War III"; "Ronald Reagan, killer of the hour, Perfect example of U. S. power"; and "red, white and blue, we spit on you, you stand for plunder, you will go under." Brief for Respondent 3. For none of these acts was he arrested or prosecuted; it was only when he proceeded to burn publicly an American flag stolen from its rightful owner that he violated the Texas statute.

The Court could not, and did not, say that Chaplinsky's utterances were not expressive phrases—they clearly and succinctly conveyed an extremely low opinion of the addressee. The same may be said of Johnson's public burning of the flag in this case; it obviously did convey Johnson's bitter dislike of his country. But his act, like Chaplinsky's provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with "fighting words," so with flag burning, for purposes of the First Amendment: It is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace. The highest courts of several States have upheld state statutes prohibiting the public burning of the flag on the grounds that it is so inherently inflammatory that it may cause a breach of public order. See, *e. g.*, *State* v. *Royal*, 113 N. H. 224, 229, 305 A. 2d 676, 680 (1973); *State* v. *Waterman*, 190 N. W. 2d 809, 811–812 (Iowa 1971); see also *State* v. *Mitchell*, 32 Ohio App. 2d 16, 30, 288 N. E. 2d 216, 226 (1972).

The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of many means of "symbolic speech." Far from being a case of "one picture being worth a thousand words," flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others. Only five years ago we said in *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 812 (1984), that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

Our prior cases dealing with flag desecration statutes have left open the question that the Court resolves today. In *Street* v. *New York*, 394 U. S. 576, 579 (1969), the defendant burned a flag in the street, shouting "We don't need no damned flag" and "[i]f they let that happen to Meredith we don't need an American flag." The Court ruled that since the defendant might have been convicted solely on the basis of his words, the conviction could not stand, but it expressly reserved the question whether a defendant could constitutionally be convicted for burning the flag. *Id.*, at 581.

Chief Justice Warren, in dissent, stated: "I believe that the States and Federal Government do have the power to protect the flag from acts of desecration and disgrace. . . . [I]t is dif-

ficult for me to imagine that, had the Court faced this issue, it would have concluded otherwise." *Id.*, at 605. Justices Black and Fortas also expressed their personal view that a prohibition on flag burning did not violate the Constitution. See *id.*, at 610 (Black, J., dissenting) ("It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American Flag an offense"); *id.*, at 615–617 (Fortas, J., dissenting) ("[T]he States and the Federal Government have the power to protect the flag from acts of desecration committed in public. . . . [T]he flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulation. . . . A person may 'own' a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly . . . these special conditions are not *per se* arbitrary or beyond governmental power under our Constitution").

In *Spence* v. *Washington*, 418 U. S. 405 (1974), the Court reversed the conviction of a college student who displayed the flag with a peace symbol affixed to it by means of removable black tape from the window of his apartment. Unlike the instant case, there was no risk of a breach of the peace, no one other than the arresting officers saw the flag, and the defendant owned the flag in question. The Court concluded that the student's conduct was protected under the First Amendment, because "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts." *Id.*, at 415. The Court was careful to note, however, that the defendant "was not charged under the desecration statute, nor did he permanently disfigure the flag or destroy it." *Ibid.*

In another related case, *Smith* v. *Goguen*, 415 U. S. 566 (1974), the appellee, who wore a small flag on the seat of his trousers, was convicted under a Massachusetts flag-misuse statute that subjected to criminal liability anyone who

"publicly . . . treats contemptuously the flag of the United States." *Id.*, at 568–569. The Court affirmed the lower court's reversal of appellee's conviction, because the phrase "treats contemptuously" was unconstitutionally broad and vague. *Id.*, at 576. The Court was again careful to point out that "[c]ertainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags." *Id.*, at 581–582. See also *id.*, at 587 (WHITE, J., concurring in judgment) ("The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it. I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, without regard to whether such conduct might provoke violence. . . . There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial. . . . The flag is itself a monument, subject to similar protection"); *id.*, at 591 (BLACKMUN, J., dissenting) ("Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants").

But the Court today will have none of this. The uniquely deep awe and respect for our flag felt by virtually all of us are bundled off under the rubric of "designated symbols," *ante*, at 417, that the First Amendment prohibits the government from "establishing." But the government has not "established" this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

The Court concludes its opinion with a regrettably patronizing civics lecture, presumably addressed to the Members of both Houses of Congress, the members of the 48 state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its

being burned: "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Ante*, at 419. The Court's role as the final expositor of the Constitution is well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were truant schoolchildren has no similar place in our system of government. The cry of "no taxation without representation" animated those who revolted against the English Crown to found our Nation—the idea that those who submitted to government should have some say as to what kind of laws would be passed. Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning.

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court "is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." *Fletcher* v. *Peck*, 6 Cranch 87, 128 (1810) (Marshall, C. J.). Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.[2]

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[2] In holding that the Texas statute as applied to Johnson violates the First Amendment, the Court does not consider Johnson's claims that the statute is unconstitutionally vague or overbroad. Brief for Respondent 24–30. I think those claims are without merit. In *New York State Club Assn.* v. *City of New York*, 487 U. S. 1, 11 (1988), we stated that a facial

JUSTICE STEVENS, dissenting.

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. The question is unique. In my judgment rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than "nationhood and national unity." *Ante*, at 407, 410, 413, and n. 9, 417, 420. It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. The fleurs-de-lis and the tricolor both symbolized "nationhood and national unity," but they had vastly different meanings. The message conveyed by some flags—the swastika, for example—may survive long after it has outlived its usefulness as a symbol of regimented unity in a particular nation.

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challenge is only proper under the First Amendment when a statute can never be applied in a permissible manner or when, even if it may be validly applied to a particular defendant, it is so broad as to reach the protected speech of third parties. While Tex. Penal Code Ann. § 42.09 (1989) "may not satisfy those intent on finding fault at any cost, [it is] set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *CSC* v. *Letter Carriers*, 413 U. S. 548, 579 (1973). By defining "desecrate" as "deface," "damage" or otherwise "physically mistreat" in a manner that the actor knows will "seriously offend" others, § 42.09 only prohibits flagrant acts of physical abuse and destruction of the flag of the sort at issue here—soaking a flag with lighter fluid and igniting it in public—and not any of the examples of improper flag etiquette cited in respondent's brief.

So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States as ultimate guarantor of that freedom is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag, see *Street* v. *New York*, 394 U. S. 576 (1969)—be employed.

It is appropriate to emphasize certain propositions that are not implicated by this case. The statutory prohibition of flag desecration does not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943). The statute does not compel any conduct or any profession of respect for any idea or any symbol.

Nor does the statute violate "the government's paramount obligation of neutrality in its regulation of protected communication." *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 70 (1976) (plurality opinion). The content of respondent's message has no relevance whatsoever to the case. The concept of "desecration" does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the *act* will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others—perhaps simply because they misperceive the intended message—will be seriously offended. Indeed, even if the actor knows that all possible witnesses will understand that he intends to send a message of respect, he might still be guilty of desecration if he also knows that this understanding does not lessen the offense taken by some of those witnesses. Thus, this is not a case in which the fact that "it is the speaker's opinion that gives offense" provides a special "reason for according it constitutional protection," *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 745 (1978) (plurality opinion). The case has nothing to do with "disagreeable ideas," see *ante*, at 409. It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

The Court is therefore quite wrong in blandly asserting that respondent "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." *Ante*, at 411. Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray-paint—or perhaps convey with a motion picture projector—his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important

national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.*

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I respectfully dissent.

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*The Court suggests that a prohibition against flag desecration is not content neutral because this form of symbolic speech is only used by persons who are critical of the flag or the ideas it represents. In making this suggestion the Court does not pause to consider the far-reaching consequences of its introduction of disparate-impact analysis into our First Amendment jurisprudence. It seems obvious that a prohibition against the desecration of a gravesite is content neutral even if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried while permitting others to salute the flame by bowing their heads. Few would doubt that a protester who extinguishes the flame has desecrated the gravesite, regardless of whether he prefaces that act with a speech explaining that his purpose is to express deep admiration or unmitigated scorn for the late President. Likewise, few would claim that the protester who bows his head has desecrated the gravesite, even if he makes clear that his purpose is to show disrespect. In such a case, as in a flag burning case, the prohibition against desecration has absolutely nothing to do with the content of the message that the symbolic speech is intended to convey.

BARNES, PROSECUTING ATTORNEY OF ST. JOSEPH COUNTY, INDIANA, ET AL. *v.* GLEN THEATRE, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 90-26. Argued January 8, 1991—Decided June 21, 1991

Respondents, two Indiana establishments wishing to provide totally nude dancing as entertainment and individual dancers employed at those establishments, brought suit in the District Court to enjoin enforcement of the state public indecency law—which requires respondent dancers to wear pasties and G-strings—asserting that the law's prohibition against total nudity in public places violates the First Amendment. The court held that the nude dancing involved here was not expressive conduct. The Court of Appeals reversed, ruling that nonobscene nude dancing performed for entertainment is protected expression, and that the statute was an improper infringement of that activity because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers.

Held: The judgment is reversed.

904 F. 2d 1081, reversed.

THE CHIEF JUSTICE, joined by JUSTICE O'CONNOR and JUSTICE KENNEDY, concluded that the enforcement of Indiana's public indecency law to prevent totally nude dancing does not violate the First Amendment's guarantee of freedom of expression. Pp. 565–572.

(a) Nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, although only marginally so. See, *e. g.*, *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 932. Pp. 565–566.

(b) Applying the four-part test of *United States* v. *O'Brien*, 391 U. S. 367, 376–377—which rejected the contention that symbolic speech is entitled to full First Amendment protection—the statute is justified despite its incidental limitations on some expressive activity. The law is clearly within the State's constitutional power. And it furthers a substantial governmental interest in protecting societal order and morality. Public indecency statutes reflect moral disapproval of people appearing in the nude among strangers in public places, and this particular law follows a line of state laws, dating back to 1831, banning public nudity. The States' traditional police power is defined as the authority to provide for the public health, safety, and morals, and such a basis for legislation

has been upheld. See, *e. g.*, *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 61. This governmental interest is unrelated to the suppression of free expression, since public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity. The law does not proscribe nudity in these establishments because the dancers are conveying an erotic message. To the contrary, an erotic performance may be presented without any state interference, so long as the performers wear a scant amount of clothing. Finally, the incidental restriction on First Amendment freedom is no greater than is essential to the furtherance of the governmental interest. Since the statutory prohibition is not a means to some greater end, but an end itself, it is without cavil that the statute is narrowly tailored. Pp. 566–572.

JUSTICE SCALIA concluded that the statute—as a general law regulating conduct and not specifically directed at expression, either in practice or on its face—is not subject to normal First Amendment scrutiny and should be upheld on the ground that moral opposition to nudity supplies a rational basis for its prohibition. Cf. *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872. There is no intermediate level of scrutiny requiring that an incidental restriction on expression, such as that involved here, be justified by an important or substantial governmental interest. Pp. 572–580.

JUSTICE SOUTER, agreeing that the nude dancing at issue here is subject to a degree of First Amendment protection, and that the test of *United States* v. *O'Brien*, 391 U. S. 367, is the appropriate analysis to determine the actual protection required, concluded that the State's interest in preventing the secondary effects of adult entertainment establishments—prostitution, sexual assaults, and other criminal activity—is sufficient under *O'Brien* to justify the law's enforcement against nude dancing. The prevention of such effects clearly falls within the State's constitutional power. In addition, the asserted interest is plainly substantial, and the State could have concluded that it is furthered by a prohibition on nude dancing, even without localized proof of the harmful effects. See *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 50, 51. Moreover, the interest is unrelated to the suppression of free expression, since the pernicious effects are merely associated with nude dancing establishments and are not the result of the expression inherent in nude dancing. *Id.*, at 48. Finally, the restriction is no greater than is essential to further the governmental interest, since pasties and a G-string moderate expression to a minor degree when measured against the dancer's remaining capacity and opportunity to express an erotic message. Pp. 581–587.

REHNQUIST, C. J., announced the judgment of the Court and delivered an opinion, in which O'CONNOR and KENNEDY, JJ., joined. SCALIA, J., *post*, p. 572, and SOUTER, J., *post*, p. 581, filed opinions concurring in the judgment. WHITE, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 587.

Wayne E. Uhl, Deputy Attorney General of Indiana, argued the cause for petitioners. With him on the briefs was *Linley E. Pearson*, Attorney General.

Bruce J. Ennis, Jr., argued the cause for respondents. *Lee J. Klein* and *Bradley J. Shafer* filed a brief for respondents Glen Theatre, Inc., et al. *Patrick Louis Baude* and *Charles A. Asher* filed a brief for respondents Darlene Miller et al.*

CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which JUSTICE O'CONNOR and JUSTICE KENNEDY join.

Respondents are two establishments in South Bend, Indiana, that wish to provide totally nude dancing as entertainment, and individual dancers who are employed at these

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*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Robert K. Corbin*, Attorney General of Arizona, and *Steven J. Twist*, Chief Assistant Attorney General, *Clarine Nardi Riddle*, Attorney General of Connecticut, and *John J. Kelly*, Chief State's Attorney, *William L. Webster*, Attorney General of Missouri, *Lacy H. Thornburg*, Attorney General of North Carolina, and *Rosalie Simmonds Ballentine*, Acting Attorney General of the Virgin Islands; for the American Family Association, Inc., et al. by *Alan E. Sears*, *James Mueller*, and *Peggy M. Coleman;* and for the National Governors' Association et al. by *Benna Ruth Solomon* and *Peter Buscemi*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Spencer Neth*, *Thomas D. Buckley, Jr.*, *Steven R. Shapiro*, and *John A. Powell;* for the Georgia on Premise & Lounge Association, Inc., by *James A. Walrath;* for People for the American Way et al. by *Timothy B. Dyk*, *Robert H. Klonoff*, *Patricia A. Dunn*, *Elliot M. Mincberg*, *Stephen F. Rohde*, and *Mary D. Dorman*.

James J. Clancy filed a brief *pro se* as *amicus curiae*.

establishments. They claim that the First Amendment's guarantee of freedom of expression prevents the State of Indiana from enforcing its public indecency law to prevent this form of dancing. We reject their claim.

The facts appear from the pleadings and findings of the District Court and are uncontested here. The Kitty Kat Lounge, Inc. (Kitty Kat), is located in the city of South Bend. It sells alcoholic beverages and presents "go-go dancing." Its proprietor desires to present "totally nude dancing," but an applicable Indiana statute regulating public nudity requires that the dancers wear "pasties" and "G-strings" when they dance. The dancers are not paid an hourly wage, but work on commission. They receive a 100 percent commission on the first $60 in drink sales during their performances. Darlene Miller, one of the respondents in the action, had worked at the Kitty Kat for about two years at the time this action was brought. Miller wishes to dance nude because she believes she would make more money doing so.

Respondent Glen Theatre, Inc., is an Indiana corporation with a place of business in South Bend. Its primary business is supplying so-called adult entertainment through written and printed materials, movie showings, and live entertainment at an enclosed "bookstore." The live entertainment at the "bookstore" consists of nude and seminude performances and showings of the female body through glass panels. Customers sit in a booth and insert coins into a timing mechanism that permits them to observe the live nude and seminude dancers for a period of time. One of Glen Theatre's dancers, Gayle Ann Marie Sutro, has danced, modeled, and acted professionally for more than 15 years, and in addition to her performances at the Glen Theatre, can be seen in a pornographic movie at a nearby theater. App. to Pet. for Cert. 131–133.

Respondents sued in the United States District Court for the Northern District of Indiana to enjoin the enforcement of the Indiana public indecency statute, Ind. Code § 35–45–4–1

(1988), asserting that its prohibition against complete nudity in public places violated the First Amendment. The District Court originally granted respondents' prayer for an injunction, finding that the statute was facially overbroad. The Court of Appeals for the Seventh Circuit reversed, deciding that previous litigation with respect to the statute in the Supreme Court of Indiana and this Court precluded the possibility of such a challenge,[1] and remanded to the District Court in order for the plaintiffs to pursue their claim that the statute violated the First Amendment as applied to their dancing. *Glen Theatre, Inc.* v. *Pearson*, 802 F. 2d 287, 288–290 (1986). On remand, the District Court concluded that

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[1] The Indiana Supreme Court appeared to give the public indecency statute a limiting construction to save it from a facial overbreadth attack:

"There is no right to appear nude in public. Rather, it *may* be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *State* v. *Baysinger*, 272 Ind. 236, 247, 397 N. E. 2d 580, 587 (1979) (emphasis added), appeals dism'd *sub nom. Clark* v. *Indiana*, 446 U. S. 931, and *Dove* v. *Indiana*, 449 U. S. 806 (1980).

Five years after *Baysinger*, however, the Indiana Supreme Court reversed a decision of the Indiana Court of Appeals holding that the statute did "not apply to activity such as the theatrical appearances involved herein, which may not be prohibited absent a finding of obscenity," in a case involving a partially nude dance in the "Miss Erotica of Fort Wayne" contest. *Erhardt* v. *State*, 468 N. E. 2d 224 (Ind. 1984). The Indiana Supreme Court did not discuss the constitutional issues beyond a cursory comment that the statute had been upheld against constitutional attack in *Baysinger*, and Erhardt's conduct fell within the statutory prohibition. Justice Hunter dissented, arguing that "a public indecency statute which prohibits nudity in any public place is unconstitutionally overbroad. My reasons for so concluding have already been articulated in *State* v. *Baysinger*, (1979) 272 Ind. 236, 397 N. E. 2d 580 (Hunter and DeBruler, JJ., dissenting)." 468 N. E. 2d, at 225–226. Justice DeBruler expressed similar views in his dissent in *Erhardt*. *Id.*, at 226. Therefore, the Indiana Supreme Court did not affirmatively limit the reach of the statute in *Baysinger*, but merely said that to the extent the First Amendment would require it, the statute might be unconstitutional as applied to some activities.

"the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States," and rendered judgment in favor of the defendants. *Glen Theatre, Inc.* v. *Civil City of South Bend*, 695 F. Supp. 414, 419 (1988). The case was again appealed to the Seventh Circuit, and a panel of that court reversed the District Court, holding that the nude dancing involved here was expressive conduct protected by the First Amendment. *Miller* v. *Civil City of South Bend*, 887 F. 2d 826 (1989). The Court of Appeals then heard the case en banc, and the court rendered a series of comprehensive and thoughtful opinions. The majority concluded that nonobscene nude dancing performed for entertainment is expression protected by the First Amendment, and that the public indecency statute was an improper infringement of that expressive activity because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers. *Miller* v. *Civil City of South Bend*, 904 F. 2d 1081 (1990). We granted certiorari, 498 U. S. 807 (1990), and now hold that the Indiana statutory requirement that the dancers in the establishments involved in this case must wear pasties and G-strings does not violate the First Amendment.

Several of our cases contain language suggesting that nude dancing of the kind involved here is expressive conduct protected by the First Amendment. In *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 932 (1975), we said: "[A]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California* v. *LaRue*, 409 U. S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." In *Schad* v. *Mount Ephraim*, 452 U. S. 61, 66 (1981), we said that "[f]urthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation" (citations omitted). These statements support the conclusion of the Court of Appeals

that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so. This, of course, does not end our inquiry. We must determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the Indiana statute is an impermissible infringement of that protected activity.

Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board. The Supreme Court of Indiana has construed the Indiana statute to preclude nudity in what are essentially places of public accommodation such as the Glen Theatre and the Kitty Kat Lounge. In such places, respondents point out, minors are excluded and there are no nonconsenting viewers. Respondents contend that while the State may license establishments such as the ones involved here, and limit the geographical area in which they do business, it may not in any way limit the performance of the dances within them without violating the First Amendment. The petitioners contend, on the other hand, that Indiana's restriction on nude dancing is a valid "time, place, or manner" restriction under cases such as *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984).

The "time, place, or manner" test was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a "public forum," *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989), although we have on at least one occasion applied it to conduct occurring on private property. See *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986). In *Clark* we observed that this test has been interpreted to embody much the same standards as those set forth in *United States* v. *O'Brien*, 391 U. S. 367 (1968), and we turn, therefore, to the rule enunciated in *O'Brien*.

O'Brien burned his draft card on the steps of the South Boston Courthouse in the presence of a sizable crowd, and

was convicted of violating a statute that prohibited the knowing destruction or mutilation of such a card. He claimed that his conviction was contrary to the First Amendment because his act was "symbolic speech"—expressive conduct. The Court rejected his contention that symbolic speech is entitled to full First Amendment protection, saying:

> "[E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 376–377 (footnotes omitted).

Applying the four-part *O'Brien* test enunciated above, we find that Indiana's public indecency statute is justified despite its incidental limitations on some expressive activity. The public indecency statute is clearly within the constitutional power of the State and furthers substantial governmental interests. It is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind when they enacted

this statute, for Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose. Nonetheless, the statute's purpose of protecting societal order and morality is clear from its text and history. Public indecency statutes of this sort are of ancient origin and presently exist in at least 47 States. Public indecency, including nudity, was a criminal offense at common law, and this Court recognized the common-law roots of the offense of "gross and open indecency" in *Winters* v. *New York*, 333 U. S. 507, 515 (1948). Public nudity was considered an act *malum in se*. *Le Roy* v. *Sidley*, 1 Sid. 168, 82 Eng. Rep. 1036 (K. B. 1664). Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places.

This public indecency statute follows a long line of earlier Indiana statutes banning all public nudity. The history of Indiana's public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition. At least as early as 1831, Indiana had a statute punishing "open and notorious lewdness, or . . . any grossly scandalous and public indecency." Rev. Laws of Ind., ch. 26, § 60 (1831); Ind. Rev. Stat., ch. 53, § 81 (1834). A gap during which no statute was in effect was filled by the Indiana Supreme Court in *Ardery* v. *State*, 56 Ind. 328 (1877), which held that the court could sustain a conviction for exhibition of "privates" in the presence of others. The court traced the offense to the Bible story of Adam and Eve. *Id.*, at 329–330. In 1881, a statute was enacted that would remain essentially unchanged for nearly a century:

> "Whoever, being over fourteen years of age, makes an indecent exposure of his person in a public place, or in any place where there are other persons to be offended or annoyed thereby, . . . is guilty of public indecency . . . ." 1881 Ind. Acts, ch. 37, § 90.

The language quoted above remained unchanged until it was simultaneously repealed and replaced with the present statute in 1976. 1976 Ind. Acts, Pub. L. 148, Art. 45, ch. 4, § 1.[2]

This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation. In *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 61 (1973), we said:

> "In deciding *Roth* [v. *United States*, 354 U. S. 476 (1957)], this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.' *[Id.]*, at 485." (Emphasis omitted.)

And in *Bowers* v. *Hardwick*, 478 U. S. 186, 196 (1986), we said:

> "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."

Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.

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[2] Indiana Code § 35–45–4–1 (1988) provides:

"Public indecency; indecent exposure

"Sec. 1. (a) A person who knowingly or intentionally, in a public place:

"(1) engages in sexual intercourse;

"(2) engages in deviate sexual conduct;

"(3) appears in a state of nudity; or

"(4) fondles the genitals of himself or another person;

commits public indecency, a Class A misdemeanor.

"(b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state."

This interest is unrelated to the suppression of free expression. Some may view restricting nudity on moral grounds as necessarily related to expression. We disagree. It can be argued, of course, that almost limitless types of conduct—including appearing in the nude in public—are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But the court rejected this expansive notion of "expressive conduct" in *O'Brien*, saying:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U. S., at 376.

And in *Dallas* v. *Stanglin*, 490 U. S. 19 (1989), we further observed:

> "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment." *Id.*, at 25.

Respondents contend that even though prohibiting nudity in public generally may not be related to suppressing expression, prohibiting the performance of nude dancing is related to expression because the State seeks to prevent its erotic message. Therefore, they reason that the application of the Indiana statute to the nude dancing in this case violates the First Amendment, because it fails the third part of the *O'Brien* test, viz: the governmental interest must be unrelated to the suppression of free expression.

But we do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers.

Presumably numerous other erotic performances are presented at these establishments and similar clubs without any interference from the State, so long as the performers wear a scant amount of clothing. Likewise, the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.

This conclusion is buttressed by a reference to the facts of *O'Brien*. An Act of Congress provided that anyone who knowingly destroyed a Selective Service registration certificate committed an offense. O'Brien burned his certificate on the steps of the South Boston Courthouse to influence others to adopt his antiwar beliefs. This Court upheld his conviction, reasoning that the continued availability of issued certificates served a legitimate and substantial purpose in the administration of the Selective Service System. O'Brien's deliberate destruction of his certificate frustrated this purpose and "[f]or this noncommunicative impact of his conduct, and for nothing else, he was convicted." 391 U. S., at 382. It was assumed that O'Brien's act in burning the certificate had a communicative element in it sufficient to bring into play the First Amendment, *id.*, at 376, but it was for the noncommunicative element that he was prosecuted. So here with the Indiana statute; while the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.

The fourth part of the *O'Brien* test requires that the incidental restriction on First Amendment freedom be no greater than is essential to the furtherance of the governmental interest. As indicated in the discussion above, the

governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and among strangers. The statutory prohibition is not a means to some greater end, but an end in itself. It is without cavil that the public indecency statute is "narrowly tailored"; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose.

The judgment of the Court of Appeals accordingly is

Reversed.

JUSTICE SCALIA, concurring in the judgment.

I agree that the judgment of the Court of Appeals must be reversed. In my view, however, the challenged regulation must be upheld, not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.

I

Indiana's public indecency statute provides:

> "(a) A person who knowingly or intentionally, in a public place:
>
> "(1) engages in sexual intercourse;
>
> "(2) engages in deviate sexual conduct;
>
> "(3) appears in a state of nudity; or
>
> "(4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.
>
> "(b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state." Ind. Code § 35–45–4–1 (1988).

On its face, this law is not directed at expression in particular. As Judge Easterbrook put it in his dissent below: "Indi-

ana does not regulate dancing. It regulates public nudity. . . . Almost the entire domain of Indiana's statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech." *Miller* v. *Civil City of South Bend*, 904 F. 2d 1081, 1120 (CA7 1990). The intent to convey a "message of eroticism" (or any other message) is not a necessary element of the statutory offense of public indecency; nor does one commit that statutory offense by conveying the most explicit "message of eroticism," so long as he does not commit any of the four specified acts in the process.[1]

Indiana's statute is in the line of a long tradition of laws against public nudity, which have never been thought to run afoul of traditional understanding of "the freedom of speech." Public indecency—including public nudity—has long been an offense at common law. See 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §17, pp. 449, 472–474 (1970); Annot., Criminal offense predicated on indecent exposure, 93 A. L. R. 996, 997–998 (1934); *Winters* v. *New York*, 333 U. S. 507, 515 (1948). Indiana's first public nudity statute, Rev. Laws of Ind., ch. 26, §60 (1831), predated by many years the appearance of nude barroom dancing. It was general in scope, directed at all public nudity, and not just at public nude expression; and all succeeding statutes, down to

[1] Respondents assert that the statute cannot be characterized as a general regulation of conduct, unrelated to suppression of expression, because one defense put forward in oral argument below by the attorney general referred to the "message of eroticism" conveyed by respondents. But that argument seemed to go to whether the statute could constitutionally be applied to the present performances, rather than to what was the purpose of the legislation. Moreover, the State's argument below was in the alternative: (1) that the statute does not implicate the First Amendment because it is a neutral rule not directed at expression, and (2) that the statute in any event survives First Amendment scrutiny because of the State's interest in suppressing nude barroom dancing. The second argument can be claimed to contradict the first (though I think it does not); but it certainly does not waive or abandon it. In any case, the clear purpose shown by both the text and historical use of the statute cannot be refuted by a litigating statement in a single case.

the present one, have been the same. Were it the case that Indiana *in practice* targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools, see *Miller*, 904 F. 2d, at 1120, 1121, it might be said that what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct. Respondents have adduced no evidence of that. Indiana officials have brought many public indecency prosecutions for activities having no communicative element. See *Bond* v. *State*, 515 N. E. 2d 856, 857 (Ind. 1987); *In re Levinson*, 444 N. E. 2d 1175, 1176 (Ind. 1983); *Preston* v. *State*, 259 Ind. 353, 354–355, 287 N. E. 2d 347, 348 (1972); *Thomas* v. *State*, 238 Ind. 658, 659–660, 154 N. E. 2d 503, 504–505 (1958); *Blanton* v. *State*, 533 N. E. 2d 190, 191 (Ind. App. 1989); *Sweeney* v. *State*, 486 N. E. 2d 651, 652 (Ind. App. 1985); *Thompson* v. *State*, 482 N. E. 2d 1372, 1373–1374 (Ind. App. 1985); *Adims* v. *State*, 461 N. E. 2d 740, 741–742 (Ind. App. 1984); *State* v. *Elliott*, 435 N. E. 2d 302, 304 (Ind. App. 1982); *Lasko* v. *State*, 409 N. E. 2d 1124, 1126 (Ind. App. 1980).[2]

The dissent confidently asserts, *post*, at 590–591, that the purpose of restricting nudity in public places in general is to protect nonconsenting parties from offense; and argues that since only consenting, admission-paying patrons see respondents dance, that purpose cannot apply and the only remaining purpose must relate to the communicative elements of the performance. Perhaps the dissenters believe that "offense to others" *ought* to be the only reason for restricting nudity in public places generally, but there is no

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[2] Respondents also contend that the statute, as interpreted, is not content neutral in the expressive conduct to which it applies, since it allegedly does not apply to nudity in theatrical productions. See *State* v. *Baysinger*, 272 Ind. 236, 247, 397 N. E. 2d 580, 587 (1979). I am not sure that theater versus nontheater represents a distinction based on content rather than format, but assuming that it does, the argument nonetheless fails for the reason the plurality describes, *ante*, at 564, n. 1.

basis for thinking that our society has ever shared that Thoreauvian "you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else" beau ideal—much less for thinking that it was written into the Constitution. The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "*contra bonos mores*," *i. e.*, immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality." See *Bowers* v. *Hardwick*, 478 U. S. 186, 196 (1986) (upholding prohibition of private homosexual sodomy enacted solely on "the presumed belief of a majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable"). See also *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 68, n. 15 (1973); *Dronenburg* v. *Zech*, 239 U. S. App. D. C. 229, 238, and n. 6, 741 F. 2d 1388, 1397, and n. 6 (1984) (opinion of Bork, J.). The purpose of the Indiana statute, as both its text and the manner of its enforcement demonstrate, is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified. Since that is so, the dissent has no basis for positing that, where only thoroughly edified adults are present, the purpose must be repression of communication.[3]

[3] The dissent, *post*, at 590, 595–596, also misunderstands what is meant by the term "general law." I do not mean that the law restricts the tar-

II

Since the Indiana regulation is a general law not specifically targeted at expressive conduct, its application to such conduct does not in my view implicate the First Amendment.

The First Amendment explicitly protects "the freedom of speech [and] of the press"—oral and written speech—not "expressive conduct." When any law restricts speech, even for a purpose that has nothing to do with the suppression of communication (for instance, to reduce noise, see *Saia* v. *New York*, 334 U. S. 558, 561 (1948), to regulate election campaigns, see *Buckley* v. *Valeo*, 424 U. S. 1, 16 (1976), or to prevent littering, see *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 163 (1939)), we insist that it meet the high, First Amendment standard of justification. But virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition. See, *e. g.*, *Florida Free Beaches, Inc.* v. *Miami*, 734 F. 2d 608, 609 (CA11 1984) (nude sunbathers challenging public indecency law claimed their "message" was that nudity is not indecent). It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even—as some of our cases have suggested, see, *e. g.*, *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968)—that it be justified by an "important or sub-

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geted conduct in all places at all times. A law is "general" for the present purposes if it regulates conduct without regard to whether that conduct is expressive. Concededly, Indiana bans nudity in public places, but not within the privacy of the home. (That is not surprising, since the common-law offense, and the traditional moral prohibition, runs against *public* nudity, not against all nudity. *E. g.*, 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity § 17, pp. 472–474 (1970)). But that confirms, rather than refutes, the general nature of the law: One may not go nude in public, whether or not one intends thereby to convey a message, and similarly one *may* go nude in private, again whether or not that nudity is expressive.

stantial" government interest. Nor do our holdings require such justification: We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest.

This is not to say that the First Amendment affords no protection to expressive conduct. Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional. See, *e. g.*, *United States* v. *Eichman*, 496 U. S. 310 (1990) (burning flag); *Texas* v. *Johnson*, 491 U. S. 397 (1989) (same); *Spence* v. *Washington*, 418 U. S. 405 (1974) (defacing flag); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969) (wearing black arm bands); *Brown* v. *Louisiana*, 383 U. S. 131 (1966) (participating in silent sit-in); *Stromberg* v. *California*, 283 U. S. 359 (1931) (flying a red flag).[4] In each of the foregoing cases, we explicitly found that suppressing communication was the object of the regulation of conduct. Where that has not been the case, however—where suppression of communicative use of the conduct was merely the incidental effect of forbidding the conduct for other reasons—we have allowed the regulation to stand. *O'Brien*, *supra*, at 377 (law banning destruction of draft card upheld in application against card burning to pro-

[4] It is easy to conclude that conduct has been forbidden because of its communicative attributes when the conduct in question is what the Court has called "inherently expressive," and what I would prefer to call "conventionally expressive"—such as flying a red flag. I mean by that phrase (as I assume the Court means by "inherently expressive") conduct that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else. I am not sure whether dancing fits that description, see *Dallas* v. *Stanglin*, 490 U. S. 19, 24 (1989) (social dance group "do[es] not involve the sort of expressive association that the First Amendment has been held to protect"). But even if it does, this law is directed against nudity, not dancing. Nudity is *not* normally engaged in for the purpose of communicating an idea or an emotion.

test war); *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411 (1990) (Sherman Act upheld in application against restraint of trade to protest low pay); cf. *United States* v. *Albertini*, 472 U. S. 675, 687–688 (1985) (rule barring respondent from military base upheld in application against entrance on base to protest war); *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984) (rule barring sleeping in parks upheld in application against persons engaging in such conduct to dramatize plight of homeless). As we clearly expressed the point in *Johnson:*

> "The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements. What might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription." 491 U. S., at 406 (internal quotation marks and citations omitted; emphasis in original).

All our holdings (though admittedly not some of our discussion) support the conclusion that "the only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription." *Community for Creative Non-Violence* v. *Watt*, 227 U. S. App. D. C. 19, 55–56, 703 F. 2d 586, 622–623 (1983) (en banc) (Scalia, J., dissenting), (footnote omitted; emphasis omitted), rev'd *sub nom. Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984). Such a regime ensures that the government does not act to suppress communication, without requiring that all conduct-restricting regulation

(which means in effect all regulation) survive an enhanced level of scrutiny.

We have explicitly adopted such a regime in another First Amendment context: that of free exercise. In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), we held that general laws not specifically targeted at religious practices did not require heightened First Amendment scrutiny even though they diminished some people's ability to practice their religion. "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Id.*, at 885, quoting *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 451 (1988); see also *Minersville School District* v. *Gobitis*, 310 U. S. 586, 594–595 (1940) (Frankfurter, J.) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs"). There is even greater reason to apply this approach to the regulation of expressive conduct. Relatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons; but almost anyone can violate almost any law as a means of expression. In the one case, as in the other, if the law is not directed against the protected value (religion or expression) the law must be obeyed.

III

While I do not think the plurality's conclusions differ greatly from my own, I cannot entirely endorse its reasoning. The plurality purports to apply to this general law, insofar as it regulates this allegedly expressive conduct, an intermediate level of First Amendment scrutiny: The government interest in the regulation must be "'important or substantial,'" *ante*, at 567, quoting *O'Brien*, *supra*, at 377. As I have indi-

cated, I do not believe such a heightened standard exists. I think we should avoid wherever possible, moreover, a method of analysis that requires judicial assessment of the "importance" of government interests—and especially of government interests in various aspects of morality.

Neither of the cases that the plurality cites to support the "importance" of the State's interest here, see *ante*, at 569, is in point. *Paris Adult Theatre I* v. *Slaton*, 413 U. S., at 61, and *Bowers* v. *Hardwick*, 478 U. S., at 196, did uphold laws prohibiting private conduct based on concerns of decency and morality; but neither opinion held that those concerns were particularly "important" or "substantial," or amounted to anything more than a *rational basis* for regulation. *Slaton* involved an exhibition which, since it was obscene and at least to some extent public, was unprotected by the First Amendment, see *Roth* v. *United States*, 354 U. S. 476 (1957); the State's prohibition could therefore be invalidated only if it had no rational basis. We found that the State's "right . . . to maintain a decent society" provided a "legitimate" basis for regulation—even as to obscene material viewed by consenting adults. 413 U. S., at 59–60. In *Bowers*, we held that since homosexual behavior is not a fundamental right, a Georgia law prohibiting private homosexual intercourse needed only a rational basis in order to comply with the Due Process Clause. Moral opposition to homosexuality, we said, provided that rational basis. 478 U. S., at 196. I would uphold the Indiana statute on precisely the same ground: Moral opposition to nudity supplies a rational basis for its prohibition, and since the First Amendment has no application to this case no more than that is needed.

* * *

Indiana may constitutionally enforce its prohibition of public nudity even against those who choose to use public nudity as a means of communication. The State is regulating conduct, not expression, and those who choose to employ con-

duct as a means of expression must make sure that the conduct they select is not generally forbidden. For these reasons, I agree that the judgment should be reversed.

JUSTICE SOUTER, concurring in the judgment.

Not all dancing is entitled to First Amendment protection as expressive activity. This Court has previously categorized ballroom dancing as beyond the Amendment's protection, *Dallas* v. *Stanglin*, 490 U. S. 19, 24–25 (1989), and dancing as aerobic exercise would likewise be outside the First Amendment's concern. But dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience. Such is the expressive content of the dances described in the record.

