Separation of Campaign and State

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Abstract

In a pair of recent decisions, Davis v. FEC *and* Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Supreme Court has struck down on First Amendment grounds laws that would have arguably created more, not less speech. The federal statute at issue in* Davis *actually raised contribution limits for certain candidates being outspent from the personal resources of wealthy opponents; the state law in* Arizona Free Enterprise Club *provided for state subsidies to candidates being outspent by their opponents and independent spenders.*

The Court's opinions in these cases, taken on their own terms, are unsatisfying. The Court correctly recognizes the deeply troubling nature of the government policies at issue in Davis *and* Arizona Free Enterprise Club*, which involved the government in favoring certain candidates over others, but it has not successfully articulated why those policies are offensive to the First Amendment, given that each law provides more resources for a candidate to speak.*

This Article argues that the Court's opinions show only an inchoate recognition of the core problem. Government involvement in regulating and especially in subsidizing candidate speech inherently entangles government in campaigns in a manner incompatible with core American assumptions about democracy, in much the same way that direct subsidies to churches violate the First Amendment's religion clauses even if made available to all religions.

The Roberts Court, however, is trapped by its refusal to challenge precedents allowing government subsidies of campaigns and wrongly confusing the government's authority to regulate the "time, place and manner" of elections under Article I, Section 4 of the Constitution as the authority to regulate political speech and campaigns. This Article argues from history, text, and structure that Article I, Section 4 applies only to regulating such actual election mechanics as the system of election, maintenance of voter lists, and the method of casting and counting ballots, not to the regulation of political debate that precedes elections.

The Article further argues that the text of the First Amendment and the structure of the Constitution require a "separation of campaign and state," limiting direct government regulation or subsidizing of political speech and campaigning analogous to the judicially created doctrine of "separation of church and state." The Article concludes with a review of some of the implications of such a doctrine.

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INTRODUCTION

The arrival of the Roberts Court has heralded a new agnosticism toward campaign finance regulation. The credulity that marked the Court's opinions at the turn of the century has been replaced by a more skeptical approach.[1] In cases such as *Citizens United v. FEC*,[2] *Randall v. Sorrell*,[3] and *FEC v. Wisconsin Right to Life, Inc.*,[4] the majority's skepticism has been contested by heated dissents,[5] but the decisions, whatever their merits, have been based comfortably on traditional First Amendment doctrine. One can argue that the decisions may have misapplied that doctrine, but in each of these cases the Court majority sees the government adopting a policy that severely limits political speech, perhaps intentionally, and therefore strikes

1 *Compare* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391 (2000) ("The state statute is not void, however, for want of evidence."), *and* McConnell v. FEC, 540 U.S. 93, 188–89, 209, 211, 223, 231, 238, 239–40 (2003) (upholding campaign restrictions against constitutional challenges), *with* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007) ("[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it."), *and* Citizens United v. FEC, 558 U.S. 310, 365 (2010) (overruling *McConnell* in part).

2 Citizens United v. FEC, 558 U.S. 310 (2010).

3 Randall v. Sorrell, 548 U.S. 230 (2006).

4 FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

5 *Citizens United*, 558 U.S. at 393–485 (Stevens, J., concurring in part and dissenting in part); *Wis. Right to Life, Inc.*, 551 U.S. at 504–36 (Souter, J., dissenting); *Randall*, 548 U.S. at 273–81 (Stevens, J., dissenting); *id.* at 281–90 (Souter, J., dissenting).

down the law after finding that such regulation is not justified by a compelling government interest.[6]

Two recent cases, however, do not fit so neatly within this framework. In *Davis v. FEC*,[7] the Court struck down a federal statute that, under certain circumstances, actually increased the size of political contributions that an individual could make to a candidate.[8] And in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* ("*Arizona Free Enterprise Club*"),[9] the Court struck down an Arizona law that, under particular circumstances, provided political candidates with state subsidies in order to increase the reach of their political speech.[10] In these cases, the Court's opinions, taken on their own terms, are less satisfying than those in *Citizens United*, *Randall*, and *Wisconsin Right to Life*. This Article suggests that the Court correctly recognizes the deeply troubling nature of the government policies at issue in *Davis* and *Arizona Free Enterprise Club*, but has not successfully articulated why those policies are offensive to the First Amendment. This Article sets forth, in rudimentary terms, an alternative theory, which I will call "separation of campaign and state."

"Separation of campaign and state," of course, conjures up our well-known and long-standing commitment to separation of church and state. It is intended to. Like the separation of church and state, it is not explicit in the Constitution but flows from the document's structure and purpose.[11] Like separation of church and state, it hardly resolves all difficult First Amendment questions, but it answers many and provides a sound formula for addressing harder cases.[12]

For over 100 years, since the passage of the Tillman Act[13] in 1907, Congress has enacted legislation to regulate campaign finance.[14] In

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6 *See Citizens United*, 558 U.S. at 348–65, 371–72; *Wis. Right to Life, Inc.*, 551 U.S. at 476–81; *Randall*, 548 U.S. at 247–48, 253–63.

7 Davis v. FEC, 554 U.S. 724 (2008).

8 *Id.* at 743–45.

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

10 *Id.* at 2813, 2828–29.

11 *See* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 217–21 (1963).

12 *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 683–86 (2005).

13 Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907).

14 *See id.*; Bipartisan Campaign Reform Act of 2002 (McCain-Feingold), Pub. L. No. 107-155, 116 Stat. 81; Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972); Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947); Smith-Connally Act, Pub. L. No. 78-89, 57 Stat. 163 (1943); Hatch Act Amendments, Pub. L. No. 76-753, 54 Stat. 767 (1940); Hatch Act, Pub. L. No. 76-252, 53 Stat. 1147 (1939); Federal Corrupt Practices Act, Pub. L. No. 68-505, §§ 301–319, 43 Stat. 1053, 1070–74 (1925) (repealed 1972); Publicity Act Amendments, Pub. L. No. 62-32, 37 Stat. 25 (1911); Publicity Act, Pub. L. No. 61-274, 36 Stat. 822 (1910). The Tillman

Burroughs v. United States,[15] the Court, without analysis, found constitutional authority for this undertaking in Article I, Section 4 of the Constitution,[16] which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators,"[17] and Article II, Section 1,[18] which provides that "[t]he Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."[19] On the basis of this opinion, broad authority to regulate political campaigns was later assumed in the seminal case of *Buckley v. Valeo*,[20] and in all campaign finance cases since.[21]

This Article argues that *Burroughs* and later cases wrongly conflate the concept of "elections" with that of "campaigns," and that these are distinct concepts that can and should be separated for constitutional purposes. Further, it argues that the Constitution does not provide an explicit grant of power for the federal government to regulate political campaigns and that, in fact, the Constitution should be deemed to create "a wall of separation" between political campaigns and state power, similar to the one that has long been accepted between church and state. The future of campaign finance jurisprudence is slowly but inexorably moving in this direction—if only because heavy regulation of campaign finance has been so unsuccessful in achieving its stated aim of ending corruption and restoring public confidence in government—and its fundamental conflict with the First Amendment is becoming more and more obvious.

