SUPREME COURT OF THE UNITED STATES

Nos. 02–1674, 02–1675, 02–1676, 02–1702, 02–1727, 02–1733, 02–1734, 02–1740, 02–1747, 02–1753, 02–1755, AND 02–1756

MITCH MCCONNELL, UNITED STATES SENATOR, ET AL., APPELLANTS
02–1674 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

NATIONAL RIFLE ASSOCIATION, ET AL., APPELLANTS
02–1675 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

FEDERAL ELECTION COMMISSION, ET AL., APPELLANTS
02–1676 *v.*
MITCH MCCONNELL, UNITED STATES SENATOR, ET AL.;

JOHN MCCAIN, UNITED STATES SENATOR, ET AL., APPELLANTS
02–1702 *v.*
MITCH MCCONNELL, UNITED STATES SENATOR, ET AL.;

REPUBLICAN NATIONAL COMMITTEE, ET AL., APPELLANTS
02–1727 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

NATIONAL RIGHT TO LIFE COMMITTEE, INC., ET AL., APPELLANTS
02–1733 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

AMERICAN CIVIL LIBERTIES UNION, APPELLANTS
02–1734 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

VICTORIA JACKSON GRAY ADAMS, ET AL., APPELLANTS
02–1740 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

RON PAUL, UNITED STATES CONGRESSMAN, ET AL., APPELLANTS
02–1747 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

CALIFORNIA DEMOCRATIC PARTY, ET AL., APPELLANTS
02–1753 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ET AL., APPELLANTS
02–1755 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

CHAMBER OF COMMERCE OF THE UNITED STATES, ET AL., APPELLANTS
02–1756 *v.*
FEDERAL ELECTION COMMISSION, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[December 10, 2003]

JUSTICE THOMAS, concurring with respect to BCRA Titles III and IV, except for BCRA §§311 and 318, concurring in the result with respect to BCRA §318, concurring in the judgment in part and dissenting in part with respect to BCRA Title II, and dissenting with respect to BCRA Titles I, V, and §311.*

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." Nevertheless, the Court today upholds what can only be described as the most significant abridgment of the freedoms of speech and association since the Civil War. With

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* JUSTICE SCALIA joins Parts I, II–A, and II–B of this opinion.

breathtaking scope, the Bipartisan Campaign Reform Act of 2002 (BCRA), directly targets and constricts core political speech, the "primary object of First Amendment protection." *Nixon* v. *Shrink Missouri Government PAC,* 528 U. S. 377, 410–411 (2000) (THOMAS, J., dissenting). Because "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)), our duty is to approach these restrictions "with the utmost skepticism" and subject them to the "strictest scrutiny." *Shrink Missouri*, *supra*, at 412 (THOMAS, J., dissenting).

In response to this assault on the free exchange of ideas and with only the slightest consideration of the appropriate standard of review or of the Court's traditional role of protecting First Amendment freedoms, the Court has placed its *imprimatur* on these unprecedented restrictions. The very "purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 390 (1969). Yet today the fundamental principle 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) (Holmes, J., dissenting), is cast aside in the purported service of preventing "corruption," or the mere "appearance of corruption." *Buckley* v. *Valeo,* 424 U. S. 1, 26 (1976) *(per curiam).* Apparently, the marketplace of ideas is to be fully open only to defamers, *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964); nude dancers, *Barnes* v. *Glen Theatre, Inc.,* 501 U. S. 560 (1991) (plurality opinion); pornographers, *Ashcroft* v. *Free Speech Coalition,* 535 U. S. 234 (2002); flag burners, *United States* v. *Eichman,* 496 U. S. 310 (1990); and cross burners, *Virginia* v. *Black,* 538 U. S. ___ (2003).

Because I cannot agree with the treatment given by

JUSTICE STEVENS' and JUSTICE O'CONNOR's opinion (hereinafter joint opinion) to speech that is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society," *Thornhill* v. *Alabama,* 310 U. S. 88, 103 (1940), I respectfully dissent. I also dissent from JUSTICE BREYER's opinion upholding BCRA §504. I join THE CHIEF JUSTICE's opinion in regards to BCRA §§304, 305, 307, 316, 319, and 403(b); concur in the result as to §318; and dissent from the opinion as to §311. I also fully agree with JUSTICE KENNEDY's discussion of §213 and join that portion of his opinion. *Post*, at 37–38.