Although such performance dancing is inherently expressive, nudity *per se* is not. It is a condition, not an activity, and the voluntary assumption of that condition, without more, apparently expresses nothing beyond the view that the condition is somehow appropriate to the circumstances. But every voluntary act implies some such idea, and the implication is thus so common and minimal that calling all voluntary activity expressive would reduce the concept of expression to the point of the meaningless. A search for some expression beyond the minimal in the choice to go nude will often yield nothing: a person may choose nudity, for example, for maximum sunbathing. But when nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a striptease, are integrated into the dance and its expressive function. Thus I agree with the plurality and the dissent that an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection.

I also agree with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part enquiry described in *United States* v. *O'Brien*, 391 U. S. 367 (1968), for judging the limits of appropriate state action burdening expressive acts as distinct from pure speech or representation. I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments.

It is, of course, true that this justification has not been articulated by Indiana's Legislature or by its courts. As the plurality observes, "Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose," *ante*, at 568. While it is certainly sound in such circumstances to infer general purposes "of protecting societal order and morality . . . from [the statute's] text and history," *ibid.*, I think that we need not so limit ourselves in identifying the justification for the legislation at issue here, and may legitimately consider petitioners' assertion that the statute is applied to nude dancing because such dancing "encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity." Brief for Petitioners 37.

This asserted justification for the statute may not be ignored merely because it is unclear to what extent this purpose motivated the Indiana Legislature in enacting the statute. Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. Cf. *McGowan* v. *Maryland*, 366 U. S. 420

(1961). At least as to the regulation of expressive conduct,[1] "[w]e decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *O'Brien*, *supra*, at 384. In my view, the interest asserted by petitioners in preventing prostitution, sexual assault, and other criminal activity, although presumably not a justification for all applications of the statute, is sufficient under *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment at issue here.

At the outset, it is clear that the prevention of such evils falls within the constitutional power of the State, which satisfies the first *O'Brien* criterion. See 391 U. S., at 377. The second *O'Brien* prong asks whether the regulation "furthers an important or substantial governmental interest." *Ibid.* The asserted state interest is plainly a substantial one; the only question is whether prohibiting nude dancing of the sort at issue here "furthers" that interest. I believe that our cases have addressed this question sufficiently to establish that it does.

In *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), we upheld a city's zoning ordinance designed to prevent the occurrence of harmful secondary effects, including the crime associated with adult entertainment, by protecting approximately 95% of the city's area from the placement of motion picture theaters emphasizing "'matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" . . . for observation by patrons therein.'" *Id.*, at 44. Of particular importance to the present enquiry, we held that the city of Renton was not compelled to justify its restrictions by studies specifically relating to the problems

[1] Cf., *e. g.*, *Edwards* v. *Aguillard*, 482 U. S. 578 (1987) (striking down state statute on Establishment Clause grounds due to impermissible legislative intent).

that would be caused by adult theaters in that city. Rather, "Renton was entitled to rely on the experiences of Seattle and other cities," *id.*, at 51, which demonstrated the harmful secondary effects correlated with the presence "of even one [adult] theater in a given neighborhood." *Id.*, at 50; cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 71, n. 34 (1976) (legislative finding that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime"); *California* v. *LaRue*, 409 U. S. 109, 111 (1972) (administrative findings of criminal activity associated with adult entertainment).

The type of entertainment respondents seek to provide is plainly of the same character as that at issue in *Renton*, *American Mini Theatres*, and *LaRue*. It therefore is no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying "specified anatomical areas" at issue in *Renton*. Other reported cases from the Circuit in which this litigation arose confirm the conclusion. See, *e. g.*, *United States* v. *Marren*, 890 F. 2d 924, 926 (CA7 1989) (prostitution associated with nude dancing establishment); *United States* v. *Doerr*, 886 F. 2d 944, 949 (CA7 1989) (same). In light of *Renton*'s recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre's "bookstore" furthers its interest in preventing prostitution, sexual assault, and associated crimes. Given our recognition that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," *American Mini Theatres*, *supra*, at 70, I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every

case. The statute as applied to nudity of the sort at issue here therefore satisfies the second prong of *O'Brien*.[2]

The third *O'Brien* condition is that the governmental interest be "unrelated to the suppression of free expression," 391 U. S., at 377, and, on its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression. The dissent contends, however, that Indiana seeks to regulate nude dancing as its means of combating such secondary effects "because . . . creating or emphasizing [the] thoughts and ideas [expressed by nude dancing] in the minds of the spectators may lead to increased prostitution," *post*, at 592, and that regulation of expressive conduct because of the fear that the expression will prove persuasive is inherently related to the suppression of free expression. *Ibid.*

The major premise of the dissent's reasoning may be correct, but its minor premise describing the causal theory of Indiana's regulatory justification is not. To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation

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[2] Because there is no overbreadth challenge before us, we are not called upon to decide whether the application of the statute would be valid in other contexts. It is enough, then, to say that the secondary effects rationale on which I rely here would be open to question if the State were to seek to enforce the statute by barring expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986). It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of *Renton*-type adult entertainment was correlated with such secondary effects.

actually are. It is possible, for example, that the higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of crowds of men predisposed to such activities, or from the simple viewing of nude bodies regardless of whether those bodies are engaged in expression or not. In neither case would the chain of causation run through the persuasive effect of the expressive component of nude dancing.

Because the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, rather than from a relationship between the other evils and the expressive component of the dancing, the interest is unrelated to the suppression of free expression. *Renton* is again persuasive in support of this conclusion. In *Renton*, we held that an ordinance that regulated adult theaters because the presence of such theaters was correlated with secondary effects that the local government had an interest in regulating was content neutral (a determination similar to the "unrelated to the suppression of free expression" determination here, see *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 298, and n. 8 (1984)) because it was "*justified* without reference to the content of the regulated speech." 475 U. S., at 48 (emphasis in original). We reached this conclusion without need to decide whether the cause of the correlation might have been the persuasive effect of the adult films that were being regulated. Similarly here, the "secondary effects" justification means that enforcement of the Indiana statute against nude dancing is "justified without reference to the content of the regulated [expression]," *ibid.* (emphasis omitted), which is sufficient, at least in the context of sexually explicit expression,[3] to satisfy the third prong of the *O'Brien* test.

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[3] I reach this conclusion again mindful, as was the Court in *Renton*, that the protection of sexually explicit expression may be of lesser societal importance than the protection of other forms of expression. See *Renton*,

The fourth *O'Brien* condition, that the restriction be no greater than essential to further the governmental interest, requires little discussion. Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message. Nor, so far as we are told, is the dancer or her employer limited by anything short of obscenity laws from expressing an erotic message by articulate speech or representational means; a pornographic movie featuring one of respondents, for example, was playing nearby without any interference from the authorities at the time these cases arose.

Accordingly, I find *O'Brien* satisfied and concur in the judgment.

JUSTICE WHITE, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

The first question presented to us in this case is whether nonobscene nude dancing performed as entertainment is expressive conduct protected by the First Amendment. The Court of Appeals held that it is, observing that our prior decisions permit no other conclusion. Not surprisingly, then, the plurality now concedes that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment . . . ." *Ante*, at 566. This is no more than recognizing, as the Seventh Circuit observed, that dancing is an ancient art form and "inherently embodies the expression and communication of ideas and emotions." *Miller* v. *Civil City of South Bend*, 904 F. 2d 1081, 1087 (1990) (en banc).[1]

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supra, at 49, and n. 2, citing *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 70 (1976).

[1] JUSTICE SCALIA suggests that performance dancing is not inherently expressive activity, see *ante*, at 577, n. 4, but the Court of Appeals has the better view: "Dance has been defined as 'the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate

Having arrived at the conclusion that nude dancing performed as entertainment enjoys First Amendment protection, the plurality states that it must "determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the Indiana statute is an impermissible infringement of that protected activity." *Ante*, at 566. For guidance, the plurality turns to *United States* v. *O'Brien*, 391 U. S. 367 (1968), which held that expressive conduct could be narrowly regulated or forbidden in pursuit of an important or substantial governmental interest that is unrelated to the content of the expression. The plurality finds that the Indiana statute satisfies the *O'Brien* test in all respects.

The plurality acknowledges that it is impossible to discern the exact state interests which the Indiana Legislature had in mind when it enacted the Indiana statute, but the plurality nonetheless concludes that it is clear from the statute's text and history that the law's purpose is to protect "societal order and morality." *Ante*, at 568. The plurality goes on to

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a story, or simply to take delight in the movement itself.' 16 The New Encyclopedia Britannica 935 (1989). Inherently, it is the communication of emotion or ideas. At the root of all '[t]he varied manifestations of dancing . . . lies the common impulse to resort to movement to externalise states which we cannot externalise by rational means. This is basic dance.' Martin, J. *Introduction to the Dance* (1939). Aristotle recognized in *Poetics* that the purpose of dance is 'to represent men's character as well as what they do and suffer.' The raw communicative power of dance was noted by the French poet Stéphane Mallarmé who declared that the dancer 'writing with her body . . . *suggests* things which the written work could *express* only in several paragraphs of dialogue or descriptive prose.'" 904 F. 2d, at 1085–1086. JUSTICE SCALIA cites *Dallas* v. *Stanglin*, 490 U. S. 19 (1989), but that decision dealt with social dancing, not performance dancing; and the submission in that case, which we rejected, was not that social dancing was an expressive activity but that plaintiff's *associational* rights were violated by restricting admission to dance halls on the basis of age. The Justice also asserts that even if dancing is inherently expressive, nudity is not. The statement may be true, but it tells us nothing about dancing in the nude.

conclude that Indiana's statute "was enacted as *a general prohibition*," *ante*, at 568 (emphasis added), on people appearing in the nude among strangers in public places. The plurality then points to cases in which we upheld legislation based on the State's police power, and ultimately concludes that the Indiana statute "furthers a substantial government interest in protecting order and morality." *Ante*, at 569. The plurality also holds that the basis for banning nude dancing is unrelated to free expression and that it is narrowly drawn to serve the State's interest.

The plurality's analysis is erroneous in several respects. Both the plurality and JUSTICE SCALIA in his opinion concurring in the judgment overlook a fundamental and critical aspect of our cases upholding the States' exercise of their police powers. None of the cases they rely upon, including *O'Brien* and *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), involved anything less than truly *general* proscriptions on individual conduct. In *O'Brien*, for example, individuals were prohibited from destroying their draft cards at any time and in any place, even in completely private places such as the home. Likewise, in *Bowers*, the State prohibited sodomy, regardless of where the conduct might occur, including the home as was true in that case. The same is true of cases like *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), which, though not applicable here because it did not involve any claim that the peyote users were engaged in expressive activity, recognized that the State's interest in preventing the use of illegal drugs extends even into the home. By contrast, in this case Indiana does not suggest that its statute applies to, or could be applied to, nudity wherever it occurs, including the home. We do not understand the plurality or JUSTICE SCALIA to be suggesting that Indiana could constitutionally enact such an intrusive prohibition, nor do we think such a suggestion would be tenable in light of our decision in *Stanley* v. *Georgia*, 394 U. S. 557 (1969), in which we held that States could not punish the

mere possession of obscenity in the privacy of one's own home.

We are told by the attorney general of Indiana that, in *State* v. *Baysinger*, 272 Ind. 236, 397 N. E. 2d 580 (1979), the Indiana Supreme Court held that the statute at issue here cannot and does not prohibit nudity as a part of some larger form of expression meriting protection when the communication of ideas is involved. Brief for Petitioners 25, 30–31; Reply Brief for Petitioners 9–11. Petitioners also state that the evils sought to be avoided by applying the statute in this case would not obtain in the case of theatrical productions, such as "Salome" or "Hair." *Id.*, at 11–12. Neither is there any evidence that the State has attempted to apply the statute to nudity in performances such as plays, ballets, or operas. "No arrests have ever been made for nudity as part of a play or ballet." App. 19 (affidavit of Sgt. Timothy Corbett).

Thus, the Indiana statute is not a *general* prohibition of the type we have upheld in prior cases. As a result, the plurality and JUSTICE SCALIA's simple references to the State's general interest in promoting societal order and morality are not sufficient justification for a statute which concededly reaches a significant amount of protected expressive activity. Instead, in applying the *O'Brien* test, we are obligated to carefully examine the reasons the State has chosen to regulate this expressive conduct in a less than general statute. In other words, when the State enacts a law which draws a line between expressive conduct which is regulated and nonexpressive conduct of the same type which is not regulated, *O'Brien* places the burden on the State to justify the distinctions it has made. Closer inquiry as to the purpose of the statute is surely appropriate.

Legislators do not just randomly select certain conduct for proscription; they have reasons for doing so and those reasons illuminate the purpose of the law that is passed. Indeed, a law may have multiple purposes. The purpose of

forbidding people to appear nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theaters and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates. This is why *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984), is of no help to the State: "In *Clark* . . . the damage to the parks was the same whether the sleepers were camping out for fun, were in fact homeless, or wished by sleeping in the park to make a symbolic statement on behalf of the homeless." 904 F. 2d, at 1103 (Posner, J., concurring). That cannot be said in this case: The perceived damage to the public interest caused by appearing nude on the streets or in the parks, as I have said, is not what the State seeks to avoid in preventing nude dancing in theaters and taverns. There the perceived harm is the communicative aspect of the erotic dance. As the State now tells us, and as JUSTICE SOUTER agrees, the State's goal in applying what it describes as its "content neutral" statute to the nude dancing in this case is "deterrence of prostitution, sexual assaults, criminal activity, degradation of women, and other activities which break down family structure." Reply Brief for Petitioners 11. The attainment of these goals, however, depends on preventing an expressive activity.

The plurality nevertheless holds that the third requirement of the *O'Brien* test, that the governmental interest be unrelated to the suppression of free expression, is satisfied because in applying the statute to nude dancing, the State is not "proscribing nudity because of the erotic message conveyed by the dancers." *Ante*, at 570. The plurality suggests that this is so because the State does not ban dancing that sends an erotic message; it is only nude erotic dancing that is forbidden. The perceived evil is not erotic dancing but pub-

lic nudity, which may be prohibited despite any incidental impact on expressive activity. This analysis is transparently erroneous.

In arriving at its conclusion, the plurality concedes that nude dancing conveys an erotic message and concedes that the message would be muted if the dancers wore pasties and G-strings. Indeed, the emotional or erotic impact of the dance is intensified by the nudity of the performers. As Judge Posner argued in his thoughtful concurring opinion in the Court of Appeals, the nudity of the dancer is an integral part of the emotions and thoughts that a nude dancing performance evokes. 904 F. 2d, at 1090–1098. The sight of a fully clothed, or even a partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expressive component of the dance, not merely incidental "conduct." We have previously pointed out that "'[n]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Schad* v. *Mt. Ephraim*, 452 U. S. 61, 66 (1981).

This being the case, it cannot be that the statutory prohibition is unrelated to expressive conduct. Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication. The nudity element of nude dancing performances can-

not be neatly pigeonholed as mere "conduct" independent of any expressive component of the dance.[2]

That fact dictates the level of First Amendment protection to be accorded the performances at issue here. In *Texas* v. *Johnson*, 491 U. S. 397, 411–412 (1989), the Court observed: "Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct. . . .We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.' *Boos* v. *Barry*, 485 U. S. [312], 321 [(1988)]." Content based restrictions "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States* v. *Grace*, 461 U. S. 171, 177 (1983); *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989). Nothing could be clearer from our cases.

That the performances in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled doctrine. The Court's assessment of the artistic merits of nude dancing performances should not be the determining factor in deciding this case. In the words of Justice Harlan: "[I]t is largely because governmental officials cannot make principled deci-

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[2] JUSTICE SOUTER agrees with the plurality that the third requirement of the *O'Brien* test is satisfied, but only because he is not certain that there is a causal connection between the message conveyed by nude dancing and the evils which the State is seeking to prevent. See *ante*, at 585. JUSTICE SOUTER's analysis is at least as flawed as that of the plurality. If JUSTICE SOUTER is correct that there is no causal connection between the message conveyed by the nude dancing at issue here and the negative secondary effects that the State desires to regulate, the State does not have even a rational basis for its absolute prohibition on nude dancing that is admittedly expressive. Furthermore, if the real problem is the "concentration of crowds of men predisposed" to the designated evils, *ante*, at 586, then the First Amendment requires that the State address that problem in a fashion that does not include banning an entire category of expressive activity. See *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986).

sions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen* v. *California*, 403 U. S. 15, 25 (1971). "[W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who . . . wants some 'entertainment' with his beer or shot of rye." *Salem Inn, Inc.* v. *Frank*, 501 F. 2d 18, 21, n. 3 (CA2 1974), aff'd in part *sub nom. Doran* v. *Salem Inn, Inc.*, 422 U. S. 922 (1975).

The plurality and JUSTICE SOUTER do not go beyond saying that the state interests asserted here are important and substantial. But even if there were compelling interests, the Indiana statute is not narrowly drawn. If the State is genuinely concerned with prostitution and associated evils, as JUSTICE SOUTER seems to think, or the type of conduct that was occurring in *California* v. *LaRue*, 409 U. S. 109 (1972), it can adopt restrictions that do not interfere with the expressiveness of nonobscene nude dancing performances. For instance, the State could perhaps require that, while performing, nude performers remain at all times a certain minimum distance from spectators, that nude entertainment be limited to certain hours, or even that establishments providing such entertainment be dispersed throughout the city. Cf. *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986). Likewise, the State clearly has the authority to criminalize prostitution and obscene behavior. Banning an entire category of expressive activity, however, generally does not satisfy the narrow tailoring requirement of strict First Amendment scrutiny. See *Frisby* v. *Schultz*, 487 U. S. 474, 485 (1988). Furthermore, if nude dancing in barrooms, as compared with other establishments, is the most worrisome problem, the State could invoke its Twenty-first Amendment powers and impose appropriate regulation. *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714 (1981) *(per curiam); California* v. *LaRue*, *supra.*

As I see it, our cases require us to affirm absent a compelling state interest supporting the statute. Neither the plurality nor the State suggest that the statute could withstand scrutiny under that standard.

JUSTICE SCALIA's views are similar to those of the plurality and suffer from the same defects. The Justice asserts that a general law barring specified conduct does not implicate the First Amendment unless the purpose of the law is to suppress the expressive quality of the forbidden conduct, and that, absent such purpose, First Amendment protections are not triggered simply because the incidental effect of the law is to proscribe conduct that is unquestionably expressive. Cf. *Community for Creative Non-Violence* v. *Watt*, 227 U. S. App. D. C. 19, 703 F. 2d 586, 622–623 (1983) (Scalia, J., dissenting). The application of the Justice's proposition to this case is simple to state: The statute at issue is a general law banning nude appearances in public places, including barrooms and theaters. There is no showing that the purpose of this general law was to regulate expressive conduct; hence, the First Amendment is irrelevant and nude dancing in theaters and barrooms may be forbidden, irrespective of the expressiveness of the dancing.

As I have pointed out, however, the premise for the Justice's position—that the statute is a *general* law of the type our cases contemplate—is nonexistent in this case. Reference to JUSTICE SCALIA's own hypothetical makes this clear. We agree with JUSTICE SCALIA that the Indiana statute would not permit 60,000 consenting Hoosiers to expose themselves to each other in the Hoosier Dome. No one can doubt, however, that those same 60,000 Hoosiers would be perfectly free to drive to their respective homes all across Indiana and, once there, to parade around, cavort, and revel in the nude for hours in front of relatives and friends. It is difficult to see why the State's interest in morality is any less in that situation, especially if, as JUSTICE SCALIA seems to suggest, nudity is inherently evil, but clearly the statute does

not reach such activity. As we pointed out earlier, the State's failure to enact a truly general proscription requires closer scrutiny of the reasons for the distinctions the State has drawn. See *supra*, at 590.

As explained previously, the purpose of applying the law to the nude dancing performances in respondents' establishments is to prevent their customers from being exposed to the distinctive communicative aspects of nude dancing. That being the case, JUSTICE SCALIA's observation is fully applicable here: "Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional." *Ante*, at 577.

The *O'Brien* decision does not help JUSTICE SCALIA. Indeed, his position, like the plurality's, would eviscerate the *O'Brien* test. *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), is likewise not on point. The Indiana law, as applied to nude dancing, targets the expressive activity itself; in Indiana nudity in a dancing performance is a crime because of the message such dancing communicates. In *Smith*, the use of drugs was not criminal because the use was part of or occurred within the course of an otherwise protected religious ceremony, but because a general law made it so and was supported by the same interests in the religious context as in others.

Accordingly, I would affirm the judgment of the Court of Appeals, and dissent from this Court's judgment.

Syllabus

CITIZENS UNITED *v.* FEDERAL ELECTION COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 08–205. Argued March 24, 2009—Reargued September 9, 2009—Decided January 21, 2010

As amended by § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an "electioneering communication" or for speech that expressly advocates the election or defeat of a candidate. 2 U. S. C. § 441b. An electioneering communication is "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary election, § 434(f)(3)(A), and that is "publicly distributed," 11 CFR § 100.29(a)(2), which in "the case of a candidate for nomination for President . . . means" that the communication "[c]an be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days," § 100.29(b)(3)(ii). Corporations and unions may establish a political action committee (PAC) for express advocacy or electioneering communications purposes. 2 U. S. C. § 441b(b)(2). In *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 203–209, this Court upheld limits on electioneering communications in a facial challenge, relying on the holding in *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, that political speech may be banned based on the speaker's corporate identity.

In January 2008, appellant Citizens United, a nonprofit corporation, released a documentary (hereinafter *Hillary*) critical of then-Senator Hillary Clinton, a candidate for her party's Presidential nomination. Anticipating that it would make *Hillary* available on cable television through video-on-demand within 30 days of primary elections, Citizens United produced television ads to run on broadcast and cable television. Concerned about possible civil and criminal penalties for violating § 441b, it sought declaratory and injunctive relief, arguing that (1) § 441b is unconstitutional as applied to *Hillary;* and (2) BCRA's disclaimer, disclosure, and reporting requirements, BCRA §§ 201 and 311, were unconstitutional as applied to *Hillary* and the ads. The District Court denied Citizens United a preliminary injunction and granted appellee Federal Election Commission (FEC) summary judgment.

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Held:

1. Because the question whether § 441b applies to *Hillary* cannot be resolved on other, narrower grounds without chilling political speech, this Court must consider the continuing effect of the speech suppression upheld in *Austin*. Pp. 322–336.

(a) Citizens United's narrower arguments—that *Hillary* is not an "electioneering communication" covered by § 441b because it is not "publicly distributed" under 11 CFR § 100.29(a)(2); that § 441b may not be applied to *Hillary* under *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449 *(WRTL)*, which found § 441b unconstitutional as applied to speech that was not "express advocacy or its functional equivalent," *id.*, at 481 (opinion of ROBERTS, C. J.), determining that a communication "is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *id.*, at 469–470; that § 441b should be invalidated as applied to movies shown through video-on-demand because this delivery system has a lower risk of distorting the political process than do television ads; and that there should be an exception to § 441b's ban for nonprofit corporate political speech funded overwhelmingly by individuals—are not sustainable under a fair reading of the statute. Pp. 322–329.

(b) Thus, this case cannot be resolved on a narrower ground without chilling political speech, speech that is central to the First Amendment's meaning and purpose. Citizens United did not waive this challenge to *Austin* when it stipulated to dismissing the facial challenge below, since (1) even if such a challenge could be waived, this Court may reconsider *Austin* and § 441b's facial validity here because the District Court "passed upon" the issue, *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 379; (2) throughout the litigation, Citizens United has asserted a claim that the FEC has violated its right to free speech; and (3) the parties cannot enter into a stipulation that prevents the Court from considering remedies necessary to resolve a claim that has been preserved. Because Citizens United's narrower arguments are not sustainable, this Court must, in an exercise of its judicial responsibility, consider § 441b's facial validity. Any other course would prolong the substantial, nationwide chilling effect caused by § 441b's corporate expenditure ban. This conclusion is further supported by the following: (1) the uncertainty caused by the Government's litigating position; (2) substantial time would be required to clarify § 441b's application on the points raised by the Government's position in order to avoid any chilling effect caused by an improper interpretation; and (3) because speech itself is of primary importance to the integrity of the election process, any speech arguably within the reach of rules created for regu-

lating political speech is chilled. The regulatory scheme at issue may not be a prior restraint in the strict sense. However, given its complexity and the deference courts show to administrative determinations, a speaker wishing to avoid criminal liability threats and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. The restrictions thus function as the equivalent of a prior restraint, giving the FEC power analogous to the type of government practices that the First Amendment was drawn to prohibit. The ongoing chill on speech makes it necessary to invoke the earlier precedents that a statute that chills speech can and must be invalidated where its facial invalidity has been demonstrated. Pp. 329–336.

2. *Austin* is overruled, and thus provides no basis for allowing the Government to limit corporate independent expenditures. Hence, § 441b's restrictions on such expenditures are invalid and cannot be applied to *Hillary*. Given this conclusion, the part of *McConnell* that upheld BCRA § 203's extension of § 441b's restrictions on independent corporate expenditures is also overruled. Pp. 336–366.

(a) Although the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech," § 441b's prohibition on corporate independent expenditures is an outright ban on speech, backed by criminal sanctions. It is a ban notwithstanding the fact that a PAC created by a corporation can still speak, for a PAC is a separate association from the corporation. Because speech is an essential mechanism of democracy—it is the means to hold officials accountable to the people—political speech must prevail against laws that would suppress it by design or inadvertence. Laws burdening such speech are subject to strict scrutiny, which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL, supra*, at 464. This language provides a sufficient framework for protecting the interests in this case. Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints or to distinguish among different speakers, which may be a means to control content. The Government may also commit a constitutional wrong when by law it identifies certain preferred speakers. There is no basis for the proposition that, in the political speech context, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead to this conclusion. Pp. 336–341.

(b) The Court has recognized that the First Amendment applies to corporations, *e. g.*, *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 778, n. 14, and extended this protection to the context of political speech, see, *e. g.*, *NAACP* v. *Button*, 371 U. S. 415, 428–429. Addressing challenges to the Federal Election Campaign Act of 1971, the Court in *Buck-*

ley v. *Valeo*, 424 U. S. 1 *(per curiam)*, upheld limits on direct contributions to candidates, 18 U. S. C. §608(b), recognizing a governmental interest in preventing *quid pro quo* corruption. 424 U. S., at 25–26. However, the Court invalidated §608(e)'s expenditure ban, which applied to individuals, corporations, and unions, because it "fail[ed] to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," *id.*, at 47–48. While *Buckley* did not consider a separate ban on corporate and union independent expenditures found in §610, had that provision been challenged in *Buckley*'s wake, it could not have been squared with the precedent's reasoning and analysis. The *Buckley* Court did not invoke the overbreadth doctrine to suggest that §608(e)'s expenditure ban would have been constitutional had it applied to corporations and unions but not individuals. Notwithstanding this precedent, Congress soon recodified §610's corporate and union expenditure ban at 2 U. S. C. §441b, the provision at issue. Less than two years after *Buckley*, *Bellotti* reaffirmed the First Amendment principle that the Government lacks the power to restrict political speech based on the speaker's corporate identity. 435 U. S., at 784–785. Thus the law stood until *Austin* upheld a corporate independent expenditure restriction, bypassing *Buckley* and *Bellotti* by recognizing a new governmental interest in preventing "the corrosive and distorting effects of immense aggregations of [corporate] wealth . . . that have little or no correlation to the public's support for the corporation's political ideas." 494 U. S., at 660. Pp. 342–348.

(c) This Court is confronted with conflicting lines of precedent: a pre-*Austin* line forbidding speech restrictions based on the speaker's corporate identity and a post-*Austin* line permitting them. Neither *Austin*'s antidistortion rationale nor the Government's other justifications support §441b's restrictions. Pp. 348–362.

(1) The First Amendment prohibits Congress from fining or jailing citizens, or associations of citizens, for engaging in political speech, but *Austin*'s antidistortion rationale would permit the Government to ban political speech because the speaker is an association with a corporate form. Political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation." *Bellotti*, *supra*, at 777 (footnote omitted). This protection is inconsistent with *Austin*'s rationale, which is meant to prevent corporations from obtaining "'an unfair advantage in the political marketplace'" by using "'resources amassed in the economic marketplace.'" 494 U. S., at 659. First Amendment protections do not depend on the speaker's "financial ability to engage in public discussion." *Buckley*, *supra*, at 49. These conclusions were reaffirmed when the Court invalidated a BCRA provision that increased the cap on contributions to one candidate if the opponent made certain expenditures from personal funds. *Davis* v.

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Federal Election Comm'n, 554 U. S. 724, 742. Distinguishing wealthy individuals from corporations based on the latter's special advantages of, *e. g.*, limited liability, does not suffice to allow laws prohibiting speech. It is irrelevant for First Amendment purposes that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." *Austin*, *supra*, at 660. All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech. Under the antidistortion rationale, Congress could also ban political speech of media corporations. Although currently exempt from § 441b, they accumulate wealth with the help of their corporate form, may have aggregations of wealth, and may express views "hav-[ing] little or no correlation to the public's support" for those views. Differential treatment of media corporations and other corporations cannot be squared with the First Amendment, and there is no support for the view that the Amendment's original meaning would permit suppressing media corporations' political speech. *Austin* interferes with the "open marketplace" of ideas protected by the First Amendment. *New York State Bd. of Elections* v. *Lopez Torres*, 552 U. S. 196, 208. Its censorship is vast in its reach, suppressing the speech of both for-profit and nonprofit, both small and large, corporations. Pp. 349–356.

(2) This reasoning also shows the invalidity of the Government's other arguments. It reasons that corporate political speech can be banned to prevent corruption or its appearance. The *Buckley* Court found this rationale "sufficiently important" to allow contribution limits but refused to extend that reasoning to expenditure limits, 424 U. S., at 25, and the Court does not do so here. While a single *Bellotti* footnote purported to leave the question open, 435 U. S., at 788, n. 26, this Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy. *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, distinguished. Pp. 356–361.

(3) The Government's asserted interest in protecting shareholders from being compelled to fund corporate speech, like the antidistortion rationale, would allow the Government to ban political speech even of media corporations. The statute is underinclusive; it only protects a dissenting shareholder's interests in certain media for 30 or 60 days before an election when such interests would be implicated in any media at any time. It is also overinclusive because it covers all corporations, including those with one shareholder. Pp. 361–362.

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(4) Because § 441b is not limited to corporations or associations created in foreign countries or funded predominantly by foreign shareholders, it would be overbroad even if the Court were to recognize a compelling governmental interest in limiting foreign influence over the Nation's political process. P. 362.

(d) The relevant factors in deciding whether to adhere to *stare decisis*, beyond workability—the precedent's antiquity, the reliance interests at stake, and whether the decision was well reasoned—counsel in favor of abandoning *Austin*, which itself contravened the precedents of *Buckley* and *Bellotti*. As already explained, *Austin* was not well reasoned. It is also undermined by experience since its announcement. Political speech is so ingrained in this country's culture that speakers find ways around campaign finance laws. Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. In addition, no serious reliance issues are at stake. Thus, due consideration leads to the conclusion that *Austin* should be overruled. The Court returns to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech based on the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations. Pp. 362–366.

3. BCRA §§ 201 and 311 are valid as applied to the ads for *Hillary* and to the movie itself. Pp. 366–372.

(a) Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," *Buckley, supra*, at 64, or "'"prevent anyone from speaking,"'" *McConnell*, 540 U. S., at 201. The *Buckley* Court explained that disclosure can be justified by a governmental interest in providing "the electorate with information" about election-related spending sources. 424 U. S., at 66. The *McConnell* Court applied this interest in rejecting facial challenges to §§ 201 and 311. 540 U. S., at 196. However, the Court acknowledged that as-applied challenges would be available if a group could show a "'reasonable probability'" that disclosing its contributors' names would "'subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Id.*, at 198. Pp. 366–367.

(b) The disclaimer and disclosure requirements are valid as applied to Citizens United's ads. They fall within BCRA's "electioneering communication" definition: They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy. Section 311 disclaimers provide information to the electorate, *McConnell, supra*, at 196, and "insure that the voters are fully informed" about who is speaking, *Buckley, supra*, at 76. At the very

least, they avoid confusion by making clear that the ads are not funded by a candidate or political party. Citizens United's arguments that §311 is underinclusive because it requires disclaimers for broadcast advertisements but not for print or Internet advertising and that §311 decreases the quantity and effectiveness of the group's speech were rejected in *McConnell*. This Court also rejects their contention that §201's disclosure requirements must be confined to speech that is the functional equivalent of express advocacy under *WRTL*'s test for restrictions on independent expenditures, 551 U. S., at 469–476 (opinion of ROBERTS, C. J.). Disclosure is the less restrictive alternative to more comprehensive speech regulations. Such requirements have been upheld in *Buckley* and *McConnell*. Citizens United's argument that no informational interest justifies applying §201 to its ads is similar to the argument this Court rejected with regard to disclaimers. Citizens United finally claims that disclosure requirements can chill donations by exposing donors to retaliation, but offers no evidence that its members face the type of threats, harassment, or reprisals that might make §201 unconstitutional as applied. Pp. 367–371.

(c) For these same reasons, this Court affirms the application of the §§201 and 311 disclaimer and disclosure requirements to *Hillary*. Pp. 371–372.

Reversed in part, affirmed in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA and ALITO, JJ., joined, in which THOMAS, J., joined as to all but Part IV, and in which STEVENS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined as to Part IV. ROBERTS, C. J., filed a concurring opinion, in which ALITO, J., joined, *post*, p. 372. SCALIA, J., filed a concurring opinion, in which ALITO, J., joined, and in which THOMAS, J., joined in part, *post*, p. 385. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 393. THOMAS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 480.

Theodore B. Olson argued and reargued the cause for appellant. With him on the briefs were *Matthew D. McGill*, *Amir C. Tayrani*, and *Michael Boos*.

Floyd Abrams argued the cause for Senator Mitch McConnell as *amicus curiae*. With him on the brief was *Susan Buckley*.

Solicitor General Kagan reargued the cause for appellee. *Deputy Solicitor General Stewart* argued the cause for ap-

pellee on the original argument. With them on the briefs were then-*Acting Solicitor General Kneedler, William M. Jay, Thomasenia P. Duncan, David Kolker, Kevin Deeley,* and *Adav Noti.*

Seth P. Waxman argued the cause for Senator John McCain et al. as *amici curiae* urging affirmance. With him on the briefs were *Randolph D. Moss, Roger M. Witten, Scott L. Nelson, Alan B. Morrison, Brian Wolfman, Trevor Potter, J. Gerald Hebert, Paul S. Ryan, Tara Malloy, Fred Wertheimer,* and *Donald J. Simon.**

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*Briefs of *amici curiae* urging reversal were filed for the Alliance Defense Fund by *Benjamin W. Bull, Erik W. Stanley,* and *Robert J. McCully;* for the American Civil Rights Union by *Peter Ferrara;* for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt* and *Laurence E. Gold;* for the Cato Institute by *Benjamin D. Wood, Glenn M. Willard, William J. McGinley,* and *Ilya Shapiro;* for the Center for Competitive Politics by *Stephen M. Hoersting* and *Reid Alan Cox;* for the Chamber of Commerce of the United States of America by *Jan Witold Baran, Thomas W. Kirby, Caleb P. Burns, Robin S. Conrad, Amar D. Sarwal, Steven J. Law,* and *Judith K. Richmond;* for the Committee for Truth in Politics, Inc., by *James Bopp, Jr.,* and *Richard E. Coleson;* for the Foundation for Free Expression by *Deborah J. Dewart* and *James L. Hirsen;* for the National Rifle Association by *Charles J. Cooper, David H. Thompson,* and *David Lehn;* for the Reporters Committee for Freedom of the Press by *Lucy A. Dalglish* and *Gregg P. Leslie;* and for the Wyoming Liberty Group et al. by *Benjamin Barr.*

Briefs of *amici curiae* urging affirmance were filed for the American Independent Business Alliance by *Brenda Wright, Lisa J. Danetz,* and *Daniel J. H. Greenwood;* for the Campaign Legal Center et al. by *Messrs. Potter* and *Hebert, Ms. Malloy,* and *Messrs. Ryan, Simon,* and *Wertheimer;* for the Center for Political Accountability et al. by *Karl J. Sandstrom;* for the League of Women Voters of the United States et al. by *Douglas T. Kendall, Elizabeth B. Wydra, David H. Gans,* and *Lloyd J. Leonard;* for the Program on Corporations, Law and Democracy et al. by *Jeffrey D. Clements;* for the Sunlight Foundation et al. by *Gary S. Stein;* and for Norman Ornstein et al. by *H. Christopher Bartolomucci.*

Briefs of *amici curiae* were filed for the State of Montana et al. by *Steve Bullock,* Attorney General of Montana, and *Anthony Johnstone,* Solicitor, by *Terry Goddard,* Attorney General of Arizona, *Mary R. O'Grady,* Solicitor General, and *Orville B. Fitch II,* Acting Attorney General of New

JUSTICE KENNEDY delivered the opinion of the Court.