Part I of this Article discusses the conceptual difficulties facing the Court's majority in *Davis* and *Arizona Free Enterprise Club*. The

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Act, named after its sponsor, the segregationist South Carolina firebrand Benjamin "Pitchfork Ben" Tillman, prohibited federally chartered banks and corporations from making campaign contributions. 34 Stat. at 864–65. A handful of states had earlier enacted similar laws. *See* Bradley A. Smith, Unfree Speech: The Folly of Campaign Finance Reform 23–24 (2001).

15 Burroughs v. United States, 290 U.S. 534 (1934).

16 *See id.* at 545–47 (citing *Ex Parte* Yarbrough, 110 U.S. 651, 657–58, 663, 666–67 (1884)) (explaining that *Yarbrough*, which relied on, inter alia, Article I, Section 4 of the Constitution in upholding election regulations, is controlling).

17 U.S. CONST. art. I, § 4, cl. 1.

18 *Burroughs*, 209 U.S. at 544.

19 U.S. CONST. art. II, § 1, cl. 4.

20 Buckley v. Valeo, 424 U.S. 1, 62, 67–68 (1976).

21 *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 451 (2010) (Stevens, J., concurring in part and dissenting in part).

Court is correct in its skepticism of campaign finance regulation and in particular direct government funding of campaigns, but has not fully explained why. Part II locates this conceptual problem in the confusion of "election" with "campaign," reviews the constitutional grant of power to regulate "elections," and explains why "elections" are different from "campaigns." Part III explains the basis for a doctrine of "separation of campaign and state." Part IV concludes with a brief review of some practical difficulties in such a doctrine.

I. *ARIZONA FREE ENTERPRISE CLUB*, *DAVIS*, AND THE CONCEPTUAL ANALYSIS OF GOVERNMENT REGULATION OF CAMPAIGNS

Since it was announced in January of 1976, *Buckley v. Valeo* has been the Court's lodestar for campaign finance cases.[22] *Buckley* addressed challenges to the Federal Election Campaign Act, as amended in 1974.[23] The Court's opinion in *Buckley* is exceedingly long,[24] complex, and much richer than it is often given credit for being, but its basic contours are well known, if often incompletely grasped. First, *Buckley* recognized that limitations on campaign spending and contributions burden rights of speech and association.[25] From there, it applied a basic First Amendment analysis: infringements on a fundamental right must be justified by a compelling government interest, subjected to a high level of judicial scrutiny, and be narrowly tailored to the problem to be addressed.[26] In perhaps the most controversial part of the decision, the Court determined that expenditures, as direct communications from the speaker, were entitled to greater constitutional protection than contributions to candidates, which it called proxy speech.[27] It further held that expenditures posed less of a threat of corruption, and that the government interest in regulating them was not so great.[28] Thus the Court prohibited limitations

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22 *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 120–22, 126, 134–38, 141–45, 190–94, 221 (2003).

23 *Buckley*, 424 U.S. at 6.

24 By some measurements, *Buckley* is the Court's longest opinion ever. Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 631 (2008).

25 *Buckley*, 424 U.S. at 14–15.

26 *Id.* at 44–45.

27 *Id.* at 19–22. I have been critical of this distinction. *See* Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 56–59 (1997) [hereinafter Smith, *Money Talks*].

28 *Buckley*, 424 U.S. at 19–23.

on expenditures made independently of a candidate[29] while permitting limitations on the source and amounts of contributions to candidates.[30]

But there is more to *Buckley* than just these core holdings. *Buckley* recognized a deep conflict between campaign finance regulation and the First Amendment and so sought to restrict the former to a relatively narrow field of very overtly procandidate or anticandidate speech—the famous "express advocacy" test.[31] To avoid constitutional infirmities, it narrowly construed portions of the statute that would have required most Americans engaged in political advocacy to register with the government and report regularly as political committees, effectively removing from the Act most disclosures.[32] The decision is, at root, deeply skeptical of government regulation of speech.[33]

Despite that skepticism, however, the *Buckley* Court did a rather curious thing: it upheld the system for government financing of campaigns created by the Federal Election Campaign Act.[34] Elsewhere in the opinion the Court recognized the potential self-interest of legislators in regulating political speech.[35] It drew a bright line limit, "express advocacy," to delineate the field in which government can operate with the full recognition that doing so would allow easy circumvention of the Act, but suggested that such prophylactic safeguards are necessary to protect political speech.[36] But the Court brushed off the challenge to the government financing system.[37] "Congress was legislating for the 'general welfare,'" wrote the Court, "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."[38] The Court analyzed the issue as one of Congress's spending power, limited only by the constraints of the First Amendment.[39] And because it did not directly suppress speech, the Court found no serious First Amend-

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29 *Id.* at 50–51, 54, 58.

30 *Id.* at 29, 35–38.

31 *Id.* at 42–45, 79–81.

32 *Id.* at 79–80.

33 Lillian R. BeVier, McConnell v. FEC*: Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127, 128 (2004).

34 *Buckley*, 424 U.S. at 108–09.

35 *See id.* at 84 n.112 (recognizing that part of the legislation gives incumbents "considerable advantages").

36 *See id.* at 79–81.

37 *Id.* at 85–86.

38 *Id.* at 91.

39 *Id.* at 90–92.

ment issues.[40] It paid little attention to the potential dangers of such an enterprise for the basic structure or theory of American government, writing, "[w]hether the chosen means appear 'bad,' 'unwise,' or 'unworkable' to us is irrelevant."[41]

In the years that followed *Buckley*, the Court would wax and wane on the issue of campaign finance laws. For a decade, culminating in *FEC v. Massachusetts Citizens for Life, Inc.*,[42] the Court was generally a campaign finance skeptic.[43] Beginning in 1990 with *Austin v. Michigan State Chamber of Commerce*,[44] however, the Court took an increasingly lax approach to government regulation.[45] By the start of the twenty-first century, supporters of regulation were praising the Court's new deference to legislative initiatives.[46] That deference peaked in *McConnell v. FEC*,[47] which upheld all significant parts of the Bipartisan Campaign Reform Act of 2002 (commonly known as "McCain-Feingold" for its two lead Senate sponsors), including broad new restrictions on political speech close to an election and mandatory reporting even prior to engaging in speech,[48] and more or less invited Congress to do far more without much constitutional scrutiny. The Court's decision did considerable violence to *Buckley*,[49] but the *McConnell* majority attempted to present the result as one respecting the *Buckley* precedent,[50] which would have important results down the road. Leaving aside the particulars of the case, however, the skepticism that so infuses *Buckley* is absent in *McConnell*.[51]

Yet within a short time that skepticism returned with a vengeance. Largely, it reflected a simple change in Court personnel. Chief Justice Rehnquist, who dissented (for the most part) in *McConnell*[52] but who had never been a thoroughly reliable vote against regu-

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40 *Id.* at 90–93.

41 *Id.* at 91.

42 FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986).

43 *See* J. Robert Abraham, *Saving* Buckley*: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1085–86 (2010). *See generally* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

44 Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990).

45 *See, e.g.*, *id.* at 668–69.

46 *See* Richard L. Hasen, Buckley *is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 72 (2004).

47 McConnell v. FEC, 540 U.S. 93 (2003); *see* Abraham, *supra* note 43, at 1088.

48 *See McConnell*, 540 U.S. at 196–99, 226, 233, 246.