I

A

"[C]ampaign finance laws are subject to strict scrutiny," *Federal Election Comm'n* v. *Beaumont*, 539 U. S. ___, ___ (2003) (slip op., at 1) (THOMAS, J., dissenting), and thus Title I must satisfy that demanding standard even if it were (incorrectly) conceived of as nothing more than a contribution limitation. The defendants do not even attempt to defend Title I under this standard, and for good reason: The various restrictions imposed by Title I are much less narrowly tailored to target only corrupting or problematic donations than even the contribution limits in *Shrink Missouri*. See 528 U. S., at 427–430 (THOMAS, J., dissenting); see also *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n,* 518 U. S. 604, 641–644 (1996) (THOMAS, J., dissenting) *(Colorado I).* And, as I have previously noted, it is unclear why "[b]ribery laws [that] bar precisely the *quid pro quo* arrangements that are targeted here" and "disclosure laws" are not "less restrictive means of addressing [the Government's] interest in curtailing corruption." *Shrink Missouri*, *supra*, at 428.

The joint opinion not only continues the errors of *Buck-*

ley v. *Valeo,* by applying a low level of scrutiny to contribution ceilings, but also builds upon these errors by expanding the anticircumvention rationale beyond reason. Admittedly, exploitation of an anticircumvention concept has a long pedigree, going back at least to *Buckley* itself. *Buckley* upheld a $1,000 contribution ceiling as a way to combat both the "actuality and appearance of corruption." 424 U. S., at 26. The challengers in *Buckley* contended both that bribery laws represented "a less restrictive means of dealing with 'proven and suspected *quid pro quo* arrangements,'" *id.*, at 27, and that the $1,000 contribution ceiling was overbroad as "most large contributors do not seek improper influence over a candidate's position or an officeholder's action," *id.*, at 29. The Court rejected the first argument on the grounds that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action," *id.*, at 27–28, and rejected the second on the grounds that "it [is] difficult to isolate suspect contributions," *id.*, at 30.[1] But a broadly drawn bribery law[2] would cover even subtle and general attempts to influence government officials corruptly, eliminating the

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[1]The Court also rejected an overbreadth challenge, reasoning that "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." *Buckley*, 424 U. S., at 30. But this justification was inextricably intertwined with the Court's concern over the difficulty of isolating suspect contributions. If it were easy to isolate suspect contributions, and if bribery laws could be quickly and effectively enforced, then there would be no "opportunity for abuse inherent in the process," *ibid.,* and hence no need for an otherwise overbroad contribution ceiling.

[2]Arguably, the current antibribery statute, 18 U. S. C. §201, is broad enough to cover the unspecified other "attempts . . . to influence governmental action" that the *Buckley* Court seemed worried about. 424 U. S., at 28.

Court's first concern. And, an effective bribery law would deter actual *quid pro quos* and would, in all likelihood, eliminate any appearance of corruption in the system.

Hence, at root, the *Buckley* Court was concerned that bribery laws could not be effectively enforced to prevent *quid pro quos* between donors and officeholders, and the only rational reading of *Buckley* is that it approved the $1,000 contribution ceiling on this ground. The Court then, however, having at least in part concluded that individual contribution ceilings were necessary to prevent easy evasion of bribery laws, proceeded to uphold a separate contribution limitation, using, as the only justification, the "prevent[ion] [of] evasion of the $1,000 contribution limitation." *Id.*, at 38. The need to prevent circumvention of a limitation that was itself an anti-circumvention measure led to the upholding of another significant restriction on individuals' freedom of speech.

The joint opinion now repeats this process. New Federal Election Campaign Act of 1971 (FECA) §323(a), 2 U. S. C. A. §441i(a) (Supp. 2003), is intended to prevent easy circumvention of the (now) $2,000 contribution ceiling. The joint opinion even recognizes this, relying heavily on evidence that, for instance, "candidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries." *Ante*, at 36. The joint opinion upholds §323(a), in part, on the grounds that it had become too easy to circumvent the $2,000 cap by using the national parties as go-betweens.

And the remaining provisions of new FECA §323 are upheld mostly as measures preventing circumvention of other contribution limits, including §323(a), *ante,* at 55–57 (§323(b)); *ante,* at 66–69 (§323(d)); *ante,* at 75 (§323(e)); *ante,* at 77–78 (§323(f)), which, as I have already explained, is a second-order anticircumvention measure.

The joint opinion's handling of §323(f) is perhaps most telling, as it upholds §323(f) only because of "Congress' eminently reasonable *prediction* that . . . state and local candidates and officeholders will become the next conduits for the soft-money funding of sham issue advertising." *Ante,* at 78 (emphasis added). That is, this Court upholds a third-order anticircumvention measure based on Congress' anticipation of circumvention of these second-order anticircumvention measures that might possibly, at some point in the future, pose some problem.