Federal law prohibits corporations and unions from using their general treasury funds to make independent expendi-

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Hampshire, and by the Attorneys General for their respective States as follows: *Richard Blumenthal* of Connecticut, *Bill McCollum* of Florida, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Steve Six* of Kansas, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Michael A. Cox* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Anne Milgram* of New Jersey, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Richard Cordray* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Patrick C. Lynch* of Rhode Island, *Lawrence E. Long* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *William H. Sorrell* of Vermont, and *Darrell V. McGraw, Jr.*, of West Virginia; for the American Civil Liberties Union by *Steven R. Shapiro, Joel M. Gora,* and *Mark J. Lopez;* for the American Justice Partnership et al. by *Cleta Mitchell* and *Michael J. Lockerby;* for the California Broadcasters Association et al. by *Lawrence H. Norton, James A. Kahl,* and *Gregg P. Skall;* for the California First Amendment Coalition by *Gary L. Bostwick* and *Jean-Paul Jassy;* for Campaign Finance Scholars by *Allison R. Hayward, pro se;* for the Center for Constitutional Jurisprudence by *Anthony T. Caso, Edwin Meese III,* and *John C. Eastman;* for the Center for Independent Media et al. by *Monica Youn;* for the Center for Political Accountability et al. by *Mr. Sandstrom;* for the Committee for Economic Development by *Paul M. Smith;* for the Democratic National Committee by *Robert F. Bauer* and *David J. Burman;* for the Fidelis Center for Law and Policy et al. by *Patrick T. Gillen;* for Former Officials of the American Civil Liberties Union by *Norman Dorsen* and *Burt Neuborne,* both *pro se;* for the Free Speech Defense and Education Fund, Inc., et al. by *William J. Olson, Herbert W. Titus, John S. Miles,* and *Mark B. Weinberg;* for the Hachette Book Group, Inc., et al. by *Michael J. Chepiga;* for the Independent Sector by *M. Devereux Chatillon;* for the Institute for Justice by *William R. Maurer, William H. Mellor, Steven M. Simpson,* and *Robert W. Gall;* for Judicial Watch, Inc., by *Paul J. Orfanedes* and *Dale L. Wilcox;* for Justice at Stake et al. by *James E. Scarboro;* for the Michigan Chamber of Commerce by *Richard D. McLellan, Gary P. Gordon, John D. Pirich,* and *Andrea L. Hansen;* for the Pacific Legal Foundation by *Deborah J. La Fetra* and *Damien M. Schiff;* for Public Good by *Seth E. Mermin;* for Seven Former Chairmen of the Federal Election Commission et al. by *Messrs. Bopp* and *Coleson;* and for Representative Chris Van Hollen et al. by *Bradley S. Phillips* and *Aaron S. Lowenstein.*

tures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. 2 U. S. C. § 441b. Limits on electioneering communications were upheld in *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 203–209 (2003). The holding of *McConnell* rested to a large extent on an earlier case, *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990). *Austin* had held that political speech may be banned based on the speaker's corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that "*Austin* was a significant departure from ancient First Amendment principles," *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, 490 (2007) *(WRTL)* (SCALIA, J., concurring in part and concurring in judgment). We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. We turn to the case now before us.

I

A

Citizens United is a nonprofit corporation. It brought this action in the United States District Court for the District of Columbia. A three-judge court later convened to hear the cause. The resulting judgment gives rise to this appeal.

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

In January 2008, Citizens United released a film entitled *Hillary: The Movie*. We refer to the film as *Hillary*. It is a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Hillary* mentions Senator

Clinton by name and depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton. *Hillary* was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available through video-on-demand.

Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program. In December 2007, a cable company offered, for a payment of $1.2 million, to make *Hillary* available on a video-on-demand channel called "Elections '08." App. 255a–257a. Some video-on-demand services require viewers to pay a small fee to view a selected program, but here the proposal was to make *Hillary* available to viewers free of charge.

To implement the proposal, Citizens United was prepared to pay for the video-on-demand; and to promote the film, it produced two 10-second ads and one 30-second ad for *Hillary*. Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie's Web site address. *Id.*, at 26a–27a. Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.

B

Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited—and still does prohibit—corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. 2 U. S. C. §441b (2000 ed.); see *McConnell, supra,* at 204, and n. 87; *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 249 (1986) *(MCFL)*. BCRA §203 amended

§441b to prohibit any "electioneering communication" as well. 2 U. S. C. §441b(b)(2) (2006 ed.). An electioneering communication is defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election. §434(f)(3)(A). The Federal Election Commission's (FEC) regulations further define an electioneering communication as a communication that is "publicly distributed." 11 CFR §100.29(a)(2) (2009). "In the case of a candidate for nomination for President . . . *publicly distributed* means" that the communication "[c]an be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days." §100.29(b)(3)(ii)(A). Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a "separate segregated fund" (known as a political action committee, or PAC) for these purposes. 2 U. S. C. §441b(b)(2). The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union. *Ibid.*

C

Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by §441b's ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties under §437g. In December 2007, Citizens United sought declaratory and injunctive relief against the FEC. It argued that (1) §441b is unconstitutional as applied to *Hillary;* and (2) BCRA's disclaimer and disclosure requirements, BCRA §§201 and 311, 116 Stat. 88, 105, are unconstitutional as applied to *Hillary* and to the three ads for the movie.

The District Court denied Citizens United's motion for a preliminary injunction, 530 F. Supp. 2d 274 (DC 2008) *(per curiam)*, and then granted the FEC's motion for summary judgment, App. 261a–262a. See *id.*, at 261a ("Based on the reasoning of our prior opinion, we find that the [FEC] is entitled to judgment as a matter of law. *See Citizen[s] United v. FEC*, 530 F. Supp. 2d 274 (D. D. C. 2008) (denying Citizens United's request for a preliminary injunction)"). The court held that § 441b was facially constitutional under *McConnell*, and that § 441b was constitutional as applied to *Hillary* because it was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." 530 F. Supp. 2d, at 279. The court also rejected Citizens United's challenge to BCRA's disclaimer and disclosure requirements. It noted that "the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment." *Id.*, at 281.

We noted probable jurisdiction. 555 U. S. 1028 (2008). The case was reargued in this Court after the Court asked the parties to file supplemental briefs addressing whether we should overrule either or both *Austin* and the part of *McConnell* which addresses the facial validity of 2 U. S. C. § 441b. See 557 U. S. 932 (2009).

II

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

A

Citizens United contends that § 441b does not cover *Hillary*, as a matter of statutory interpretation, because the film

does not qualify as an "electioneering communication." § 441b(b)(2). Citizens United raises this issue for the first time before us, but we consider the issue because "it was addressed by the court below." *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 379 (1995); see 530 F. Supp. 2d, at 277, n. 6. Under the definition of electioneering communication, the video-on-demand showing of *Hillary* on cable television would have been a "cable . . . communication" that "refer[red] to a clearly identified candidate for Federal office" and that was made within 30 days of a primary election. 2 U. S. C. § 434(f)(3)(A)(i). Citizens United, however, argues that *Hillary* was not "publicly distributed," because a single video-on-demand transmission is sent only to a requesting cable converter box and each separate transmission, in most instances, will be seen by just one household—not 50,000 or more persons. 11 CFR § 100.29(a)(2); see § 100.29(b)(3)(ii).

This argument ignores the regulation's instruction on how to determine whether a cable transmission "[c]an be received by 50,000 or more persons." § 100.29(b)(3)(ii). The regulation provides that the number of people who can receive a cable transmission is determined by the number of cable subscribers in the relevant area. §§ 100.29(b)(7)(i)(G), (ii). Here, Citizens United wanted to use a cable video-on-demand system that had 34.5 million subscribers nationwide. App. 256a. Thus, *Hillary* could have been received by 50,000 persons or more.

One *amici* brief asks us, alternatively, to construe the condition that the communication "[c]an be received by 50,000 or more persons," § 100.29(b)(3)(ii)(A), to require "a plausible likelihood that the communication will be viewed by 50,000 or more potential voters"—as opposed to requiring only that the communication is "technologically capable" of being seen by that many people, Brief for Former Officials of the American Civil Liberties Union 5. Whether the population and demographic statistics in a proposed viewing area consisted

of 50,000 registered voters—but not "infants, pre-teens, or otherwise electorally ineligible recipients"—would be a required determination, subject to judicial challenge and review, in any case where the issue was in doubt. *Id.*, at 6.

In our view the statute cannot be saved by limiting the reach of 2 U. S. C. § 441b through this suggested interpretation. In addition to the costs and burdens of litigation, this result would require a calculation as to the number of people a particular communication is likely to reach, with an inaccurate estimate potentially subjecting the speaker to criminal sanctions. The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application." *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926). The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation. We must reject the approach suggested by the *amici.* Section 441b covers *Hillary.*

B

Citizens United next argues that § 441b may not be applied to *Hillary* under the approach taken in *WRTL.* *McConnell* decided that § 441b(b)(2)'s definition of an "electioneering communication" was facially constitutional insofar as it restricted speech that was "the functional equivalent of express advocacy" for or against a specific candidate. 540 U. S., at 206. *WRTL* then found an unconstitutional application of § 441b where the speech was not "express advocacy or its functional equivalent." 551 U. S., at 481 (opinion of ROBERTS, C. J.). As explained by THE CHIEF JUSTICE's controlling opinion in *WRTL,* the functional-equivalent test is objective: "[A] court should find that [a communication] is

the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.*, at 469–470.

Under this test, *Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency. The narrative may contain more suggestions and arguments than facts, but there is little doubt that the thesis of the film is that she is unfit for the Presidency. The movie concentrates on alleged wrongdoing during the Clinton administration, Senator Clinton's qualifications and fitness for office, and policies the commentators predict she would pursue if elected President. It calls Senator Clinton "Machiavellian," App. 64a, and asks whether she is "the most qualified to hit the ground running if elected President," *id.*, at 88a. The narrator reminds viewers that "Americans have never been keen on dynasties" and that "a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House," *id.*, at 143a–144a.

Citizens United argues that *Hillary* is just "a documentary film that examines certain historical events." Brief for Appellant 35. We disagree. The movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for President. The narrator begins by asking "could [Senator Clinton] become the first female President in the history of the United States?" App. 35a. And the narrator reiterates the movie's message in his closing line: "Finally, before America decides on our next president, voters should need no reminders of . . . what's at stake—the well being and prosperity of our nation." *Id.*, at 144a–145a.

As the District Court found, there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy.

C

Citizens United further contends that § 441b should be invalidated as applied to movies shown through video-on-demand, arguing that this delivery system has a lower risk of distorting the political process than do television ads. Cf. *McConnell, supra,* at 207. On what we might call conventional television, advertising spots reach viewers who have chosen a channel or a program for reasons unrelated to the advertising. With video-on-demand, by contrast, the viewer selects a program after taking "a series of affirmative steps": subscribing to cable; navigating through various menus; and selecting the program. See *Reno* v. *American Civil Liberties Union,* 521 U. S. 844, 867 (1997).

While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux. See *Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 639 (1994).

Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. It must be noted, moreover, that this undertaking would require substantial litigation over an extended time, all to interpret a

law that beyond doubt discloses serious First Amendment flaws. The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable. First Amendment standards, however, "must give the benefit of any doubt to protecting rather than stifling speech." *WRTL*, 551 U. S., at 469 (opinion of ROBERTS, C. J.) (citing *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269–270 (1964)).

D

Citizens United also asks us to carve out an exception to § 441b's expenditure ban for nonprofit corporate political speech funded overwhelmingly by individuals. As an alternative to reconsidering *Austin*, the Government also seems to prefer this approach. This line of analysis, however, would be unavailing.

In *MCFL*, the Court found unconstitutional § 441b's restrictions on corporate expenditures as applied to nonprofit corporations that were formed for the sole purpose of promoting political ideas, did not engage in business activities, and did not accept contributions from for-profit corporations or labor unions. 479 U. S., at 263–264; see also 11 CFR § 114.10. BCRA's so-called Wellstone Amendment applied § 441b's expenditure ban to all nonprofit corporations. See 2 U. S. C. § 441b(c)(6); *McConnell*, 540 U. S., at 209. *McConnell* then interpreted the Wellstone Amendment to retain the *MCFL* exemption to § 441b's expenditure prohibition. 540 U. S., at 211. Citizens United does not qualify for the *MCFL* exemption, however, since some funds used to make the movie were donations from for-profit corporations.

The Government suggests we could find BCRA's Wellstone Amendment unconstitutional, sever it from the statute, and hold that Citizens United's speech is exempt from § 441b's ban under BCRA's Snowe-Jeffords Amendment, § 441b(c)(2). See Tr. of Oral Arg. 37–38 (Sept. 9, 2009). The Snowe-Jeffords Amendment operates as a backup provision that

only takes effect if the Wellstone Amendment is invalidated. See *McConnell, supra,* at 339 (KENNEDY, J., concurring in judgment in part and dissenting in part). The Snowe-Jeffords Amendment would exempt from § 441b's expenditure ban the political speech of certain nonprofit corporations if the speech were funded "exclusively" by individual donors and the funds were maintained in a segregated account. § 441b(c)(2). Citizens United would not qualify for the Snowe-Jeffords exemption, under its terms as written, because *Hillary* was funded in part with donations from for-profit corporations.

Consequently, to hold for Citizens United on this argument, the Court would be required to revise the text of *MCFL*, sever BCRA's Wellstone Amendment, § 441b(c)(6), and ignore the plain text of BCRA's Snowe-Jeffords Amendment, § 441b(c)(2). If the Court decided to create a *de minimis* exception to *MCFL* or the Snowe-Jeffords Amendment, the result would be to allow for-profit corporate general treasury funds to be spent for independent expenditures that support candidates. There is no principled basis for doing this without rewriting *Austin*'s holding that the Government can restrict corporate independent expenditures for political speech.

Though it is true that the Court should construe statutes as necessary to avoid constitutional questions, the series of steps suggested would be difficult to take in view of the language of the statute. In addition to those difficulties the Government's suggestion is troubling for still another reason. The Government does not say that it agrees with the interpretation it wants us to consider. See Supp. Brief for Appellee 3, n. 1 ("Some courts" have implied a *de minimis* exception, and "appellant would appear to be covered by these decisions"). Presumably it would find textual difficulties in this approach too. The Government, like any party, can make arguments in the alternative; but it ought to say if there is merit to an alternative proposal instead of

merely suggesting it. This is especially true in the context of the First Amendment. As the Government stated, this case "would require a remand" to apply a *de minimis* standard. Tr. of Oral Arg. 39 (Sept. 9, 2009). Applying this standard would thus require case-by-case determinations. But archetypical political speech would be chilled in the meantime. "'First Amendment freedoms need breathing space to survive.'" *WRTL*, *supra*, at 468–469 (opinion of ROBERTS, C. J.) (quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963)). We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject.

E

As the foregoing analysis confirms, the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment. See *Morse* v. *Frederick*, 551 U. S. 393, 403 (2007). It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling. Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin*.

Citizens United stipulated to dismissing count 5 of its complaint, which raised a facial challenge to § 441b, even though count 3 raised an as-applied challenge. See App. 23a (count 3: "As applied to *Hillary*, [§ 441b] is unconstitutional under the First Amendment guarantees of free expression and association"). The Government argues that Citizens United waived its challenge to *Austin* by dismissing count 5. We disagree.

First, even if a party could somehow waive a facial challenge while preserving an as-applied challenge, that would not prevent the Court from reconsidering *Austin* or addressing the facial validity of § 441b in this case. "Our practice 'permit[s] review of an issue not pressed [below] so long as it has been passed upon . . . .'" *Lebron,* 513 U. S., at 379 (quoting *United States* v. *Williams,* 504 U. S. 36, 41 (1992); first alteration in original). And here, the District Court addressed Citizens United's facial challenge. See 530 F. Supp. 2d, at 278 ("Citizens wants us to enjoin the operation of BCRA § 203 as a facially unconstitutional burden on the First Amendment right to freedom of speech"). In rejecting the claim, it noted that it "would have to overrule *McConnell*" for Citizens United to prevail on its facial challenge and that "[o]nly the Supreme Court may overrule its decisions." *Ibid.* (citing *Rodriguez de Quijas* v. *Shearson/American Express, Inc.,* 490 U. S. 477, 484 (1989)). The District Court did not provide much analysis regarding the facial challenge because it could not ignore the controlling Supreme Court decisions in *Austin* and *McConnell.* Even so, the District Court did "'pas[s] upon'" the issue. *Lebron, supra,* at 379. Furthermore, the District Court's later opinion, which granted the FEC summary judgment, was "[b]ased on the reasoning of [its] prior opinion," which included the discussion of the facial challenge. App. 261a (citing 530 F. Supp. 2d 274). After the District Court addressed the facial validity of the statute, Citizens United raised its challenge to *Austin* in this Court. See Brief for Appellant 30 ("*Austin* was wrongly decided and should be overruled"); *id.,* at 30–32. In these circumstances, it is necessary to consider Citizens United's challenge to *Austin* and the facial validity of § 441b's expenditure ban.

Second, throughout the litigation, Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech. All concede that this claim is properly before us. And "'[o]nce a federal claim is properly

presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron, supra,* at 379 (quoting *Yee* v. *Escondido,* 503 U. S. 519, 534 (1992); alteration in original). Citizens United's argument that *Austin* should be overruled is "not a new claim." *Lebron,* 513 U. S., at 379. Rather, it is—at most—"a new argument to support what has been [a] consistent claim: that [the FEC] did not accord [Citizens United] the rights it was obliged to provide by the First Amendment." *Ibid.*

Third, the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint. See *United States* v. *Treasury Employees,* 513 U. S. 454, 477–478 (1995) (contrasting "a facial challenge" with "a narrower remedy"). The parties cannot enter into a stipulation that prevents the Court from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved. Citizens United has preserved its First Amendment challenge to § 441b as applied to the facts of its case; and given all the circumstances, we cannot easily address that issue without assuming a premise—the permissibility of restricting corporate political speech—that is itself in doubt. See Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1339 (2000) ("[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases"); *id.,* at 1327–1328. As our request for supplemental briefing implied, Citizens United's claim implicates the validity of *Austin,* which in turn implicates the facial validity of § 441b.

When the statute now at issue came before the Court in *McConnell,* both the majority and the dissenting opinions

considered the question of its facial validity. The holding and validity of *Austin* were essential to the reasoning of the *McConnell* majority opinion, which upheld BCRA's extension of § 441b. See 540 U. S., at 205 (quoting *Austin*, 494 U. S., at 660). *McConnell* permitted federal felony punishment for speech by all corporations, including nonprofit ones, that speak on prohibited subjects shortly before federal elections. See 540 U. S., at 203–209. Four Members of the *McConnell* Court would have overruled *Austin*, including Chief Justice Rehnquist, who had joined the Court's opinion in *Austin* but reconsidered that conclusion. See 540 U. S., at 256–262 (SCALIA, J., concurring in part, concurring in judgment in part, and dissenting in part); *id.*, at 273–275 (THOMAS, J., concurring in part, concurring in result in part, concurring in judgment in part, and dissenting in part); *id.*, at 322–338 (opinion of KENNEDY, J., joined by Rehnquist, C. J., and SCALIA, J.). That inquiry into the facial validity of the statute was facilitated by the extensive record, which was "over 100,000 pages" long, made in the three-judge District Court. *McConnell* v. *Federal Election Comm'n*, 251 F. Supp. 2d 176, 209 (DC 2003) *(per curiam) (McConnell I)*. It is not the case, then, that the Court today is premature in interpreting § 441b "'on the basis of [a] factually barebones recor[d].'" *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 450 (2008) (quoting *Sabri* v. *United States*, 541 U. S. 600, 609 (2004)).

The *McConnell* majority considered whether the statute was facially invalid. An as-applied challenge was brought in *Wisconsin Right to Life, Inc.* v. *Federal Election Comm'n*, 546 U. S. 410, 411–412 (2006) *(per curiam)*, and the Court confirmed that the challenge could be maintained. Then, in *WRTL*, the controlling opinion of the Court not only entertained an as-applied challenge but also sustained it. Three Justices noted that they would continue to maintain the position that the record in *McConnell* demonstrated the invalidity of the Act on its face. 551 U. S., at 485–504 (opinion of

SCALIA, J.). The controlling opinion in *WRTL*, which refrained from holding the statute invalid except as applied to the facts then before the Court, was a careful attempt to accept the essential elements of the Court's opinion in *McConnell*, while vindicating the First Amendment arguments made by the *WRTL* parties. 551 U. S., at 482 (opinion of ROBERTS, C. J.).

As noted above, Citizens United's narrower arguments are not sustainable under a fair reading of the statute. In the exercise of its judicial responsibility, it is necessary then for the Court to consider the facial validity of § 441b. Any other course of decision would prolong the substantial, nationwide chilling effect caused by § 441b's prohibitions on corporate expenditures. Consideration of the facial validity of § 441b is further supported by the following reasons.

First is the uncertainty caused by the litigating position of the Government. As discussed above, see Part II–D, *supra*, the Government suggests, as an alternative argument, that an as-applied challenge might have merit. This argument proceeds on the premise that the nonprofit corporation involved here may have received only *de minimis* donations from for-profit corporations and that some nonprofit corporations may be exempted from the operation of the statute. The Government also suggests that an as-applied challenge to § 441b's ban on books may be successful, although it would defend § 441b's ban as applied to almost every other form of media including pamphlets. See Tr. of Oral Arg. 65–66 (Sept. 9, 2009). The Government thus, by its own position, contributes to the uncertainty that § 441b causes. When the Government holds out the possibility of ruling for Citizens United on a narrow ground yet refrains from adopting that position, the added uncertainty demonstrates the necessity to address the question of statutory validity.

Second, substantial time would be required to bring clarity to the application of the statutory provision on these points

in order to avoid any chilling effect caused by some improper interpretation. See Part II–C, *supra.* It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others. A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on, even if they could establish that the case is not moot because the issue is "capable of repetition, yet evading review." *WRTL, supra,* at 462 (opinion of ROBERTS, C. J.) (citing *Los Angeles* v. *Lyons,* 461 U. S. 95, 109 (1983); *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911)). Here, Citizens United decided to litigate its case to the end. Today, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary—long after the opportunity to persuade primary voters has passed.

Third is the primary importance of speech itself to the integrity of the election process. As additional rules are created for regulating political speech, any speech arguably within their reach is chilled. See Part II–A, *supra.* Campaign finance regulations now impose "unique and complex rules" on "71 distinct entities." Brief for Seven Former Chairmen of FEC et al. as *Amici Curiae* 11–12. These entities are subject to separate rules for 33 different types of political speech. *Id.,* at 14–15, n. 10. The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975. See *id.,* at 6, n. 7. In fact, after this Court in

WRTL adopted an objective "appeal to vote" test for determining whether a communication was the functional equivalent of express advocacy, 551 U. S., at 470 (opinion of ROBERTS, C. J.), the FEC adopted a two-part, 11-factor balancing test to implement *WRTL*'s ruling. See 11 CFR §114.15; Brief for Wyoming Liberty Group et al. as *Amici Curiae* 17–27 (filed Jan. 15, 2009).

This regulatory scheme may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place. Cf. *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 712–713 (1931). As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. See 2 U. S. C. §437f; 11 CFR §112.1. These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit. See *Thomas* v. *Chicago Park Dist.*, 534 U. S. 316, 320 (2002); *Lovell* v. *City of Griffin*, 303 U. S. 444, 451–452 (1938); *Near, supra*, at 713–714. Because the FEC's "business is to censor, there inheres the danger that [it] may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." *Freedman* v. *Maryland*, 380 U. S. 51, 57–58 (1965). When the FEC issues advisory opinions that prohibit speech, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."

Virginia v. *Hicks*, 539 U. S. 113, 119 (2003) (citation omitted). Consequently, "the censor's determination may in practice be final." *Freedman, supra*, at 58.

This is precisely what *WRTL* sought to avoid. *WRTL* said that First Amendment standards "must eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal.'" 551 U. S., at 469 (opinion of ROBERTS, C. J.) (quoting *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U. S. 527, 547 (1995); alteration in original). Yet, the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests. If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech.

The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated. See *WRTL, supra*, at 482–483 (ALITO, J., concurring); *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940). For these reasons we find it necessary to reconsider *Austin*.

III

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." Laws enacted to control or suppress speech may operate at different points in the speech process. The following are just a few examples of restrictions that have been attempted at different stages of the speech process—all laws found to be invalid: restrictions requiring a permit at the outset, *Watchtower*

Bible & Tract Soc. of N. Y., Inc. v. *Village of Stratton*, 536 U. S. 150, 153 (2002); imposing a burden by impounding proceeds on receipts or royalties, *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 108, 123 (1991); seeking to exact a cost after the speech occurs, *New York Times Co.* v. *Sullivan*, 376 U. S., at 267; and subjecting the speaker to criminal penalties, *Brandenburg* v. *Ohio*, 395 U. S. 444, 445 (1969) *(per curiam)*.

The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under §441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U. S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. See *McConnell*, 540 U. S., at 330–333 (opinion of KENNEDY, J.). A PAC is a separate association from the corporation. So the PAC exemption from §441b's expenditure ban, §441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with §441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC

must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. See *id.*, at 330–332 (quoting *MCFL*, 479 U. S., at 253–254 (opinion of Brennan, J.)).

And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur:

> "'These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed by 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation.'" 540 U. S., at 331–332 (quoting *MCFL, supra,* at 253–254).

PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs. See Brief for Seven Former Chairmen of FEC et al. as *Amici Curiae* 11 (citing FEC, Summary of PAC Activity 1990–2006, online at http://www.fec.gov/press/press2007/20071009pac/sumhistory.pdf (as visited Jan. 18, 2010, and available in Clerk of Court's case file)); IRS, Statistics of Income: 2006, Corporation In-

come Tax Returns 2 (2009) (hereinafter Statistics of Income) (5.8 million for-profit corporations filed 2006 tax returns). PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley* v. *Valeo*, 424 U. S. 1, 19 (1976) *(per curiam)*. Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. See *McConnell, supra*, at 251 (opinion of SCALIA, J.) (Government could repress speech by "attacking all levels of the production and dissemination of ideas," for "effective public communication requires the speaker to make use of the services of others"). If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley, supra*, at 14–15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential"). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu* v. *San Francisco County Democratic Central Comm.*, 489

U. S. 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971)); see *Buckley, supra*, at 14 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution").

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL*, 551 U. S., at 464 (opinion of ROBERTS, C. J.). While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter, see *Simon & Schuster*, 502 U. S., at 124 (KENNEDY, J., concurring in judgment), the quoted language from *WRTL* provides a sufficient framework for protecting the relevant First Amendment interests in this case. We shall employ it here.

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. See, *e. g.*, *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000) (striking down content-based restriction). Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. See *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 784 (1978). As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth,

standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions. See, *e. g., Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 683 (1986) (protecting the "function of public school education"); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 129 (1977) (furthering "the legitimate penological objectives of the corrections system" (internal quotation marks omitted)); *Parker* v. *Levy*, 417 U. S. 733, 759 (1974) (ensuring "the capacity of the Government to discharge its [military] responsibilities" (internal quotation marks omitted)); *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 557 (1973) ("[F]ederal service should depend upon meritorious performance rather than political service"). The corporate independent expenditures at issue in this case, however, would not interfere with governmental functions, so these cases are inapposite. These precedents stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech. By contrast, it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes. At least before *Austin*, the Court had not allowed the exclusion of a class of speakers from the general public dialogue.

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

A

1

The Court has recognized that First Amendment protection extends to corporations. *Bellotti, supra,* at 778, n. 14 (citing *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85 (1977); *Time, Inc.* v. *Firestone,* 424 U. S. 448 (1976); *Doran* v. *Salem Inn, Inc.,* 422 U. S. 922 (1975); *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546 (1975); *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975); *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974); *New York Times Co.* v. *United States,* 403 U. S. 713 (1971) *(per curiam); Time, Inc.* v. *Hill,* 385 U. S. 374 (1967); *New York Times Co.* v. *Sullivan,* 376 U. S. 254; *Kingsley Int'l Pictures Corp.* v. *Regents of Univ. of N. Y.,* 360 U. S. 684 (1959); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952)); see, *e. g., Turner Broadcasting System, Inc.* v. *FCC,* 520 U. S. 180 (1997); *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC,* 518 U. S. 727 (1996); *Turner,* 512 U. S. 622; *Simon & Schuster,* 502 U. S. 105; *Sable Communications of Cal., Inc.* v. *FCC,* 492 U. S. 115 (1989); *Florida Star* v. *B. J. F.,* 491 U. S. 524 (1989); *Philadelphia Newspapers, Inc.* v. *Hepps,* 475 U. S. 767 (1986); *Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829 (1978); *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50 (1976); *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323 (1974); *Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler,* 398 U. S. 6 (1970).

This protection has been extended by explicit holdings to the context of political speech. See, *e. g., Button,* 371 U. S., at 428–429; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244 (1936). Under the rationale of these precedents, political speech does not lose First Amendment protection "simply because its source is a corporation." *Bellotti, supra,* at 784; see *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.,* 475 U. S. 1, 8 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is pro-

tected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" (quoting *Bellotti*, 435 U. S., at 783)). The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons." *Id.*, at 776; see *id.*, at 780, n. 16. Cf. *id.*, at 828 (Rehnquist, J., dissenting).

At least since the latter part of the 19th century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates. See B. Smith, Unfree Speech: The Folly of Campaign Finance Reform 23 (2001). Yet not until 1947 did Congress first prohibit independent expenditures by corporations and labor unions in §304 of the Labor Management Relations Act, 1947, 61 Stat. 159 (codified at 2 U. S. C. §251 (1946 ed., Supp. I)). In passing this Act Congress overrode the veto of President Truman, who warned that the expenditure ban was a "dangerous intrusion on free speech." Message from the President of the United States, H. R. Doc. No. 334, 80th Cong., 1st Sess., 9 (1947).

For almost three decades thereafter, the Court did not reach the question whether restrictions on corporate and union expenditures are constitutional. See *WRTL*, 551 U. S., at 502 (opinion of SCALIA, J.). The question was in the background of *United States* v. *CIO*, 335 U. S. 106 (1948). There, a labor union endorsed a congressional candidate in its weekly periodical. The Court stated that "the gravest doubt would arise in our minds as to [the federal expenditure prohibition's] constitutionality" if it were construed to suppress that writing. *Id.*, at 121. The Court engaged in statutory interpretation and found the statute did not cover the publication. *Id.*, at 121–122, and n. 20. Four Justices, however, said they would reach the constitutional question and invalidate the Labor-Management Relations Act's expendi-

ture ban. *Id.*, at 155 (Rutledge, J., joined by Black, Douglas, and Murphy, JJ., concurring in result). The concurrence explained that any "'undue influence'" generated by a speaker's "large expenditures" was outweighed "by the loss for democratic processes resulting from the restrictions upon free and full public discussion." *Id.*, at 143.

In *United States* v. *Automobile Workers*, 352 U. S. 567 (1957), the Court again encountered the independent expenditure ban, which had been recodified at 18 U. S. C. § 610 (1952 ed.). See 62 Stat. 723–724. After holding only that a union television broadcast that endorsed candidates was covered by the statute, the Court "[r]efus[ed] to anticipate constitutional questions" and remanded for the trial to proceed. 352 U. S., at 591. Three Justices dissented, arguing that the Court should have reached the constitutional question and that the ban on independent expenditures was unconstitutional:

> "Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community." *Id.*, at 593 (opinion of Douglas, J., joined by Warren, C. J., and Black, J.).

The dissent concluded that deeming a particular group "too powerful" was not a "justificatio[n] for withholding First Amendment rights from any group—labor or corporate." *Id.*, at 597. The Court did not get another opportunity to consider the constitutional question in that case; for after a remand, a jury found the defendants not guilty. See Hayward, Revisiting the Fable of Reform, 45 Harv. J. Legis. 421, 463 (2008).

Later, in *Pipefitters* v. *United States*, 407 U. S. 385, 400–401 (1972), the Court reversed a conviction for expenditure of union funds for political speech—again without reaching the constitutional question. The Court would not resolve that question for another four years.

2

In *Buckley*, 424 U. S. 1, the Court addressed various challenges to the Federal Election Campaign Act of 1971 (FECA) as amended in 1974. These amendments created 18 U. S. C. §608(e) (1970 ed., Supp. V), see 88 Stat. 1265, an independent expenditure ban separate from §610 that applied to individuals as well as corporations and labor unions, *Buckley*, 424 U. S., at 23, 39, and n. 45.

Before addressing the constitutionality of §608(e)'s independent expenditure ban, *Buckley* first upheld §608(b), FECA's limits on direct contributions to candidates. The *Buckley* Court recognized a "sufficiently important" governmental interest in "the prevention of corruption and the appearance of corruption." *Id.*, at 25; see *id.*, at 26. This followed from the Court's concern that large contributions could be given "to secure a political *quid pro quo*." *Ibid.*

The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that "the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," *id.*, at 47–48, because "[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate," *id.*, at 47. *Buckley* invalidated §608(e)'s restrictions on independent expenditures, with only one Justice dissenting. See *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 491, n. 3 (1985) *(NCPAC)*.

Buckley did not consider § 610's separate ban on corporate and union independent expenditures, the prohibition that had also been in the background in *CIO, Automobile Workers,* and *Pipefitters.* Had § 610 been challenged in the wake of *Buckley,* however, it could not have been squared with the reasoning and analysis of that precedent. See *WRTL,* 551 U. S., at 487 (opinion of SCALIA, J.) ("*Buckley* might well have been the last word on limitations on independent expenditures"); *Austin,* 494 U. S., at 683 (SCALIA, J., dissenting). The expenditure ban invalidated in *Buckley,* § 608(e), applied to corporations and unions, 424 U. S., at 23, 39, n. 45; and some of the prevailing plaintiffs in *Buckley* were corporations, *id.,* at 8. The *Buckley* Court did not invoke the First Amendment's overbreadth doctrine, see *Broadrick* v. *Oklahoma,* 413 U. S. 601, 615 (1973), to suggest that § 608(e)'s expenditure ban would have been constitutional if it had applied only to corporations and not to individuals, 424 U. S., at 50. *Buckley* cited with approval the *Automobile Workers* dissent, which argued that § 610 was unconstitutional. 424 U. S., at 43 (citing 352 U. S., at 595–596 (opinion of Douglas, J.)).

Notwithstanding this precedent, Congress recodified § 610's corporate and union expenditure ban at 2 U. S. C. § 441b four months after *Buckley* was decided. See 90 Stat. 490. Section 441b is the independent expenditure restriction challenged here.

Less than two years after *Buckley, Bellotti,* 435 U. S. 765, reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity. *Bellotti* could not have been clearer when it struck down a state-law prohibition on corporate independent expenditures related to referenda issues:

> "We thus find no support in the First . . . Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply be-

> cause its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. . . . [That proposition] amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.
>
> . . . . . .
>
> "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Id.*, at 784–785.

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

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

3

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

To bypass *Buckley* and *Bellotti*, the *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest. *Austin* found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U. S., at 660; see *id.*, at 659 (citing *MCFL*, 479 U. S., at 257; *NCPAC*, 470 U. S., at 500–501).

B

The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them. No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity. Before *Austin*, Congress had enacted legislation for this purpose, and the Government urged the same proposition before this Court. See *MCFL*, *supra*, at 257 (FEC posited that Congress intended to "curb the political influence of 'those who exercise control over large aggregations of capital'" (quoting *Automobile Workers*, 352 U. S., at 585)); *California Medical Assn.* v. *Federal Election Comm'n*, 453 U. S. 182, 201 (1981) (Congress believed that "differing structures and purposes" of corporations and unions "may require different forms of regulation in order to protect the integrity of the electoral process"). In neither of these cases did the Court adopt the proposition.

In its defense of the corporate-speech restrictions in § 441b, the Government notes the antidistortion rationale on which *Austin* and its progeny rest in part, yet it all but abandons reliance upon it. It argues instead that two other compelling interests support *Austin*'s holding that corporate expenditure restrictions are constitutional: an anticorruption interest, see 494 U. S., at 678 (STEVENS, J., concurring), and

a shareholder-protection interest, see *id.*, at 674–675 (Brennan, J., concurring). We consider the three points in turn.

1

As for *Austin*'s antidistortion rationale, the Government does little to defend it. See Tr. of Oral Arg. 45–48 (Sept. 9, 2009). And with good reason, for the rationale cannot support § 441b.

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. See Part II–E, *supra;* Tr. of Oral Arg. 66 (Sept. 9, 2009); see also *id.*, at 26–31 (Mar. 24, 2009). If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. The Government responds "that the FEC has never applied this statute to a book," and if it did, "there would be quite [a] good as-applied challenge." Tr. of Oral Arg. 65 (Sept. 9, 2009). This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.

Political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Bellotti*, 435 U. S., at 777 (footnote omitted); see *ibid.* (the worth of speech "does not depend upon the identity of its source, whether corporation, association, union, or individual"); *Buckley*, 424 U. S., at 48–49 ("[T]he concept that government may restrict the speech of some elements of our society in order to en-

hance the relative voice of others is wholly foreign to the First Amendment"); *Automobile Workers*, *supra*, at 597 (Douglas, J., dissenting); *CIO*, 335 U. S., at 154–155 (Rutledge, J., concurring in result). This protection for speech is inconsistent with *Austin*'s antidistortion rationale. *Austin* sought to defend the antidistortion rationale as a means to prevent corporations from obtaining "'an unfair advantage in the political marketplace'" by using "'resources amassed in the economic marketplace.'" 494 U. S., at 659 (quoting *MCFL*, *supra*, at 257). But *Buckley* rejected the premise that the Government has an interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections." 424 U. S., at 48; see *Bellotti*, *supra*, at 791, n. 30. *Buckley* was specific in stating that "the skyrocketing cost of political campaigns" could not sustain the governmental prohibition. 424 U. S., at 26. The First Amendment's protections do not depend on the speaker's "financial ability to engage in public discussion." *Id.*, at 49.

The Court reaffirmed these conclusions when it invalidated the BCRA provision that increased the cap on contributions to one candidate if the opponent made certain expenditures from personal funds. See *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 742 (2008) ("Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, §2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices"). The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.

Either as support for its antidistortion rationale or as a further argument, the *Austin* majority undertook to distin-

guish wealthy individuals from corporations on the ground that "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." 494 U. S., at 658–659. This does not suffice, however, to allow laws prohibiting speech. "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights." *Id.*, at 680 (SCALIA, J., dissenting).

It is irrelevant for purposes of the First Amendment that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." *Id.*, at 660 (majority opinion). All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas. See *id.*, at 707 (KENNEDY, J., dissenting) ("Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary").

Austin's antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations. See *McConnell*, 540 U. S., at 283 (opinion of THOMAS, J.) ("The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press"). Cf. *Tornillo*, 418 U. S., at 250 (alleging the existence of "vast accumulations of unreviewable power in the modern media empires"). Media corporations are now exempt from § 441b's ban on corporate expenditures. See 2 U. S. C. §§ 431(9)(B)(i), 434(f)(3)(B)(i). Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have "immense aggregations of wealth," and the views expressed by media corporations often "have little or no correlation to the public's support" for those views. *Austin*, 494 U. S., at 660.

Thus, under the Government's reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment.