49 *See* BeVier, *supra* note 33, at 129; Hasen, *supra* note 46, at 68.

50 *McConnell*, 540 U.S. at 134–38, 159, 190–94, 196–99, 219, 221.

51 *See* BeVier, *supra* note 33, at 129, 135–36.

52 *McConnell*, 540 U.S. at 350–63 (Rehnquist, J., dissenting in part).

lation,[53] was replaced by Justice Roberts.[54] Justice O'Connor, who was a reliable vote for free speech rights early in her career but who, as she became more distant from her past as an elected politician, became increasingly deferential to politicians,[55] was replaced by Justice Alito.[56]

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53 *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 654, 668–69 (1990); FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 198, 210–11 (1982).

54 Russell L. Weaver, *The Roberts Court and Campaign Finance: "Umpire" or "Pro-Business Activism?*," 40 STETSON L. REV. 839, 848 (2011).

55 It is interesting to note that many proponents of regulation have criticized the Court's more recent jurisprudence in this area on the mistaken assumption that Justices lacking electoral experience do not appreciate the need for regulation. *See, e.g.*, Andrew Rosenthal, *John McCain's Three Little Words*, N.Y. TIMES TAKING NOTE (June 18, 2012, 1:20 PM), http://takingnote.blogs.nytimes.com/2012/06/18/john-mccains-three-little-words/ (quoting Senator John McCain as stating "I just wish one of them had run for county sheriff"). In fact, Justices with electoral experience, either as candidates or in other overtly political roles, have tended to be more skeptical of regulation. For example, Justice O'Connor was far more skeptical of regulation early in her term on the high court, when she was closer to her political career as a state senator. *Compare Austin*, 494 U.S. at 652, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986), *Nat'l Right to Work Comm.*, 459 U.S. at 197, *and* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981), *with McConnell*, 540 U.S. at 93, FEC v. Beaumont, 539 U.S. 146 (2003), FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001), *and* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000). Justice Powell, a former elected school board member, Joan Biskupic & Fred Barbash, *Retired Justice Lewis Powell Dies at 90*, WASH. POST, Aug. 26, 1998, at A1, was a strong vote for the unconstitutionality of most regulation. *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978). Justice Douglas, a close advisor to Franklin Roosevelt who was considered for Vice President, James L. Moses, *William O. Douglas's "Political Ambitions" and the 1944 Vice-Presidential Nomination: A Reinterpretation*, 62 HISTORIAN 325, 325 (2000), wrote one of the most eloquent opinions for the unconstitutionality of the Federal Corrupt Practices Act in *United States v. UAW-CIO*, 352 U.S. 567, 593–98 (1957) (Douglas, J., dissenting). Chief Justice Earl Warren, former governor of California, Stuart Shiffman, *A Consensus Builder*, 90 JUDICATURE 181, 184 (2007), joined Douglas's *UAW* opinion, as did former U.S. Senator Hugo Black. *UAW-CIO*, 352 U.S. at 593. Charles Evans Hughes, a former Presidential candidate, argued against the constitutionality of the Federal Corrupt Practices Act as defense counsel in *Newberry v. United States*, 256 U.S. 232, 234 (1921); William E. Leuchtenburg, *Charles Evans Hughes: The Center Holds*, 83 N.C. L. REV. 1187, 1188 (2005). Chief Justice Rehnquist, who cut his teeth doing political field work for Barry Goldwater's 1964 campaign, Madhavi M. McCall & Michael A. McCall, *Chief Justice William Rehnquist: His Law-and-Order Legacy and Impact on Criminal Justice*, 39 AKRON L. REV. 323, 329 (2006), was, as noted, an unreliable vote against regulation, but he usually did come down on the pro-speech side, including in his last campaign finance case, *McConnell*, 540 U.S. at 350–63 (Rehnquist, J., dissenting in part). Those justices who have been most supportive of regulation have been those without electoral experience, including Justice Frankfurter, author of the credulous and historically inaccurate majority opinion in *UAW*, *see* Allison Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. ON LEGIS. 421, 426–63 (2008), Justice Souter, author of the opinion in *Shrink*, 528 U.S. 377, 381 (2000), and Justice Stevens, co-author (with Justice O'Connor) of *McConnell*, 540 U.S. at 94, and author of the dissent in *Citizens United v. FEC*, 558 U.S. 310, 393 (2010).

56 Weaver, *supra* note 54, at 843.

But the skepticism may also represent the almost inarguable failure of the McCain-Feingold legislation to put a dent in political corruption or accomplish its other objectives and the realization by the Court majority that simply giving Congress the green light no more solved the difficult First Amendment problems than did the higher levels of scrutiny exercised in *Buckley* and its more immediate successors.[57] *Randall v. Sorrell* and *Wisconsin Right to Life* set the tone. The former struck down a campaign finance contribution limit as unconstitutionally low, the first time the Court had taken that step.[58] The latter took advantage of the *McConnell* Court's lip service to *Buckley* to give *McConnell* a very narrow interpretation that could, at least at a crude level, somewhat harmonize *McConnell* with the *Buckley* precedent it claimed to respect,[59] but in fact ignored or at points sub silentio overruled.[60] The result was to substantially restrict the reach of McCain-Feingold.[61] But both of these decisions fit neatly within the *Buckley* framework, as would the later, more controversial decision in *Citizens United*. Both *Wisconsin Right to Life* and *Citizens United* struck down restrictions on independent advocacy[62] and as such can be viewed as straightforward (if controversial) applications of the *Buckley* theory. *Randall* also struck down limitations on spending in a manner entirely consistent with *Buckley*—indeed, that part of Justice Breyer's plurality opinion is an ode to stare decisis.[63] Striking down Vermont's low contribution limit[64] was more daring, but doctrinally it too broke no new ground—*Buckley* had made clear that at some level contribution limits could be so low as to trigger a judicial veto.[65] But two other recent decisions by the Roberts Court do not fall so neatly within the *Buckley* paradigm: *Davis v. FEC* and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.

In *Arizona Free Enterprise Club*, the Court struck down a provision of Arizona's "Clean Elections" law, a complex system providing government subsidies to candidates to campaign for state political of-

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57 Bradley A. Smith, *The John Roberts Salvage Company: After* McConnell*, a New Court Looks to Repair the Constitution*, 68 OHIO ST. L.J. 891, 892–93, 907 (2007) [hereinafter Smith, *The John Roberts Salvage Company*].

58 Randall v. Sorrell, 548 U.S. 230, 236, 275 (2006).

59 FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464–67, 477–78 (2007).

60 *See* BeVier, supra note 33, at 129, 136, 141.

61 *See Wis. Right to Life, Inc.*, 551 U.S. at 476–81.

62 *Id.*; Citizens United v. FEC, 558 U.S. 310, 339, 361–62 (2010).

63 *See Randall*, 548 U.S. at 241–46.

64 *Id.* at 248–53.

65 Buckley v. Valeo, 424 U.S. 1, 21–22 (1976).

fice.[66] To understand the Arizona system, a brief review of government campaign subsidies in the post-*Buckley* world is necessary.