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

B

But Title I falls even on the joint opinion's terms. This Court has held that "[t]he 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." *Shrink Missouri*, 528 U. S., at 391. And three Members of today's majority have observed that "the opportunity for corruption" presented by "[u]nregulated 'soft money' contributions" is "at best, attenuated." *Colorado I*, 518 U. S., at 616 (opinion of BREYER, J., joined by O'CONNOR and SOUTER, JJ.). Such an observation is quite clearly correct. A donation to a political party is a clumsy method by which to influence a candidate, as the party is free to spend the donation however it sees fit,

and could easily spend the money as to provide no help to the candidate. And, a soft-money donation to a party will be of even less benefit to a candidate, "because of legal restrictions on how the money may be spent." Brief for FEC et al. in No. 02–1674 et al., p. 43. It follows that the defendants bear an especially heavy empirical burden in justifying Title I.

The evidence cited by the joint opinion does not meet this standard and would barely suffice for anything more than rational-basis review. The first category of the joint opinion's evidence is evidence that "federal officeholders have commonly asked donors to make soft-money donations to national and state committees solely in order to assist federal campaigns, including the officeholder's own." *Ante*, at 36 (internal quotation marks omitted). But to the extent that donors and federal officeholders have collaborated so that donors could give donations to a national party committee "for the purpose of influencing any election for Federal office," the alleged soft-money donation is in actuality a regular "contribution" as already defined and regulated by FECA. See 2 U. S. C. §431(8)(A)(i). Neither the joint opinion nor the defendants present evidence that enforcement of pre-BCRA law has proved to be impossible, ineffective, or even particularly difficult.

The second category is evidence that "lobbyists, CEOs, and wealthy individuals" have "donat[ed] substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials." *Ante*, at 37. Even if true (and the cited evidence consists of nothing more than vague allegations of wrongdoing), it is unclear why existing bribery laws could not address this problem. Again, neither the joint opinion nor the defendants point to evidence that the enforcement of bribery laws has been or would be ineffective. If the problem has been clear and widespread, as the joint opinion suggests, I would expect that convic-

tions, or at least prosecutions, would be more frequent.

The third category is evidence characterized by the joint opinion as "connect[ing] soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation." *Ante*, at 40. But the evidence for this is no stronger than the evidence that there has been actual vote buying or vote switching for soft money. The joint opinion's citations to the record do not stand for the propositions that they claim. For instance, the McCain declaration does not provide any evidence of any exchange of legislative action for donations of any kind (hard or soft).[3] Neither do the Simpson or Simon declarations, with perhaps one exception effectively addressed by JUSTICE KENNEDY's opinion.[4] See *post*, at 18–19. In fact, the findings by two of the District Court's judges confirm that the evidence of any *quid pro quo* corruption is exceedingly weak, if not nonexistent. See 251 F. Supp. 2d 176, 349–352 (DC 2003) (Henderson, J., concurring in judgment in part and dissenting in part); *id.*,

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[3] Indeed, the principal contents of Senator McCain's declaration are his complaints that several bills he supported were defeated. The Senator also suggests, without evidence, that there had been some connection between the defeat of his favored policy outcomes and certain soft-money donors. See, *e.g.*, App. 393–394, ¶10 (declaration of Sen. John McCain ¶10) (noting Democratic "parliamentary procedural device" used to block one of Senator McCain's proposed amendments to the Sarbanes-Oxley corporate governance bill). The possibility that his favored policy outcomes lost due to lack of public support, or because the opponents of the amendment honestly believed it would do harm to the public, does not appear to be addressed.

[4] Former Senators Simpson and Simon both seem to have the same response as Senator McCain, see n. 3, *supra,* in having their favored interests voted down, and similarly do not consider alternative explanations for the failure of their proposals. See App. 811, ¶11 (declaration of former Sen. Alan Simpson ¶11); App. 805, ¶14 (declaration of former Sen. Paul Simon ¶14).

at 851–853 (Leon, J.). The evidence cited by the joint opinion is properly described as "at best, [the Members of Congress'] personal conjecture regarding the impact of soft money donations on the voting practices of their present and former colleagues." *Id.*, at 852 (Leon, J.).

The joint opinion also places a substantial amount of weight on the fact that "in 1996 and 2000, more than half of the top 50 soft-money donors gave substantial sums to *both* major national parties," and suggests that this fact "leav[es] room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology." *Ante*, at 38 (emphasis in original). But that is not necessarily the case. The two major parties are not perfect ideological opposites, and supporters or opponents of certain policies or ideas might find substantial overlap between the two parties. If donors feel that both major parties are in general agreement over an issue of importance to them, it is unremarkable that such donors show support for both parties. This commonsense explanation surely belies the joint opinion's too-hasty conclusion drawn from a relatively innocent fact.