The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Id.*, at 691 (SCALIA, J., dissenting) (citing *Bellotti*, 435 U. S., at 782); see *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 784 (1985) (Brennan, J., joined by Marshall, Blackmun, and STEVENS, JJ., dissenting); *id.*, at 773 (White, J., concurring in judgment). With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.

The law's exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale. And the exemption results in a further, separate reason for finding this law invalid: Again by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. The exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news. So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or

inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.

There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations. The Framers may not have anticipated modern business and media corporations. See *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 360–361 (1995) (THOMAS, J., concurring in judgment). Yet television networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times. The First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media. It was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the Colonies. See *McConnell*, *supra*, at 252–253 (opinion of SCALIA, J.); *Grosjean*, 297 U. S., at 245–248; *Near*, 283 U. S., at 713–714. The great debates between the Federalists and the Anti-Federalists over our founding document were published and expressed in the most important means of mass communication of that era—newspapers owned by individuals. See *McIntyre*, 514 U. S., at 341–343; *id.*, at 367 (THOMAS, J., concurring in judgment). At the founding, speech was open, comprehensive, and vital to society's definition of itself; there were no limits on the sources of speech and knowledge. See B. Bailyn, Ideological Origins of the American Revolution 5 (1967) ("Any number of people could join in such proliferating polemics, and rebuttals could come from all sides"); G. Wood, Creation of the American Republic 1776–1787, p. 6 (1969) ("[I]t is not surprising that the intellectual sources of [the Americans'] Revolutionary thought were profuse and various"). The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers

and media that provided the means of communicating political ideas when the Bill of Rights was adopted.

Austin interferes with the "open marketplace" of ideas protected by the First Amendment. *New York State Bd. of Elections* v. *Lopez Torres*, 552 U. S. 196, 208 (2008); see *ibid.* (ideas "may compete" in this marketplace "without government interference"); *McConnell*, 540 U. S., at 274 (opinion of THOMAS, J.). It permits the Government to ban the political speech of millions of associations of citizens. See Statistics of Income 2 (5.8 million for-profit corporations filed 2006 tax returns). Most of these are small corporations without large amounts of wealth. See Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* 1, 3 (96% of the 3 million businesses that belong to the U. S. Chamber of Commerce have fewer than 100 employees); M. Keightley, Congressional Research Service Report for Congress, Business Organizational Choices: Taxation and Responses to Legislative Changes 10 (2009) (more than 75% of corporations whose income is taxed under federal law, see 26 U. S. C. §301, have less than $1 million in receipts per year). This fact belies the Government's argument that the statute is justified on the ground that it prevents the "distorting effects of immense aggregations of wealth." *Austin*, 494 U. S., at 660. It is not even aimed at amassed wealth.

The censorship we now confront is vast in its reach. The Government has "muffle[d] the voices that best represent the most significant segments of the economy." *McConnell*, *supra*, at 257–258 (opinion of SCALIA, J.). And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." *CIO*, 335 U. S., at 144 (Rutledge, J., concurring in result). By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of "destroying the liberty" of

some factions is "worse than the disease." The Federalist No. 10, p. 130 (B. Wright ed. 1961) (J. Madison). Factions should be checked by permitting them all to speak, see *ibid.*, and by entrusting the people to judge what is true and what is false.

The purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public. This makes *Austin*'s antidistortion rationale all the more an aberration. "[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies." *Bellotti*, 435 U. S., at 792, n. 31 (citing *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 510–511 (1972); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 137–138 (1961)). Corporate executives and employees counsel Members of Congress and Presidential administrations on many issues, as a matter of routine and often in private. An *amici* brief filed on behalf of Montana and 25 other States notes that lobbying and corporate communications with elected officials occur on a regular basis. Brief for State of Montana et al. 19. When that phenomenon is coupled with § 441b, the result is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government. That cooperation may sometimes be voluntary, or it may be at the demand of a Government official who uses his or her authority, influence, and power to threaten corporations to support the Government's policies. Those kinds of interactions are often unknown and unseen. The speech that § 441b forbids, though, is public, and all can judge its content and purpose. References to massive corporate treasuries should not mask the real operation of this law. Rhetoric ought not obscure reality.

Even if § 441b's expenditure ban were constitutional, wealthy corporations could still lobby elected officials, al-

though smaller corporations may not have the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. See, *e. g.*, *WRTL*, 551 U. S., at 503–504 (opinion of SCALIA, J.) ("In the 2004 election cycle, a mere 24 individuals contributed an astounding total of $142 million to [26 U. S. C. §527 organizations]"). Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech.

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

2

What we have said also shows the invalidity of other arguments made by the Government. For the most part relinquishing the antidistortion rationale, the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. In *Buckley*, the Court found this interest "sufficiently important" to allow limits on contributions but did not extend that reasoning to expenditure limits. 424 U. S., at 25. When *Buckley* examined an expenditure ban, it found "that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures." *Id.*, at 45.

With regard to large direct contributions, *Buckley* reasoned that they could be given "to secure a political *quid pro quo*," *id.*, at 26, and that "the scope of such pernicious practices can never be reliably ascertained," *id.*, at 27. The practices *Buckley* noted would be covered by bribery laws, see, *e. g.*, 18 U. S. C. §201, if a *quid pro quo* arrangement were proved. See *Buckley*, *supra*, at 27, and n. 28 (citing *Buckley* v. *Valeo*, 519 F. 2d 821, 839–840, and nn. 36–38

(CADC 1975) (en banc) *(per curiam)*). The Court, in consequence, has noted that restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. *MCFL*, 479 U. S., at 260; *NCPAC*, 470 U. S., at 500; *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U. S. 197, 210 (1982) *(NRWC)*. The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here.

"The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U. S., at 47; see *ibid.* (independent expenditures have a "substantially diminished potential for abuse"). Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States. See Supp. Brief for Appellee 18, n. 3; Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* 8–9, n. 5.

A single footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. 435 U. S., at 788, n. 26. For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. Dicta in *Bellotti*'s footnote suggested that "a corporation's right to speak on issues of general public interest implies no

comparable right in the quite different context of participation in a political campaign for election to public office." *Ibid.* Citing the portion of *Buckley* that invalidated the federal independent expenditure ban, 424 U. S., at 46, and a law review student comment, *Bellotti* surmised that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." 435 U. S., at 788, n. 26. *Buckley,* however, struck down a ban on independent expenditures to support candidates that covered corporations, 424 U. S., at 23, 39, n. 45, and explained that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," *id.,* at 42. *Bellotti*'s dictum is thus supported only by a law review student comment, which misinterpreted *Buckley.* See Comment, The Regulation of Union Political Activity: Majority and Minority Rights and Remedies, 126 U. Pa. L. Rev. 386, 408 (1977) (suggesting that "corporations and labor unions should be held to different and more stringent standards than an individual or other associations under a regulatory scheme for campaign financing").

Seizing on this aside in *Bellotti*'s footnote, the Court in *NRWC* did say there is a "sufficient" governmental interest in "ensur[ing] that substantial aggregations of wealth amassed" by corporations would not "be used to incur political debts from legislators who are aided by the contributions." 459 U. S., at 207–208 (citing *Automobile Workers,* 352 U. S., at 579); see 459 U. S., at 210, and n. 7; *NCPAC, supra,* at 500–501 (*NRWC* suggested a governmental interest in restricting "the influence of political war chests funneled through the corporate form"). *NRWC,* however, has little relevance here. *NRWC* decided no more than that a restriction on a corporation's ability to solicit funds for its segregated PAC, which made direct contributions to candidates, did not violate the First Amendment. 459 U. S., at

206. *NRWC* thus involved contribution limits, see *NCPAC*, *supra*, at 495–496, which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption, see *McConnell*, 540 U. S., at 136–138, and n. 40; *MCFL*, *supra*, at 259–260. Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.

When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. See *McConnell*, *supra*, at 296–298 (opinion of KENNEDY, J.) (citing *Buckley*, *supra*, at 26–28, 30, 46–48); *NCPAC*, 470 U. S., at 497 ("The hallmark of corruption is the financial *quid pro quo:* dollars for political favors"); *id.*, at 498. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

> "Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness." *McConnell*, 540 U. S., at 297 (opinion of KENNEDY, J.).

Reliance on a "generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Id.*, at 296.

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. See *Buckley, supra,* at 46. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse "'to take part in democratic governance'" because of additional political speech made by a corporation or any other speaker. *McConnell, supra,* at 144 (quoting *Nixon* v. *Shrink Missouri Government PAC,* 528 U. S. 377, 390 (2000)).

Caperton v. *A. T. Massey Coal Co.*, 556 U. S. 868 (2009), is not to the contrary. *Caperton* held that a judge was required to recuse himself "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.*, at 884. The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. See *Withrow* v. *Larkin,* 421 U. S. 35, 46 (1975). *Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.

The *McConnell* record was "over 100,000 pages" long, *McConnell I,* 251 F. Supp. 2d, at 209, yet it "does not have any direct examples of votes being exchanged for . . . expenditures," *id.*, at 560 (opinion of Kollar-Kotelly, J.). This confirms *Buckley*'s reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. See 251 F. Supp. 2d, at 555–557 (opinion of Kollar-Kotelly, J.). Ingratiation and access, in any event, are not corruption. The BCRA record establishes that certain donations to political parties, called "soft

money," were made to gain access to elected officials. *McConnell, supra,* at 125, 130–131, 146–152; see *McConnell I,* 251 F. Supp. 2d, at 471–481, 491–506 (opinion of Kollar-Kotelly, J.); *id.,* at 842–843, 858–859 (opinion of Leon, J.). This case, however, is about independent expenditures, not soft money. When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.

3

The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest, like *Austin*'s antidistortion rationale, would allow the Government to ban the political speech even of media corporations. See *supra,* at 352–354. Assume, for example, that a shareholder of a corporation that owns a newspaper disagrees with the political views the newspaper expresses. See *Austin,* 494 U. S., at 687 (SCALIA, J., dissenting). Under the Government's view, that potential disagreement could give the Government the authority to restrict the media corporation's political speech. The First Amendment does not allow that power. There is, furthermore, little evidence of

abuse that cannot be corrected by shareholders "through the procedures of corporate democracy." *Bellotti*, 435 U. S., at 794; see *ibid.*, n. 34.

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

4

We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process. Cf. 2 U. S. C. §441e (contribution and expenditure ban applied to "foreign national[s]"). Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominantly by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process. See *Broadrick*, 413 U. S., at 615.

C

Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error. "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare*

decisis include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo* v. *Louisiana*, 556 U. S. 778, 792–793 (2009) (overruling *Michigan* v. *Jackson*, 475 U. S. 625 (1986)). We have also examined whether "experience has pointed up the precedent's shortcomings." *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009) (overruling *Saucier* v. *Katz*, 533 U. S. 194 (2001)).

These considerations counsel in favor of rejecting *Austin*, which itself contravened this Court's earlier precedents in *Buckley* and *Bellotti*. "This Court has not hesitated to overrule decisions offensive to the First Amendment." *WRTL*, 551 U. S., at 500 (opinion of SCALIA, J.). "*[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940).

For the reasons above, it must be concluded that *Austin* was not well reasoned. The Government defends *Austin*, relying almost entirely on "the quid pro quo interest, the corruption interest or the shareholder interest," and not *Austin*'s expressed antidistortion rationale. Tr. of Oral Arg. 48 (Sept. 9, 2009); see *id.*, at 45–46. When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished. *Austin* abandoned First Amendment principles, furthermore, by relying on language in some of our precedents that traces back to the *Automobile Workers* Court's flawed historical account of campaign finance laws, see Brief for Campaign Finance Scholars as *Amici Curiae;* Hayward, 45 Harv. J. Legis. 421; R. Mutch, Campaigns, Congress, and Courts 33–35, 153–157 (1988). See *Austin*, *supra*, at 659 (citing *MCFL*, 479 U. S., at 257–258; *NCPAC*, 470 U. S., at 500–501); *MCFL*, *supra*, at 257 (citing *Automobile Workers*, 352 U. S., at 585); *NCPAC*, *supra*, at 500 (citing *NRWC*, 459 U. S., at 210); *id.*, at 208 ("The history of the movement to regulate the political contributions and expenditures of corporations

and labor unions is set forth in great detail in *[Automobile Workers]*, *supra*, at 570–584, and we need only summarize the development here").

Austin is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws. See, *e. g.*, *McConnell*, 540 U. S., at 176–177 ("Given BCRA's tighter restrictions on the raising and spending of soft money, the incentives . . . to exploit [26 U. S. C. § 527] organizations will only increase"). Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.

Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. See Part II–C, *supra*. Today, 30-second television ads may be the most effective way to convey a political message. See *McConnell*, *supra*, at 261 (opinion of SCALIA, J.). Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues. Yet, § 441b would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. See 2 U. S. C. § 441b(a); *MCFL*, *supra*, at 249. The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.

No serious reliance interests are at stake. As the Court stated in *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), reliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions. Here, though, parties have been prevented from acting—corporations have been banned from making independent expenditures. Legislatures may have enacted bans on corporate expenditures believing that those bans were constitutional. This is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty "to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

Due consideration leads to this conclusion: *Austin*, 494 U. S. 652, should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

D

Austin is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures. As the Government appears to concede, overruling *Austin* "effectively invalidate[s] not only BCRA Section 203, but also 2 U. S. C. 441b's prohibition on the use of corporate treasury funds for express advocacy." Brief for Appellee 33, n. 12. Section 441b's restrictions on corporate independent expenditures are therefore invalid and cannot be applied to *Hillary*.

Given our conclusion we are further required to overrule the part of *McConnell* that upheld BCRA §203's extension of §441b's restrictions on corporate independent expenditures. See 540 U. S., at 203–209. The *McConnell* Court relied on

the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin*, see 540 U. S., at 205, and we have found this interest unconvincing and insufficient. This part of *McConnell* is now overruled.

IV

A

Citizens United next challenges BCRA's disclaimer and disclosure provisions as applied to *Hillary* and the three advertisements for the movie. Under BCRA §311, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that "'——— is responsible for the content of this advertising.'" 2 U. S. C. §441d(d)(2). The required statement must be made in a "clearly spoken manner," and displayed on the screen in a "clearly readable manner" for at least four seconds. *Ibid.* It must state that the communication "is not authorized by any candidate or candidate's committee"; it must also display the name and address (or Web site address) of the person or group that funded the advertisement. §441d(a)(3). Under BCRA §201, any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC. 2 U. S. C. §434(f)(1). That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. §434(f)(2).

Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," *Buckley*, 424 U. S., at 64, and "do not prevent anyone from speaking," *McConnell, supra*, at 201 (internal quotation marks and brackets omitted). The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmen-

tal interest. *Buckley, supra,* at 64, 66 (internal quotation marks omitted); see *McConnell, supra,* at 231–232.

In *Buckley,* the Court explained that disclosure could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending. 424 U. S., at 66. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§ 201 and 311. 540 U. S., at 196. There was evidence in the record that independent groups were running election-related advertisements "'while hiding behind dubious and misleading names.'" *Id.,* at 197 (quoting *McConnell I,* 251 F. Supp. 2d, at 237). The Court therefore upheld BCRA §§ 201 and 311 on the ground that they would help citizens "'make informed choices in the political marketplace.'" 540 U. S., at 197 (quoting *McConnell I, supra,* at 237); see 540 U. S., at 231.

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

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

B

Citizens United sought to broadcast one 30-second and two 10-second ads to promote *Hillary.* Under FEC regulations, a communication that "[p]roposes a commercial transaction" was not subject to 2 U. S. C. § 441b's restrictions on corporate or union funding of electioneering communications. 11 CFR § 114.15(b)(3)(ii). The regulations, however, do not exempt those communications from the disclaimer and disclosure requirements in BCRA §§ 201 and 311. See 72 Fed. Reg. 72901 (2007).

Citizens United argues that the disclaimer requirements in §311 are unconstitutional as applied to its ads. It contends that the governmental interest in providing information to the electorate does not justify requiring disclaimers for any commercial advertisements, including the ones at issue here. We disagree. The ads fall within BCRA's definition of an "electioneering communication": They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy. See 530 F. Supp. 2d, at 276, nn. 2–4. The disclaimers required by §311 "provid[e] the electorate with information," *McConnell, supra,* at 196, and "insure that the voters are fully informed" about the person or group who is speaking, *Buckley, supra,* at 76; see also *Bellotti,* 435 U. S., at 792, n. 32 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected"). At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.

Citizens United argues that §311 is underinclusive because it requires disclaimers for broadcast advertisements but not for print or Internet advertising. It asserts that §311 decreases both the quantity and effectiveness of the group's speech by forcing it to devote four seconds of each advertisement to the spoken disclaimer. We rejected these arguments in *McConnell, supra,* at 230–231. And we now adhere to that decision as it pertains to the disclosure provisions.

As a final point, Citizens United claims that, in any event, the disclosure requirements in §201 must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in *WRTL* limited 2 U. S. C. §441b's restrictions on independent expenditures to express advocacy and its functional equivalent. 551 U. S., at 469–476 (opinion of ROBERTS, C. J.). Citizens United seeks to import a simi-

lar distinction into BCRA's disclosure requirements. We reject this contention.

The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. See, *e. g.*, *MCFL*, 479 U. S., at 262. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. 424 U. S., at 75–76. In *McConnell*, three Justices who would have found §441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. 540 U. S., at 321 (opinion of KENNEDY, J., joined by Rehnquist, C. J., and SCALIA, J.). And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States* v. *Harriss*, 347 U. S. 612, 625 (1954) (Congress "has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose"). For these reasons, we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.

Citizens United also disputes that an informational interest justifies the application of §201 to its ads, which only attempt to persuade viewers to see the film. Even if it disclosed the funding sources for the ads, Citizens United says, the information would not help viewers make informed choices in the political marketplace. This is similar to the argument rejected above with respect to disclaimers. Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election. Because the informational interest alone is sufficient to justify application of §201 to these ads, it is not necessary to consider the Government's other asserted interests.

Last, Citizens United argues that disclosure requirements can chill donations to an organization by exposing donors to retaliation. Some *amici* point to recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation. See Brief for Institute for Justice as *Amicus Curiae* 13–16; Brief for Alliance Defense Fund as *Amicus Curiae* 16–22. In *McConnell*, the Court recognized that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed. 540 U. S., at 198. The examples cited by *amici* are cause for concern. Citizens United, however, has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation.

Shareholder objections raised through the procedures of corporate democracy, see *Bellotti*, *supra*, at 794, and n. 34, can be more effective today because modern technology makes disclosures rapid and informative. A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. See *McConnell*, 540 U. S., at 128 ("[T]he public may not have been fully informed about the sponsorship of so-called issue ads"); *id.*, at 196–197 (citing *McConnell I*, 251 F. Supp. 2d, at 237). With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." 540 U. S., at 259 (opinion of SCALIA, J.); see *MCFL*, *supra*, at

261. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

C

For the same reasons we uphold the application of BCRA §§ 201 and 311 to the ads, we affirm their application to *Hillary*. We find no constitutional impediment to the application of BCRA's disclaimer and disclosure requirements to a movie broadcast via video-on-demand. And there has been no showing that, as applied in this case, these requirements would impose a chill on speech or expression.

V

When word concerning the plot of the movie *Mr. Smith Goes to Washington* reached the circles of Government, some officials sought, by persuasion, to discourage its distribution. See Smoodin, "Compulsory" Viewing for Every Citizen: *Mr. Smith* and the Rhetoric of Reception, 35 Cinema Journal 3, 19, and n. 52 (Winter 1996) (citing Mr. Smith Riles Washington, Time, Oct. 30, 1939, p. 49); Nugent, Capra's Capitol Offense, N. Y. Times, Oct. 29, 1939, p. X5. Under *Austin*, though, officials could have done more than discourage its distribution—they could have banned the film. After all, it, like *Hillary*, was speech funded by a corporation that was critical of Members of Congress. *Mr. Smith Goes to Washington* may be fiction and caricature; but fiction and caricature can be a powerful force.

Modern day movies, television comedies, or skits on YouTube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made

the "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value" in order to engage in political speech. 2 U. S. C. § 431(9)(A)(i). Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design.

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

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

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, concurring.

The Government urges us in this case to uphold a direct prohibition on political speech. It asks us to embrace a theory of the First Amendment that would allow censorship not only of television and radio broadcasts, but of pamphlets,

posters, the Internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern. Its theory, if accepted, would empower the Government to prohibit newspapers from running editorials or opinion pieces supporting or opposing candidates for office, so long as the newspapers were owned by corporations—as the major ones are. First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy.

The Court properly rejects that theory, and I join its opinion in full. The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer. I write separately to address the important principles of judicial restraint and *stare decisis* implicated in this case.

I

Judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." *Blodgett* v. *Holden*, 275 U. S. 142, 147–148 (1927) (Holmes, J., concurring). Because the stakes are so high, our standard practice is to refrain from addressing constitutional questions except when necessary to rule on particular claims before us. See *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring). This policy underlies both our willingness to construe ambiguous statutes to avoid constitutional problems and our practice "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *United States* v. *Raines*, 362 U. S. 17, 21 (1960) (quoting *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885)).

The majority and dissent are united in expressing allegiance to these principles. *Ante*, at 329; *post*, at 405–406 (STEVENS, J., concurring in part and dissenting in part).

But I cannot agree with my dissenting colleagues on how these principles apply in this case.

The majority's step-by-step analysis accords with our standard practice of avoiding broad constitutional questions except when necessary to decide the case before us. The majority begins by addressing—and quite properly rejecting—Citizens United's statutory claim that 2 U. S. C. §441b does not actually cover its production and distribution of *Hillary: The Movie* (hereinafter *Hillary*). If there were a valid basis for deciding this statutory claim in Citizens United's favor (and thereby avoiding constitutional adjudication), it would be proper to do so. Indeed, that is precisely the approach the Court took just last Term in *Northwest Austin Municipal Util. Dist. No. One* v. *Holder,* 557 U. S. 193 (2009), when eight Members of the Court agreed to decide the case on statutory grounds instead of reaching the appellant's broader argument that the Voting Rights Act is unconstitutional.

It is only because the majority rejects Citizens United's statutory claim that it proceeds to consider the group's various constitutional arguments, beginning with its narrowest claim (that *Hillary* is not the functional equivalent of express advocacy) and proceeding to its broadest claim (that *Austin* v. *Michigan Chamber of Commerce,* 494 U. S. 652 (1990), should be overruled). This is the same order of operations followed by the controlling opinion in *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.,* 551 U. S. 449 (2007) (*WRTL*). There the appellant was able to prevail on its narrowest constitutional argument because its broadcast ads did not qualify as the functional equivalent of express advocacy; there was thus no need to go on to address the broader claim that *McConnell* v. *Federal Election Comm'n,* 540 U. S. 93 (2003), should be overruled. *WRTL,* 551 U. S., at 482; *id.,* at 482–483 (ALITO, J., concurring). This case is different—not, as the dissent suggests, because the approach taken in *WRTL* has been deemed a "failure," *post,* at 402,

but because, in the absence of any valid narrower ground of decision, there is no way to avoid Citizens United's broader constitutional argument.

The dissent advocates an approach to addressing Citizens United's claims that I find quite perplexing. It presumably agrees with the majority that Citizens United's narrower statutory and constitutional arguments lack merit—otherwise its conclusion that the group should lose this case would make no sense. Despite agreeing that these narrower arguments fail, however, the dissent argues that the majority should nonetheless latch on to one of them in order to avoid reaching the broader constitutional question of whether *Austin* remains good law. It even suggests that the Court's failure to adopt one of these concededly meritless arguments is a sign that the majority is not "serious about judicial restraint." *Post*, at 408.

This approach is based on a false premise: that our practice of avoiding unnecessary (and unnecessarily broad) constitutional holdings somehow trumps our obligation faithfully to interpret the law. It should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right. Thus while it is true that "[i]f it is not necessary to decide more, it is necessary not to decide more," *post*, at 405 (internal quotation marks omitted), sometimes it *is* necessary to decide more. There is a difference between judicial restraint and judicial abdication. When constitutional questions are "indispensably necessary" to resolving the case at hand, "the court must meet and decide them." *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C. J.).

Because it is necessary to reach Citizens United's broader argument that *Austin* should be overruled, the debate over whether to consider this claim on an as-applied or facial basis strikes me as largely beside the point. Citizens United has standing—it is being injured by the Government's enforcement of the Act. Citizens United has a constitutional

claim—the Act violates the First Amendment, because it prohibits political speech. The Government has a defense—the Act may be enforced, consistent with the First Amendment, against corporations. Whether the claim or the defense prevails is the question before us.

Given the nature of that claim and defense, it makes no difference of any substance whether this case is resolved by invalidating the statute on its face or only as applied to Citizens United. Even if considered in as-applied terms, a holding in this case that the Act may not be applied to Citizens United—because corporations as well as individuals enjoy the pertinent First Amendment rights—would mean that any other corporation raising the same challenge would also win. Likewise, a conclusion that the Act may be applied to Citizens United—because it is constitutional to prohibit corporate political speech—would similarly govern future cases. Regardless whether we label Citizens United's claim a "facial" or "as-applied" challenge, the consequences of the Court's decision are the same.[1]

II

The text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech, even if the speaker is a corporation or union. What makes this case difficult is the need to confront our prior decision in *Austin*.

This is the first case in which we have been asked to overrule *Austin*, and thus it is also the first in which we have had reason to consider how much weight to give *stare decisis* in assessing its continued validity. The dissent erroneously

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[1] The dissent suggests that I am "much too quick" to reach this conclusion because I "ignore" Citizens United's narrower arguments. *Post*, at 405, n. 12. But in fact I do not ignore those arguments; on the contrary, I (and my colleagues in the majority) appropriately consider and reject them on their merits, before addressing Citizens United's broader claims. *Supra*, at 373–375; *ante*, at 322–329.

declares that the Court "reaffirmed" *Austin*'s holding in subsequent cases—namely, *Federal Election Comm'n* v. *Beaumont*, 539 U. S. 146 (2003); *McConnell*; and *WRTL*. *Post*, at 439–441. Not so. Not a single party in any of those cases asked us to overrule *Austin*, and as the dissent points out, *post*, at 396–398, the Court generally does not consider constitutional arguments that have not properly been raised. *Austin*'s validity was therefore not directly at issue in the cases the dissent cites. The Court's unwillingness to overturn *Austin* in those cases cannot be understood as a *reaffirmation* of that decision.

A

Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function. "*Stare decisis* is the preferred course because it promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). For these reasons, we have long recognized that departures from precedent are inappropriate in the absence of a "special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984).

At the same time, *stare decisis* is neither an "inexorable command," *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003), nor "a mechanical formula of adherence to the latest decision," *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940), especially in constitutional cases, see *United States* v. *Scott*, 437 U. S. 82, 101 (1978). If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants. See *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), overruled by *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525 (1923), overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937); *Olmstead* v. *United States*, 277 U. S. 438 (1928), overruled by *Katz* v. *United States*,

389 U. S. 347 (1967). As the dissent properly notes, none of us has viewed *stare decisis* in such absolute terms. *Post*, at 408; see also, *e. g.*, *Randall* v. *Sorrell*, 548 U. S. 230, 274–281 (2006) (STEVENS, J., dissenting) (urging the Court to overrule its invalidation of limits on independent expenditures on political speech in *Buckley* v. *Valeo*, 424 U. S. 1 (1976) (*per curiam*)).

Stare decisis is instead a "principle of policy." *Helvering*, *supra*, at 119. When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*. As Justice Jackson explained, this requires a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other." Jackson, Decisional Law and *Stare Decisis*, 30 A. B. A. J. 334 (1944).

In conducting this balancing, we must keep in mind that *stare decisis* is not an end in itself. It is instead "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986). Its greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.

Thus, for example, if the precedent under consideration itself departed from the Court's jurisprudence, returning to the "'intrinsically sounder' doctrine established in prior cases" may "better serv[e] the values of *stare decisis* than would following [the] more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 231 (1995); see also *Helvering*, *supra*, at 119; *Randall*, *supra*, at 274 (STEVENS, J., dissenting). Abrogating the errant precedent, rather than

reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects.

Likewise, if adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished. This can happen in a number of circumstances, such as when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake. See, *e. g.*, *Pearson* v. *Callahan*, 555 U. S. 223, 235 (2009); *Montejo* v. *Louisiana*, 556 U. S. 778, 792 (2009) (*stare decisis* does not control when adherence to the prior decision requires "fundamentally revising its theoretical basis").

B

These considerations weigh against retaining our decision in *Austin*. First, as the majority explains, that decision was an "aberration" insofar as it departed from the robust protections we had granted political speech in our earlier cases. *Ante*, at 355; see also *Buckley*, *supra*; *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978). *Austin* undermined the careful line that *Buckley* drew to distinguish limits on contributions to candidates from limits on independent expenditures on speech. *Buckley* rejected the asserted government interest in regulating independent expenditures, concluding that "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U. S., at 48–49; see also *Bellotti*, *supra*, at 790–791; *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U. S. 290, 295 (1981). *Austin*, however, allowed the Government to prohibit these same expenditures out of concern for "the corrosive and distorting effects of immense aggrega-

tions of wealth" in the marketplace of ideas. 494 U. S., at 660. *Austin*'s reasoning was—and remains—inconsistent with *Buckley*'s explicit repudiation of any government interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections." 424 U. S., at 48–49.

Austin was also inconsistent with *Bellotti*'s clear rejection of the idea that "speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation." 435 U. S., at 784. The dissent correctly points out that *Bellotti* involved a referendum rather than a candidate election, and that *Bellotti* itself noted this factual distinction, *id.*, at 788, n. 26; *post*, at 442–443. But this distinction does not explain why corporations may be subject to prohibitions on speech in candidate elections when individuals may not.

Second, the validity of *Austin*'s rationale—itself adopted over two "spirited dissents," *Payne*, 501 U. S., at 829—has proved to be the consistent subject of dispute among Members of this Court ever since. See, *e. g.*, *WRTL*, 551 U. S., at 483 (SCALIA, J., joined by KENNEDY and THOMAS, JJ., concurring in part and concurring in judgment); *McConnell*, 540 U. S., at 247, 264, 286 (opinions of SCALIA, THOMAS, and KENNEDY, JJ.); *Beaumont*, 539 U. S., at 163, 164 (opinions of KENNEDY and THOMAS, JJ.). The simple fact that one of our decisions remains controversial is, of course, insufficient to justify overruling it. But it does undermine the precedent's ability to contribute to the stable and orderly development of the law. In such circumstances, it is entirely appropriate for the Court—which in this case is squarely asked to reconsider *Austin*'s validity for the first time—to address the matter with a greater willingness to consider new approaches capable of restoring our doctrine to sounder footing.

Third, the *Austin* decision is uniquely destabilizing because it threatens to subvert our Court's decisions even outside the particular context of corporate express advocacy.

The First Amendment theory underlying *Austin*'s holding is extraordinarily broad. *Austin*'s logic would authorize government prohibition of political speech by a category of speakers in the name of equality—a point that most scholars acknowledge (and many celebrate), but that the dissent denies. Compare, *e. g.*, Garrett, New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics, 52 How. L. J. 655, 669 (2009) (*Austin* "has been understood by most commentators to be an opinion driven by equality considerations, albeit disguised in the language of 'political corruption' "), with *post*, at 464 (*Austin*'s rationale "is manifestly not just an 'equalizing' ideal in disguise").[2]

It should not be surprising, then, that Members of the Court have relied on *Austin*'s expansive logic to justify greater incursions on the First Amendment, even outside the original context of corporate advocacy on behalf of candidates running for office. See, *e. g.*, *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 756 (2008) (STEVENS, J., concurring in part and dissenting in part) (relying on *Austin* and other cases to justify restrictions on campaign spending by individual candidates, explaining that "there is no reason that their logic—specifically, their concerns about the corrosive and distorting effects of wealth on our political process—is not equally applicable in the context of individual wealth"); *McConnell*, *supra*, at 203–209 (extending *Austin* beyond its original context to cover not only the "functional equivalent" of express advocacy by corporations, but also

[2] See also, *e. g.*, R. Hasen, The Supreme Court and Election Law: Judging Equality from *Baker v. Carr* to *Bush v. Gore* 114 (2003) ("*Austin* represents the first and only case [before *McConnell*] in which a majority of the Court accepted, in deed if not in word, the equality rationale as a permissible state interest"); Strauss, Corruption, Equality, and Campaign Finance Reform, 94 Colum. L. Rev. 1369, and n. 1 (1994) (noting that *Austin*'s rationale was based on equalizing political speech); Ashdown, Controlling Campaign Spending and the "New Corruption": Waiting for the Court, 44 Vand. L. Rev. 767, 781 (1991); Eule, Promoting Speaker Diversity: Austin and Metro Broadcasting, 1990 S. Ct. Rev. 105, 108–111.

electioneering speech conducted by labor unions). The dissent in this case succumbs to the same temptation, suggesting that *Austin* justifies prohibiting corporate speech because such speech might unduly influence "the market for legislation." *Post,* at 471. The dissent reads *Austin* to permit restrictions on corporate speech based on nothing more than the fact that the corporate form may help individuals coordinate and present their views more effectively. *Post,* at 471–472. A speaker's ability to persuade, however, provides no basis for government regulation of free and open public debate on what the laws should be.

If taken seriously, *Austin*'s logic would apply most directly to newspapers and other media corporations. They have a more profound impact on public discourse than most other speakers. These corporate entities are, for the time being, not subject to § 441b's otherwise generally applicable prohibitions on corporate political speech. But this is simply a matter of legislative grace. The fact that the law currently grants a favored position to media corporations is no reason to overlook the danger inherent in accepting a theory that would allow government restrictions on their political speech. See generally *McConnell, supra,* at 283–286 (THOMAS, J., concurring in part, concurring in judgment in part, and dissenting in part).

These readings of *Austin* do no more than carry that decision's reasoning to its logical endpoint. In doing so, they highlight the threat *Austin* poses to First Amendment rights generally, even outside its specific factual context of corporate express advocacy. Because *Austin* is so difficult to confine to its facts—and because its logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly—the costs of giving it *stare decisis* effect are unusually high.

Finally and most importantly, the Government's own effort to defend *Austin*—or, more accurately, to defend something that is not quite *Austin*—underscores its weakness as

a precedent of the Court. The Government concedes that *Austin* "is not the most lucid opinion," yet asks us to reaffirm its holding. Tr. of Oral Arg. 62 (Sept. 9, 2009). But while invoking *stare decisis* to support this position, the Government never once even *mentions* the compelling interest that *Austin* relied upon in the first place: the need to diminish "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U. S., at 660.

Instead of endorsing *Austin* on its own terms, the Government urges us to reaffirm *Austin*'s specific holding on the basis of two new and potentially expansive interests—the need to prevent actual or apparent *quid pro quo* corruption, and the need to protect corporate shareholders. See Supp. Brief for Appellee 8–10, 12–13. Those interests may or may not support the *result* in *Austin*, but they were plainly not part of the *reasoning* on which *Austin* relied.

To its credit, the Government forthrightly concedes that *Austin* did not embrace either of the new rationales it now urges upon us. See, *e. g.*, Supp. Brief for Appellee 11 ("The Court did not decide in *Austin* . . . whether the compelling interest in preventing actual or apparent corruption provides a constitutionally sufficient justification for prohibiting the use of corporate treasury funds for independent electioneering"); Tr. of Oral Arg. 45 (Sept. 9, 2009) ("*Austin* did not articulate what we believe to be the strongest compelling interest"); *id.*, at 61 ("[The Court:] I take it we have never accepted your shareholder protection interest. This is a new argument. [The Government:] I think that that's fair"); *id.*, at 64 ("[The Court:] In other words, you are asking us to uphold *Austin* on the basis of two arguments, two principles, two compelling interests we have never accepted, in [the context of limits on political expenditures]. [The Government:] [I]n this particular context, fair enough").

To be clear: The Court in *Austin* nowhere relied upon the only arguments the Government now raises to support that decision. In fact, the only opinion in *Austin* endorsing the Government's argument based on the threat of *quid pro quo* corruption was JUSTICE STEVENS's concurrence. 494 U. S., at 678. The Court itself did not do so, despite the fact that the concurrence highlighted the argument. Moreover, the Court's only discussion of shareholder protection in *Austin* appeared in a section of the opinion that sought merely to distinguish *Austin*'s facts from those of *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238 (1986). *Austin, supra,* at 663. Nowhere did *Austin* suggest that the goal of protecting shareholders is itself a compelling interest authorizing restrictions on First Amendment rights.

To the extent that the Government's case for reaffirming *Austin* depends on radically reconceptualizing its reasoning, that argument is at odds with itself. *Stare decisis* is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones. There is therefore no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited.

Doing so would undermine the rule-of-law values that justify *stare decisis* in the first place. It would effectively license the Court to invent and adopt new principles of constitutional law solely for the purpose of rationalizing its past errors, without a proper analysis of whether those principles have merit on their own. This approach would allow the Court's past missteps to spawn future mistakes, undercutting the very rule-of-law values that *stare decisis* is designed to protect.

None of this is to say that the Government is barred from making new arguments to support the outcome in *Austin.*

On the contrary, it is free to do so. And of course the Court is free to accept them. But the Government's new arguments must stand or fall on their own; they are not entitled to receive the special deference we accord to precedent. They are, as grounds to support *Austin*, literally *un*precedented. Moreover, to the extent the Government relies on new arguments—and declines to defend *Austin* on its own terms—we may reasonably infer that it lacks confidence in that decision's original justification.

Because continued adherence to *Austin* threatens to subvert the "principled and intelligible" development of our First Amendment jurisprudence, *Vasquez*, 474 U. S., at 265, I support the Court's determination to overrule that decision.

* * *

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

JUSTICE SCALIA, with whom JUSTICE ALITO joins, and with whom JUSTICE THOMAS joins in part, concurring.