In the years closely surrounding the *Buckley* opinion, the federal government[67] and several states adopted systems for government financing of candidate campaigns.[68] The common approach favored in that early era was one of "matching funds."[69] That is, a candidate would be rewarded for raising small dollar contributions with "matching funds" from the federal or state treasury.[70] In return, the candidate would agree to limit his or her campaign spending to an amount set by statute.[71] By making the system voluntary for candidates, such plans appear to comply with *Buckley*'s prohibition on mandatory spending limits.[72]

Although begun with great fanfare, these programs have largely failed. The system for awarding subsidies is often bewilderingly complex, at least to average citizens whose political and financial support was needed for the program to succeed.[73] People rarely trust a political system they cannot understand. Many of the programs rely on voluntary earmarking of tax dollars by taxpayers, but this never caught on, even though taxpayers have been assured that contributing to the campaign fund would not increase their tax liability.[74] The sub-

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66 Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2828–29 (2011).

67 *See* Donald J. Simon, *Current Regulation and Future Challenges for Campaign Financing in the United States*, 3 ELECTION L.J. 474, 474–75 (2004).

68 *See* Deborah E. Schneider, *As Goes Maine? The 1996 Maine Clean Election Act: Innovations and Implications for Future Campaign Finance Reforms at the State and Federal Level*, 2 WASH. U. J.L. & POL'Y 627, 637–45 (2000).

69 *See, e.g.*, *id.* at 640–41, 648–49.

70 *See* Ciara Torres-Spelliscy & Ari Weisbard, *What Albany Could Learn from New York City: A Model of Meaningful Campaign Finance Reform in Action*, 1 ALB. GOV'T L. REV. 194, 225 (2008).

71 *See* Simon, *supra* note 67, at 482.

72 *See id.*

73 The federal presidential campaign finance system, for example, is actually two systems. A primary system provides "matching funds" up to $250 per contribution to candidates who raised at least $5000 in each of at least 20 states in contributions of $250 or less. *Id.* Participating candidates then agree to limit their spending, including both an overall limit and limits in each state. *Id.* A candidate can lose eligibility for continuing subsidies by failing to poll at least ten percent of the vote in two consecutive primaries, but can regain eligibility by winning twenty percent of the vote in a future primary. *See* 26 U.S.C. § 9033(c) (2006). *See generally* 26 U.S.C. §§ 9031–9042 (2006 & Supp. I 2007). A second subsidy is provided to pay for the parties' nominating conventions. *See* 26 U.S.C. § 9008(a)–(b)(1) (2006). Once a candidate is formally nominated at the convention, he is eligible for a lump sum grant from the Treasury to pay for the general election campaign. *See* 26 U.S.C. §§ 9002–9006 (2006 & Supp. I 2007).

74 Tax filers contribute to the fund by checking a box on their returns, with the express advisory on the tax form that doing so will not increase their tax liability. *See* Simon, *supra* note 67, at 484. In other words, it operates as an "earmark" of tax receipts. After peaking in 1980 at

sidy often comes with substantial strings attached in addition to the spending limitation that one must accept to be eligible.[75] But most importantly, the amounts are often set too low to allow for effective campaigning[76] and have not had adequate adjustments for inflation.[77]

This last issue has been particularly problematic. Political candidates are unlikely to participate in a matching fund system if, as a result, they will be subjected to a spending limit while their nonparticipating opponents are free to spend without legal limit.[78] Some government funding advocates have been loath to raise the spending caps because of a general aversion to the idea of money in politics.[79] But even those with a more realistic view of the problem have run into political difficulties—as the pressure on the public purse has grown, voters and their legislators have had little stomach for pumping more tax dollars into financing political campaigns.[80] Whatever the real problems of money in politics might or might not be, "reform" advocates have long been able to demagogue the issue of "corruption" and

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28.7% of tax filers, the number of tax filers opting to earmark steadily declined, and is now in the mid-single digits. *Presidential Election Campaign Fund (PECF)*, FED. ELECTION COMM'N, http://www.fec.gov/press/bkgnd/fund.shtml (last visited Aug. 26, 2013).

75 For example, campaigns that accept government subsidies under the federal presidential system are automatically subject to audit by the Federal Election Commission. 26 U.S.C. § 9007 (2006). During primaries, campaigns are restricted in how much can be spent in each state. *See* 26 U.S.C. § 9035(a); *see also* 2 U.S.C. § 441a(b)(1) (2012). These state-by-state limits cause presidential campaigns to base staff just outside of the early states in the nominating process—for example, staffers working in New Hampshire rent cars or stay in hotels in Vermont or Massachusetts, thus charging those costs to the limits in those particular states and so extending their resources for the more crucial New Hampshire race. *See Primary Matching Funds: How the Matching Fund System Works*, FED. ELECTION COMM'N, http://www.fec.gov/info/chone.htm (last visited Aug. 25, 2013).

76 *See* Kenneth R. Mayer, Timothy Werner & Amanda Williams, *Do Public Funding Programs Enhance Electoral Competition?*, *in* THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 245, 263–65 (John Samples & Michael McDonald eds., 2006) (discussing Hawaii and Wisconsin campaign finance programs); Simon, *supra* note 67, at 483.

77 *See* Joel M. Gora, *Don't Feed the Alligators: Government Funding of Political Speech and the Unyielding Vigilance of the First Amendment*, 2010–2011 CATO SUP. CT. REV. 81, 90 n.15.

78 *See* Simon, *supra* note 67, at 483.

79 *Cf.* Justin A. Nelson, Note, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524, 525, 529–30, 549 (2000) (explaining that some have tried to reduce money in politics with "tight contribution limits and spending caps" in public financing and other regulations).

80 *See* STEVEN R. WEISMAN & RUTH A. HASSAN, CAMPAIGN FIN. INST., PUBLIC OPINION POLLS CONCERNING PUBLIC FINANCING OF FEDERAL ELECTIONS 1972–2000: A CRITICAL ANALYSIS AND PROPOSED FUTURE DIRECTIONS 2–3 (2005), *available at* http://www.cfinst.org/president/pdf/PublicFunding_Surveys.pdf; Raymond J. La Raja & Brian F. Schaffner, *Explaining the Unpopularity of Public Funding for Congressional Elections*, 30 ELECTORAL STUD. 525, 525 (2011).

"obscene amounts of money" to whip up popular support for limitations and prohibitions.[81] Yet when it comes to government paying for campaigns, they have found themselves on the opposite end of the political sloganeering—whatever their real concerns about the budget might or might not be, opponents of government funding can easily attack the idea of campaign subsidies as "welfare for politicians."[82]

Making matters worse is that the systems cannot impose thresholds that make subsidies unavailable to all but the best-known, most popular candidates. Stories of taxpayer dollars going to perceived "kooks" or fringe politicians have eroded support for the system.[83] But to overly restrict the candidates eligible for subsidies would raise constitutional issues[84] and also undercut one frequently proffered argument for such plans—that they enable more people to run for office.[85] Substantially raising the subsidies, however, would lead to more perceived waste and abuse as more public dollars went to the campaigns of unchallenged incumbents, novelty and joke challengers, and third party candidates with little popular support.[86] This would further undercut support for appropriating the funds at all.