The Court today finds such sparse evidence sufficient. This cannot be held to satisfy even the "relatively complaisant review" of *Beaumont*, 539 U. S., at ___ (slip op., at 14), unless, as it appears, the Court intends to abdicate entirely its role.[5]

II

The Court is not content with "balanc[ing] away First Amendment freedoms," *Shrink Missouri,* 528 U. S., at 410 (THOMAS, J., dissenting), in the context of the restrictions

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[5] Because there is not an iota of evidence supporting the Government's asserted interests in BCRA §318, I concur in the Court's conclusion that this provision is unconstitutional.

imposed by Title I, which could arguably (if wrongly) be thought to be mere contribution limits. The Court also, in upholding virtually all of Title II, proceeds to do the same for limitations on expenditures, which constitute "political expression 'at the core of our electoral process and of the First Amendment freedoms,'" *Buckley,* 424 U. S., at 39 (quoting *Williams* v. *Rhodes*, 393 U. S. 23, 32 (1968)). Today's holding continues a disturbing trend: the steady decrease in the level of scrutiny applied to restrictions on core political speech. See *Buckley*, *supra*, at 16 (First Amendment requires "exacting scrutiny"); *Shrink Missouri*, *supra*, at 387 (applying "*Buckley*'s standard of scrutiny"); *Beaumont, supra*, at ___ (slip op., at 14) (referencing "relatively complaisant review").[6] Although this trend is most obvious in the review of contribution limits, it has now reached what even this Court today would presumably recognize as a direct restriction on core political speech: limitations on independent expenditures.

A

Of course, by accepting Congress' expansion of what constitutes "coordination" for purposes of treating expenditures as limitations, the Court can pretend that it is, in fact, still only restricting primarily "contributions." I need not say much about this illusion. I have already discussed how the language used in new FECA §315(a)(7)(B)(ii) is, even under *Buckley*'s framework, overly broad and restricts fully protected speech. See *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.,* 533 U. S. 431, 467–468 (2001) (THOMAS, J., dissenting) *(Colorado II).* The particular language used, "expenditures made by any person . . . in cooperation, consultation, or concert with, or at the request or suggestion of, a national,

[6]The joint opinion continues yet another disturbing trend: the application of a complaisant level of scrutiny under the guise of "strict scrutiny." See *Grutter* v. *Bollinger*, 539 U. S. ___ (2003).

State, or local committee of a political party," BCRA §214(a)(2), captures expenditures with "no constitutional difference" from "a purely independent one." *Id.,* at 468 (THOMAS, J., dissenting).[7] And new FECA §315(a)(7)(C), although using the neutral term "coordinated," certainly has the purpose of "clarif[ying] the scope of the preceding subsection, §315(a)(7)(B)," *ante*, at 95 (joint opinion), and thus should be read to be as expansive as the overly broad language in §315(a)(7)(B). Hence, it too is unconstitutional.

B

As for §§203 and 204, the Court rests its decision on another vast expansion of the First Amendment framework described in *Buckley*, this time of the Court's, rather than Congress', own making. In *Austin* v. *Michigan Chamber of Commerce,* 494 U. S. 652, 659–660 (1990), the Court recognized a "different type of corruption" from the "'financial *quid pro quo*'": the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." The only effect, however, that the "immense aggregations" of wealth will have (in the context of independent expenditures) on an election is that they might be used to fund communications to convince voters to select certain candidates over others. In other words, the "corrosive and distorting effects" described in *Austin* are that corporations, on behalf of their shareholders, will be able to convince voters of the correctness of their ideas. Apparently, winning in the marketplace of ideas is no longer a sign that "the ultimate good" has been "reached by free

[7] This is doubly so now that the Court has decided that there is no constitutional need for the showing even of an "agreement" in order to transform an expenditure into a "coordinated expenditur[e]" and hence into a contribution for FECA purposes. *Ante*, at 115–117 (joint opinion).

trade in ideas," or that the speaker has survived "the best test of truth" by having "the thought . . . get itself accepted in the competition of the market." *Abrams*, 250 U. S., at 630 (Holmes, J., dissenting). It is now evidence of "corruption." This conclusion is antithetical to everything for which the First Amendment stands. See, *e.g., First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765, 790 (1978) ("[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it"); *Kingsley Int'l Pictures Corp.* v. *Regents of Univ. of N. Y.,* 360 U. S. 684, 689 (1959) ("[I]n the realm of ideas [the Constitution] protects expression which is eloquent no less than that which is unconvincing").