I join the opinion of the Court.[1]

I write separately to address JUSTICE STEVENS' discussion of *"Original Understandings," post*, at 425 (opinion concurring in part and dissenting in part) (hereinafter referred to as the dissent). This section of the dissent purports to show that today's decision is not supported by the original understanding of the First Amendment. The dissent at-

[1] JUSTICE THOMAS does not join Part IV of the Court's opinion.

tempts this demonstration, however, in splendid isolation from the text of the First Amendment. It never shows why "the freedom of speech" that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form. To be sure, in 1791 (as now) corporations could pursue only the objectives set forth in their charters; but the dissent provides no evidence that their speech in the pursuit of those objectives could be censored.

Instead of taking this straightforward approach to determining the Amendment's meaning, the dissent embarks on a detailed exploration of the Framers' views about the "role of corporations in society." *Post*, at 426. The Framers did not like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech. Of course the Framers' personal affection or disaffection for corporations is relevant only insofar as it can be thought to be reflected in the understood meaning of the text they enacted—not, as the dissent suggests, as a free-standing substitute for that text. But the dissent's distortion of proper analysis is even worse than that. Though faced with a constitutional text that makes no distinction between types of speakers, the dissent feels no necessity to provide even an isolated statement from the founding era to the effect that corporations are *not* covered, but places the burden on appellant to bring forward statements showing that they *are*. *Ibid.* ("[T]here is not a scintilla of evidence to support the notion that anyone believed [the First Amendment] would preclude regulatory distinctions based on the corporate form").

Despite the corporation-hating quotations the dissent has dredged up, it is far from clear that by the end of the 18th century corporations were despised. If so, how came there to be so many of them? The dissent's statement that there were few business corporations during the 18th century—"only a few hundred during all of the 18th century"—is mis-

leading. *Post*, at 426, n. 53. There were approximately 335 charters issued to business corporations in the United States by the end of the 18th century.[2] See 2 J. Davis, Essays in the Earlier History of American Corporations 24 (1917) (reprinted 2006) (hereinafter Davis). This was a "considerable extension of corporate enterprise in the field of business," *id.*, at 8, and represented "unprecedented growth," *id.*, at 309. Moreover, what seems like a small number by today's standards surely does not indicate the relative importance of corporations when the Nation was considerably smaller. As I have previously noted, "[b]y the end of the eighteenth century the corporation was a familiar figure in American economic life." *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 256 (2003) (SCALIA, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting C. Cooke, Corporation Trust and Company 92 (1951) (hereinafter Cooke); internal quotation marks omitted).

Even if we thought it proper to apply the dissent's approach of excluding from First Amendment coverage what the Founders disliked, and even if we agreed that the Founders disliked founding-era corporations, modern corporations might not qualify for exclusion. Most of the Founders' resentment toward corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed.[3] Modern corporations do not have such

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[2] The dissent protests that 1791 rather than 1800 should be the relevant date, and that "[m]ore than half of the century's total business charters were issued between 1796 and 1800." *Post*, at 426, n. 53. I used 1800 only because the dissent did. But in any case, it is surely fanciful to think that a consensus of hostility toward corporations was transformed into general favor at some magical moment between 1791 and 1796.

[3] "[P]eople in 1800 identified corporations with franchised monopolies." L. Friedman, A History of American Law 194 (2d ed. 1985) (hereinafter Friedman). "The chief cause for the changed popular attitude towards business corporations that marked the opening of the nineteenth century was the elimination of their inherent monopolistic character. This was accomplished primarily by an extension of the principle of free incorpora-

privileges, and would probably have been favored by most of our enterprising Founders—excluding, perhaps, Thomas Jefferson and others favoring perpetuation of an agrarian society. Moreover, if the Founders' specific intent with respect to corporations is what matters, why does the dissent ignore the Founders' views about other legal entities that have more in common with modern business corporations than the founding-era corporations? At the time of the founding, religious, educational, and literary corporations were incorporated under general incorporation statutes, much as business corporations are today.[4] See Davis 16–17; R. Seavoy, Origins of the American Business Corporation, 1784–1855, p. 5 (1982); Cooke 94. There were also small unincorporated business associations, which some have argued were the "'true progenitors'" of today's business corporations. Friedman 200 (quoting S. Livermore, Early American Land Companies: Their Influence on Corporate Development 216 (1939)); see also Davis 33. Were all of these silently excluded from the protections of the First Amendment?

The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak. To the contrary, colleges, towns and cities, religious institutions, and guilds had long been organized as corporations at common law and under the King's charter, see 1 W. Blackstone, Commentaries on the Laws of England 455–473 (1765); 1 S. Kyd, A Treatise on the Law of Corporations 1–32, 63 (1793) (reprinted 2006), and as

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tion under general laws." 1 W. Fletcher, Cyclopedia of the Law of Corporations §2, p. 8 (rev. ed. 2006).

[4] At times (though not always) the dissent seems to exclude such non-"business corporations" from its denial of free-speech rights. See *post*, at 428. Finding in a seemingly categorical text a distinction between the rights of business corporations and the rights of nonbusiness corporations is even more imaginative than finding a distinction between the rights of *all* corporations and the rights of other associations.

I have discussed, the practice of incorporation only expanded in the United States. Both corporations and voluntary associations actively petitioned the Government and expressed their views in newspapers and pamphlets. For example: An antislavery Quaker corporation petitioned the First Congress, distributed pamphlets, and communicated through the press in 1790. W. diGiacomantonio, "For the Gratification of a Volunteering Society": Antislavery and Pressure Group Politics in the First Federal Congress, 15 J. Early Republic 169 (1995). The New York Sons of Liberty sent a circular to Colonies farther south in 1766. P. Maier, From Resistance to Revolution 79–80 (1972). And the Society for the Relief and Instruction of Poor Germans circulated a biweekly paper from 1755 to 1757. Adams, The Colonial German-language Press and the American Revolution, in The Press & the American Revolution 151, 161–162 (B. Bailyn & J. Hench eds. 1980). The dissent offers no evidence—none whatever—that the First Amendment's unqualified text was originally understood to exclude such associational speech from its protection.[5]

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[5] The best the dissent can come up with is that "[p]ostratification practice" supports its reading of the First Amendment. *Post*, at 431, n. 56. For this proposition, the dissent cites Justice White's statement (in dissent) that "[t]he common law was generally interpreted as prohibiting corporate political participation," *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 819 (1978). The sole authority Justice White cited for this proposition, *id.*, at 819, n. 14, was a law-review note that made no such claim. To the contrary, it stated that the cases dealing with the propriety of corporate political expenditures were "few." Note, Corporate Political Affairs Programs, 70 Yale L. J. 821, 852 (1961). More specifically, the note cites only two holdings to that effect, one by a Federal District Court, and one by the Supreme Court of Montana. *Ibid.*, n. 197. Of course even if the common law was "generally interpreted" to prohibit corporate political expenditures as ultra vires, that would have nothing to do with whether political expenditures that *were* authorized by a corporation's charter could constitutionally be suppressed.

As additional "[p]ostratification practice," the dissent notes that the Court "did not recognize *any* First Amendment protections for corpora-

Historical evidence relating to the textually similar clause "the freedom of . . . the press" also provides no support for the proposition that the First Amendment excludes conduct of artificial legal entities from the scope of its protection. The freedom of "the press" was widely understood to protect the publishing activities of individual editors and printers. See *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 360 (1995) (THOMAS, J., concurring in judgment); see also *McConnell*, 540 U. S., at 252–253 (opinion of SCALIA, J.). But these individuals often acted through newspapers, which (much like corporations) had their own names, outlived the individuals who had founded them, could be bought and sold, were sometimes owned by more than one person, and were operated for profit. See generally F. Mott, American Journalism: A History of Newspapers in the United States Through 250 Years 3–164 (1941); J. Smith, Freedom's Fetters (1956). Their activities were not stripped of First Amendment protection simply because they were carried out under the banner of an artificial legal entity. And the notion which follows from the dissent's view, that modern newspapers, since they are incorporated, have free-speech rights only at the sufferance of Congress, boggles the mind.[6]

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tions until the middle part of the 20th century." *Post*, at 431, n. 56. But it did that in *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), a case involving freedom of the press—which the dissent acknowledges *did* cover corporations from the outset. The relative recency of that first case is unsurprising. All of our First Amendment jurisprudence was slow to develop. We did not consider application of the First Amendment to speech restrictions other than prior restraints until 1919, see *Schenck* v. *United States*, 249 U. S. 47; we did not invalidate a state law on First Amendment grounds until 1931, see *Stromberg* v. *California*, 283 U. S. 359, and a federal law until 1965, see *Lamont* v. *Postmaster General*, 381 U. S. 301.

[6]The dissent seeks to avoid this conclusion (and to turn a liability into an asset) by interpreting the Freedom of the Press Clause to refer to the institutional press (thus demonstrating, according to the dissent, that the Founders "did draw distinctions—explicit distinctions—between types of 'speakers,' or speech outlets or forms"). *Post*, at 431, and n. 57. It is passing strange to interpret the phrase "the freedom of speech, or of the

In passing, the dissent also claims that the Court's conception of corruption is unhistorical. The Framers "would have been appalled," it says, by the evidence of corruption in the congressional findings supporting the Bipartisan Campaign Reform Act of 2002. *Post*, at 451–452. For this proposition, the dissent cites a law-review article arguing that "corruption" was originally understood to include "moral decay" and even actions taken by citizens in pursuit of private rather than public ends. Teachout, The Anti-Corruption Principle, 94 Cornell L. Rev. 341, 373, 378 (2009). It is hard to see how this has anything to do with what sort of corruption can be combated by restrictions on political speech. Moreover, if speech can be prohibited because, in the view of the Government, it leads to "moral decay" or does not serve "public ends," then there is no limit to the Government's censorship power.

The dissent says that when the Framers "constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind." *Post*, at 428. That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual

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press" to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish. No one thought that is what it meant. Patriot Noah Webster's 1828 dictionary contains, under the word "press," the following entry:

"*Liberty of the press*, in civil policy, is the free right of publishing books, pamphlets or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or to the peace of the state." 2 American Dictionary of the English Language (1828) (reprinted 1970).

As the Court's opinion describes, *ante*, at 352, our jurisprudence agrees with Noah Webster and contradicts the dissent.

"The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *City of Griffin*, 303 U. S. 444, 452 (1938).

men and women—not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak *in association with other individual persons.* Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of "an individual American." It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not "an individual American."[7]

But to return to, and summarize, my principal point, which is the conformity of today's opinion with the original meaning of the First Amendment. The Amendment is written in terms of "speech," not speakers. Its text offers no foothold

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[7] The dissent says that "'speech'" refers to oral communications of human beings, and since corporations are not human beings they cannot speak. *Post,* at 428, n. 55. This is sophistry. The authorized spokesman of a corporation is a human being, who speaks on behalf of the human beings who have formed that association—just as the spokesman of an unincorporated association speaks on behalf of its members. The power to publish thoughts, no less than the power to speak thoughts, belongs only to human beings, but the dissent sees no problem with a corporation's enjoying the freedom of the press.

The same footnote asserts that "it has been 'claimed that the notion of institutional speech . . . did not exist in post-revolutionary America.'" This is quoted from a law-review article by a Bigelow Fellow at the University of Chicago (Fagundes, State Actors as First Amendment Speakers, 100 Nw. U. L. Rev. 1637, 1654 (2006)), which offers as the sole support for its statement a treatise dealing with government speech, M. Yudof, When Government Speaks 42–50 (1983). The cited pages of that treatise provide no support whatever for the statement—unless, as seems overwhelmingly likely, the "institutional speech" referred to was speech by the subject of the law-review article, governmental institutions.

The other authority cited in the footnote, a law-review article by a professor at Washington and Lee Law School, Bezanson, Institutional Speech, 80 Iowa L. Rev. 735, 775 (1995), in fact contradicts the dissent, in that it would accord free-speech protection to associations.

for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals—and the dissent offers no evidence about the original meaning of the text to support any such exclusion. We are therefore simply left with the question whether the speech at issue in this case is "speech" covered by the First Amendment. No one says otherwise. A documentary film critical of a potential Presidential candidate is core political speech, and its nature as such does not change simply because it was funded by a corporation. Nor does the character of that funding produce any reduction whatever in the "inherent worth of the speech" and "its capacity for informing the public," *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777 (1978). Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.

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

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election. Neither Citizens United's nor any other corporation's speech has been "banned," *ante*, at 319. All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment

dictates an affirmative answer to that question is, in my judgment, profoundly misguided. Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by *for-profit* corporations and unions to decide this case.

The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

The majority's approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907, ch. 420, 34 Stat. 864. We have unanimously concluded that this "reflects a

permissible assessment of the dangers posed by those entities to the electoral process," *FEC* v. *National Right to Work Comm.*, 459 U. S. 197, 209 (1982) *(NRWC)*, and have accepted the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," *id.*, at 209–210. The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990). Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law including *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449 (2007) *(WRTL)*, *McConnell* v. *FEC*, 540 U. S. 93 (2003), *FEC* v. *Beaumont*, 539 U. S. 146 (2003), *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238 (1986) *(MCFL)*, *NRWC*, 459 U. S. 197, and *California Medical Assn.* v. *FEC*, 453 U. S. 182 (1981).

In his landmark concurrence in *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936), Justice Brandeis stressed the importance of adhering to rules the Court has "developed . . . for its own governance" when deciding constitutional questions. Because departures from those rules always enhance the risk of error, I shall review the background of this case in some detail before explaining why the Court's analysis rests on a faulty understanding of *Austin* and *McConnell* and of our campaign finance jurisprudence more generally.[1] I regret the length of what follows, but the importance and novelty of the Court's opinion require a full response. Although

[1] Specifically, Part I, *infra*, at 396–408, addresses the procedural history of the case and the narrower grounds of decision the majority has bypassed. Part II, *infra*, at 408–414, addresses *stare decisis*. Part III, *infra*, at 414–446, addresses the Court's assumptions that BCRA "bans" corporate speech, that identity-based distinctions may not be drawn in the political realm, and that *Austin* and *McConnell* were outliers in our First Amendment tradition. Part IV, *infra*, at 447–478, addresses the Court's treatment of the anticorruption, antidistortion, and shareholder protection rationales for regulating corporate electioneering.

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

I

The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution. Before turning to the question whether to overrule *Austin* and part of *McConnell*, it is important to explain why the Court should not be deciding that question.

Scope of the Case

The first reason is that the question was not properly brought before us. In declaring § 203 of BCRA facially unconstitutional on the ground that corporations' electoral expenditures may not be regulated any more stringently than those of individuals, the majority decides this case on a basis relinquished below, not included in the questions presented to us by the litigants, and argued here only in response to the Court's invitation. This procedure is unusual and inadvisable for a court.[2] Our colleagues' suggestion that "we are asked to reconsider *Austin* and, in effect, *McConnell*," *ante*, at 319, would be more accurate if rephrased to state that "we have asked ourselves" to reconsider those cases.

In the District Court, Citizens United initially raised a facial challenge to the constitutionality of § 203. App. 23a–

[2] See *Yee* v. *Escondido*, 503 U. S. 519, 535 (1992) ("[U]nder this Court's Rule 14.1(a), only the questions set forth in the petition, or fairly included therein, will be considered by the Court" (internal quotation marks and alteration omitted)); *Wood* v. *Allen*, *ante*, at 304 ("[T]he fact that petitioner discussed [an] issue in the text of his petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review" (internal quotation marks and brackets omitted)); *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 168–169 (2004) ("We ordinarily do not decide in the first instance issues not decided below" (internal quotation marks omitted)).

24a. In its motion for summary judgment, however, Citizens United expressly abandoned its facial challenge, 1:07–cv–2240–RCL–RWR, Docket Entry No. 52, pp. 1–2 (May 16, 2008), and the parties stipulated to the dismissal of that claim, *id.*, Nos. 53 (May 22, 2008), 54 (May 23, 2008), App. 6a. The District Court therefore resolved the case on alternative grounds,[3] and in its jurisdictional statement to this Court, Citizens United properly advised us that it was raising only "an as-applied challenge to the constitutionality of . . . BCRA §203." Juris. Statement 5. The jurisdictional statement never so much as cited *Austin*, the key case the majority today overrules. And not one of the questions presented suggested that Citizens United was surreptitiously raising the facial challenge to §203 that it previously agreed to dismiss. In fact, not one of those questions raised an issue based on Citizens United's corporate status. Juris. Statement (i). Moreover, even in its merits briefing, when Citizens United injected its request to overrule *Austin*, it never sought a declaration that §203 was facially unconstitutional as to all corporations and unions; instead it argued only that the statute could not be applied to it because it was "funded overwhelmingly by individuals." Brief for Appellant 29; see also *id.*, at 10, 12, 16, 28 (affirming "as applied" character of challenge to §203); Tr. of Oral Arg. 4–9 (Mar. 24, 2009) (coun-

[3] The majority states that, in denying Citizens United's motion for a preliminary injunction, the District Court "addressed" the facial validity of BCRA §203. *Ante*, at 330. That is true, in the narrow sense that the court observed the issue was foreclosed by *McConnell* v. *FEC*, 540 U. S. 93 (2003). See 530 F. Supp. 2d 274, 278 (DC 2008) *(per curiam)*. Yet as explained above, Citizens United subsequently dismissed its facial challenge, so that by the time the District Court granted the Federal Election Commission's (FEC) motion for summary judgment, App. 261a–262a, any question about statutory validity had dropped out of the case. That latter ruling by the District Court was the "final decision" from which Citizens United appealed to this Court under BCRA §403(a)(3). As regards the lower court decision that has come before us, the claim that §203 is facially unconstitutional was neither pressed nor passed upon in any form.

sel for Citizens United conceding that § 203 could be applied to General Motors); *id.*, at 55 (counsel for Citizens United stating that "we accept the Court's decision in *[WRTL]*").

"'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed,'" *Youakim* v. *Miller*, 425 U. S. 231, 234 (1976) *(per curiam)* (quoting *Duignan* v. *United States*, 274 U. S. 195, 200 (1927)), and it is "only in the most exceptional cases" that we will consider issues outside the questions presented, *Stone* v. *Powell*, 428 U. S. 465, 481, n. 15 (1976). The appellant in this case did not so much as assert an exceptional circumstance, and one searches the majority opinion in vain for the mention of any. That is unsurprising, for none exists.

Setting the case for reargument was a constructive step, but it did not cure this fundamental problem. Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.

As-Applied and Facial Challenges

This Court has repeatedly emphasized in recent years that "[f]acial challenges are disfavored." *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 450 (2008); see also *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329 (2006) ("[T]he 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact'" (quoting *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504 (1985); alteration in original)). By declaring § 203 facially unconstitutional, our colleagues have turned an as-applied challenge into a facial challenge, in defiance of this principle.

This is not merely a technical defect in the Court's decision. The unnecessary resort to a facial inquiry "run[s] con-

trary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange*, 552 U. S., at 450 (internal quotation marks omitted). Scanting that principle "threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.*, at 451. These concerns are heightened when judges overrule settled doctrine upon which the legislature has relied. The Court operates with a sledge hammer rather than a scalpel when it strikes down one of Congress' most significant efforts to regulate the role that corporations and unions play in electoral politics. It compounds the offense by implicitly striking down a great many state laws as well.

The problem goes still deeper, for the Court does all of this on the basis of pure speculation. Had Citizens United maintained a facial challenge, and thus argued that there are virtually no circumstances in which BCRA § 203 can be applied constitutionally, the parties could have developed, through the normal process of litigation, a record about the *actual* effects of § 203, its actual burdens and its actual benefits, on *all* manner of corporations and unions.[4] "Claims of facial invalidity often rest on speculation," and consequently "raise the risk of premature interpretation of statutes on the

[4] Shortly before Citizens United mooted the issue by abandoning its facial challenge, the Government advised the District Court that it "require[d] time to develop a factual record regarding [the] facial challenge." 1:07–cv–2240–RCL–RWR, Docket Entry No. 47, p. 4 (Mar. 26, 2008). By reinstating a claim that Citizens United abandoned, the Court gives it a perverse litigating advantage over its adversary, which was deprived of the opportunity to gather and present information necessary to its rebuttal.

basis of factually barebones records." *Id.*, at 450 (internal quotation marks omitted). In this case, the record is not simply incomplete or unsatisfactory; it is nonexistent. Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert. The Court now negates Congress' efforts without a shred of evidence on how §203 or its state-law counterparts have been affecting any entity other than Citizens United.[5]

Faced with this gaping empirical hole, the majority throws up its hands. Were we to confine our inquiry to Citizens United's as-applied challenge, it protests, we would commence an "extended" process of "draw[ing], and then redraw[ing], constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker." *Ante*, at 326. While tacitly acknowledging that some applications of §203 might be found constitutional, the majority thus posits a future in which novel First Amendment standards must be devised on an ad hoc basis, and then leaps from this unfounded prediction to the unfounded conclusion that such complexity counsels the abandonment of all normal restraint. Yet it is a pervasive

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[5] In fact, we do not even have a good evidentiary record of how §203 has been affecting Citizens United, which never submitted to the District Court the details of *Hillary*'s funding or its own finances. We likewise have no evidence of how §203 and comparable state laws were expected to affect corporations and unions in the future.

It is true, as the majority points out, that the *McConnell* Court evaluated the facial validity of §203 in light of an extensive record. See *ante*, at 331–332. But that record is not before us in this case. And in any event, the majority's argument for striking down §203 depends on its contention that the statute has proved too "chilling" in practice—and in particular on the contention that the controlling opinion in *WRTL*, 551 U. S. 449 (2007), failed to bring sufficient clarity and "breathing space" to this area of law. See *ante*, at 329, 333–336. We have no record with which to assess that claim. The Court complains at length about the burdens of complying with §203, but we have no meaningful evidence to show how regulated corporations and unions have experienced its restrictions.

feature of regulatory systems that unanticipated events, such as new technologies, may raise some unanticipated difficulties at the margins. The fluid nature of electioneering communications does not make this case special. The fact that a Court can hypothesize situations in which a statute might, at some point down the line, pose some unforeseen as-applied problems, does not come close to meeting the standard for a facial challenge.[6]

The majority proposes several other justifications for the sweep of its ruling. It suggests that a facial ruling is necessary because, if the Court were to continue on its normal course of resolving as-applied challenges as they present themselves, that process would itself run afoul of the First Amendment. See, *e. g.*, *ante*, at 326 (as-applied review process "would raise questions as to the courts' own lawful authority"); *ibid.* ("Courts, too, are bound by the First Amendment"). This suggestion is perplexing. Our colleagues elsewhere trumpet "our duty 'to say what the law is,'" even when our predecessors on the bench and our counterparts in Congress have interpreted the law differently. *Ante*, at 365 (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). We do not typically say what the law *is not* as a hedge against future judicial error. The possibility that later courts will misapply a constitutional provision does not give

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[6] Our cases recognize a "type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional." *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449, n. 6 (2008) (internal quotation marks omitted). Citizens United has not made an overbreadth argument, and "[w]e generally do not apply the strong medicine of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law," *ibid.* (internal quotation marks omitted). If our colleagues nonetheless concluded that §203's fatal flaw is that it affects too much protected speech, they should have invalidated it for overbreadth and given guidance as to which applications are permissible, so that Congress could go about repairing the error.

us a basis for pretermitting litigation relating to that provision.[7]

The majority suggests that a facial ruling is necessary because anything less would chill too much protected speech. See *ante,* at 326–327, 329, 333–336. In addition to begging the question what types of corporate spending are constitutionally protected and to what extent, this claim rests on the assertion that some significant number of corporations have been cowed into quiescence by FEC "'censor[ship].'" *Ante,* at 335. That assertion is unsubstantiated, and it is hard to square with practical experience. It is particularly hard to square with the legal landscape following *WRTL,* which held that a corporate communication could be regulated under §203 only if it was "susceptible of *no* reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U. S., at 470 (opinion of ROBERTS, C. J.) (emphasis added). The whole point of this test was to make §203 as simple and speech-protective as possible. The Court does not explain how, in the span of a single election cycle, it has determined THE CHIEF JUSTICE's project to be a failure. In this respect, too, the majority's critique of line-drawing collapses into a critique of the as-applied review method generally.[8]

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[7] Also perplexing is the majority's attempt to pass blame to the Government for its litigating position. By "hold[ing] out the possibility of ruling for Citizens United on a narrow ground yet refrain[ing] from adopting that position," the majority says, the Government has caused "added uncertainty [that] demonstrates the necessity to address the question of statutory validity." *Ante,* at 333. Our colleagues have apparently never heard of an alternative argument. Like every litigant, the Government would prefer to win its case outright; failing that, it would prefer to lose on a narrow ground. The fact that there are numerous different ways this case could be decided, and that the Government acknowledges as much, does not demonstrate anything about the propriety of a facial ruling.

[8] The majority's "chilling" argument is particularly inapposite with respect to 2 U. S. C. §441b's longstanding restriction on the use of corporate general treasury funds for express advocacy. If there was ever any significant uncertainty about what counts as the functional equivalent of ex-

The majority suggests that, even though it expressly dismissed its facial challenge, Citizens United nevertheless preserved it—not as a freestanding "claim," but as a potential argument in support of "a claim that the FEC has violated its First Amendment right to free speech." *Ante*, at 330; see also *ante*, at 376 (ROBERTS, C. J., concurring) (describing Citizens United's claim as: "[T]he Act violates the First Amendment"). By this novel logic, virtually any submission could be reconceptualized as "a claim that the Government has violated my rights," and it would then be available to the Court to entertain any conceivable issue that might be relevant to that claim's disposition. Not only the as-applied/facial distinction, but the basic relationship between litigants and courts, would be upended if the latter had free rein to construe the former's claims at such high levels of generality. There would be no need for plaintiffs to argue their case; they could just cite the constitutional provisions they think relevant, and leave the rest to us.[9]

Finally, the majority suggests that though the scope of Citizens United's claim may be narrow, a facial ruling is necessary as a matter of remedy. Relying on a law review article, it asserts that Citizens United's dismissal of the facial challenge does not prevent us "'from making broader pronouncements of invalidity in properly "as-applied" cases.'" *Ante*, at 331 (quoting Fallon, As-Applied and Facial Challenges and

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press advocacy, there has been little doubt about what counts as express advocacy since the "magic words" test of *Buckley* v. *Valeo*, 424 U. S. 1, 44, n. 52 (1976) *(per curiam)*. Yet even though Citizens United's briefs never once mention §441b's restriction on express advocacy; even though this restriction does not generate chilling concerns; and even though no one has suggested that *Hillary* counts as express advocacy; the majority nonetheless reaches out to opine that this statutory provision is "invalid" as well. *Ante*, at 365.

[9]The majority adds that the distinction between facial and as-applied challenges does not have "some automatic effect" that mechanically controls the judicial task. *Ante*, at 331. I agree, but it does not follow that in any given case we should ignore the distinction, much less invert it.

Third-Party Standing, 113 Harv. L. Rev. 1321, 1339 (2000) (hereinafter Fallon)); accord, *ante,* at 376 (opinion of ROBERTS, C. J.) ("Regardless whether we label Citizens United's claim a 'facial' or 'as-applied' challenge, the consequences of the Court's decision are the same"). The majority is on firmer conceptual ground here. Yet even if one accepts this part of Professor Fallon's thesis, one must proceed to ask *which* as-applied challenges, if successful, will "properly" invite or entail invalidation of the underlying statute.[10] The paradigmatic case is a judicial determination that the legislature acted with an impermissible purpose in enacting a provision, as this carries the necessary implication that all future as-applied challenges to the provision must prevail. See Fallon 1339–1340.

Citizens United's as-applied challenge was not of this sort. Until this Court ordered reargument, its contention was that BCRA § 203 could not lawfully be applied to a feature-length video-on-demand film (such as *Hillary*) or to a nonprofit corporation exempt from taxation under 26 U. S. C. § 501(c)(4)[11] and funded overwhelmingly by individuals (such as itself). See Brief for Appellant 16–41. Success on either of these claims would not necessarily carry any implications for the validity of § 203 as applied to other types of broadcasts, other

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[10] Professor Fallon proposes an intricate answer to this question that the majority ignores. Fallon 1327–1359. It bears mention that our colleagues have previously cited Professor Fallon's article for the exact opposite point from the one they wish to make today. In *Gonzales* v. *Carhart,* 550 U. S. 124 (2007), the Court explained that "[i]t is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop," and "[f]or this reason, '[a]s-applied challenges are the basic building blocks of constitutional adjudication.'" *Id.,* at 168 (opinion for the Court by KENNEDY, J.) (quoting Fallon 1328 (second alteration in original)).

[11] Internal Revenue Code § 501(c)(4) applies, *inter alia,* to nonprofit organizations "operated exclusively for the promotion of social welfare, . . . the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

types of corporations, or unions. It certainly would not invalidate the statute as applied to a large for-profit corporation. See Tr. of Oral Arg. 8, 4 (Mar. 24, 2009) (counsel for Citizens United emphasizing that appellant is "a small, nonprofit organization, which is very much like [an *MCFL* corporation]," and affirming that its argument "definitely would not be the same" if *Hillary* were distributed by General Motors).[12] There is no legitimate basis for resurrecting a facial challenge that dropped out of this case 20 months ago.

Narrower Grounds

It is all the more distressing that our colleagues have manufactured a facial challenge, because the parties have advanced numerous ways to resolve the case that would facilitate electioneering by nonprofit advocacy corporations such as Citizens United, without toppling statutes and precedents. Which is to say, the majority has transgressed yet another "cardinal" principle of the judicial process: "[I]f it is not necessary to decide more, it is necessary not to decide more," *PDK Labs. Inc.* v. *Drug Enforcement Admin.*, 362 F. 3d 786,

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[12] THE CHIEF JUSTICE is therefore much too quick when he suggests that, "[e]ven if considered in as-applied terms, a holding in this case that the Act may not be applied to Citizens United—because corporations as well as individuals enjoy the pertinent First Amendment rights—would mean that any other corporation raising the same challenge would also win." *Ante,* at 376 (concurring opinion). That conclusion would only follow if the Court were to ignore Citizens United's plausible as-applied arguments and instead take the implausible position that *all* corporations and *all* types of expenditures enjoy the same First Amendment protections, which *always* trump the interests in regulation. At times, the majority appears to endorse this extreme view. At other times, however, it appears to suggest that nonprofit corporations have a better claim to First Amendment protection than for-profit corporations, see *ante,* at 337, 355, "advocacy" organizations have a better claim than other nonprofits, *ante,* at 337, domestic corporations have a better claim than foreign corporations, *ante,* at 362, small corporations have a better claim than large corporations, *ante,* at 354–356, and printed matter has a better claim than broadcast communications, *ante,* at 349. The majority never uses a multinational business corporation in its hypotheticals.

799 (CADC 2004) (Roberts, J., concurring in part and concurring in judgment).

Consider just three of the narrower grounds of decision that the majority has bypassed. First, the Court could have ruled, on statutory grounds, that a feature-length film distributed through video-on-demand does not qualify as an "electioneering communication" under §203 of BCRA, 2 U. S. C. §441b. BCRA defines that term to encompass certain communications transmitted by "broadcast, cable, or satellite." §434(f)(3)(A). When Congress was developing BCRA, the video-on-demand medium was still in its infancy, and legislators were focused on a very different sort of programming: short advertisements run on television or radio. See *McConnell*, 540 U. S., at 207. The sponsors of BCRA acknowledge that the FEC's implementing regulations do not clearly apply to video-on-demand transmissions. See Brief for Senator John McCain et al. as *Amici Curiae* 17–18. In light of this ambiguity, the distinctive characteristics of video-on-demand, and "[t]he elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," *Hooper* v. *California*, 155 U. S. 648, 657 (1895), the Court could have reasonably ruled that §203 does not apply to *Hillary*.[13]

Second, the Court could have expanded the *MCFL* exemption to cover §501(c)(4) nonprofits that accept only a *de minimis* amount of money from for-profit corporations. Citizens United professes to be such a group: Its brief says it "is funded predominantly by donations from individuals who support [its] ideological message." Brief for Appellant 5. Numerous Courts of Appeals have held that *de minimis* business support does not, in itself, remove an otherwise

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[13] The Court entirely ignores this statutory argument. It concludes that §203 applies to *Hillary* on the basis of the film's content, *ante*, at 324–326, without considering the possibility that §203 does not apply to video-on-demand transmissions generally.

qualifying organization from the ambit of *MCFL*.[14] This Court could have simply followed their lead.[15]

Finally, let us not forget Citizens United's as-applied constitutional challenge. Precisely because Citizens United looks so much like the *MCFL* organizations we have exempted from regulation, while a feature-length video-on-demand film looks so unlike the types of electoral advocacy Congress has found deserving of regulation, this challenge is a substantial one. As the appellant's own arguments show, the Court could have easily limited the breadth of its constitutional holding had it declined to adopt the novel notion that speakers and speech acts must always be treated identically—and always spared expenditures restrictions—in the political realm. Yet the Court nonetheless turns its back on the as-applied review process that has been a staple of campaign finance litigation since *Buckley* v. *Valeo*, 424 U. S. 1

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[14] See *Colorado Right to Life Comm., Inc.* v. *Coffman*, 498 F. 3d 1137, 1148 (CA10 2007) (adopting this rule and noting that "every other circuit to have addressed this issue" has done likewise); Brief for Independent Sector as *Amicus Curiae* 10–11 (collecting cases). The Court rejects this solution in part because the Government "merely suggest[s] it" and "does not say that it agrees with the interpretation." *Ante*, at 328, 329. Our colleagues would thus punish a defendant for showing insufficient excitement about a ground it has advanced, at the same time that they decide the case on a ground the plaintiff expressly abandoned. The Court also protests that a *de minimis* standard would "requir[e] intricate case-by-case determinations." *Ante*, at 329. But *de minimis* tests need not be intricate at all. A test that granted *MCFL* status to § 501(c)(4) organizations if they received less than a fixed dollar amount of business donations in the previous year, or if such donations represent less than a fixed percentage of their total assets, would be perfectly easy to understand and administer.

[15] Another bypassed ground, not briefed by the parties, would have been to revive the Snowe-Jeffords Amendment in BCRA § 203(c), allowing certain nonprofit corporations to pay for electioneering communications with general treasury funds, to the extent they can trace the payments to individual contributions. See Brief for National Rifle Association as *Amicus Curiae* 5–15 (arguing forcefully that Congress intended this result).

(1976) *(per curiam)*, and that was affirmed and expanded just two Terms ago in *WRTL*, 551 U. S. 449.

This brief tour of alternative grounds on which the case could have been decided is not meant to show that any of these grounds is ideal, though each is perfectly "valid," *ante*, at 329 (majority opinion).[16] It is meant to show that there were principled, narrower paths that a Court that was serious about judicial restraint could have taken. There was also the straightforward path: applying *Austin* and *McConnell*, just as the District Court did in holding that the funding of Citizens United's film can be regulated under them. The only thing preventing the majority from affirming the District Court, or adopting a narrower ground that would retain *Austin*, is its disdain for *Austin*.

II

The final principle of judicial process that the majority violates is the most transparent: *stare decisis*. I am not an absolutist when it comes to *stare decisis*, in the campaign finance area or in any other. No one is. But if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine. "[A] decision to overrule should rest on some special reason

[16] THE CHIEF JUSTICE finds our discussion of these narrower solutions "quite perplexing" because we suggest that the Court should "latch on to one of them in order to avoid reaching the broader constitutional question," without doing the same ourselves. *Ante*, at 375. There is nothing perplexing about the matter, because we are not similarly situated to our colleagues in the majority. We do not share their view of the First Amendment. Our reading of the Constitution would not lead us to strike down any statutes or overturn any precedents in this case, and we therefore have no occasion to practice constitutional avoidance or to vindicate Citizens United's as-applied challenge. Each of the arguments made above is surely at least as strong as the statutory argument the Court accepted in last year's Voting Rights Act case, *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193 (2009).

over and above the belief that a prior case was wrongly decided." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 864 (1992). No such justification exists in this case, and to the contrary there are powerful prudential reasons to keep faith with our precedents.[17]

The Court's central argument for why *stare decisis* ought to be trumped is that it does not like *Austin*. The opinion "was not well reasoned," our colleagues assert, and it conflicts with First Amendment principles. *Ante*, at 363. This, of course, is the Court's merits argument, the many defects in which we will soon consider. I am perfectly willing to concede that if one of our precedents were dead wrong in its reasoning or irreconcilable with the rest of our doctrine, there would be a compelling basis for revisiting it. But neither is true of *Austin*, as I explain at length in Parts III and IV, *infra*, at 414–478, and restating a merits argument with additional vigor does not give it extra weight in the *stare decisis* calculus.

Perhaps in recognition of this point, the Court supplements its merits case with a smattering of assertions. The Court proclaims that "*Austin* is undermined by experience since its announcement." *Ante*, at 364. This is a curious claim to make in a case that lacks a developed record. The majority has no empirical evidence with which to substantiate the claim; we just have its *ipse dixit* that the real world has not been kind to *Austin*. Nor does the majority bother to specify in what sense *Austin* has been "undermined." Instead it treats the reader to a string of non sequiturs: "Our Nation's speech dynamic is changing," *ante*, at 364; "[s]peakers have become adept at presenting citizens with sound bites, talking points, and scripted messages," *ibid.*; "[c]orporations . . . do not have monolithic views," *ibid.* How any

[17] I will have more to say shortly about the merits—about why *Austin* and *McConnell* are not doctrinal outliers, as the Court contends, and why their logic is not only defensible but also compelling. For present purposes, I limit the discussion to *stare-decisis*-specific considerations.

of these ruminations weakens the force of *stare decisis* escapes my comprehension.[18]

The majority also contends that the Government's hesitation to rely on *Austin*'s antidistortion rationale "diminishe[s]" "the principle of adhering to that precedent." *Ante*, at 363; see also *ante*, at 382 (opinion of ROBERTS, C. J.) (Government's litigating position is "most importan[t]" factor undermining *Austin*). Why it diminishes the value of *stare decisis* is left unexplained. We have never thought fit to overrule a precedent because a litigant has taken any particular tack. Nor should we. Our decisions can often be defended on multiple grounds, and a litigant may have strategic or case-specific reasons for emphasizing only a subset of them. Members of the public, moreover, often rely on our bottom-line holdings far more than our precise legal arguments; surely this is true for the legislatures that have been regulating corporate electioneering since *Austin*. The task of evaluating the continued viability of precedents falls to this Court, not to the parties.[19]

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[18] THE CHIEF JUSTICE suggests that *Austin* has been undermined by subsequent dissenting opinions. *Ante*, at 380. Under this view, it appears that the more times the Court stands by a precedent in the face of requests to overrule it, the weaker that precedent becomes. THE CHIEF JUSTICE further suggests that *Austin* "is uniquely destabilizing because it threatens to subvert our Court's decisions even outside" its particular facts, as when we applied its reasoning in *McConnell*. *Ante*, at 380. Once again, the theory seems to be that the more we utilize a precedent, the more we call it into question. For those who believe *Austin* was correctly decided—as the Federal Government and the States have long believed, as the majority of Justices to have served on the Court since *Austin* have believed, and as we continue to believe—there is nothing "destabilizing" about the prospect of its continued application. It is gutting campaign finance laws across the country, as the Court does today, that will be destabilizing.