Thus, the money in the systems has failed to keep up with the rising costs of campaigns and, as a result, fewer and fewer candidates have chosen to participate.[87] It might be a pain for a candidate to raise the funds from voluntary donors, but at least she will not be unilaterally disarmed. In some systems, for a candidate to announce that she is participating in the subsidy system is equivalent to announcing that she does not believe she can win the race.[88]

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81 *See, e.g.*, Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 LAW & INEQUALITY 239, 241, 255–57 (2005).

82 *See, e.g.*, WELFARE FOR POLITICIANS?: TAXPAYER FINANCING OF POLITICAL CAMPAIGNS (John Samples ed., 2005) [hereinafter WELFARE FOR POLITICIANS?].

83 *See* John Samples, *The Failure of Taxpayer Financing of Presidential Campaigns*, *in* WELFARE FOR POLITICIANS?, *supra* note 82, at 213, 226–27.

84 *See* Anderson v. Celebrezze, 460 U.S. 780, 791–93 (1983); *cf.* Buckley v. Valeo, 424 U.S. 1, 96–100 (1976) (discussing Congress's recognition of constitutional restraints against inhibiting the opportunities of minor parties).

85 *See* Samples, *supra* note 83, at 214.

86 *See, e.g.*, Sarah Fenske, *The Dirty Truth About "Clean" Elections*, PHX. NEW TIMES (Apr. 2, 2009), http://www.phoenixnewtimes.com/2009-04-02/news/the-dirty-truth-about-clean-elections/ (discussing the use of taxpayer dollars to support third party candidates).

87 *See* Gora, *supra* note 77, at 95.

88 Jonathan D. Salant, *Public Financing: A 'Scarlet Letter' for Presidential Candidates*, BLOOMBERG BUSINESSWEEK (Feb. 20, 2012), http://www.businessweek.com/articles/2012-02-20/public-financing-a-scarlet-letter-for-presidential-candidates; *see also* KENNETH R. MAYER, PUBLIC FINANCING AND ELECTORAL COMPETITION IN MINNESOTA AND WISCONSIN 17 (1998).

The solution offered in response to these problems was a subsidy system that proponents dubbed "clean elections." Under the "clean elections" design, qualified participating candidates would be guaranteed a relatively low amount of money from the state.[89] If a nonparticipating candidate were to raise more money than the voluntary limit under which the participating candidate labored, however, the government would give more money to the participating candidate, often up to several times the amount of the original limit.[90] Somewhat confusingly, these were typically dubbed "matching funds," although unlike the traditional use of the term, they did not "match" amounts raised by a candidate, but rather amounts spent by his opposition.[91] However, the plans went even further. Either because they simply believed that large spending on political races was unfair, or because they believed that independent spending might corrupt officeholders, or simply to induce more candidates to participate in the government program, sponsors of "clean election" plans typically awarded additional funds to a participating candidate if an independent expenditure was made against that candidate, or in favor of his opponent, during a race.[92] This is the provision of the Arizona program challenged in *Arizona Free Enterprise Club*.[93]

Under Arizona's "clean elections" program, "matching funds" were distributed to a publicly financed candidate once a privately financed opponent's expenditures, combined with expenditures by independent groups in support of the privately financed candidate or in opposition to the a publicly financed candidate, exceeded the partici-

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89 *See, e.g.*, Schneider, *supra* note 68, at 647–48. In most such plans, candidates qualified by raising a threshold amount of small contributions, typically five dollars. Andrea Woodman-see, Op-Ed., *'Clean Elections' Are an Upside-Down Fairy Tale*, GOLDWATER INST. (Feb. 24, 2003), http://goldwaterinstitute.org/article/clean-elections-are-upside-down-fairy-tale-0. It has been suggested that these were typically raised by interest group allies of the candidate. *See id.*; SEAN PARNELL, LAURA RENZ & SARAH FALKENSTEIN, CENTER FOR COMPETITIVE POLITICS, SPECIAL INTERESTS, PARTISAN POUTS, AND THE USUAL SUSPECTS: A STUDY OF DONORS TO NEW JERSEY'S "CLEAN ELECTIONS" CANDIDATES IN 2007, at 3 (2009), *available at* http://www.campaignfreedom.org/doclib/20090223_SR1NJ.pdf; Sasha Issenberg, *Maine Blazes a Trail in Funding: Clean Election System Popular*, BOS. GLOBE, Mar. 29, 2010, at A1 ("Former House speaker John Richardson has enlisted unions that endorsed him—including state troopers and police, plumbers, and pipe-fitters—as a source of fund-raising manpower.").

90 *See* NORMAN J. RABKIN, ET AL., U.S. GEN. ACCOUNTING OFFICE, GAO-03-453, CAMPAIGN FINANCE REFORM: EARLY EXPERIENCES OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES 52–53 (2003).

91 Schneider, *supra* note 68, at 648–49.

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

93 *Id.*

pating candidate's initial state subsidy.[94] At that point, the publicly financed candidate received roughly one dollar for every dollar raised or spent by a privately financed candidate or by independent groups to support the privately financed candidate.[95] These "matching funds" were available to all publicly financed candidates in the race,[96] and were available until the privately financed candidate spent three times the amount of the initial state subsidy.[97] Additionally, the privately funded candidates were subject to low contribution limits[98] and substantial reporting requirements.[99]

The Court struck down the law on the grounds that it imposed "an unprecedented penalty on any candidate who robustly exercises [his] First Amendment rights."[100] To the dissenters, this was nonsense. Justice Kagan, writing for herself and Justices Breyer, Ginsburg, and Sotomayor, argued that the plaintiffs had no First Amendment claim at all. "Arizona's matching funds provision," she argued, "does not restrict, but instead subsidizes, speech."[101] No one's speech was directly suppressed by the state; moreover, the state was not discriminating against the plaintiffs in awarding a subsidy to their opponents—the plaintiff candidates were eligible for the same subsidy, but had simply chosen not to take it.[102] "We have never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another."[103] Case closed.

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94 *Id.* at 2814.

95 *Id.* The law provided for a dollar-for-dollar match minus six percent, intended to account for fundraising expenses. *Id.* Generally, fundraising costs are higher than six percent. The Federal Election Commission, for example, allows for candidates in the presidential primary matching funds program to have fundraising costs equal to twenty percent of total expenditures. 11 C.F.R. § 100.152(a) (2012). This is a good measure, as both programs require a candidate to raise funds in low dollar contributions. *See* 26 U.S.C. § 9033 (2006); *Ariz. Free Enter. Club*, 131 S. Ct. at 2813. Thus, the net effect is to give the participating candidate a better than one for one match in actual purchasing power.

96 Because Arizona elects it legislature from multimember districts, in general elections, as well as primaries, it is very common to have four or more major party candidates in a race. *See Ariz. Free Enter. Club*, 131 S. Ct. at 2815.

97 *Id.* at 2815–16.

98 The limit was $840 per election cycle for statewide office, *id.* at 2815, versus, for example, the $2600 that would be allowed in a race for the U.S. House or Senate. *Contribution Limits 2013–2014*, FED. ELECTION COMM'N, http://www.fec.gov/pages/brochures/contriblimits.shtml (last visited Aug. 26, 2013).

99 *Ariz. Free Enter. Club*, 131 S. Ct. at 2827.

100 *Id.* at 2818 (quoting Davis v. FEC, 554 U.S. 724, 739 (2008)) (alteration in original).