Because *Austin*'s definition of "corruption" is incompatible with the First Amendment, I would overturn *Austin* and hold that the potential for corporations and unions to influence voters, via independent expenditures aimed at convincing these voters to adopt particular views, is not a form of corruption justifying any state regulation or suppression. Without *Austin*'s peculiar variation of "corruption," §§203 and 204 are supported by no compelling government interest. The joint opinion does not even argue that these provisions address *quid pro quo* corruption.[8] And the shareholder protection rationale is equally unavailing. The "shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason," *Bellotti, supra*, at 794, n. 34. Hence, no compelling interest can be found in protecting

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[8]The National Rifle Association (NRA) plaintiffs compellingly state that "[a]s a measure designed to prevent official corruption, of either the *quid pro quo* or the 'gratitude' variety, Title II . . . makes no more sense than a bribery statute requiring corporations to pay for their bribes using funds from PACs." Brief for Appellants NRA et al. in No. 02–1675, pp. 24–25. And, regarding the appearance of corruption: "Defendants' own witnesses concede that the public's perceptions of ads is not affected in the slightest by whether they are purchased with general treasury funds or with PAC money." *Id*., at 25.

minority shareholders from the corporation's use of its general treasury, especially where, in other contexts, "equally important and controversial corporate decisions are made by management or by a predetermined percentage of the shareholders." *Ibid.*

C

I must now address an issue on which I differ from all of my colleagues: the disclosure provisions in BCRA §201, now contained in new FECA §304(f). The "historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'" *McIntyre* v. *Ohio Elections Comm'n,* 514 U. S. 334, 361 (1995) (THOMAS, J., concurring).[9] Indeed, this Court has explicitly recognized that "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry," and thus that "an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment." *Id.*, at 342. The Court now backs away from this principle, allowing the established right to anonymous speech to be stripped away based on the flimsiest of justifications.

The only plausible interest asserted by the defendants to justify the disclosure provisions is the interest in providing "information" about the speaker to the public. But we have already held that "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or

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[9] The fact that the Founders located the right to anonymous speech in the "freedom of the press" is of no moment, as "it makes little difference in terms of our analysis, which seeks to determine only whether the First Amendment, as originally understood, protects anonymous writing." *McIntyre*, 514 U. S., at 360 (THOMAS, J., concurring).

disclosures she would otherwise omit." *Id.,* at 348. Of course, *Buckley* upheld the disclosure requirement on expenditures for communications using words of express advocacy based on this informational interest. 424 U. S., at 81. And admittedly, *McIntyre* purported to distinguish *Buckley*. *McIntyre*, *supra,* at 355–356. But the two ways *McIntyre* distinguished *Buckley*—one, that the disclosure of "an expenditure and its use, without more, reveals far less information [than a forced identification of the author of a pamphlet,]" 514 U. S., at 355; and two, that in candidate elections, the "Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures," *id*., at 356—are inherently implausible. The first is simply wrong. The revelation of one's political expenditures for independent communications about candidates can be just as revealing as the revelation of one's name on a pamphlet for a noncandidate election. See also *id*., at 384 (SCALIA, J., dissenting). The second was outright rejected in *Buckley* itself, where the Court concluded that independent expenditures did not create any substantial risk of real or apparent corruption. 424 U. S., at 47. Hence, the only reading of *McIntyre* that remains consistent with the principles it contains is that it overturned *Buckley* to the extent that *Buckley* upheld a disclosure requirement solely based on the governmental interest in providing information to the voters.

The right to anonymous speech cannot be abridged based on the interests asserted by the defendants. I would thus hold that the disclosure requirements of BCRA §201 are unconstitutional. Because of this conclusion, the so-called advance disclosure requirement of §201 necessarily falls as well.[10]

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[10] BCRA §212(a) is also unconstitutional. Although the plaintiffs only challenge the advance disclosure requirement of §212(a), by requiring

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I have long maintained that *Buckley* was incorrectly decided and should be overturned. See *Colorado II*, 533 U. S., at 465; *Shrink Missouri*, 528 U. S., at 410; *Colorado I*, 518 U. S., at 640. But, most of Title II should still be held unconstitutional even under the *Buckley* framework. Under *Buckley* and *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.,* 479 U. S. 238 (1986) *(MCFL)*, it is, or at least was, clear that any regulation of political speech beyond communications using words of express advocacy is unconstitutional. Hence, even under the joint opinion's framework, most of Title II is unconstitutional, as both the "primary definition" and "backup definition" of "electioneering communications" cover a significant number of communications that do not use words of express advocacy. 2 U. S. C. A. §434(f)(3)(A) (Supp. 2003).[11]

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disclosure of communications using express advocacy, the entire reporting requirement is unconstitutional for the same reasons that §201 is unconstitutional. Consequently, it follows that the advance disclosure provision is unconstitutional.