[19] Additionally, the majority cites some recent scholarship challenging the historical account of campaign finance law given in *United States* v. *Automobile Workers*, 352 U. S. 567 (1957). *Ante*, at 363–364. *Austin* did not so much as allude to this historical account, much less rely on it. Even

Although the majority opinion spends several pages making these surprising arguments, it says almost nothing about the standard considerations we have used to determine *stare decisis* value, such as the antiquity of the precedent, the workability of its legal rule, and the reliance interests at stake. It is also conspicuously silent about *McConnell*, even though the *McConnell* Court's decision to uphold BCRA § 203 relied not only on the antidistortion logic of *Austin* but also on the statute's historical pedigree, see, *e. g.*, 540 U. S., at 115–132, 223–224, and the need to preserve the integrity of federal campaigns, see *id.*, at 126–129, 205–208, and n. 88.

We have recognized that "*[s]tare decisis* has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard* v. *United States*, 514 U. S. 695, 714 (1995) (plurality opinion) (quoting *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991)). *Stare decisis* protects not only personal rights involving property or contract but also the ability of the elected branches to shape their laws in an effective and coherent fashion. Today's decision takes away a power that we have long permitted these branches to exercise. State legislatures have relied on their authority to regulate corporate electioneering, confirmed in *Austin*, for more than a century.[20] The Federal Congress has relied on this authority for a comparable stretch of time, and it specifically relied on *Austin* throughout the years it spent developing and de-

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if the scholarship cited by the majority is correct that certain campaign finance reforms were less deliberate or less benignly motivated than *Automobile Workers* suggested, the point remains that this body of law has played a significant and broadly accepted role in American political life for decades upon decades.

[20] See Brief for State of Montana et al. as *Amici Curiae* 5–13; see also Supp. Brief for Senator John McCain et al. as *Amici Curiae* 1a–8a (listing 24 States that presently limit or prohibit independent electioneering expenditures from corporate general treasuries).

bating BCRA. The total record it compiled was *100,000 pages* long.[21] Pulling out the rug beneath Congress after affirming the constitutionality of § 203 six years ago shows great disrespect for a coequal branch.

By removing one of its central components, today's ruling makes a hash out of BCRA's "delicate and interconnected regulatory scheme." *McConnell*, 540 U. S., at 172. Consider just one example of the distortions that will follow: Political parties are barred under BCRA from soliciting or spending "soft money," funds that are not subject to the statute's disclosure requirements or its source and amount limitations. 2 U. S. C. § 441i; *McConnell*, 540 U. S., at 122–126. Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates, whereas national parties will not be able to spend a dime of soft money on ads of any kind. The Court's ruling thus dramatically enhances the role of corporations and unions—and the narrow interests they represent—vis-à-vis the role of political parties—and the broad coalitions they represent—in determining who will hold public office.[22]

Beyond the reliance interests at stake, the other *stare decisis* factors also cut against the Court. Considerations of antiquity are significant for similar reasons. *McConnell* is only six years old, but *Austin* has been on the books for two decades, and many of the statutes called into question by today's opinion have been on the books for a half century or more. The Court points to no intervening change in circumstances that warrants revisiting *Austin*. Certainly nothing

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[21] Magleby, The Importance of the Record in *McConnell v. FEC*, 3 Election L. J. 285 (2004).

[22] To be sure, the majority may respond that Congress can correct the imbalance by removing BCRA's soft-money limits. Cf. Tr. of Oral Arg. 24 (Sept. 9, 2009) (query of KENNEDY, J.). But this is no response to any legislature that takes campaign finance regulation seriously. It merely illustrates the breadth of the majority's deregulatory vision.

relevant has changed since we decided *WRTL* two Terms ago. And the Court gives no reason to think that *Austin* and *McConnell* are unworkable.

In fact, no one has argued to us that *Austin*'s rule has proved impracticable, and not a single for-profit corporation, union, or State has asked us to overrule it. Quite to the contrary, leading groups representing the business community,[23] organized labor,[24] and the nonprofit sector,[25] together with more than half of the States,[26] urge that we preserve *Austin*. As for *McConnell*, the portions of BCRA it upheld may be prolix, but all three branches of Government have worked to make §203 as user-friendly as possible. For instance, Congress established a special mechanism for expedited review of constitutional challenges, see note following 2 U. S. C. §437h; the FEC has established a standardized process, with clearly defined safe harbors, for corporations to claim that a particular electioneering communication is permissible under *WRTL*, see 11 CFR §114.15 (2009);[27] and, as noted above, THE CHIEF JUSTICE crafted his controlling opinion in *WRTL* with the express goal of maximizing clarity and administrability, 551 U. S., at 469–470, 473–474. The case for *stare decisis* may be bolstered, we have said, when

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[23] See Brief for Committee for Economic Development as *Amicus Curiae;* Brief for American Independent Business Alliance as *Amicus Curiae*. But see Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae*.

[24] See Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 3, 9.

[25] See Brief for Independent Sector as *Amicus Curiae* 16–20.

[26] See Brief for State of Montana et al. as *Amici Curiae*.

[27] The FEC established this process following the Court's June 2007 decision in that case, 551 U. S. 449. In the brief interval between the establishment of this process and the 2008 election, corporations and unions used it to make $108.5 million in electioneering communications. Supp. Brief for Appellee 22–23; FEC, Electioneering Communication Summary, online at http://fec.gov/finance/disclosure/ECSummary.shtml (all Internet materials as visited Jan. 18, 2010, and available in Clerk of Court's case file).

subsequent rulings "have reduced the impact" of a precedent "while reaffirming the decision's core ruling." *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000).[28]

In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*, "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion" that "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986).

III

The novelty of the Court's procedural dereliction and its approach to *stare decisis* is matched by the novelty of its ruling on the merits. The ruling rests on several premises. First, the Court claims that *Austin* and *McConnell* have "banned" corporate speech. Second, it claims that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corpo-

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[28] Concededly, *Austin* and *McConnell* were constitutional decisions, and we have often said that "claims of *stare decisis* are at their weakest in that field, where our mistakes cannot be corrected by Congress." *Vieth* v. *Jubelirer*, 541 U. S. 267, 305 (2004) (plurality opinion). As a general matter, this principle is a sound one. But the principle only takes on real force when an earlier ruling has obstructed the normal democratic process; it is the fear of making "mistakes [that] cannot be corrected by Congress," *ibid.*, that motivates us to review constitutional precedents with a more critical eye. *Austin* and *McConnell* did not obstruct state or congressional legislative power in any way. Although it is unclear how high a bar today's decision will pose to future attempts to regulate corporate electioneering, it will clearly restrain much legislative action.

ration. Third, it claims that *Austin* and *McConnell* were radical outliers in our First Amendment tradition and our campaign finance jurisprudence. Each of these claims is wrong.

The So-Called "Ban"

Pervading the Court's analysis is the ominous image of a "categorical ba[n]" on corporate speech. *Ante*, at 361. Indeed, the majority invokes the specter of a "ban" on nearly every page of its opinion. *Ante*, at 319, 321, 324, 327, 328, 329, 330, 333, 337, 339, 340, 343, 344, 345, 346, 347, 349, 351, 354, 355, 358, 360, 361, 362, 364, 369. This characterization is highly misleading, and needs to be corrected.

In fact it already has been. Our cases have repeatedly pointed out that, "[c]ontrary to the [majority's] critical assumptions," the statutes upheld in *Austin* and *McConnell* do "not impose an *absolute* ban on all forms of corporate political spending." *Austin*, 494 U. S., at 660; see also *McConnell*, 540 U. S., at 203–204; *Beaumont*, 539 U. S., at 162–163. For starters, both statutes provide exemptions for PACs, separate segregated funds established by a corporation for political purposes. See 2 U. S. C. § 441b(b)(2)(C); Mich. Comp. Laws Ann. § 169.255 (West 2005). "The ability to form and administer separate segregated funds," we observed in *McConnell*, "has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy. That has been this Court's unanimous view." 540 U. S., at 203.

Under BCRA, any corporation's "stockholders and their families and its executive or administrative personnel and their families" can pool their resources to finance electioneering communications. 2 U. S. C. § 441b(b)(4)(A)(i). A significant and growing number of corporations avail themselves of this option;[29] during the most recent election cycle,

[29] See FEC, Number of Federal PAC's Increases, http://fec.gov/press/press2008/20080812paccount.shtml.

corporate and union PACs raised nearly a billion dollars.[30] Administering a PAC entails some administrative burden, but so does complying with the disclaimer, disclosure, and reporting requirements that the Court today upholds, see *ante*, at 366–367, and no one has suggested that the burden is severe for a sophisticated for-profit corporation. To the extent the majority is worried about this issue, it is important to keep in mind that we have no record to show how substantial the burden really is, just the majority's own unsupported factfinding, see *ante*, at 337–339. Like all other natural persons, every shareholder of every corporation remains entirely free under *Austin* and *McConnell* to do however much electioneering she pleases outside of the corporate form. The owners of a "mom & pop" store can simply place ads in their own names, rather than the store's. If ideologically aligned individuals wish to make unlimited expenditures through the corporate form, they may utilize an *MCFL* organization that has policies in place to avoid becoming a conduit for business or union interests. See *MCFL*, 479 U. S., at 263–264.

The laws upheld in *Austin* and *McConnell* leave open many additional avenues for corporations' political speech. Consider the statutory provision we are ostensibly evaluating in this case, BCRA § 203. It has no application to genuine issue advertising—a category of corporate speech Congress found to be far more substantial than election-related advertising, see *McConnell*, 540 U. S., at 207—or to Internet,

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[30] See Supp. Brief for Appellee 16 (citing FEC statistics placing this figure at $840 million). The majority finds the PAC option inadequate in part because "[a] PAC is a separate association from the corporation." *Ante*, at 337. The formal "separateness" of PACs from their host corporations—which administer and control the PACs but which cannot funnel general treasury funds into them or force members to support them—is, of course, the whole point of the PAC mechanism.

telephone, and print advocacy.[31] Like numerous statutes, it exempts media companies' news stories, commentaries, and editorials from its electioneering restrictions, in recognition of the unique role played by the institutional press in sustaining public debate.[32] See 2 U. S. C. § 434(f)(3)(B)(i); *McConnell*, 540 U. S., at 208–209; see also *Austin*, 494 U. S., at 666–668. It also allows corporations to spend unlimited sums on political communications with their executives and shareholders, § 441b(b)(2)(A); 11 CFR § 114.3(a)(1), to fund additional PAC activity through trade associations, 2 U. S. C. § 441b(b)(4)(D), to distribute voting guides and voting records, 11 CFR §§ 114.4(c)(4)–(5), to underwrite voter registration and voter turnout activities, § 114.3(c)(4); § 114.4(c)(2), to host fundraising events for candidates within certain limits,

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[31] Roaming far afield from the case at hand, the majority worries that the Government will use § 203 to ban books, pamphlets, and blogs. *Ante*, at 333, 337, 349, 364. Yet by its plain terms, § 203 does not apply to printed material. See 2 U. S. C. § 434(f)(3)(A)(i); see also 11 CFR § 100.29(c)(1) ("[E]lectioneering communication does not include communications appearing in print media"). And in light of the ordinary understanding of the terms "broadcast, cable, [and] satellite," 2 U. S. C. § 434(f)(3)(A)(i), coupled with Congress' clear aim of targeting "a virtual torrent of televised election-related ads," *McConnell*, 540 U. S., at 207, we highly doubt that § 203 could be interpreted to apply to a Web site or book that happens to be transmitted at some stage over airwaves or cable lines, or that the FEC would ever try to do so. See 11 CFR § 100.26 (exempting most Internet communications from regulation as advertising); § 100.155 (exempting uncompensated Internet activity from regulation as an expenditure); Supp. Brief for Center for Independent Media et al. as *Amici Curiae* 14 (explaining that "the FEC has consistently construed [BCRA's] media exemption to apply to a variety of non-traditional media"). If it should, the Government acknowledges "there would be quite [a] good as-applied challenge." Tr. of Oral Arg. 65 (Sept. 9, 2009).

[32] As the Government points out, with a media corporation there is also a lesser risk that investors will not understand, learn about, or support the advocacy messages that the corporation disseminates. Supp. Reply Brief for Appellee 10. Everyone knows and expects that media outlets may seek to influence elections in this way.

§ 114.4(c); § 114.2(f)(2), and to publicly endorse candidates through a press release and press conference, § 114.4(c)(6).

At the time Citizens United brought this lawsuit, the only types of speech that could be regulated under § 203 were: (1) broadcast, cable, or satellite communications;[33] (2) capable of reaching at least 50,000 persons in the relevant electorate;[34] (3) made within 30 days of a primary or 60 days of a general federal election;[35] (4) by a labor union or a non-*MCFL*, nonmedia corporation;[36] (5) paid for with general treasury funds;[37] and (6) "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[38] The category of communications meeting all of these criteria is not trivial, but the notion that corporate political speech has been "suppress[ed] . . . altogether," *ante*, at 319, that corporations have been "exclu[ded] . . . from the general public dialogue," *ante*, at 341, or that a work of fiction such as *Mr. Smith Goes to Washington* might be covered, *ante*, at 371–372, is nonsense.[39] Even the plaintiffs in *McConnell*, who had every incentive to depict BCRA as negatively as possible, declined to argue that § 203's prohibition on certain uses of general treasury funds amounts to a complete ban. See 540 U. S., at 204.

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[33] 2 U. S. C. § 434(f)(3)(A)(i).

[34] § 434(f)(3)(C).

[35] § 434(f)(3)(A)(i)(II).

[36] § 441b(b); *McConnell*, 540 U. S., at 211.

[37] § 441b(b)(2)(C).

[38] *WRTL*, 551 U. S. 449, 470 (2007) (opinion of ROBERTS, C. J.).

[39] It is likewise nonsense to suggest that the FEC's "'business is to censor.'" *Ante*, at 335 (quoting *Freedman* v. *Maryland*, 380 U. S. 51, 57 (1965)). The FEC's business is to administer and enforce the campaign finance laws. The regulatory body at issue in *Freedman* was a state *board of censors* that had virtually unfettered discretion to bar distribution of motion picture films it deemed not to be "'moral and proper.'" See *id.*, at 52–53, and n. 2. No movie could be shown in the State of Maryland that was not first approved and licensed by the board of censors. *Id.*, at 52, n. 1. It is an understatement to say that *Freedman* is not on point, and the majority's characterization of the FEC is deeply disconcerting.

In many ways, then, § 203 functions as a source restriction or a time, place, and manner restriction. It applies in a viewpoint-neutral fashion to a narrow subset of advocacy messages about clearly identified candidates for federal office, made during discrete time periods through discrete channels. In the case at hand, all Citizens United needed to do to broadcast *Hillary* right before the primary was to abjure business contributions or use the funds in its PAC, which by its own account is "one of the most active conservative PACs in America," Citizens United Political Victory Fund, http://www.cupvf.org/.[40]

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

Identity-Based Distinctions

The second pillar of the Court's opinion is its assertion that "the Government cannot restrict political speech based on the speaker's . . . identity." *Ante*, at 346; accord, *ante*, at 319, 340–341, 342–343, 346–347, 347, 348, 349, 350, 364, 365.

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[40] Citizens United has administered this PAC for over a decade. See Defendant FEC's Memorandum in Opposition to Plaintiff's Second Motion for Preliminary Injunction in No. 07–2240 (ARR, RCL, RWR) (DC), p. 20. Citizens United also operates multiple "527" organizations that engage in partisan political activity. See Defendant FEC's Statement of Material Facts as to Which There Is No Genuine Dispute in No. 07–2240 (DC), ¶¶ 22–24.

The case on which it relies for this proposition is *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978). As I shall explain, *infra*, at 442–446, the holding in that case was far narrower than the Court implies. Like its paeans to unfettered discourse, the Court's denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality.

"Our jurisprudence over the past 216 years has rejected an absolutist interpretation" of the First Amendment. *WRTL*, 551 U. S., at 482 (opinion of ROBERTS, C. J.). The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Apart perhaps from measures designed to protect the press, that text might seem to permit no distinctions of any kind. Yet in a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students,[41] prisoners,[42] members of the Armed Forces,[43] foreigners,[44] and its own employees.[45]

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[41] See, *e. g.*, *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 682 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

[42] See, *e. g.*, *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 129 (1977) ("In a prison context, an inmate does not retain those First Amendment rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system" (internal quotation marks omitted)).

[43] See, *e. g.*, *Parker* v. *Levy*, 417 U. S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections").

[44] See, *e. g.*, 2 U. S. C. § 441e(a)(1) (foreign nationals may not directly or indirectly make contributions or independent expenditures in connection with a U. S. election).

[45] See, *e. g.*, *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 550 (1973) (upholding statute prohibiting Executive Branch employees from taking "an active part in political management or in political campaigns"

When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems.[46] In contrast to the blanket rule that the majority espouses, our cases recognize that the Government's interests may be more or less compelling with respect to different classes of speakers,[47] cf. *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 585 (1983) ("[D]ifferential treatment" is constitutionally suspect "*unless* justified by some special characteristic" of the regulated class of speakers (emphasis added)), and that the constitutional rights of certain categories of speakers, in certain contexts, "'are not automatically coextensive with the rights'" that are normally accorded to members of our soci-

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(internal quotation marks omitted)); *Public Workers* v. *Mitchell*, 330 U. S. 75 (1947) (same); *United States* v. *Wurzbach*, 280 U. S. 396, 398 (1930) (upholding statute prohibiting federal employees from making contributions to Members of Congress for "any political purpose whatever" (internal quotation marks omitted)); *Ex parte Curtis*, 106 U. S. 371 (1882) (upholding statute prohibiting certain federal employees from giving money to other employees for political purposes).

[46] The majority states that the cases just cited are "inapposite" because they "stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." *Ante*, at 341. The majority's creative suggestion that these cases stand only for that one proposition is quite implausible. In any event, the proposition lies at the heart of this case, as Congress and half the state legislatures have concluded, over many decades, that their core functions of administering elections and passing legislation cannot operate effectively without some narrow restrictions on corporate electioneering paid for by general treasury funds.

[47] Outside of the law, of course, it is a commonplace that the identity and incentives of the speaker might be relevant to an assessment of his speech. See Aristotle, Poetics § 11.2(vi), pp. 43–44 (M. Heath transl. 1996) ("In evaluating any utterance or action, one must take into account not just the moral qualities of what is actually done or said, but also the identity of the agent or speaker, the addressee, the occasion, the means, and the motive"). The insight that the identity of speakers is a proper subject of regulatory concern, it bears noting, motivates the disclaimer and disclosure provisions that the Court today upholds.

ety, *Morse* v. *Frederick*, 551 U. S. 393, 396–397, 404 (2007) (quoting *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 682 (1986)).

The free speech guarantee thus does not render every other public interest an illegitimate basis for qualifying a speaker's autonomy; society could scarcely function if it did. It is fair to say that our First Amendment doctrine has "frowned on" certain identity-based distinctions, *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32, 47, n. 4 (1999) (STEVENS, J., dissenting), particularly those that may reflect invidious discrimination or preferential treatment of a politically powerful group. But it is simply incorrect to suggest that we have prohibited all legislative distinctions based on identity or content. Not even close.

The election context is distinctive in many ways, and the Court, of course, is right that the First Amendment closely guards political speech. But in this context, too, the authority of legislatures to enact viewpoint-neutral regulations based on content and identity is well settled. We have, for example, allowed state-run broadcasters to exclude independent candidates from televised debates. *Arkansas Ed. Television Comm'n* v. *Forbes*, 523 U. S. 666 (1998).[48] We have upheld statutes that prohibit the distribution or display of campaign materials near a polling place. *Burson* v. *Freeman*, 504 U. S. 191 (1992).[49] Although we have not reviewed

[48] I dissented in *Forbes* because the broadcaster's decision to exclude the respondent from its debate was done "on the basis of entirely subjective, ad hoc judgments," 523 U. S., at 690, that suggested anticompetitive viewpoint discrimination, *id.*, at 693–694, and lacked a compelling justification. Needless to say, my concerns do not apply to the instant case.

[49] The law at issue in *Burson* was far from unusual. "[A]ll 50 States," the Court observed, "limit access to the areas in or around polling places." 504 U. S., at 206 (plurality opinion); see also Note, 91 Ky. L. J. 715, 729, n. 89, 747–769 (2003) (collecting statutes). I dissented in *Burson* because the evidence adduced to justify Tennessee's law was "exceptionally thin," 504 U. S., at 219, and "the reason for [the] restriction [had] disappear[ed]"

them directly, we have never cast doubt on laws that place special restrictions on campaign spending by foreign nationals. See, *e. g.*, 2 U. S. C. § 441e(a)(1). And we have consistently approved laws that bar Government employees, but not others, from contributing to or participating in political activities. See n. 45, *supra*. These statutes burden the political expression of one class of speakers, namely, civil servants. Yet we have sustained them on the basis of longstanding practice and Congress' reasoned judgment that certain regulations which leave "untouched full participation . . . in political decisions at the ballot box," *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 556 (1973) (internal quotation marks omitted), help ensure that public officials are "sufficiently free from improper influences," *id.*, at 564, and that "confidence in the system of representative Government is not . . . eroded to a disastrous extent," *id.*, at 565.

The same logic applies to this case with additional force because it is the identity of corporations, rather than individuals, that the Legislature has taken into account. As we have unanimously observed, legislatures are entitled to decide "that the special characteristics of the corporate structure require particularly careful regulation" in an electoral context. *NRWC*, 459 U. S., at 209–210.[50] Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also "furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely

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over time, *id.*, at 223. "In short," I concluded, "Tennessee ha[d] failed to point to any legitimate interest that would justify its selective regulation of campaign-related expression." *Id.*, at 225. These criticisms are inapplicable to the case before us.

[50] They are likewise entitled to regulate media corporations differently from other corporations "to ensure that the law 'does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events.'" *McConnell*, 540 U. S., at 208 (quoting *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 668 (1990)).

from those of their members and of the public in receiving information," *Beaumont*, 539 U. S., at 161, n. 8 (citation omitted). Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the "speakers" are not natural persons, much less members of our political community, and the governmental interests are of the highest order. Furthermore, when corporations, as a class, are distinguished from noncorporations, as a class, there is a lesser risk that regulatory distinctions will reflect invidious discrimination or political favoritism.

If taken seriously, our colleagues' assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by "Tokyo Rose" during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could " 'enhance the relative voice' " of some (*i. e.*, humans) over others (*i. e.*, nonhumans). *Ante*, at 349–350 (quoting *Buckley*, 424 U. S., at 49).[51] Under the

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[51] The Court all but confesses that a categorical approach to speaker identity is untenable when it acknowledges that Congress might be allowed to take measures aimed at "preventing foreign individuals or associations from influencing our Nation's political process." *Ante*, at 362. Such measures have been a part of U. S. campaign finance law for many years. The notion that Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers, whose "obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country." Teachout, The Anti-Corruption Principle, 94 Cornell L. Rev. 341, 393, n. 245 (2009) (hereinafter Teachout); see also U. S. Const., Art. I, §9, cl. 8 ("[N]o Person holding any Office of Profit or Trust . . . shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State"). Professor Teachout observes that a cor-

majority's view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.[52]

In short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.

Our First Amendment Tradition

A third fulcrum of the Court's opinion is the idea that *Austin* and *McConnell* are radical outliers, "aberration[s]," in our First Amendment tradition. *Ante,* at 355; see also *ante,* at 361, 372 (professing fidelity to "our law and our tradition"). The Court has it exactly backwards. It is today's holding that is the radical departure from what had been settled First Amendment law. To see why, it is useful to take a long view.

1. *Original Understandings*

Let us start from the beginning. The Court invokes "ancient First Amendment principles," *ante,* at 319 (internal quotation marks omitted), and original understandings, *ante,* at 353–354, to defend today's ruling, yet it makes only a perfunctory attempt to ground its analysis in the principles or

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poration might be analogized to a foreign power in this respect, "inasmuch as its legal loyalties necessarily exclude patriotism." Teachout 393, n. 245.

[52] See A. Bickel, The Supreme Court and the Idea of Progress 59–60 (1978); A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 39–40 (1965); Tokaji, First Amendment Equal Protection: On Discretion, Inequality, and Participation, 101 Mich. L. Rev. 2409, 2508–2509 (2003). Of course, voting is not speech in a pure or formal sense, but then again neither is a campaign expenditure; both are nevertheless communicative acts aimed at influencing electoral outcomes. Cf. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 Colum. L. Rev. 1369, 1383–1384 (1994) (hereinafter Strauss).

understandings of those who drafted and ratified the Amendment. Perhaps this is because there is not a scintilla of evidence to support the notion that anyone believed it would preclude regulatory distinctions based on the corporate form. To the extent that the Framers' views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority's position.

This is not only because the Framers and their contemporaries conceived of speech more narrowly than we now think of it, see Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1, 22 (1971), but also because they held very different views about the nature of the First Amendment right and the role of corporations in society. Those few corporations that existed at the founding were authorized by grant of a special legislative charter.[53] Corporate sponsors would petition the legislature, and the legislature, if amenable, would issue a charter that specified the corporation's powers and purposes and "authoritatively fixed

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[53] Scholars have found that only a handful of business corporations were issued charters during the colonial period, and only a few hundred during all of the 18th century. See E. Dodd, American Business Corporations Until 1860, p. 197 (1954); L. Friedman, A History of American Law 188–189 (2d ed. 1985); Baldwin, American Business Corporations Before 1789, 8 Am. Hist. Rev. 449, 450–459 (1903). JUSTICE SCALIA quibbles with these figures; whereas we say that "a few hundred" charters were issued to business corporations during the 18th century, he says that the number is "approximately 335." *Ante*, at 387 (concurring opinion). JUSTICE SCALIA also raises the more serious point that it is improper to assess these figures by today's standards, *ibid.*, though I believe he fails to substantiate his claim that "the corporation was a familiar figure in American economic life" by the century's end, *ibid.* (internal quotation marks omitted). His formulation of that claim is also misleading, because the relevant reference point is not 1800 but the date of the First Amendment's ratification, in 1791. And at that time, the number of business charters must have been significantly smaller than 335, because the pace of chartering only began to pick up steam in the last decade of the 18th century. More than half of the century's total business charters were issued between 1796 and 1800. Friedman, History of American Law, at 189.

the scope and content of corporate organization," including "the internal structure of the corporation." J. Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780–1970, pp. 15–16 (1970) (reprinted 2004). Corporations were created, supervised, and conceptualized as quasi-public entities, "designed to serve a social function for the state." Handlin & Handlin, Origins of the American Business Corporation, 5 J. Econ. Hist. 1, 22 (1945). It was "assumed that [they] were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare." R. Seavoy, Origins of the American Business Corporation, 1784–1855, p. 5 (1982).

The individualized charter mode of incorporation reflected the "cloud of disfavor under which corporations labored" in the early years of this Nation. 1 W. Fletcher, Cyclopedia of the Law of Corporations § 2, p. 8 (rev. ed. 2006); see also *Louis K. Liggett Co.* v. *Lee*, 288 U. S. 517, 548–549 (1933) (Brandeis, J., dissenting) (discussing fears of the "evils" of business corporations); L. Friedman, A History of American Law 194 (2d ed. 1985) ("The word 'soulless' constantly recurs in debates over corporations. . . . Corporations, it was feared, could concentrate the worst urges of whole groups of men"). Thomas Jefferson famously fretted that corporations would subvert the Republic.[54] General incorporation statutes, and widespread acceptance of business corporations as socially useful actors, did not emerge until the 1800's. See Hansmann & Kraakman, The End of History for Corporate Law, 89 Geo. L. J. 439, 440 (2001) (hereinafter Hansmann & Kraakman) ("[A]ll general business corporation statutes appear to date from well after 1800").

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[54] See Letter from Thomas Jefferson to Tom Logan (Nov. 12, 1816), in 12 The Works of Thomas Jefferson 42, 44 (P. Ford ed. 1905) ("I hope we shall . . . crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country").

The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.[55] While individuals might join together to exercise their speech rights, business corporations, at least, were plainly not seen as facilitating such associational or expressive ends. Even "the notion that business corporations could invoke the First Amendment would probably have been quite a novelty," given that "at the time, the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign." Shelledy, Autonomy, Debate, and Corporate Speech, 18 Hastings Const. L. Q. 541, 578 (1991); cf. *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819) (Marshall,

[55] In normal usage then, as now, the term "speech" referred to oral communications by individuals. See, *e. g.*, 2 S. Johnson, Dictionary of the English Language 1853–1854 (4th ed. 1773) (reprinted 1978) (listing as primary definition of "speech": "The power of articulate utterance; the power of expressing thoughts by vocal words"); 2 N. Webster, American Dictionary of the English Language (1828) (reprinted 1970) (listing as primary definition of "speech": "The faculty of uttering articulate sounds or words, as in human beings; the faculty of expressing thoughts by words or articulate sounds. *Speech* was given to man by his Creator for the noblest purposes"). Indeed, it has been "claimed that the notion of institutional speech . . . did not exist in post-revolutionary America." Fagundes, State Actors as First Amendment Speakers, 100 Nw. U. L. Rev. 1637, 1654 (2006); see also Bezanson, Institutional Speech, 80 Iowa L. Rev. 735, 775 (1995) ("In the intellectual heritage of the eighteenth century, the idea that free speech was individual and personal was deeply rooted and clearly manifest in the writings of Locke, Milton, and others on whom the framers of the Constitution and the Bill of Rights drew"). Given that corporations were conceived of as artificial entities and do not have the technical capacity to "speak," the burden of establishing that the Framers and ratifiers understood "the freedom of speech" to encompass corporate speech is, I believe, far heavier than the majority acknowledges.

C. J.) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it"); Eule, Promoting Speaker Diversity: Austin and Metro Broadcasting, 1990 S. Ct. Rev. 105, 129 ("The framers of the First Amendment could scarcely have anticipated its application to the corporation form. That, of course, ought not to be dispositive. What is compelling, however, is an understanding of who was supposed to be the beneficiary of the free speech guaranty—the individual"). In light of these background practices and understandings, it seems to me implausible that the Framers believed "the freedom of speech" would extend equally to all corporate speakers, much less that it would preclude legislatures from taking limited measures to guard against corporate capture of elections.

The Court observes that the Framers drew on diverse intellectual sources, communicated through newspapers, and aimed to provide greater freedom of speech than had existed in England. *Ante*, at 353. From these (accurate) observations, the Court concludes that "[t]he First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media." *Ibid.* This conclusion is far from certain, given that many historians believe the Framers were focused on prior restraints on publication and did not understand the First Amendment to "prevent the subsequent punishment of such [publications] as may be deemed contrary to the public welfare." *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 714 (1931) (internal quotation marks omitted). Yet, even if the majority's conclusion were correct, it would tell us only that the First Amendment was understood to protect political speech *in* certain media. It would tell us little about whether the Amendment was understood to protect general treasury electioneering expenditures *by* corporations, and to what extent.

As a matter of original expectations, then, it seems absurd to think that the First Amendment prohibits legislatures from taking into account the corporate identity of a sponsor of electoral advocacy. As a matter of original meaning, it likewise seems baseless—unless one evaluates the First Amendment's "principles," *ante*, at 319, 363, or its "purpose," *ante*, at 376 (opinion of ROBERTS, C. J.), at such a high level of generality that the historical understandings of the Amendment cease to be a meaningful constraint on the judicial task. This case sheds a revelatory light on the assumption of some that an impartial judge's application of an originalist methodology is likely to yield more determinate answers, or to play a more decisive role in the decisional process, than his or her views about sound policy.

JUSTICE SCALIA criticizes the foregoing discussion for failing to adduce statements from the founding era showing that corporations were understood to be excluded from the First Amendment's free speech guarantee. *Ante*, at 386, 393. Of course, JUSTICE SCALIA adduces no statements to suggest the contrary proposition, or even to suggest that the contrary proposition better reflects the kind of right that the drafters and ratifiers of the Free Speech Clause thought they were enshrining. Although JUSTICE SCALIA makes a perfectly sensible argument that an individual's right to speak entails a right to speak with others for a common cause, cf. *MCFL*, 479 U. S. 238, he does not explain why those two rights must be precisely identical, or why that principle applies to electioneering by corporations that serve no "common cause." *Ante*, at 392. Nothing in his account dislodges my basic point that members of the founding generation held a cautious view of corporate power and a narrow view of corporate rights (not that they "despised" corporations, *ante*, at 386), and that they conceptualized speech in individualistic terms. If no prominent Framer bothered to articulate that corporate speech would have lesser status than individual speech, that may well be because the contrary proposition—

if not also the very notion of "corporate speech"—was inconceivable.[56]

JUSTICE SCALIA also emphasizes the unqualified nature of the First Amendment text. *Ante*, at 386, 392–393. Yet he would seemingly read out the Free Press Clause: How else could he claim that my purported views on newspapers must track my views on corporations generally? *Ante*, at 390.[57] Like virtually all modern lawyers, JUSTICE SCALIA presumably believes that the First Amendment restricts the Executive, even though its language refers to Congress alone. In any event, the text only leads us back to the questions who or what is guaranteed "the freedom of speech," and, just as critically, what that freedom consists of and under what circumstances it may be limited. JUSTICE SCALIA appears to believe that because corporations are created and utilized by individuals, it follows (as night the day) that their electioneering must be equally protected by the First Amendment

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[56] Postratification practice bolsters the conclusion that the First Amendment, "as originally understood," *ante*, at 353, did not give corporations political speech rights on a par with the rights of individuals. Well into the modern era of general incorporation statutes, "[t]he common law was generally interpreted as prohibiting corporate political participation," *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 819 (1978) (White, J., dissenting), and this Court did not recognize *any* First Amendment protections for corporations until the middle part of the 20th century, see *ante*, at 342 (listing cases).

[57] In fact, the Free Press Clause might be turned against JUSTICE SCALIA, for two reasons. First, we learn from it that the drafters of the First Amendment did draw distinctions—explicit distinctions—between types of "speakers," or speech outlets or forms. Second, the Court's strongest historical evidence all relates to the Framers' views on the press, see *ante*, at 353–354; *ante*, at 388–390 (SCALIA, J., concurring), yet while the Court tries to sweep this evidence into the Free Speech Clause, the Free Press Clause provides a more natural textual home. The text and history highlighted by our colleagues suggests why one type of corporation, those that are part of the press, might be able to claim special First Amendment status, and therefore why some kinds of "identity"-based distinctions might be permissible after all. Once one accepts that much, the intellectual edifice of the majority opinion crumbles.

and equally immunized from expenditure limits. See *ante*, at 391–392. That conclusion certainly does not follow as a logical matter, and JUSTICE SCALIA fails to explain why the original public meaning leads it to follow as a matter of interpretation.

The truth is we cannot be certain how a law such as BCRA §203 meshes with the original meaning of the First Amendment.[58] I have given several reasons why I believe the Constitution would have been understood then, and ought to be understood now, to permit reasonable restrictions on corporate electioneering, and I will give many more reasons in the pages to come. The Court enlists the Framers in its defense without seriously grappling with their understandings of corporations or the free speech right, or with the republican principles that underlay those understandings.

In fairness, our campaign finance jurisprudence has never attended very closely to the views of the Framers, see *Randall* v. *Sorrell*, 548 U. S. 230, 280 (2006) (STEVENS, J., dissenting), whose political universe differed profoundly from that of today. We have long since held that corporations are covered by the First Amendment, and many legal scholars have long since rejected the concession theory of the corporation. But "historical context is usually relevant," *ibid.* (internal quotation marks omitted), and in light of the Court's effort to cast itself as guardian of ancient values, it pays to remember that nothing in our constitutional history dictates today's outcome. To the contrary, this history helps illuminate just how extraordinarily dissonant the decision is.

2. *Legislative and Judicial Interpretation*

A century of more recent history puts to rest any notion that today's ruling is faithful to our First Amendment tradi-

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[58] Cf. L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 4 (1960) ("The meaning of no other clause of the Bill of Rights at the time of its framing and ratification has been so obscure to us" as the Free Speech and Press Clause).

tion. At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, ch. 420, 34 Stat. 864, banning all corporate contributions to candidates. The Senate Report on the legislation observed that "[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials." S. Rep. No. 3056, 59th Cong., 1st Sess., 2 (1906). President Roosevelt, in his 1905 annual message to Congress, declared:

> "'All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts.'" *United States* v. *Automobile Workers*, 352 U. S. 567, 572 (1957) (quoting 40 Cong. Rec. 96).

The Court has surveyed the history leading up to the Tillman Act several times, see *WRTL*, 551 U. S., at 508–510 (Souter, J., dissenting); *McConnell*, 540 U. S., at 115; *Automobile Workers*, 352 U. S., at 570–575, and I will refrain from doing so again. It is enough to say that the Act was primarily driven by two pressing concerns: first, the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption; and second, a respect for the interest of shareholders and members in preventing the use of their money to support candidates they opposed. See *ibid.*; *United States* v. *CIO*, 335 U. S. 106, 113 (1948); Winkler, "Other People's Money": Corporations, Agency Costs, and Campaign Finance Law, 92 Geo. L. J. 871 (2004).