101 *Id.* at 2833 (Kagan J., dissenting).

102 *Id.* at 2834–35.

103 *Id.* at 2837.

The case "may merit less attention than any challenge to a speech subsidy ever seen in this Court."[104]

The majority rejected this reading—correctly, I believe—but its reasoning is not a model of clarity. The majority devotes considerable attention to the idea that the Arizona law was simply an artifact of an impermissible motive—that being an effort to "level the playing field" in an election.[105] In *Buckley*, the Court had held that such a leveling motive was not a compelling government interest that could justify an infringement on speech rights.[106] As the Court put it, in what is perhaps *Buckley's* most memorable line, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment."[107] In *Arizona Free Enterprise Club*, the Court simply took judicial notice of the website for the Arizona Clean Elections Commission, which administered the plan.[108] That website, it noted, stated plainly that the purpose of the law was to "level the playing field."[109] Additionally, the Act itself repeatedly referred to "equal funding" and "equalizing funds."[110]

The problem with this mantra is that, whatever the purpose of the legislature in passing the law, the law did not, as the dissenters pointed out, actually restrict anyone's speech to enhance the voices of others.[111] Rather, it simply enhanced, through subsidies, the voices of some. The Court in *Buckley* and its progeny had never suggested that promoting some degree of equality was an impermissible government objective, but only that the government could not pursue that objec-

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104 *Id.* at 2835.

105 *Id.* at 2825–26 (majority opinion).

106 Buckley v. Valeo, 424 U.S. 1, 48, 54 (1976).

107 *Id.* at 48–49. Of course, this claim is open to debate. Just seven years earlier, in *Red Lion Broadcasting Co. v. FCC*, the Court had arguably adopted exactly that position. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369–71, 392, 396, 400–01 (1969). Nevertheless, the Court since *Buckley* has steadfastly held that attempts to foster equality were not an adequate justification for burdening speech rights. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 349–50 (2010). In at least a few occasions, this claim was honored as much by the breach as the observance. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 227 (2003); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 422 & n.8 (2000); Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting). But even in these cases, the government was forced to cloak its egalitarian rationale in anticorruption rhetoric. *See* Bradley A. Smith, *Looking for Corruption in All the Wrong Places*, 2002–2003 CATO SUP. CT. REV. 187, 201–05.

108 *Ariz. Free Enter. Club*, 131 S. Ct. at 2825 n.10.

109 *Id.* The Court noted that after this was raised at oral argument, the text on the website was changed. *Id.*

110 *Id.* at 2825.

111 *Id.* at 2833 (Kagan, J., dissenting).

tive through tactics that suppressed speech.[112] Moreover, even an impermissible motive does not normally make an act of the legislature unconstitutional unless it results in the actual violation of a constitutional right.[113] Thus, even if the motive was insufficient to justify limiting speech, if speech was not limited, there would be no violation.

The majority responded to this line of attack by arguing that the purpose of the rescue funds[114] was to get candidates to participate in the "clean elections" system, including its spending limits, thus reducing the total amount of speech.[115] But this argument, too, seems flawed because the *Buckley* Court had specifically held that the government could offer tax subsidies to candidates to pay for their campaigns and could condition those subsidies on the candidate's voluntary agreement to limit spending.[116] Every system of government campaign financing that offers candidates money in exchange for agreeing to limit their spending is an effort to induce candidates to restrict their spending. This was true of the system at issue in *Buckley* as much as of the system in *Arizona Free Enterprise Club*—the latter simply offered a stronger inducement. The majority argued that the tax subsidies in the presidential tax funding system upheld in *Buckley* were "not triggered by the speech of a publicly funded candidate's political opponent, or the speech of anyone else,"[117] but it is not inherently obvious why that distinction matters once the decision to allow subsides has been made. The majority did not challenge the dissent's point that Arizona could, instead of providing "matching funds," simply have upped the original subsidy to three times the level provided.[118] "Pretend you are financing your campaign through private donations," wrote Justice Kagan. "Would you prefer that your opponent receive a guaranteed, upfront payment of $150,000, or that he receive only $50,000, with the *possibility*—a possibility that you mostly get to control—of collecting another $100,000 somewhere down the

112 *See id.* at 2837.

113 *See* Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

114 Although *Arizona Free Enterprise Club* does not use the term "rescue funds," that has been the common term in general discourse. *See, e.g.*, Jessica Levinson, Arizona Free Enterprise v. Bennett *Explained*, HUFFINGTON POST (June 27, 2011 10:51 AM), http://www.huffingtonpost.com/jessica-levinson/arizona-free-enterprise-clubs-freedom-club-pac-v-bennett_b_885121.html; Signé Thomas, *'Rescue Funds' in Peril if Senate Bill Becomes Law*, CAROLINA J. ONLINE, (June 14, 2012), http://www.carolinajournal.com/articles/display_story.html?id=9191.

115 *Ariz. Free Enter. Club*, 131 S. Ct. at 2827–28.

116 Buckley v. Valeo, 424 U.S. 1, 95–96 (1976).

117 *Ariz. Free Enter. Club*, 131 S. Ct. at 2822 n.9.

118 *See id.*at 2833, 2837–38 (Kagan, J., dissenting).

road? Me too."[119] Snark aside, this is an effective and largely unrebutted argument.

While these two arguments of the majority invoked broad First Amendment principles to strike down the Arizona statute, at other times the majority seems to suggest that the problem was merely one of particular statutory design. For example, the Court is correct that the Arizona system placed the privately funded candidate in a position where his calculations could be spoiled by someone over whom he had no control—an independent spender.[120] A candidate might decide, for example, that if both he and his opponent spent $100,000, he would be better off than if each spent $50,000. If, however, an inde-

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119 *Id.* at 2838. The dissenters also took issue with the idea that the system would lead to a decline in overall speech on the theory that candidates lured into the system would be subject to the spending limits. *Id.* at 2833. They suggest that candidates that could raise money above the matching funds cap would do so, and others who would be expected to fall below the cap would take the state subsidy and so have more resources with which to speak. *See id.* at 2834–36. It is not clear who has the better side of this argument, which seems to turn on empirical issues, but I suspect that the majority would . Because candidates must decide whether to take the subsidy at the outset of the campaign, a candidate has to discount his estimated fundraising advantage from forgoing the subsidy by the possibility that he might not raise as much as he hopes. *See* ARIZ. REV. STAT. ANN. §§ 16-961, 16-947 (2012). He would further have to consider the possibility that two or more opponents would be subsidized candidates. In that case (and especially if the subsidized candidates were largely aligned) each dollar in higher spending would trigger two dollars in spending against him.

Additionally, the spending limit is only one third of the matching fund limit. *See Ariz. Free Enter. Club*, 131 S. Ct. at 2825. Thus, with an original grant of $50,000, a candidate who believed his fundraising capacity to be $125,000 would probably find it advantageous to take the grant and limit his spending to the lower amount. Note that this is not entirely true either—some candidates, especially challengers with low name recognition, might decide that they would compete better with each side spending $125,000 than with each spending $50,000. *See* JOHN SAMPLES, THE FALLACY OF CAMPAIGN FINANCE REFORM 175–76 (2006).