BCRA §§311 and 504 also violate the First Amendment. By requiring any television or radio advertisement that satisfies the definition of "electioneering communication" to include the identity of the sponsor, and even a "full-screen view of a representative of the political committee or other person making the statement" in the case of a television advertisement, new FECA §318, §311 is a virtual carbon copy of the law at issue in *McIntyre* v. *Ohio Elections Comm'n,* 514 U. S. 334 (1995) (the only difference being the irrelevant distinction between a printed pamphlet and a television or radio advertisement). And §504 not only has the precise flaws of §201, but also sweeps broadly as well, covering any "message relating to any political matter of national importance, including . . . a national legislative issue of public importance." Hence, both §§311 and 504 should be struck down.

[11] The Court, in upholding most of its provisions by concluding that the "express advocacy" limitation derived by *Buckley* is not a constitutionally mandated line, has, in one blow, overturned every Court of Appeals that has addressed this question (except, perhaps, one). See *Clifton* v. *FEC*, 114 F. 3d 1309, 1312 (CA1 1997); *Vermont Right to Life*

In *Buckley*, the Court was presented with the ambiguous language "'any expenditure . . . relative to a clearly identified candidate.'" 424 U. S., at 41. The Court noted that the "use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech." *Ibid.* Hence, the Court read the phrase to mean "advocating the election or defeat of a candidate." *Id.*, at 42 (internal quotation marks omitted). But this construction did not complete the vagueness inquiry. As the Court observed:

> "[T]he 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." *Ibid.*

The Court then recognized that the constitutional issues raised by the provision "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." *Id.*, at 43.

The joint opinion argues that *Buckley* adopted this narrow reading only to avoid addressing a constitutional question. "[T]he concept of express advocacy and the

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Comm., Inc. v. *Sorrell*, 221 F. 3d 376, 387 (CA2 2000); *FEC* v. *Christian Action Network, Inc.*, 110 F. 3d 1049, 1064 (CA4 1997); *Chamber of Commerce* v. *Moore*, 288 F. 3d 187, 193 (CA5 2000); *Iowa Right to Life Comm., Inc.* v. *Williams*, 187 F. 3d 963, 968–970 (CA8 1999); *Citizens for Responsible Govt. State Political Action Comm.* v. *Davidson*, 236 F. 3d 1174, 1187 (CA10 2000). The one possible exception is the Ninth Circuit. See *FEC* v. *Furgatch*, 807 F. 2d 857, 862–863 (1987).

concomitant class of magic words were born of an effort to avoid constitutional infirmities," concludes the joint opinion after examining the language of *Buckley*. *Ante*, at 85. This ignores the fact that the Court then struck down the expenditure limitation precisely because it was too narrow:

> "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 officeholder. 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." 424 U. S., at 45.

Far from saving the provision from constitutional doubt, the Court read the provision in such a way as to guarantee its unconstitutionality. If there were some possibility that regulation of communications without words of express advocacy were constitutional, the provision would have to have been read to include these communications, and the constitutional question addressed head on.[12] Indeed, the

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[12] After all, the constitutional avoidance doctrine counsels us to adopt constructions of statutes to "avoid decision of constitutional questions," not to deliberately create constitutional questions. *United States* v. *Thirty-seven Photographs,* 402 U. S. 363, 373 (1971); see also *United*

exceedingly narrow reading of the relevant language in *Buckley* is far from mandated by the text; it is, in fact, a highly strained reading. "'[A]ny expenditure . . . relative to a clearly identified candidate,'" *id*., at 41, would be better read to cover, for instance, any expenditure for an advertisement aired close to an election that is "intended to influence the voters' decisions and ha[s] that effect," a standard apparently endorsed by the joint opinion as being sufficiently "equivalent" to express advocacy to justify its regulation. *Ante*, at 99–100. By deliberately adopting a strained and narrow reading of the statutory text and then striking down the provision in question for being too narrow, the Court made clear that regulation of nonexpress advocacy was strictly forbidden.