Over the years, the limitations on corporate political spending have been modified in a number of ways, as Congress responded to changes in the American economy and political practices that threatened to displace the commonweal. Justice Souter recently traced these developments at length.[59] *WRTL*, 551 U. S., at 507–519 (dissenting opinion); see also *McConnell*, 540 U. S., at 115–133; *McConnell*, 251 F. Supp. 2d, at 188–205. The Taft-Hartley Act of 1947 is of special significance for this case. In that Act passed more than 60 years ago, Congress extended the prohibition on corporate support of candidates to cover not only direct contributions, but independent expenditures as well. Labor Management Relations Act, 1947, § 304, 61 Stat. 159. The bar on contributions "was being so narrowly construed" that corporations were easily able to defeat the purposes of the Act by supporting candidates through other means. *WRTL*, 551 U. S., at 511 (Souter, J., dissenting) (citing S. Rep. No. 1, 80th Cong., 1st Sess., 38–39 (1947)).

Our colleagues emphasize that in two cases from the middle of the 20th century, several Justices wrote separately to criticize the expenditure restriction as applied to unions, even though the Court declined to pass on its constitutionality. *Ante*, at 343–344. Two features of these cases are of far greater relevance. First, those Justices were writing separately; which is to say, their position failed to command a majority. Prior to today, this was a fact we found signifi-

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[59] As the majority notes, there is some academic debate about the precise origins of these developments. *Ante*, at 363–364; see also n. 19, *supra*. There is *always* some academic debate about such developments; the motives of legislatures are never entirely clear or unitary. Yet the basic shape and trajectory of 20th-century campaign finance reform are clear, and one need not take a naive or triumphalist view of this history to find it highly relevant. The Court's skepticism does nothing to mitigate the absurdity of its claim that *Austin* and *McConnell* were outliers. Nor does it alter the fact that five Justices today destroy a longstanding American practice.

cant in evaluating precedents. Second, each case in this line expressed support for the principle that corporate and union political speech financed with PAC funds, collected voluntarily from the organization's stockholders or members, receives greater protection than speech financed with general treasury funds.[60]

This principle was carried forward when Congress enacted comprehensive campaign finance reform in the Federal Election Campaign Act of 1971 (FECA), 86 Stat. 3, which retained the restriction on using general treasury funds for contributions and expenditures, 2 U. S. C. § 441b(a). FECA

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[60] See *Pipefitters* v. *United States*, 407 U. S. 385, 409, 414–415 (1972) (reading the statutory bar on corporate and union campaign spending not to apply to "the voluntary donations of employees," when maintained in a separate account, because "[t]he dominant [legislative] concern in requiring that contributions be voluntary was, after all, to protect the dissenting stockholder or union member"); *Automobile Workers*, 352 U. S., at 592 (advising the District Court to consider on remand whether the broadcast in question was "paid for out of the general dues of the union membership or [whether] the funds [could] be fairly said to have been obtained on a voluntary basis"); *United States* v. *CIO*, 335 U. S. 106, 123 (1948) (observing that "funds voluntarily contributed [by union members or corporate stockholders] for election purposes" might not be covered by the expenditure bar). Both the *Pipefitters* and the *Automobile Workers* Courts approvingly referenced Congress' goal of reducing "the effect of aggregated wealth on federal elections," understood as wealth drawn from a corporate or union general treasury without the stockholders' or members' "free and knowing choice." *Pipefitters*, 407 U. S., at 416; see *Automobile Workers*, 352 U. S., at 582.

The two dissenters in *Pipefitters* would not have read the statutory provision in question, a successor to § 304 of the Taft-Hartley Act, to allow such robust use of corporate and union funds to finance otherwise prohibited electioneering. "This opening of the door to extensive corporate and union influence on the elective and legislative processes," Justice Powell wrote, "must be viewed with genuine concern. This seems to me to be a regressive step as contrasted with the numerous legislative and judicial actions in recent years designed to assure that elections are indeed free and representative." 407 U. S., at 450 (opinion of Powell, J., joined by Burger, C. J.).

codified the option for corporations and unions to create PACs to finance contributions and expenditures forbidden to the corporation or union itself. § 441b(b).

By the time Congress passed FECA in 1971, the bar on corporate contributions and expenditures had become such an accepted part of federal campaign finance regulation that when a large number of plaintiffs, including several nonprofit corporations, challenged virtually every aspect of FECA in *Buckley*, 424 U. S. 1, no one even bothered to argue that the bar as such was unconstitutional. *Buckley* famously (or infamously) distinguished direct contributions from independent expenditures, *id.*, at 58–59, but its silence on corporations only reinforced the understanding that corporate expenditures could be treated differently from individual expenditures. "Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell*, 540 U. S., at 203.

Thus, it was unremarkable, in a 1982 case holding that Congress could bar nonprofit corporations from soliciting nonmembers for PAC funds, that then-Justice Rehnquist wrote for a unanimous Court that Congress' "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations . . . warrants considerable deference," and "reflects a permissible assessment of the dangers posed by those entities to the electoral process." *NRWC*, 459 U. S., at 209 (internal quotation marks and citation omitted). "The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized," the unanimous Court observed, "and there is no reason why it may not . . . be accomplished by treating . . . corporations . . . differently from individuals." *Id.*, at 210–211.

The corporate/individual distinction was not questioned by the Court's disposition, in 1986, of a challenge to the expenditure restriction as applied to a distinctive type of nonprofit corporation. In *MCFL*, 479 U. S. 238, we stated again "that 'the special characteristics of the corporate structure require particularly careful regulation,'" *id.*, at 256 (quoting *NRWC*, 459 U. S., at 209–210), and again we acknowledged that the Government has a legitimate interest in "regulat[ing] the substantial aggregations of wealth amassed by the special advantages which go with the corporate form," 479 U. S., at 257 (internal quotation marks omitted). Those aggregations can distort the "free trade in ideas" crucial to candidate elections, *ibid.* (internal quotation marks omitted), at the expense of members or shareholders who may disagree with the object of the expenditures, *id.*, at 260. What the Court held by a 5-to-4 vote was that a limited class of corporations must be allowed to use their general treasury funds for independent expenditures, because Congress' interests in protecting shareholders and "restrict[ing] 'the influence of political war chests funneled through the corporate form,'" *id.*, at 257 (quoting *FEC* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 501 (1985) *(NCPAC)*), did not apply to corporations that were structurally insulated from those concerns.[61]

It is worth remembering for present purposes that the four *MCFL* dissenters, led by Chief Justice Rehnquist, thought the Court was carrying the First Amendment *too*

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[61] Specifically, these corporations had to meet three conditions. First, they had to be formed "for the express purpose of promoting political ideas," so that their resources reflected political support rather than commercial success. *MCFL*, 479 U. S., at 264. Next, they had to have no shareholders, so that "persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." *Ibid.* Finally, they could not be "established by a business corporation or a labor union," nor "accept contributions from such entities," lest they "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace." *Ibid.*

far. They would have recognized congressional authority to bar general treasury electioneering expenditures even by this class of nonprofits; they acknowledged that "the threat from corporate political activity will vary depending on the particular characteristics of a given corporation," but believed these "distinctions among corporations" were "distinctions in degree," not "in kind," and thus "more properly drawn by the Legislature than by the Judiciary." 479 U. S., at 268 (opinion of Rehnquist, C. J.) (internal quotation marks omitted). Not a single Justice suggested that regulation of corporate political speech could be no more stringent than of speech by an individual.

Four years later, in *Austin,* 494 U. S. 652, we considered whether corporations falling outside the *MCFL* exception could be barred from using general treasury funds to make independent expenditures in support of, or in opposition to, candidates. We held they could be. Once again recognizing the importance of "the integrity of the marketplace of political ideas" in candidate elections, *MCFL,* 479 U. S., at 257, we noted that corporations have "special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," 494 U. S., at 658–659—that allow them to spend prodigious general treasury sums on campaign messages that have "little or no correlation" with the beliefs held by actual persons, *id.,* at 660. In light of the corrupting effects such spending might have on the political process, *ibid.,* we permitted the State of Michigan to limit corporate expenditures on candidate elections to corporations' PACs, which rely on voluntary contributions and thus "reflect actual public support for the political ideas espoused by corporations," *ibid.* Notwithstanding our colleagues' insinuations that *Austin* deprived the public of general "ideas," "facts," and "'knowledge,'" *ante,* at 354, 355, the decision addressed only candidate-focused expenditures and gave the State no license to regulate corporate spending on other matters.

In the 20 years since *Austin*, we have reaffirmed its holding and rationale a number of times, see, *e. g.*, *Beaumont*, 539 U. S., at 153–156, most importantly in *McConnell*, 540 U. S. 93, where we upheld the provision challenged here, § 203 of BCRA.[62] Congress crafted § 203 in response to a problem created by *Buckley*. The *Buckley* Court had construed FECA's definition of prohibited "expenditures" narrowly to avoid any problems of constitutional vagueness, holding it applicable only to "communications that expressly advocate the election or defeat of a clearly identified candidate," 424 U. S., at 80, *i. e.*, statements containing so-called "magic words" like " 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject,' " *id.*, at 43–44, and n. 52. After *Buckley*, corporations and unions figured out how to circumvent the limits on express advocacy by using sham "issue ads" that "eschewed the use of magic words" but nonetheless "advocate[d] the election or defeat of clearly identified federal candidates." *McConnell*, 540 U. S., at 126. "Corporations and unions spent hundreds

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[62] According to THE CHIEF JUSTICE, we are "erroneou[s]" in claiming that *McConnell* and *Beaumont* " 'reaffirmed' " *Austin*. *Ante*, at 376–377. In both cases, the Court explicitly relied on *Austin* and quoted from it at length. See 540 U. S., at 204–205; 539 U. S., at 153–155, 158, 160, 163; see also *ante*, at 332 (opinion of the Court) ("The holding and validity of *Austin* were essential to the reasoning of the *McConnell* majority opinion"); Brief for Appellants National Rifle Association et al., O. T. 2003, No. 02–1675, p. 21 ("*Beaumont* reaffirmed . . . the *Austin* rationale for restricting expenditures"). The *McConnell* Court did so in the teeth of vigorous protests by Justices in today's majority that *Austin* should be overruled. See *ante*, at 332 (citing relevant passages); see also *Beaumont*, 539 U. S., at 163–164 (KENNEDY, J., concurring in judgment). Both Courts also heard criticisms of *Austin* from parties or *amici*. See Brief for Appellants Chamber of Commerce of the United States et al., O. T. 2003, No. 02–1756, p. 35, n. 22; Reply Brief for Appellants/Cross-Appellees Senator Mitch McConnell et al., O. T. 2003, No. 02–1674, pp. 13–14; Brief for Pacific Legal Foundation as *Amicus Curiae* in *FEC* v. *Beaumont*, O. T. 2002, No. 02–403, *passim*. If this does not qualify as reaffirmation of a precedent, then I do not know what would.

of millions of dollars of their general funds to pay for these ads." *Id.*, at 127. Congress passed §203 to address this circumvention, prohibiting corporations and unions from using general treasury funds for electioneering communications that "refe[r] to a clearly identified candidate," whether or not those communications use the magic words. 2 U. S. C. §434(f)(3)(A)(i)(I).

When we asked in *McConnell* "whether a compelling governmental interest justifie[d]" §203, we found the question "easily answered": "We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" 540 U. S., at 205 (quoting *Austin*, 494 U. S., at 660). These precedents "represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." 540 U. S., at 205 (internal quotation marks omitted). "Moreover, recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against '"circumvention of [valid] contribution limits."'" *Ibid.* (quoting *Beaumont*, 539 U. S., at 155, in turn quoting *FEC* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 456, and n. 18 (2001) *(Colorado II);* alteration in original). BCRA, we found, is faithful to the compelling governmental interests in "'preserving the integrity of the electoral process, preventing corruption, . . . sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government,'" and maintaining "'the individual citizen's confidence in government.'" 540 U. S., at 206–207, n. 88 (quoting *Bellotti*, 435 U. S., at 788–789; some internal quotation marks and brackets omitted). What made the answer even easier than it might have been otherwise was the option to form PACs, which give corporations, at the least,

"a constitutionally sufficient opportunity to engage in" independent expenditures. 540 U. S., at 203.

3. *Buckley and Bellotti*

Against this extensive background of congressional regulation of corporate campaign spending, and our repeated affirmation of this regulation as constitutionally sound, the majority dismisses *Austin* as "a significant departure from ancient First Amendment principles," *ante,* at 319 (internal quotation marks omitted). How does the majority attempt to justify this claim? Selected passages from two cases, *Buckley,* 424 U. S. 1, and *Bellotti,* 435 U. S. 765, do all of the work. In the Court's view, *Buckley* and *Bellotti* decisively rejected the possibility of distinguishing corporations from natural persons in the 1970's; it just so happens that in every single case in which the Court has reviewed campaign finance legislation in the decades since, the majority failed to grasp this truth. The Federal Congress and dozens of state legislatures, we now know, have been similarly deluded.

The majority emphasizes *Buckley*'s statement that "'[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.'" *Ante,* at 349–350 (quoting 424 U. S., at 48–49); *ante,* at 379 (opinion of ROBERTS, C. J.). But this elegant phrase cannot bear the weight that our colleagues have placed on it. For one thing, the Constitution does, in fact, permit numerous "restrictions on the speech of some in order to prevent a few from drowning out the many": for example, restrictions on ballot access and on legislators' floor time. *Nixon* v. *Shrink Missouri Government PAC,* 528 U. S. 377, 402 (2000) (BREYER, J., concurring). For another, the *Buckley* Court used this line in evaluating "the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections." 424 U. S., at 48. It is not apparent why this is relevant to the case

before us. The majority suggests that *Austin* rests on the foreign concept of speech equalization, *ante*, at 350; *ante*, at 379–381 (opinion of ROBERTS, C. J.), but we made it clear in *Austin* (as in several cases before and since) that a restriction on the way corporations spend their money is no mere exercise in disfavoring the voice of some elements of our society in preference to others. Indeed, we *expressly* ruled that the compelling interest supporting Michigan's statute was not one of "'equaliz[ing] the relative influence of speakers on elections,'" *Austin*, 494 U. S., at 660 (quoting *id.*, at 705 (KENNEDY, J., dissenting)), but rather the need to confront the distinctive corrupting potential of corporate electoral advocacy financed by general treasury dollars, *id.*, at 659–660.

For that matter, it should go without saying that when we made this statement in *Buckley*, we could not have been casting doubt on the restriction on corporate expenditures in candidate elections, which had not been challenged as "foreign to the First Amendment," *ante*, at 350 (quoting *Buckley*, 424 U. S., at 49), or for any other reason. *Buckley*'s independent expenditure analysis was focused on a very different statutory provision, 18 U. S. C. § 608(e)(1) (1970 ed., Supp. V). It is implausible to think, as the majority suggests, *ante*, at 346, that *Buckley* covertly invalidated FECA's separate corporate and union campaign expenditure restriction, § 610 (now codified at 2 U. S. C. § 441b), even though that restriction had been on the books for decades before *Buckley* and would remain on the books, undisturbed, for decades after.

The case on which the majority places even greater weight than *Buckley*, however, is *Bellotti*, 435 U. S. 765, claiming it "could not have been clearer" that *Bellotti*'s holding forbade distinctions between corporate and individual expenditures like the one at issue here, *ante*, at 346. The Court's reliance is odd. The only thing about *Bellotti* that could not be clearer is that it declined to adopt the majority's position. *Bellotti* ruled, in an explicit limitation on the scope of its holding, that "our consideration of a corporation's right to

speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." 435 U. S., at 788, n. 26; see also *id.*, at 787–788 (acknowledging that the interests in preserving public confidence in Government and protecting dissenting shareholders may be "weighty . . . in the context of partisan candidate elections"). *Bellotti*, in other words, did not touch the question presented in *Austin* and *McConnell*, and the opinion squarely disavowed the proposition for which the majority cites it.

The majority attempts to explain away the distinction *Bellotti* drew—between general corporate speech and campaign speech intended to promote or prevent the election of specific candidates for office—as inconsistent with the rest of the opinion and with *Buckley*. *Ante*, at 347, 357–360. Yet the basis for this distinction is perfectly coherent: The anticorruption interests that animate regulations of corporate participation in candidate elections, the "importance" of which "has never been doubted," 435 U. S., at 788, n. 26, do not apply equally to regulations of corporate participation in referenda. A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation's retaliation. Cf. *Austin*, 494 U. S., at 678 (STEVENS, J., concurring); *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U. S. 290, 299 (1981). The majority likewise overlooks the fact that, over the past 30 years, our cases have repeatedly recognized the candidate/issue distinction. See, *e. g.*, *Austin*, 494 U. S., at 659; *NCPAC*, 470 U. S., at 495–496; *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364, 371, n. 9 (1984); *NRWC*, 459 U. S., at 210, n. 7. The Court's critique of *Bellotti*'s footnote 26 puts it in the strange position of trying to elevate *Bellotti* to canonical status, while simultaneously disparaging a critical piece of its analysis as unsupported and irreconcilable with *Buckley*. *Bellotti*, apparently, is both the font of all wisdom and internally incoherent.

The *Bellotti* Court confronted a dramatically different factual situation from the one that confronts us in this case: a state statute that barred business corporations' expenditures on some referenda but not others. Specifically, the statute barred a business corporation "from making contributions or expenditures 'for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation,'" 435 U. S., at 768 (quoting Mass. Gen. Laws Ann., ch. 55, § 8 (West Supp. 1977); alteration in original), and it went so far as to provide that referenda related to income taxation would not "'be deemed materially to affect the property, business or assets of the corporation,'" 435 U. S., at 768. As might be guessed, the legislature had enacted this statute in order to limit corporate speech on a proposed state constitutional amendment to authorize a graduated income tax. The statute was a transparent attempt to prevent corporations from spending money to defeat this amendment, which was favored by a majority of legislators but had been repeatedly rejected by the voters. See *id.*, at 769–770, and n. 3. We said that "where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id.*, at 785–786 (footnote omitted).

Bellotti thus involved a *viewpoint-discriminatory* statute, created to effect a particular policy outcome. Even Justice Rehnquist, in dissent, had to acknowledge that "a very persuasive argument could be made that the [Massachusetts Legislature], desiring to impose a personal income tax but more than once defeated in that desire by the combination of the Commonwealth's referendum provision and corporate expenditures in opposition to such a tax, simply decided to muzzle corporations on this sort of issue so that it could succeed in its desire." *Id.*, at 827, n. 6. To make matters

worse, the law at issue did not make any allowance for corporations to spend money through PACs. *Id.*, at 768, n. 2 (opinion of the Court). This really was a complete ban on a specific, preidentified subject. See *MCFL*, 479 U. S., at 259, n. 12 (stating that 2 U. S. C. §441b's expenditure restriction "is *of course distinguishable* from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in . . . *Bellotti*" (emphasis added)).

The majority grasps a quotational straw from *Bellotti*, that speech does not fall entirely outside the protection of the First Amendment merely because it comes from a corporation. *Ante*, at 346–347. Of course not, but no one suggests the contrary, and neither *Austin* nor *McConnell* held otherwise. They held that even though the expenditures at issue were subject to First Amendment scrutiny, the restrictions on those expenditures were justified by a compelling state interest. See *McConnell*, 540 U. S., at 205; *Austin*, 494 U. S., at 658, 660. We acknowledged in *Bellotti* that numerous "interests of the highest importance" can justify campaign finance regulation. 435 U. S., at 788–789. But we found no evidence that these interests were served by the Massachusetts law. *Id.*, at 789. We left open the possibility that our decision might have been different if there had been "record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests." *Ibid.*

Austin and *McConnell*, then, sit perfectly well with *Bellotti*. Indeed, all six Members of the *Austin* majority had been on the Court at the time of *Bellotti*, and none so much as hinted in *Austin* that they saw any tension between the decisions. The difference between the cases is not that *Austin* and *McConnell* rejected First Amendment protection for corporations whereas *Bellotti* accepted it. The difference is that the statute at issue in *Bellotti* smacked of viewpoint

discrimination, targeted one class of corporations, and provided no PAC option; and the State has a greater interest in regulating independent corporate expenditures on candidate elections than on referenda, because in a functioning democracy the public must have faith that its representatives owe their positions to the people, not to the corporations with the deepest pockets.

* * *

In sum, over the course of the past century Congress has demonstrated a recurrent need to regulate corporate participation in candidate elections to "'[p]reserv[e] the integrity of the electoral process, preven[t] corruption, . . . sustai[n] the active, alert responsibility of the individual citizen,'" protect the expressive interests of shareholders, and "'[p]reserv[e] . . . the individual citizen's confidence in government.'" *McConnell*, 540 U. S., at 206–207, n. 88 (quoting *Bellotti*, 435 U. S., at 788–789; first alteration in original). These understandings provided the combined impetus behind the Tillman Act in 1907, see *Automobile Workers*, 352 U. S., at 570–575, the Taft-Hartley Act in 1947, see *WRTL*, 551 U. S., at 511 (Souter, J., dissenting), FECA in 1971, see *NRWC*, 459 U. S., at 209–210, and BCRA in 2002, see *McConnell*, 540 U. S., at 126–132. Continuously for over 100 years, this line of "[c]ampaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries." *WRTL*, 551 U. S., at 522 (Souter, J., dissenting). Time and again, we have recognized these realities in approving measures that Congress and the States have taken. None of the cases the majority cites is to the contrary. The only thing new about *Austin* was the dissent, with its stunning failure to appreciate the legitimacy of interests recognized in the name of democratic integrity since the days of the Progressives.

IV

Having explained why this is not an appropriate case in which to revisit *Austin* and *McConnell* and why these decisions sit perfectly well with "First Amendment principles," *ante*, at 319, 363, I come at last to the interests that are at stake. The majority recognizes that *Austin* and *McConnell* may be defended on anticorruption, antidistortion, and shareholder protection rationales. *Ante*, at 348–362. It badly errs both in explaining the nature of these rationales, which overlap and complement each other, and in applying them to the case at hand.

The Anticorruption Interest

Undergirding the majority's approach to the merits is the claim that the only "sufficiently important governmental interest in preventing corruption or the appearance of corruption" is one that is "limited to *quid pro quo* corruption." *Ante*, at 359. This is the same "crabbed view of corruption" that was espoused by JUSTICE KENNEDY in *McConnell* and squarely rejected by the Court in that case. 540 U. S., at 152. While it is true that we have not always spoken about corruption in a clear or consistent voice, the approach taken by the majority cannot be right, in my judgment. It disregards our constitutional history and the fundamental demands of a democratic society.

On numerous occasions we have recognized Congress' legitimate interest in preventing the money that is spent on elections from exerting an "'undue influence on an officeholder's judgment'" and from creating "'the appearance of such influence,'" beyond the sphere of *quid pro quo* relationships. *Id.*, at 150; see also, *e. g.*, *id.*, at 143–144, 152–154; *Colorado II*, 533 U. S., at 441; *Shrink Missouri*, 528 U. S., at 389. Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And sell-

ing access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other's backs—and which amply supported Congress' determination to target a limited set of especially destructive practices.

The District Court that adjudicated the initial challenge to BCRA pored over this record. In a careful analysis, Judge Kollar-Kotelly made numerous findings about the corrupting consequences of corporate and union independent expenditures in the years preceding BCRA's passage. See *McConnell*, 251 F. Supp. 2d, at 555–560, 622–625; see also *id.*, at 804–805, 813, n. 143 (Leon, J.) (indicating agreement). As summarized in her own words:

> "The factual findings of the Court illustrate that corporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications relevant to the Members' elections. The record also indicates that Members express appreciation to organizations for the airing of these election-related advertisements. Indeed, Members of Congress are particularly grateful when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as 'above the fray.' Political consultants testify that campaigns are quite aware of who is running advertisements on the candidate's behalf, when they are being run, and where they are being run. Likewise, a prominent lob-

byist testifies that these organizations use issue advocacy as a means to influence various Members of Congress.

"The Findings also demonstrate that Members of Congress seek to have corporations and unions run these advertisements on their behalf. The Findings show that Members suggest that corporations or individuals make donations to interest groups with the understanding that the money contributed to these groups will assist the Member in a campaign. After the election, these organizations often seek credit for their support. . . . Finally, a large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these corporations and organizations." *Id.*, at 623–624 (citations and footnote omitted).

Many of the relationships of dependency found by Judge Kollar-Kotelly seemed to have a *quid pro quo* basis, but other arrangements were more subtle. Her analysis shows the great difficulty in delimiting the precise scope of the *quid pro quo* category, as well as the adverse consequences that *all* such arrangements may have. There are threats of corruption that are far more destructive to a democratic society than the odd bribe. Yet the majority's understanding of corruption would leave lawmakers impotent to address all but the most discrete abuses.

Our "undue influence" cases have allowed the American people to cast a wider net through legislative experiments designed to ensure, to some minimal extent, "that officeholders will decide issues . . . on the merits or the desires of their constituencies," and not "according to the wishes of those who have made large financial contributions"—or expenditures—"valued by the officeholder." *McConnell*, 540

U. S., at 153.[63] When private interests are seen to exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns, the result can depart so thoroughly "from what is pure or correct" in the conduct of Government, Webster's Third New International Dictionary 512 (1966) (defining "corruption"), that it amounts to a "subversion . . . of the . . . electoral process," *Automobile Workers*, 352 U. S., at 575. At stake in the legislative efforts to address this threat is therefore not only the legitimacy and quality of Government but also the public's faith therein, not only "the capacity of this democracy to represent its constituents [but also] the confidence of its citizens in their capacity to govern themselves," *WRTL*, 551 U. S., at 507 (Souter, J., dissenting). "Take away Congress' authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.'" *McConnell*, 540 U. S., at 144 (quoting *Shrink Missouri*, 528 U. S., at 390).[64]

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[63] Cf. *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 389 (2000) (recognizing "the broader threat from politicians too compliant with the wishes of large contributors"). Though discrete in scope, these experiments must impose some meaningful limits if they are to have a chance at functioning effectively and preserving the public's trust. "Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize." *McConnell*, 540 U. S., at 153. There should be nothing controversial about the proposition that the influence being targeted is "undue." In a democracy, officeholders should not make public decisions with the aim of placating a financial benefactor, except to the extent that the benefactor is seen as representative of a larger constituency or its arguments are seen as especially persuasive.

[64] The majority declares by fiat that the appearance of undue influence by high-spending corporations "will not cause the electorate to lose faith in our democracy." *Ante*, at 360. The electorate itself has consistently indicated otherwise, both in opinion polls, see *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 557–558, 623–624 (DC 2003) (opinion of Kollar-Kotelly, J.), and in the laws its representatives have passed, and our colleagues have no basis for elevating their own optimism into a tenet of constitutional law.

The cluster of interrelated interests threatened by such undue influence and its appearance has been well captured under the rubric of "democratic integrity." *WRTL*, 551 U. S., at 522 (Souter, J., dissenting). This value has underlined a century of state and federal efforts to regulate the role of corporations in the electoral process.[65]

Unlike the majority's myopic focus on *quid pro quo* scenarios and the free-floating "First Amendment principles" on which it rests so much weight, *ante*, at 319, 363, this broader understanding of corruption has deep roots in the Nation's history. "During debates on the earliest [campaign finance] reform acts, the terms 'corruption' and 'undue influence' were used nearly interchangeably." Pasquale, Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform, 2008 U. Ill. L. Rev. 599, 601. Long before *Buckley*, we appreciated that "[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." *Burroughs* v. *United States*, 290 U. S. 534, 545 (1934). And whereas we have no evidence to support the notion that the Framers would have wanted corporations to have the same rights as natural persons in the electoral context, we have ample evidence to suggest that they would

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[65] Quite distinct from the interest in preventing improper influences on the electoral process, I have long believed that "a number of [other] purposes, both legitimate and substantial, may justify the imposition of reasonable limitations on the expenditures permitted during the course of any single campaign." *Davis* v. *FEC*, 554 U. S. 724, 751 (2008) (opinion concurring in part and dissenting in part). In my judgment, such limitations may be justified to the extent they are tailored to "improving the quality of the exposition of ideas" that voters receive, *ibid.*, "free[ing] candidates and their staffs from the interminable burden of fundraising," *ibid.* (internal quotation marks omitted), and "protect[ing] equal access to the political arena," *Randall* v. *Sorrell*, 548 U. S. 230, 278 (2006) (STEVENS, J., dissenting) (internal quotation marks omitted). I continue to adhere to these beliefs, but they have not been briefed by the parties or *amici* in this case, and their soundness is immaterial to its proper disposition.

have been appalled by the evidence of corruption that Congress unearthed in developing BCRA and that the Court today discounts to irrelevance. It is fair to say that "[t]he Framers were obsessed with corruption," Teachout 348, which they understood to encompass the dependency of public officeholders on private interests, see *id.*, at 373–374; see also *Randall*, 548 U. S., at 280 (STEVENS, J., dissenting). They discussed corruption "more often in the Constitutional Convention than factions, violence, or instability." Teachout 352. When they brought our constitutional order into being, the Framers had their minds trained on a threat to republican self-government that this Court has lost sight of.

Quid Pro Quo Corruption

There is no need to take my side in the debate over the scope of the anticorruption interest to see that the Court's merits holding is wrong. Even under the majority's "crabbed view of corruption," *McConnell*, 540 U. S., at 152, the Government should not lose this case.

"The importance of the governmental interest in preventing [corruption through the creation of political debts] has never been doubted." *Bellotti*, 435 U. S., at 788, n. 26. Even in the cases that have construed the anticorruption interest most narrowly, we have never suggested that such *quid pro quo* debts must take the form of outright vote buying or bribes, which have long been distinct crimes. Rather, they encompass the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder. See *McConnell*, 540 U. S., at 143 ("We have not limited [the anticorruption] interest to the elimination of cash-for-votes exchanges. In *Buckley*, we expressly rejected the argument that antibribery laws provided a less restrictive alternative to FECA's contribution limits, noting that such laws 'deal[t] with only the most blatant and specific attempts

of those with money to influence governmental action'" (quoting 424 U. S., at 28; alteration in original)). It has likewise never been doubted that "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption." *Id.*, at 27. Congress may "legitimately conclude that the avoidance of the appearance of improper influence is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Ibid.* (internal quotation marks omitted; alteration in original). A democracy cannot function effectively when its constituent members believe laws are being bought and sold.

In theory, our colleagues accept this much. As applied to BCRA §203, however, they conclude "[t]he anticorruption interest is not sufficient to displace the speech here in question." *Ante,* at 357.

Although the Court suggests that *Buckley* compels its conclusion, *ante,* at 356–360, *Buckley* cannot sustain this reading. It is true that, in evaluating FECA's ceiling on independent expenditures by all persons, the *Buckley* Court found the governmental interest in preventing corruption "inadequate." 424 U. S., at 45. But *Buckley* did not evaluate corporate expenditures specifically, nor did it rule out the possibility that a future Court might find otherwise. The opinion reasoned that an expenditure limitation covering only express advocacy (*i. e.*, magic words) would likely be ineffectual, *ibid.*, a problem that Congress tackled in BCRA, and it concluded that "the independent advocacy restricted by [FECA §608(e)(1)] *does not presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions," *id.*, at 46 (emphasis added). *Buckley* expressly contemplated that an anticorruption rationale might justify restrictions on independent expenditures at a later date, "because it may be that, in some circumstances, 'large independent expenditures pose the same dangers of actual or apparent *quid pro quo*

arrangements as do large contributions.'" *WRTL*, 551 U. S., at 478 (opinion of ROBERTS, C. J.) (quoting *Buckley*, 424 U. S., at 45). Certainly *Buckley* did not foreclose this possibility with respect to electioneering communications made with corporate general treasury funds, an issue the Court had no occasion to consider.

The *Austin* Court did not rest its holding on *quid pro quo* corruption, as it found the broader corruption implicated by the antidistortion and shareholder protection rationales a sufficient basis for Michigan's restriction on corporate electioneering. 494 U. S., at 658–660. Concurring in that opinion, I took the position that "the danger of either the fact, or the appearance, of *quid pro quo* relationships [also] provides an adequate justification for state regulation" of these independent expenditures. *Id.*, at 678. I did not see this position as inconsistent with *Buckley*'s analysis of individual expenditures. Corporations, as a class, tend to be more attuned to the complexities of the legislative process and more directly affected by tax and appropriations measures that receive little public scrutiny; they also have vastly more money with which to try to buy access and votes. See Supp. Brief for Appellee 17 (stating that the Fortune 100 companies earned revenues of $13.1 trillion during the last election cycle). Business corporations must engage the political process in instrumental terms if they are to maximize shareholder value. The unparalleled resources, professional lobbyists, and single-minded focus they bring to this effort, I believed, make *quid pro quo* corruption and its appearance inherently more likely when they (or their conduits or trade groups) spend unrestricted sums on elections.

It is with regret rather than satisfaction that I can now say that time has borne out my concerns. The legislative and judicial proceedings relating to BCRA generated a substantial body of evidence suggesting that, as corporations grew more and more adept at crafting "issue ads" to help

or harm a particular candidate, these nominally independent expenditures began to corrupt the political process in a very direct sense. The sponsors of these ads were routinely granted special access after the campaign was over; "candidates and officials knew who their friends were," *McConnell*, 540 U. S., at 129. Many corporate independent expenditures, it seemed, had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements. In an age in which money and television ads are the coin of the campaign realm, it is hardly surprising that corporations deployed these ads to curry favor with, and to gain influence over, public officials.

The majority appears to think it decisive that the BCRA record does not contain "direct examples of votes being exchanged for . . . expenditures." *Ante*, at 360 (internal quotation marks omitted). It would have been quite remarkable if Congress had created a record detailing such behavior by its own Members. Proving that a specific vote was exchanged for a specific expenditure has always been next to impossible: Elected officials have diverse motivations, and no one will acknowledge that he sold a vote. Yet, even if "[i]ngratiation and access . . . are not corruption" themselves, *ibid.*, they are necessary prerequisites to it; they can create both the opportunity for, and the appearance of, *quid pro quo* arrangements. The influx of unlimited corporate money into the electoral realm also creates new opportunities for the mirror image of *quid pro quo* deals: threats, both explicit and implicit. Starting today, corporations with large war chests to deploy on electioneering may find democratically elected bodies becoming much more attuned to their interests. The majority both misreads the facts and draws the wrong conclusions when it suggests that the BCRA record provides "only scant evidence that independent expenditures . . . ingratiate," and that, "in any event," none of it matters. *Ibid.*

In her analysis of the record, Judge Kollar-Kotelly documented the pervasiveness of this ingratiation and explained its significance under the majority's own touchstone for defining the scope of the anticorruption rationale, *Buckley*. See *McConnell*, 251 F. Supp. 2d, at 555–560, 622–625. Witnesses explained how political parties and candidates used corporate independent expenditures to circumvent FECA's "hard-money" limitations. See, *e. g.*, *id.*, at 478–479. One former Senator candidly admitted to the District Court that "'[c]andidates whose campaigns benefit from [phony "issue ads"] greatly appreciate the help of these groups. In fact, Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation.'" *Id.*, at 556 (quoting declaration of Sen. Dale Bumpers). One prominent lobbyist went so far as to state, in uncontroverted testimony, that "'unregulated expenditures—whether soft money donations to the parties or issue ad campaigns—can sometimes generate *far more* influence than direct campaign contributions.'" *Ibid.* (quoting declaration of Wright Andrews; emphasis added). In sum, Judge Kollar-Kotelly found, "[t]he record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting." *Id.*, at 622–623. She concluded that the Government's interest in preventing the appearance of corruption, as that concept was defined in *Buckley*, was itself sufficient to uphold BCRA §203. 251 F. Supp. 2d, at 622–625. Judge Leon agreed. See *id.*, at 804–805 (dissenting only with respect to the Wellstone Amendment's coverage of *MCFL* corporations).

When the *McConnell* Court affirmed the judgment of the District Court regarding §203, we did not rest our holding on a narrow notion of *quid pro quo* corruption. Instead we relied on the governmental interest in combating the unique forms of corruption threatened by corporations, as recog-

nized in *Austin*'s antidistortion and shareholder protection rationales, 540 U. S., at 205 (citing *Austin*, 494 U. S., at 660), as well as the interest in preventing circumvention of contribution limits, 540 U. S., at 128–129, 205, 206, n. 88. Had we felt constrained by the view of today's Court that *quid pro quo* corruption and its appearance are the only interests that count in this field, *ante*, at 348–362, we of course would have looked closely at that issue. And as the analysis by Judge Kollar-Kotelly reflects, it is a very real possibility that we would have found one or both of those interests satisfied and §203 appropriately tailored to them.

The majority's rejection of the *Buckley* anticorruption rationale on the ground that independent corporate expenditures "do not give rise to *[quid pro quo]* corruption or the appearance of corruption," *ante*, at 357, is thus unfair as well as unreasonable. Congress and outside experts have generated significant evidence corroborating this rationale, and the only reason we do not have any of the relevant materials before us is that the Government had no reason to develop a record at trial for a facial challenge the plaintiff had abandoned. The Court cannot both *sua sponte* choose to relitigate *McConnell* on appeal and then complain that the Government has failed to substantiate its case. If our colleagues were really serious about the interest in preventing *quid pro quo* corruption, they would remand to the District Court with instructions to commence evidentiary proceedings.[66]

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[66] In fact, the notion that the "electioneering communications" covered by §203 can breed *quid pro quo* corruption or the appearance of such corruption has only become more plausible since we decided *McConnell*. Recall that THE CHIEF JUSTICE's controlling opinion in *WRTL* subsequently limited BCRA's definition of "electioneering communications" to those that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U. S., at 470. The upshot was that after *WRTL*, a corporate or union expenditure could be regulated under §203 only if everyone would understand it as an endorsement of or attack on a particular candidate for office. It does not

The insight that even technically independent expenditures can be corrupting in much the same way as direct contributions is bolstered by our decision last year in *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868 (2009). In that case, Don Blankenship, the chief executive officer of a corporation with a lawsuit pending before the West Virginia high court, spent large sums on behalf of a particular candidate, Brent Benjamin, running for a seat on that court. "In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to 'And For The Sake Of The Kids,' " a § 527 corporation that ran ads targeting Benjamin's opponent. *Id.*, at 873. "This was not all. Blankenship spent, in addition, just over $500,000 on independent expenditures . . . ' "to support . . . Brent Benjamin." ' " *Ibid.* (second alteration in original). Applying its common sense, this Court accepted petitioners' argument that Blankenship's "pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias" when Benjamin later declined to recuse himself from the appeal by Blankenship's corporation. *Id.*, at 882. "Though n[o] . . . bribe or criminal influence" was involved, we recognized that "Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected." *Ibid.* "The difficulties of inquiring into actual bias," we further noted, "simply underscore the need for objective rules," *id.*, at 883—rules which will perforce turn on the appearance of bias rather than its actual existence.