But the nonparticipating candidate would also have to factor in that cost of raising funds. Even if the six percent allowance of the statute were adequate to account for fundraising costs—and it probably is not—the participating candidate would still benefit because his first $50,000 in subsidy would be free of any such discount. *See* ARIZ. REV. STAT. ANN. § 16-951 (2012). Thus, if the nonparticipating candidate raised and spent $160,000 with a six percent fundraising cost, his effective communications budget would be $150,400 (*$160,000*0.94*), while his subsidized candidate would have a budget of $144,000 (*$50,000 + ($100,000*0.94)*). The nonparticipating candidate would still have an advantage, but less than the raw six percent figure would suggest. And if the nonparticipating candidate ended up only raising $145,000, he would actually end up with less money for effective campaigning than his opponent. Further adding to his woes, he would have added compliance and reporting costs, *see Ariz. Free Enter. Club*, 131 S. Ct. at 2815, and could count on being regularly portrayed in the press as a "big money" candidate, *see Clean Money Public Financing of Campaigns*, PROGRESSIVE STS. NETWORK, http://www.progressivestates.org/content/257/clean-money-public-financing-of-campaigns (last visited Aug. 26, 2013), even though his campaign funds would, under the law, have to come in the form of small contributions, *Ariz. Free Enter. Club*, 131 S. Ct. at 2815.

120 *Ariz. Free Enter. Club*, 131 S. Ct. at 2819.

pendent group then entered the arena and spent $50,000 to promote his candidacy, that would trigger still more spending for his opponent.[121] But the publicly financed opponent would get the money directly "to use as he saw fit."[122] The privately financed candidate would have no control over the spending by the independent group.[123] Thus the spending, if not actually harmful to his candidacy, would likely be less effective than the corresponding subsidy given his opponent.

But does this mean that the program would be permissible if matching funds were distributed only for the privately financed candidate's own spending? Certainly there is nothing wrong with the Court martialing all arguments in favor of its decision.[124] But this feels like something of a makeweight; the Court likely would have struck down the law even without this feature. Similarly, the Court recognized that the state formula for matching funds could, in a multicandidate race, mean that each dollar of spending by the privately funded candidate could trigger two or more dollars of spending against him.[125]

These results may seem unfair to many observers, but we are nonetheless left to ask why it matters. There is still no speech that is suppressed, and a candidate who is eligible for the subsidy cannot much complain if he chooses to forgo it and finds this works to his disadvantage. We are back to the dissent's starting point.

Finally, the majority relied heavily on precedent. Not, however, some long-standing precedent, but on its own 2008 opinion in *Davis*,[126] itself the other problematic opinion in our story. In that case, the Court struck down, again on a 5–4 vote, a provision of McCain-Feingold that raised the limit on the size of contributions that a candidate could accept when that candidate was being heavily outspent by a self-funded candidate—that is, a candidate who was financing much of his campaign from personal wealth.[127] But this reliance on *Davis*[128] only adds to the opaqueness, for the *Davis* opinion is itself less than a model of clear legal theory. *Davis* appears to rely heavily on the fact that the system at issue was asymmetrical.[129] One candidate (the self-

121 *See id.*

122 *Id.*

123 *Id.*

124 *See id.* at 2818–19 (laying out three reasons to strike down the matching fund provision).

125 *Id.* at 2819.

126 *Id.* at 2818 ("The logic of *Davis* largely controls our approach to this case.").

127 Davis v. FEC, 554 U.S. 724, 742–44 (2008).

128 *See Ariz. Free Enter. Club*, 131 S. Ct. at 2818–22, 2826.

129 *See Davis*, 554 U.S. at 729–31, 738, 742–44.

funder) was limited to asking for $2300 in contributions, but his opponent could ask for as much as $6900 from a single donor.[130] Of course, this is an important distinction—a lower limit on contributions for one group of donors seems more like speech suppression than the mere determination not to subsidize speech. But *Davis*, like *Arizona Free Enterprise Club*, fails to effectively identify how plaintiff Davis's own speech is suppressed. Although the majority argued that *Arizona Free Enterprise Club* was an even more obvious case than *Davis*,[131] in an important way, *Arizona Free Enterprise Club* would seem to be a weaker case. This is because in *Arizona Free Enterprise Club* the majority conceded again the holding of *Buckley*—that the government can subsidize campaign speech for candidates and condition that subsidy on the candidate agreeing to limit his spending.[132] The *Arizona Free Enterprise Club* majority specifically disavowed any challenge to this principle: "We do not today call into question the wisdom of public financing as a means of funding political candidacy. That is not our business."[133]

Nevertheless, *Arizona Free Enterprise Club*, and also *Davis*, indicate that the Court is uncomfortable with government efforts to promote campaign spending equality by tinkering with campaign contribution rules or, more so, through government subsidies.[134] In this, the majority is on to an important principle, even if its own opinions reveal it to be only dimly aware of that principle.

The problem, I suggest, is the acceptance in *Buckley*, reiterated in *Arizona Free Enterprise Club*, that there is a legitimate constitutional role for the government to play in directly subsidizing candidates for political office.[135]

II. Campaigns vs. Elections

This Part and Part III of this Article set forth a rationale that is in certain ways more radical, yet in others more conservative, judicially manageable, and coherent, to address the Court's uneasiness with the type of government regulation at issue in *Davis* and *Arizona Free Enterprise Club*. Simply put, it is inappropriate and contrary to the structure and theory of the Constitution for the government to be so

130 *See id.* at 728–29.

131 *Ariz. Free Enter. Club*, 131 S. Ct. at 2818.

132 *See id.* at 2827–28.

133 *Id.* at 2828.

134 *See id.* at 2826; *Davis*, 554 U.S. at 738, 741–42.

135 *See* Buckley v. Valeo, 424 U.S. 1, 90–95 (1976).

directly involved in the dialogue that determines if the current government or its party retains power. The Constitution should operate on a doctrine of separation of campaign and state, similar to that of the separation of church and state which underlies jurisprudence surrounding the Establishment and Free Exercise Clause of the First Amendment.

Unlike the religion clauses that call for the government to avoid not only interference with free exercise, but also the "establishment" of religion, the speech clause of the First Amendment merely precludes the government from "abridging" the right to free speech, not from working to create more speech.[136] Indeed, the Constitution elsewhere specifically grants Congress the power to regulate the "Times, Places and Manner of holding Elections."[137] In short, in an era in which most debates over government power center on how far one can expand the definition of the power to regulate commerce,[138] regulating elections might seem to be one of the powers more clearly granted to government, not one calling for a separation. This Section addresses this grant of government power, and why it does not provide authority for the federal government to involve itself in the conduct of political campaigns.

Dissenting from that portion of *Buckley* that upheld government-funded campaigns, Chief Justice Burger wrote:

> The use of funds from the public treasury to subsidize political activity of private individuals [will] produce substantial and profound questions about the nature of our democratic society. . . . [T]he inappropriateness of subsidizing, from general revenues, the actual political dialogue of the people—the process which begets the Government itself—is as basic to our national tradition as the separation of church and state . . . or the separation of civilian and military authority.[139]

Unfortunately, Justice Burger did little to develop this argument. What he grasped, however, was that to find congressional power to regulate campaigns in the "times, places, and manner" clause is to col-

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136 U.S. CONST. amend. I.