This reading is confirmed by other portions of *Buckley* and by other cases. For instance, in limiting FECA's disclosure provisions to expenditures involving express advocacy, the Court noted that it gave such a narrowing interpretation "[t]o insure that the reach of [the disclosure provision] is not *impermissibly broad*." 424 U. S., at 80 (emphasis added). If overbreadth were a concern in limiting the scope of a disclosure provision, it surely was equally a concern in the limitation of an actual cap on expenditures. And, in *MCFL*, the Court arguably eliminated any ambiguity remaining in *Buckley* when it explicitly stated that the narrowing interpretations taken in *Buckley* were necessary "in order to avoid problems of overbreadth." *MCFL*, 479 U. S., at 248. The joint opinion's attempt to explain away *MCFL*'s uncomfortable language is unpersuasive. The joint opinion emphasizes that the *MCFL* Court "held that a 'similar *construction*' must apply to the expenditure limitation," as if that some-

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States ex rel. Attorney General v. *Delaware & Hudson Co.,* 213 U. S. 366, 408 (1909).

how proved its point. *Ante*, at 85, n. 76 (emphasis in original). The fact that the *MCFL* Court said this does not establish anything, of course; adopting a narrow construction of a statute "in order to avoid problems of overbreadth," 479 U. S., at 248, is perfectly consistent with a holding that, lacking the narrowing construction, the statute would be overly broad, *i.e.*, unconstitutional.

The defendants' principal argument in response is that

> "it would be bizarre to conclude that the Constitution permits Congress to prohibit the use of corporate or union general treasury funds for electioneering advertisements, but that the *only* standard that it can constitutionally use (express advocacy) is one that misses the vast majority (88.6 percent) of advertisements that candidates themselves use for electioneering." Brief for FEC et al. in No. 02–1674 et al., p. 103 (emphasis in original).

The joint opinion echoes this, stating that the express advocacy line "cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." *Ante*, at 86. First, the presence of the "magic words" *does* differentiate in a meaningful way between categories of speech. Speech containing the "magic words" is "unambiguously campaign related," *Buckley*, *supra*, at 81, while speech without these words is not. Second, it is far from bizarre to suggest that (potentially regulable) speech that is in practice impossible to differentiate from fully protected speech must be fully protected. It is, rather, part and parcel of First Amendment first principles. See, *e.g., Free Speech Coalition,* 535 U. S., at 255 ("The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the re-

verse"). In fact, First Amendment protection was extended to that fundamental category of artistic and entertaining speech not for its own sake, but only because it was indistinguishable, practically, from speech intended to inform. See *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 501 (1952); *Winters* v. *New York,* 333 U. S. 507, 510 (1948) (rejecting suggestion that "the constitutional protection for a free press applies only to the exposition of ideas" as the "line between the informing and the entertaining is too elusive for the protection of that basic right," noting that "[w]hat is one man's amusement, teaches another's doctrine"). This principle clearly played a significant role in *Buckley* itself, see 424 U. S., at 42 (after noting that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," holding that the "express advocacy" standard must be adopted as the interpretation of the relevant language in FECA). The express-advocacy line was drawn to ensure the protection of the "discussion of issues and candidates," not out of some strange obsession of the Court to create meaningless lines. And the joint opinion misses the point when it notes that "*Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption." *Ante*, at 86–87. *Buckley* did not draw this line solely to aid in combating real or apparent corruption, but rather also to ensure the protection of speech unrelated to election campaigns.[13]

Nor is this to say that speech with words of express

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[13] This very case is an excellent example of why such a bright-line rule is necessary. The Court, having "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy," *ante*, at 87–88, proceeds to uphold significant new restrictions on speech that is, in every sense of the word, pure issue-related speech. The Court abandons the bright-line rule, and now subjects political speech of virtually any kind to the risk of regulation by Congress.

advocacy is somehow less protected, as the joint opinion claims. *Ante,* at 99. The Court in *Buckley* recognized an informational interest that justified the imposition of a disclosure requirement on campaign-related speech. See 424 U. S., at 81. This interest is not implicated with regard to speech that is unrelated to an election campaign. Hence, it would be unconstitutional to impose such a disclosure requirement on non-election-related speech. And, as "the distinction between discussion of issues and candidates . . . may often dissolve in practical application," *id.*, at 42, the only way to prevent the unjustified burdening of nonelection speech is to impose the regulation only on speech that is "unambiguously campaign related," *id.*, at 81, *i.e.*, speech using words of express advocacy. Hence, speech that uses words of express advocacy is protected under the same standard, strict scrutiny, as all other forms of speech. The only difference is that, under *Buckley*, there is a governmental interest supporting some regulation of those using words of express advocacy not present in other forms of speech.