In *Caperton*, then, we accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of *quid pro quo* corruption. Indeed, this premise struck the Court as so intuitive that it repeatedly referred to Blankenship's spending on behalf of Benjamin—spending that consisted of

take much imagination to perceive why this type of advocacy might be especially apt to look like or amount to a deal or a threat.

99.97% independent expenditures ($3 million) and 0.03% direct contributions ($1,000)—as a "contribution." See, *e. g.*, *id.*, at 872 ("The basis for the [recusal] motion was that the justice had received campaign contributions in an extraordinary amount from" Blankenship); *id.*, at 873 (referencing "Blankenship's $3 million in contributions"); *id.*, at 884 ("Blankenship contributed some $3 million to unseat the incumbent and replace him with Benjamin"); *id.*, at 885 ("Blankenship's campaign contributions . . . had a significant and disproportionate influence on the electoral outcome"). The reason the Court so thoroughly conflated expenditures and contributions, one assumes, is that it realized that some expenditures may be functionally equivalent to contributions in the way they influence the outcome of a race, the way they are interpreted by the candidates and the public, and the way they taint the decisions that the officeholder thereafter takes.

Caperton is illuminating in several additional respects. It underscores the old insight that, on account of the extreme difficulty of proving corruption, "prophylactic measures, reaching some [campaign spending] not corrupt in purpose or effect, [may be] nonetheless required to guard against corruption." *Buckley*, 424 U. S., at 30; see also *Shrink Missouri*, 528 U. S., at 392, n. 5. It underscores that "certain restrictions on corporate electoral involvement" may likewise be needed to "hedge against circumvention of valid contribution limits." *McConnell*, 540 U. S., at 205 (internal quotation marks and brackets omitted); see also *Colorado II*, 533 U. S., at 456 ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption"). It underscores that for-profit corporations associated with electioneering communications will often prefer to use nonprofit conduits with "misleading names," such as And For The Sake Of The Kids, "to conceal their identity" as the sponsor of those communications, thereby frustrating the utility of dis-

closure laws. *McConnell*, 540 U. S., at 128; see also *id.*, at 196–197.

And it underscores that the consequences of today's holding will not be limited to the legislative or executive context. The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, see, *e. g.*, O'Connor, Justice for Sale, Wall St. Journal, Nov. 15, 2007, p. A25; Brief for Justice at Stake et al. as *Amici Curiae* 2, the Court today unleashes the floodgates of corporate and union general treasury spending in these races. Perhaps "*Caperton* motions" will catch some of the worst abuses. This will be small comfort to those States that, after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.

Deference and Incumbent Self-Protection

Rather than show any deference to a coordinate branch of Government, the majority thus rejects the anticorruption rationale without serious analysis.[67] Today's opinion provides no clear rationale for being so dismissive of Congress, but the prior individual opinions on which it relies have offered one: the incentives of the legislators who passed BCRA. Section 203, our colleagues have suggested, may be little more than "an incumbency protection plan," *McConnell*, 540 U. S., at 306 (KENNEDY, J., concurring in judgment in part and dissenting in part); see also *id.*, at 249–250, 260–263 (SCALIA, J., concurring in part, concurring in judgment in part, and dissenting in part), a disreputable attempt at legislative self-dealing rather than an earnest effort to facilitate First Amendment values and safeguard the legitimacy

[67] "We must give weight" and "due deference" to Congress' efforts to dispel corruption, the Court states at one point. *Ante*, at 361. It is unclear to me what these maxims mean, but as applied by the Court they clearly do not entail "deference" in any normal sense of that term.

of our political system. This possibility, the Court apparently believes, licenses it to run roughshod over Congress' handiwork.

In my view, we should instead start by acknowledging that "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Colorado Republican Federal Campaign Comm.* v. *FEC*, 518 U. S. 604, 650 (1996) (STEVENS, J., dissenting). Many of our campaign finance precedents explicitly and forcefully affirm the propriety of such presumptive deference. See, *e. g.*, *McConnell*, 540 U. S., at 158; *Beaumont*, 539 U. S., at 155–156; *NRWC*, 459 U. S., at 209–210. Moreover, "[j]udicial deference is particularly warranted where, as here, we deal with a congressional judgment that has remained essentially unchanged throughout a century of careful legislative adjustment." *Beaumont*, 539 U. S., at 162, n. 9 (internal quotation marks omitted); cf. *Shrink Missouri*, 528 U. S., at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"). In America, incumbent legislators pass the laws that govern campaign finance, just like all other laws. To apply a level of scrutiny that effectively bars them from regulating electioneering whenever there is the faintest whiff of self-interest, is to deprive them of the ability to regulate electioneering.

This is not to say that deference would be appropriate if there were a solid basis for believing that a legislative action was motivated by the desire to protect incumbents or that it will degrade the competitiveness of the electoral process.[68]

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[68] JUSTICE BREYER has suggested that we strike the balance as follows: "We should defer to [the legislature's] political judgment that unlimited spending threatens the integrity of the electoral process. But we should not defer in respect to whether its solution . . . insulates legislators from effective electoral challenge." *Shrink Missouri*, 528 U. S., at 403–404 (concurring opinion).

See *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 447 (2006) (STEVENS, J., concurring in part and dissenting in part); *Vieth* v. *Jubelirer*, 541 U. S. 267, 317 (2004) (STEVENS, J., dissenting). Along with our duty to balance competing constitutional concerns, we have a vital role to play in ensuring that elections remain at least minimally open, fair, and competitive. But it is the height of recklessness to dismiss Congress' years of bipartisan deliberation and its reasoned judgment on this basis, without first confirming that the statute in question was intended to be, or will function as, a restraint on electoral competition. "Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." *Buckley*, 424 U. S., at 31.

We have no record evidence from which to conclude that BCRA § 203, or any of the dozens of state laws that the Court today calls into question, reflects or fosters such invidious discrimination. Our colleagues have opined that "'*any* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.'" *McConnell*, 540 U. S., at 249 (opinion of SCALIA, J.). This kind of airy speculation could easily be turned on its head. The electioneering prohibited by § 203 might well tend to favor incumbents, because incumbents have pre-existing relationships with corporations and unions, and groups that wish to procure legislative benefits may tend to support the candidate who, as a sitting officeholder, is already in a position to dispense benefits and is statistically likely to retain office. If a corporation's goal is to induce officeholders to do its bidding, the corporation would do well to cultivate stable, long-term relationships of dependency.

So we do not have a solid theoretical basis for condemning § 203 as a front for incumbent self-protection, and it seems equally if not more plausible that restrictions on corporate electioneering will be self-denying. Nor do we have a good

empirical case for skepticism, as the Court's failure to cite any empirical research attests. Nor does the legislative history give reason for concern. Congress devoted years of careful study to the issues underlying BCRA; "[f]ew legislative proposals in recent years have received as much sustained public commentary or news coverage"; "[p]olitical scientists and academic experts . . . with no self-interest in incumbent protectio[n] were central figures in pressing the case for BCRA"; and the legislation commanded bipartisan support from the outset. Pildes, The Supreme Court 2003 Term Foreword: The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 28, 137 (2004). Finally, it is important to remember just how incumbent-friendly congressional races were prior to BCRA's passage. As the Solicitor General aptly remarked at the time, "the evidence supports overwhelmingly that incumbents were able to get re-elected under the old system just fine." Tr. of Oral Arg. in *McConnell* v. *FEC*, O. T. 2003, No. 02–1674, p. 61. "It would be hard to develop a scheme that could be better for incumbents." *Id.*, at 63.

In this case, then, "there is no convincing evidence that th[e] important interests favoring expenditure limits are fronts for incumbency protection." *Randall*, 548 U. S., at 279 (STEVENS, J., dissenting). "In the meantime, a legislative judgment that 'enough is enough' should command the greatest possible deference from judges interpreting a constitutional provision that, at best, has an indirect relationship to activity that affects the quantity . . . of repetitive speech in the marketplace of ideas." *Id.*, at 279–280. The majority cavalierly ignores Congress' factual findings and its constitutional judgment: It acknowledges the validity of the interest in preventing corruption, but it effectively discounts the value of that interest to zero. This is quite different from conscientious policing for impermissibly anticompetitive motive or effect in a sensitive First Amendment context.

It is the denial of Congress' authority to regulate corporate spending on elections.

Austin and Corporate Expenditures

Just as the majority gives short shrift to the general societal interests at stake in campaign finance regulation, it also overlooks the distinctive considerations raised by the regulation of *corporate* expenditures. The majority fails to appreciate that *Austin*'s antidistortion rationale is itself an anticorruption rationale, see 494 U. S., at 660 (describing "a different type of corruption"), tied to the special concerns raised by corporations. Understood properly, "antidistortion" is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process. It is manifestly not just an "'equalizing'" ideal in disguise. *Ante*, at 350 (quoting *Buckley*, 424 U. S., at 48).[69]

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[69] THE CHIEF JUSTICE denies this, *ante*, at 380–382, citing scholarship that has interpreted *Austin* to endorse an equality rationale, along with an article by Justice Thurgood Marshall's former law clerk that states that Marshall, the author of *Austin*, accepted "equality of opportunity" and "equalizing access to the political process" as bases for campaign finance regulation, Garrett, New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics, 52 How. L. J. 655, 667–668 (2009) (internal quotation marks omitted). It is fair to say that *Austin* can bear an egalitarian reading, and I have no reason to doubt this characterization of Justice Marshall's beliefs. But the fact that *Austin* can be read a certain way hardly proves THE CHIEF JUSTICE's charge that there is nothing more to it. Many of our precedents can bear multiple readings, and many of our doctrines have some "equalizing" implications but do not rest on an equalizing theory: for example, our takings jurisprudence and numerous rules of criminal procedure. More importantly, the *Austin* Court expressly declined to rely on a speech-equalization rationale, see 494 U. S., at 660, and we have never understood *Austin* to stand for such a rationale. Whatever his personal views, Justice Marshall simply did not write the opinion that THE CHIEF JUSTICE suggests he did; indeed, he "would have viewed it as irresponsible to write an opinion that boldly staked out a rationale based on equality that no one other than perhaps Justice White would have even considered joining," Garrett, 52 How. L. J., at 674.

1. *Antidistortion*

The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it. *Austin* set forth some of the basic differences. Unlike natural persons, corporations have "limited liability" for their owners and managers, "perpetual life," separation of ownership and control, "and favorable treatment of the accumulation and distribution of assets . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments." 494 U. S., at 658–659. Unlike voters in U. S. elections, corporations may be foreign controlled.[70] Unlike other interest groups, business corporations have been "effectively delegated responsibility for ensuring society's economic welfare";[71] they inescapably structure the life of every citizen. "'[T]he resources in the treasury of a business corporation,'" furthermore, "'are not an indication of popular support for the corporation's political ideas.'" *Id.*, at 659 (quoting *MCFL*, 479 U. S., at 258). "'They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.'" 494 U. S., at 659 (quoting *MCFL*, 479 U. S., at 258).[72]

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[70] In state elections, even domestic corporations may be "foreign" controlled in the sense that they are incorporated in another jurisdiction and primarily owned and operated by out-of-state residents.

[71] Regan, Corporate Speech and Civic Virtue, in Debating Democracy's Discontent 289, 302 (A. Allen & M. Regan eds. 1998) (hereinafter Regan).

[72] Nothing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession, see, *e. g.*, *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819) (Marshall, C. J.), a nexus of explicit and implicit contracts, see, *e. g.*, F. Easterbrook & D. Fischel, The Economic Structure of Corporate Law 12 (1991), a mediated hierarchy of stakeholders, see, *e. g.*, Blair & Stout, A Team Production Theory of Corpo-

It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of "We the People" by whom and for whom our Constitution was established.

These basic points help explain why corporate electioneering is not only more likely to impair compelling governmental interests, but also why restrictions on that electioneering are less likely to encroach upon First Amendment freedoms. One fundamental concern of the First Amendment is to "protec[t] the individual's interest in self-expression." *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 534, n. 2 (1980); see also *Bellotti*, 435 U. S., at 777, n. 12. Freedom of speech helps "make men free to develop their faculties," *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring), it respects their "dignity and choice," *Cohen* v. *California*, 403 U. S. 15, 24 (1971), and it facilitates the value of "individual self-realization," Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591, 594 (1982). Corporate speech, however, is derivative speech, speech by proxy. A regulation such as BCRA § 203 may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice. "Within the realm of [campaign spending] generally," corporate

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rate Law, 85 Va. L. Rev. 247 (1999) (hereinafter Blair & Stout), or any other recognized model. *Austin* referred to the structure and the advantages of corporations as "state-conferred" in several places, 494 U. S., at 660, 665, 667, but its antidistortion argument relied only on the basic descriptive features of corporations, as sketched above. It is not necessary to agree on a precise theory of the corporation to agree that corporations differ from natural persons in fundamental ways, and that a legislature might therefore need to regulate them differently if it is human welfare that is the object of its concern. Cf. Hansmann & Kraakman 441, n. 5.

spending is "furthest from the core of political expression." *Beaumont*, 539 U. S., at 161, n. 8.

It is an interesting question "who" is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation's electoral message will *conflict* with their personal convictions. Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least.

Corporate expenditures are distinguishable from individual expenditures in this respect. I have taken the view that a legislature may place reasonable restrictions on individuals' electioneering expenditures in the service of the governmental interests explained above, and in recognition of the fact that such restrictions are not direct restraints on speech but rather on its financing. See, *e. g.*, *Randall*, 548 U. S., at 273 (dissenting opinion). But those restrictions concededly present a tougher case, because the primary conduct of actual, flesh-and-blood persons is involved. Some of those individuals might feel that they need to spend large sums of money on behalf of a particular candidate to vindicate the intensity of their electoral preferences. This is obviously not the situation with business corporations, as their routine practice of giving "substantial sums to *both* major national

parties" makes pellucidly clear. *McConnell*, 540 U. S., at 148. "[C]orporate participation" in elections, any business executive will tell you, "is more transactional than ideological." Supp. Brief for Committee for Economic Development as *Amicus Curiae* 10.

In this transactional spirit, some corporations have affirmatively urged Congress to place limits on their electioneering communications. These corporations fear that officeholders will shake them down for supportive ads, that they will have to spend increasing sums on elections in an ever-escalating arms race with their competitors, and that public trust in business will be eroded. See *id.*, at 10–19. A system that effectively forces corporations to use their shareholders' money both to maintain access to, and to avoid retribution from, elected officials may ultimately prove more harmful than beneficial to many corporations. It can impose a kind of implicit tax.[73]

In short, regulations such as § 203 and the statute upheld in *Austin* impose only a limited burden on First Amendment freedoms not only because they target a narrow subset of expenditures and leave untouched the broader "public dialogue," *ante*, at 341, but also because they leave untouched

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[73] Not all corporations support BCRA § 203, of course, and not all corporations are large business entities or their tax-exempt adjuncts. Some nonprofit corporations are created for an ideological purpose. Some closely held corporations are strongly identified with a particular owner or founder. The fact that § 203, like the statute at issue in *Austin*, regulates some of these corporations' expenditures does not disturb the analysis above. See 494 U. S., at 661–665. Small-business owners may speak in their own names, rather than the business', if they wish to evade § 203 altogether. Nonprofit corporations that want to make unrestricted electioneering expenditures may do so if they refuse donations from businesses and unions and permit members to disassociate without economic penalty. See *MCFL*, 479 U. S. 238, 264 (1986). Making it plain that their decision is not motivated by a concern about BCRA's coverage of nonprofits that have ideological missions but lack *MCFL* status, our colleagues refuse to apply the Snowe-Jeffords Amendment or the lower courts' *de minimis* exception to *MCFL*. See *ante*, at 327–329.

the speech of natural persons. Recognizing the weakness of a speaker-based critique of *Austin*, the Court places primary emphasis not on the corporation's right to electioneer, but rather on the listener's interest in hearing what every possible speaker may have to say. The Court's central argument is that laws such as § 203 have "'deprived [the electorate] of information, knowledge and opinion vital to its function,'" *ante*, at 354 (quoting *CIO*, 335 U. S., at 144 (Rutledge, J., concurring in result)), and this, in turn, "interferes with the 'open marketplace' of ideas protected by the First Amendment," *ante*, at 354 (quoting *New York State Bd. of Elections* v. *Lopez Torres*, 552 U. S. 196, 208 (2008)).

There are many flaws in this argument. If the overriding concern depends on the interests of the audience, surely the public's perception of the value of corporate speech should be given important weight. That perception today is the same as it was a century ago when Theodore Roosevelt delivered the speeches to Congress that, in time, led to the limited prohibition on corporate campaign expenditures that is overruled today. See *WRTL*, 551 U. S., at 509–510 (Souter, J., dissenting) (summarizing President Roosevelt's remarks). The distinctive threat to democratic integrity posed by corporate domination of politics was recognized at "the inception of the republic" and "has been a persistent theme in American political life" ever since. Regan 302. It is only certain Members of this Court, not the listeners themselves, who have agitated for more corporate electioneering.

Austin recognized that there are substantial reasons why a legislature might conclude that unregulated general treasury expenditures will give corporations "unfai[r] influence" in the electoral process, 494 U. S., at 660, and distort public debate in ways that undermine rather than advance the interests of listeners. The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match. The structure of a business corporation, furthermore, draws a line between the

corporation's economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim "to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities," Brief for American Independent Business Alliance as *Amicus Curiae* 11; see also ALI, Principles of Corporate Governance: Analysis and Recommendations § 2.01(a), p. 55 (1992) ("[A] corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain"). In a state election such as the one at issue in *Austin*, the interests of nonresident corporations may be fundamentally adverse to the interests of local voters. Consequently, when corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears "little or no correlation" to the ideas of natural persons or to any broader notion of the public good, 494 U. S., at 660. The opinions of real people may be marginalized. "The expenditure restrictions of [2 U. S. C.] § 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas." *MCFL*, 479 U. S., at 259.

In addition to this immediate drowning out of noncorporate voices, there may be deleterious effects that follow soon thereafter. Corporate "domination" of electioneering, *Austin*, 494 U. S., at 659, can generate the impression that corporations dominate our democracy. When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders "'call the tune'" and a reduced "'willingness of voters to take part in democratic governance.'" *McConnell*,

540 U. S., at 144 (quoting *Shrink Missouri*, 528 U. S., at 390). To the extent that corporations are allowed to exert undue influence in electoral races, the speech of the eventual winners of those races may also be chilled. Politicians who fear that a certain corporation can make or break their reelection chances may be cowed into silence about that corporation. On a variety of levels, unregulated corporate electioneering might diminish the ability of citizens to "hold officials accountable to the people," *ante*, at 339, and disserve the goal of a public debate that is "uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). At the least, I stress again, a legislature is entitled to credit these concerns and to take tailored measures in response.

The majority's unwillingness to distinguish between corporations and humans similarly blinds it to the possibility that corporations' "war chests" and their special "advantages" in the legal realm, *Austin*, 494 U. S., at 659 (internal quotation marks omitted), may translate into special advantages in the market for legislation. When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. The corporate form, by contrast, "provides a simple way to channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger dividends or appreciation in the stock price caused by the passage of private interest legislation." Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters, 69 U. Chi. L. Rev. 1103, 1113 (2002). Corporations, that is, are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is "far more destructive" than what noncorporations are capable of.

Ibid. It is for reasons such as these that our campaign finance jurisprudence has long appreciated that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.'" *NRWC*, 459 U. S., at 210 (quoting *California Medical Assn.*, 453 U. S., at 201).

The Court's facile depiction of corporate electioneering assumes away all of these complexities. Our colleagues ridicule the idea of regulating expenditures based on "nothing more" than a fear that corporations have a special "ability to persuade," *ante*, at 382 (opinion of ROBERTS, C. J.), as if corporations were our society's ablest debaters and viewpoint-neutral laws such as § 203 were created to suppress their best arguments. In their haste to knock down yet another straw man, our colleagues simply ignore the fundamental concerns of the *Austin* Court and the legislatures that have passed laws like § 203: to safeguard the integrity, competitiveness, and democratic responsiveness of the electoral process. All of the majority's theoretical arguments turn on a proposition with undeniable surface appeal but little grounding in evidence or experience, "that there is no such thing as too much speech," *Austin*, 494 U. S., at 695 (SCALIA, J., dissenting).[74] If individuals in our society had infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; and if broadcast advertisements had no special ability to influence elections apart from the merits of their arguments (to the extent they make any); and if legislators always operated with nothing less than perfect virtue; then I suppose the majority's premise would be sound. In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process.

[74] Of course, no presiding person in a courtroom, legislature, classroom, polling place, or family dinner would take this hyperbole literally.

None of this is to suggest that corporations can or should be denied an opportunity to participate in election campaigns or in any other public forum (much less that a work of art such as *Mr. Smith Goes to Washington* may be banned), or to deny that some corporate speech may contribute significantly to public debate. What it shows, however, is that *Austin*'s "concern about corporate domination of the political process," *id.*, at 659, reflects more than a concern to protect governmental interests outside of the First Amendment. It also reflects a concern to *facilitate* First Amendment values by preserving some breathing room around the electoral "marketplace" of ideas, *ante*, at 335, 350, 354, 367, 369, the marketplace in which the actual people of this Nation determine how they will govern themselves. The majority seems oblivious to the simple truth that laws such as § 203 do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other. There are, to be sure, serious concerns with any effort to balance the First Amendment rights of speakers against the First Amendment rights of listeners. But when the speakers in question are not real people and when the appeal to "First Amendment principles" depends almost entirely on the listeners' perspective, *ante*, at 319, 363, it becomes necessary to consider how listeners will actually be affected.

In critiquing *Austin*'s antidistortion rationale and campaign finance regulation more generally, our colleagues place tremendous weight on the example of media corporations. See *ante*, at 351–354, 361–362; *ante*, at 372–373, 382 (opinion of ROBERTS, C. J.); *ante*, at 390 (opinion of SCALIA, J.). Yet it is not at all clear that *Austin* would permit § 203 to be applied to them. The press plays a unique role not only in the text, history, and structure of the First Amendment but also in facilitating public discourse; as the *Austin* Court explained, "media corporations differ significantly from other corporations in that their resources are devoted to the collec-

tion of information and its dissemination to the public," 494 U. S., at 667. Our colleagues have raised some interesting and difficult questions about Congress' authority to regulate electioneering by the press, and about how to define what constitutes the press. *But that is not the case before us.* Section 203 does not apply to media corporations, and even if it did, Citizens United is not a media corporation. There would be absolutely no reason to consider the issue of media corporations if the majority did not, first, transform Citizens United's as-applied challenge into a facial challenge and, second, invent the theory that legislatures must eschew all "identity"-based distinctions and treat a local nonprofit news outlet exactly the same as General Motors.[75] This calls to mind George Berkeley's description of philosophers: "[W]e have first raised a dust, and then complain we cannot see." Principles of Human Knowledge/Three Dialogues 38, ¶ 3 (R. Woolhouse ed. 1988).

It would be perfectly understandable if our colleagues feared that a campaign finance regulation such as § 203 may be counterproductive or self-interested, and therefore attended carefully to the choices the Legislature has made. But the majority does not bother to consider such practical matters, or even to consult a record; it simply stipulates that "enlightened self-government" can arise only in the absence of regulation. *Ante,* at 339. In light of the distinctive features of corporations identified in *Austin,* there is no valid basis for this assumption. The marketplace of ideas is not actually a place where items—or laws—are meant to be bought and sold, and when we move from the realm of eco-

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[75] Under the majority's view, the legislature is thus damned if it does and damned if it doesn't. If the legislature gives media corporations an exemption from electioneering regulations that apply to other corporations, it violates the newly minted First Amendment rule against identity-based distinctions. If the legislature does not give media corporations an exemption, it violates the First Amendment rights of the press. The only way out of this invented bind: no regulations whatsoever.

nomics to the realm of corporate electioneering, there may be no "reason to think the market ordering is intrinsically good at all," Strauss 1386.

The Court's blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve. It will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process. Americans may be forgiven if they do not feel the Court has advanced the cause of self-government today.

2. *Shareholder Protection*

There is yet another way in which laws such as § 203 can serve First Amendment values. Interwoven with *Austin*'s concern to protect the integrity of the electoral process is a concern to protect the rights of shareholders from a kind of coerced speech: electioneering expenditures that do not "reflec[t] [their] support." 494 U. S., at 660–661. When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions.

The PAC mechanism, by contrast, helps ensure that those who pay for an electioneering communication actually support its content and that managers do not use general treasuries to advance personal agendas. *Ibid.* It "'allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members.'" *McConnell*, 540 U. S., at 204 (quoting *Beaumont*, 539 U. S., at 163). A rule that privileges the use of PACs thus does more than facilitate the political speech of like-minded share-

holders; it also curbs the rent seeking behavior of executives and respects the views of dissenters. *Austin*'s acceptance of restrictions on general treasury spending "simply allows people who have invested in the business corporation for purely economic reasons"—the vast majority of investors, one assumes—"to avoid being taken advantage of, without sacrificing their economic objectives." Winkler, Beyond *Bellotti*, 32 Loyola (LA) L. Rev. 133, 201 (1998).

The concern to protect dissenting shareholders and union members has a long history in campaign finance reform. It provided a central motivation for the Tillman Act in 1907 and subsequent legislation, see *Pipefitters* v. *United States*, 407 U. S. 385, 414–415 (1972); Winkler, 92 Geo. L. J., at 887–900, and it has been endorsed in a long line of our cases, see, *e. g.*, *McConnell*, 540 U. S., at 204–205; *Beaumont*, 539 U. S., at 152–154; *MCFL*, 479 U. S., at 258; *NRWC*, 459 U. S., at 207–208; *Pipefitters*, 407 U. S., at 414–416; see also n. 60, *supra*. Indeed, we have unanimously recognized the governmental interest in "protect[ing] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *NRWC*, 459 U. S., at 207–208.

The Court dismisses this interest on the ground that abuses of shareholder money can be corrected "through the procedures of corporate democracy," *ante*, at 362 (internal quotation marks omitted), and, it seems, through Internet-based disclosures, *ante*, at 370–371.[76] I fail to understand

[76] I note that, among the many other regulatory possibilities it has left open, ranging from new versions of § 203 supported by additional evidence of *quid pro quo* corruption or its appearance to any number of tax incentive or public financing schemes, today's decision does not require that a legislature rely solely on these mechanisms to protect shareholders. Legislatures remain free in their incorporation and tax laws to condition the types of activity in which corporations may engage, including electioneering activity, on specific disclosure requirements or on prior express approval by shareholders or members.

how this addresses the concerns of dissenting union members, who will also be affected by today's ruling, and I fail to understand why the Court is so confident in these mechanisms. By "corporate democracy," presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that "these rights are so limited as to be almost nonexistent," given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule. Blair & Stout 320; see also *id.*, at 298–315; Winkler, 32 Loyola (LA) L. Rev., at 165–166, 199–200. Modern technology may help make it easier to track corporate activity, including electoral advocacy, but it is utopian to believe that it solves the problem. Most American households that own stock do so through intermediaries such as mutual funds and pension plans, see Evans, A Requiem for the Retail Investor? 95 Va. L. Rev. 1105 (2009), which makes it more difficult both to monitor and to alter particular holdings. Studies show that a majority of individual investors make no trades at all during a given year. *Id.*, at 1117. Moreover, if the corporation in question operates a PAC, an investor who sees the company's ads may not know whether they are being funded through the PAC or through the general treasury.

If and when shareholders learn that a corporation has been spending general treasury money on objectionable electioneering, they can divest. Even assuming that they reliably learn as much, however, this solution is only partial. The injury to the shareholders' expressive rights has already occurred; they might have preferred to keep that corporation's stock in their portfolio for any number of economic reasons; and they may incur a capital gains tax or other penalty from selling their shares, changing their pension plan, or the like. The shareholder protection rationale has been criticized as underinclusive, in that corporations also spend money on lobbying and charitable contributions in ways that any particu-

lar shareholder might disapprove. But those expenditures do not implicate the selection of public officials, an area in which "the interests of unwilling . . . corporate shareholders [in not being] forced to subsidize that speech" "are at their zenith." *Austin*, 494 U. S., at 677 (Brennan, J., concurring). And in any event, the question is whether shareholder protection provides a basis for regulating expenditures in the weeks before an election, not whether additional types of corporate communications might similarly be conditioned on voluntariness.

Recognizing the limits of the shareholder protection rationale, the *Austin* Court did not hold it out as an adequate and independent ground for sustaining the statute in question. Rather, the Court applied it to reinforce the anti-distortion rationale, in two main ways. First, the problem of dissenting shareholders shows that even if electioneering expenditures can advance the political views of some members of a corporation, they will often compromise the views of others. See, *e. g.*, *id.*, at 663 (discussing risk that corporation's "members may be . . . reluctant to withdraw as members even if they disagree with [its] political expression"). Second, it provides an additional reason, beyond the distinctive legal attributes of the corporate form, for doubting that these "expenditures reflect actual public support for the political ideas espoused," *id.*, at 660. The shareholder protection rationale, in other words, bolsters the conclusion that restrictions on corporate electioneering can serve both speakers' and listeners' interests, as well as the anticorruption interest. And it supplies yet another reason why corporate expenditures merit less protection than individual expenditures.

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Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories

over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality. Our colleagues have arrived at the conclusion that *Austin* must be overruled and that § 203 is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court's lawmaking power. Their conclusion that the societal interest in avoiding corruption and the appearance of corruption does not provide an adequate justification for regulating corporate expenditures on candidate elections relies on an incorrect description of that interest, along with a failure to acknowledge the relevance of established facts and the considered judgments of state and federal legislatures over many decades.

In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority's rejection of this principle "elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests." *Bellotti*, 435 U. S., at 817, n. 13 (White, J., dissenting). At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

I would affirm the judgment of the District Court.

JUSTICE THOMAS, concurring in part and dissenting in part.

I join all but Part IV of the Court's opinion.

Political speech is entitled to robust protection under the First Amendment. Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) has never been reconcilable with that protection. By striking down § 203, the Court takes an important first step toward restoring full constitutional protection to speech that is "indispensable to the effective and intelligent use of the processes of popular government." *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 265 (2003) (THOMAS, J., concurring in part, concurring in judgment in part, and dissenting in part) (internal quotation marks omitted). I dissent from Part IV of the Court's opinion, however, because the Court's constitutional analysis does not go far enough. The disclosure, disclaimer, and reporting requirements in BCRA §§ 201 and 311 are also unconstitutional. See *id.*, at 275–277, and n. 10.

Congress may not abridge the "right to anonymous speech" based on the "'simple interest in providing voters with additional relevant information,'" *id.*, at 276 (quoting *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 348 (1995)). In continuing to hold otherwise, the Court misapprehends the import of "recent events" that some *amici* describe "in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation." *Ante*, at 370. The Court properly recognizes these events as "cause for concern," *ibid.*, but fails to acknowledge their constitutional significance. In my view, *amici*'s submissions show why the Court's insistence on upholding §§ 201 and 311 will ultimately prove as misguided (and ill fated) as was its prior approval of § 203.

Amici's examples relate principally to Proposition 8, a state ballot proposition that California voters narrowly passed in the 2008 general election. Proposition 8 amended

California's Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. I, § 7.5. Any donor who gave more than $100 to any committee supporting or opposing Proposition 8 was required to disclose his full name, street address, occupation, employer's name (or business name, if self-employed), and the total amount of his contributions.[1] See Cal. Govt. Code Ann. § 84211(f) (West 2005). The California Secretary of State was then required to post this information on the Internet. See §§ 84600–84601; §§ 84602–84602.1 (West Supp. 2010); §§ 84602.5–84604 (West 2005); § 85605 (West Supp. 2010); §§ 84606–84609 (West 2005).

Some opponents of Proposition 8 compiled this information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result. They cited these incidents in a complaint they filed after the 2008 election, seeking to invalidate California's mandatory disclosure laws. Supporters recounted being told: "'Consider yourself lucky. If I had a gun I would have gunned you down along with each and every other supporter,'" or, "'we have plans for you and your friends.'" Complaint in *ProtectMarriage.com—Yes on 8* v. *Bowen*, Case No. 2:09–cv–00058–MCE–DAD (ED Cal.), ¶ 31. Proposition 8 opponents also allegedly harassed the measure's supporters by defacing or damaging their property. *Id.*, ¶ 32. Two religious organizations supporting Proposition 8 reportedly received through the mail envelopes containing a white powdery substance. *Id.*, ¶ 33.

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[1] BCRA imposes similar disclosure requirements. See, *e. g.*, 2 U. S. C. § 434(f)(2)(F) ("Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year" must disclose "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement").

Those accounts are consistent with media reports describing Proposition 8-related retaliation. The director of the nonprofit California Musical Theater gave $1,000 to support the initiative; he was forced to resign after artists complained to his employer. Lott & Smith, Donor Disclosure Has Its Downsides, Wall Street Journal, Dec. 26, 2008, p. A13. The director of the Los Angeles Film Festival was forced to resign after giving $1,500 because opponents threatened to boycott and picket the next festival. *Ibid.* And a woman who had managed her popular, family-owned restaurant for 26 years was forced to resign after she gave $100, because "throngs of [angry] protesters" repeatedly arrived at the restaurant and "shout[ed] 'shame on you' at customers." Lopez, Prop. 8 Stance Upends Her Life, Los Angeles Times, Dec. 14, 2008, p. B1. The police even had to "arriv[e] in riot gear one night to quell the angry mob" at the restaurant. *Ibid.* Some supporters of Proposition 8 engaged in similar tactics; one real estate businessman in San Diego who had donated to a group opposing Proposition 8 "received a letter from the Prop. 8 Executive Committee threatening to publish his company's name if he didn't also donate to the 'Yes on 8' campaign." Donor Disclosure, *supra*, at A13.

The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens' exercise of their First Amendment rights. Before the 2008 Presidential election, a "newly formed nonprofit group . . . plann[ed] to confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions." Luo, Group Plans Campaign Against G.O.P. Donors, N. Y. Times, Aug. 8, 2008, p. A15. Its leader, "who described his effort as 'going for the jugular,'" detailed the group's plan to send a "warning letter . . . alerting donors who might be considering giving to right-wing groups to a variety of potential dangers, including

legal trouble, public exposure and watchdog groups digging through their lives." *Ibid.*

These instances of retaliation sufficiently demonstrate why this Court should invalidate mandatory disclosure and reporting requirements. But *amici* present evidence of yet another reason to do so—the threat of retaliation from *elected officials.* As *amici*'s submissions make clear, this threat extends far beyond a single ballot proposition in California. For example, a candidate challenging an incumbent state attorney general reported that some members of the State's business community feared donating to his campaign because they did not want to cross the incumbent; in his words, "'I go to so many people and hear the same thing: "I sure hope you beat [the incumbent], but I can't afford to have my name on your records. He might come after me next."'" Strassel, Challenging Spitzerism at the Polls, Wall Street Journal, Aug. 1, 2008, p. A11. The incumbent won reelection in 2008.

My point is not to express any view on the merits of the political controversies I describe. Rather, it is to demonstrate—using real-world, recent examples—the fallacy in the Court's conclusion that "[d]isclaimer and disclosure requirements . . . impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Ante,* at 366 (internal quotation marks and citation omitted). Of course they do. Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights.

The Court nevertheless insists that as-applied challenges to disclosure requirements will suffice to vindicate those speech rights, as long as potential plaintiffs can "show a reasonable probability that disclosure . . . will subject them to threats, harassment, or reprisals from either Government of-

ficials or private parties." *Ante*, at 367 (internal quotation marks omitted). But the Court's opinion itself proves the irony in this compromise. In correctly explaining why it must address the facial constitutionality of § 203, see *ante*, at 322–336, the Court recognizes that "[t]he First Amendment does not permit laws that force speakers to . . . seek declaratory rulings before discussing the most salient political issues of our day," *ante*, at 324; that as-applied challenges to § 203 "would require substantial litigation over an extended time" and result in an "interpretive process [that] itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable," *ante*, at 326–327; that "a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling," *ante*, at 329; and that avoiding a facial challenge to § 203 "would prolong the substantial, nationwide chilling effect" that § 203 causes, *ante*, at 333. This logic, of course, applies equally to as-applied challenges to §§ 201 and 311.

Irony aside, the Court's promise that as-applied challenges will adequately protect speech is a hollow assurance. Now more than ever, §§ 201 and 311 will chill protected speech because—as California voters can attest—"the advent of the Internet" enables "prompt disclosure of expenditures," which "provide[s]" political opponents "with the information needed" to intimidate and retaliate against their foes. *Ante*, at 370. Thus, "disclosure permits citizens . . . to react to the speech of [their political opponents] in a proper"—or undeniably *improper*—"way" long before a plaintiff could prevail on an as-applied challenge.[2] *Ante*, at 371.

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[2] But cf. *Hill* v. *Colorado*, 530 U. S. 703, 707–710 (2000) (approving a statute restricting speech "within 100 feet" of abortion clinics because it protected women seeking an abortion from "'sidewalk counseling,'" which "consists of efforts 'to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written

I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in "core political speech, the 'primary object of First Amendment protection.'" *McConnell*, 540 U. S., at 264 (THOMAS, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 410–411 (2000) (THOMAS, J., dissenting)). Accordingly, I respectfully dissent from the Court's judgment upholding BCRA §§201 and 311.

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speech,'" and which "sometimes" involved "strong and abusive language in face-to-face encounters").