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The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press. None of the rationales offered by the defendants, and none of the reasoning employed by the Court, exempts the press. "This is so because of the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from [nonmedia] corporations." *Bellotti,* 435 U. S., at 796 (Burger, C. J., concurring). Media companies can run procandidate editorials as easily as nonmedia corporations can pay for advertisements. Candidates can be just as grateful to media companies as they can be to corporations and unions. In terms of "the corrosive and distorting effects" of wealth accumulated by corporations that has "little or no

correlation to the public's support for the corporation's political ideas," *Austin*, 494 U. S., at 660, there is no distinction between a media corporation and a nonmedia corporation.[14] Media corporations are influential. There is little doubt that the editorials and commentary they run can affect elections. Nor is there any doubt that media companies often wish to influence elections. One would think that the New York Times fervently hopes that its endorsement of Presidential candidates will actually influence people. What is to stop a future Congress from determining that the press is "too influential," and that the "appearance of corruption" is significant when media organizations endorse candidates or run "slanted" or "biased" news stories in favor of candidates or parties? Or, even easier, what is to stop a future Congress from concluding that the availability of unregulated media corporations creates a loophole that allows for easy "circumvention" of the limitations of the current campaign finance laws?[15]

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[14] Chief Justice Burger presciently commented on precisely this point in *First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765, 796–797 (1978) (citations omitted):

"In terms of 'unfair advantage in the political process' and 'corporate domination of the electoral process,' it could be argued that such media conglomerates as I describe pose a much more realistic threat to valid interests than do appellants and similar entities not regularly concerned with shaping popular opinion on public issues. See *Miami Herald Publishing Co.* v. *Tornillo*, [418 U. S. 241 (1974)]. In *Tornillo*, for example, we noted the serious contentions advanced that a result of the growth of modern media empires 'has been to place in a few hands the power to inform the American people and shape public opinion.' 418 U. S., at 250."

[15] It appears that "circumvention" of the campaign finance laws by exploiting media exemptions is already being planned by one of the plaintiffs in this litigation. See Theimer, *NRA Seeks Status as News Outlet*, Washington Post A09 (Dec. 7, 2003) (reporting that the NRA is looking to acquire a broadcast outlet and seeking to be classified as a

Indeed, I believe that longstanding and heretofore unchallenged opinions such as *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974), are in peril. There, the Court noted that "[c]hains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events." *Id.*, at 249. Despite expressing some sympathy for those arguing for a legally created "right of access" to encourage diversity in viewpoints in the media, the Court struck down such laws, noting that these laws acted both to suppress speech and to "intru[de] into the function of editors" by interfering with "the exercise of editorial control and judgment." *Id.*, at 257–258. Now, supporters of such laws need only argue that the press' "capacity to manipulate popular opinion" gives rise to an "appearance of corruption," especially when this capacity is used to promote a particular candidate or party. After drumming up some evidence,[16] laws regulating media outlets in their issuance of editorials would be upheld under the joint opinion's reasoning (a result considered so beyond the pale in *Miami Herald Publishing* that the Court there used it as a *reductio ad absurdum* against the right-of-access law being addressed,

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news organization).

[16] Given the quality of the evidence the Court relies upon to uphold Title I, the evidence should not be hard to come by. See Kane & Preston, Fox Chief on Hot Seat, Roll Call (June 12, 2003) ("GOP leaders such as House Majority Leader Tom DeLay (R-Texas) have labeled CNN as the 'Communist News Network' and the 'Clinton News Network'—suggesting they only presented the liberal viewpoint and that of former President Clinton"); Jones, Fox News Moves from the Margins to the Mainstream, Shorenstein Center, Harvard (Dec. 1, 2002) (quoting Al Gore as describing Fox News and the Washington Times as "part and parcel of the Republican Party").

see *id.*, at 256). Nor is there anything in the joint opinion that would prevent Congress from imposing the Fairness Doctrine, not just on radio and television broadcasters, but on the entire media. See *Red Lion Broadcasting*, 395 U. S., at 369 (defining the "fairness doctrine" as a "requirement that discussion of public issues be presented . . . and that each side of those issues must be given fair coverage").

Hence, "the freedom of the press," described as "one of the greatest bulwarks of liberty," 1 J. Elliot, Debates on the Federal Constitution 335 (___ ed. 1876) (declaration of Rhode Island upon the ratification of the Constitution),[17] could be next on the chopping block. Although today's opinion does not expressly strip the press of First Amendment protection, there is no principle of law or logic that would prevent the application of the Court's reasoning in that setting. The press now operates at the whim of Congress.

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[17] See also 4 W. Blackstone, Commentaries on the Laws of England 151 (1769) ("The liberty of the press is indeed essential to the nature of a free state").