137 U.S. CONST. art. I, § 4, cl. 1 (pertaining to "Senators and Representatives"); *see also* U.S. CONST. art. II, § 1, cl. 4 (providing that Congress may determine the time of choosing presidential electors "and the Day on which they shall give their votes").

138 *See generally Commerce Clause*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/commerce_clause (last visited Aug. 26, 2013) (describing the ebb and flow of congressional power under the Commerce Clause).

139 *Buckley*, 424 U.S. at 247–49 (Burger, J., concurring in part and dissenting in part).

lapse the distinction between campaigns and elections. Campaigns are speech and other efforts to convince the public of the merits of one's position—or, per *Webster's Dictionary*, "a connected series of operations designed to bring about a particular result"[140]—whereas elections are traditionally defined as "[the] [f]ormal process by which voters make their political choices on public issues or candidates for public office."[141] In other words, a "campaign" is the process of the American people debating politics and attempting to persuade their neighbors and others; an "election" is the process through which Americans make their political choices known at a given point in time. These are not the same thing.

Though occasionally acknowledging the distinction between campaigns and elections,[142] courts have rarely given it much thought. The first federal decision to deal with congressional regulation of elections was *Smith v. United States*,[143] which explained that "manner" included the authority of Congress to mandate single member districts for elections to the U.S. House of Representatives.[144] The next batch of cases came after the Civil War, and addressed federal statutes passed to prevent the suppression of the black vote in southern states. *Minor v. Happersett*[145] is known primarily for its holding that the Constitution does not preserve any particular right to vote;[146] *Ex parte Clarke*,[147] *Ex parte Siebold*,[148] and *Ex parte Yarbrough*[149] all dealt with issues of fraud and suppression of votes.[150]

Clarke and *Siebold*, decided on the same day in 1879, involved ballot box stuffing and fraudulent counting of votes by election judges.[151] These actions violated the Enforcement Act of 1870, and the plaintiffs, on a writ of habeas corpus, argued that the Acts, as ap-

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140 *Campaign*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 174 (11th ed. 2004).

141 *Election*, MERRIAM WEBSTER'S COLLEGIATE ENCYCLOPEDIA 518 (2000).

142 *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966) ("We should point out at once that this question in no way involves the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there. The sole reason for the charge that Mills violated the law is that he wrote and published an editorial on election day urging Birmingham voters to cast their votes in favor of changing their form of government.").

143 Smith v. United States, 3 U.S. Cong. Rep. C.C. 65, 1857 WL 4176 (Ct. Cl. 1857).

144 *Id.* at 18.

145 Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

146 *Id.* at 173, 178.

147 *Ex parte* Clarke, 100 U.S. 399 (1879).

148 *Ex parte* Siebold, 100 U.S. 371 (1879).

149 *Ex parte* Yarbrough, 110 U.S. 651 (1884).

150 *Id*. at 654–55; *Clarke*, 100 U.S. at 400–01; *Siebold*, 100 U.S. at 373–74.

151 *Clarke*, 100 U.S. at 400; *Siebold*, 100 U.S. at 374, 377–79.

plied to their conduct, were unconstitutional.[152] There was no real question that vote counting was part of the manner of holding elections, however. The issues were limited to whether or not the federal statute improperly attempted to penalize violations of state law, and whether or not Congress could make partial adjustments to an election system or had to devise a comprehensive system of elections in order to utilize its powers under the Times, Places and Manner Clause.[153]

In *Yarbrough*, the plaintiffs threatened, beat, and severely injured a black citizen for attempting to vote, in violation of provisions of the Enforcement Act.[154] Again seeking a writ of Habeas Corpus, the plaintiff argued that "[b]ecause there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted."[155]

In each of these cases, there can be no serious doubt that the statute regulated the manner of actually voting for and electing officeholders. The provisions of the law at issue dealt with the structure of the district for which the elections would occur, with counting ballots, and with preventing individuals from voting.[156] Later cases finding regulatory authority under the Times, Places and Manner Clause dealt with bribing voters.[157] Lower court decisions of the era similarly dealt with the mechanics of election voting and counting, or illegal efforts to prevent persons from casting a ballot.[158]

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152 *Clarke*, 100 U.S. at 400–01; *Siebold*, 100 U.S. at 379. The statute at issue in *Siebold* and *Clarke* regulated a variety of election day behaviors, including preventing persons from voting, fraud in counting or certifying vote totals, and threatening violence at the polls. *Siebold*, 100 U.S. at 381.

153 *Siebold*, 100 U.S. at 382–96.

154 *Yarbrough*, 110 U.S. at 655–57. The relevant provisions of the Enforcement Act provided stiff penalties for those who would:

> conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy, in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of the Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy.

Id. at 655.

155 *Id.* at 658.

156 *See id.* at 654–55; *Siebold*, 100 U.S. at 381.

157 *See* United States v. Gradwell, 243 U.S. 476, 480 (1917); United States v. Mosley, 238 U.S. 383, 386 (1915).

158 *See, e.g.*, United States v. Quinn, 27 F. Cas. 673, 676 (S.D.N.Y. 1870) (dealing with voter registration); McKay v. Campbell, 16 F. Cas. 157, 158 (D. Or. 1870) (involving election officials who refused to count vote of an otherwise eligible black voter).

The nature of these cases dealing with voter suppression and fraud is important because later cases, most notably *Burroughs v. United States*, summarily rely on them for the authority of government to regulate campaign speech under the Times, Places and Manner Clause.[159] None of these cases, however, dealt with activity outside the actual act of voting and tabulating results, and therefore none had any need, nor made any serious effort, to explore the scope or meaning of the Times, Places and Manner Clause.[160]

Had the Court undertaken such an examination, it likely would have begun by recognizing that any express government power to go beyond the regulation of voting and counting and to regulate campaigning and campaign speech under this clause would have to rely on the third criterion of the clause, "manner." Regulation of campaign speech and spending does not fit within the "times" or "places" of holding elections.[161] Is the "manner," then, enough to pull within its reach the regulation of campaign contributions, spending, and speech? Certainly, in one sense a political campaign leads to an election. But in ordinary usage, a "campaign" is not the same as an "election." As *Merriam-Webster's Dictionary* notes, the former is a series of events designed to create a result, whereas the latter is the formal process by which voters make their choices known.[162] In this dichotomy, the "campaign" is an attempt to sway voters; the "election" is the process by which voters make their selection known. This division comports with ordinary usage. We do not talk about candidates making "election stops" as they travel the country talking to voters, but rather "campaign stops." Most everyone understands the difference between "campaigning for" a candidate and "electing" a candidate. We have a "campaign," at the conclusion of which voters cast ballots on "election day."[163] One of the most popular trade magazines for political consultants is called *Campaigns and Elections*,[164] and its title does not seem intended to be mere redundancy.

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159 *See* Burroughs v. United States, 290 U.S. 534, 544–46 (1934).

160 Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 5–6 (2010).

161 An exception might be made for campaign speech at the polls themselves, such as distributing literature or wearing buttons at the polling station.

162 *Campaign*, *supra* note 140, at 174; *Election*, *supra* note 141, at 518.

163 Even in this heyday of endless early voting, people understand the difference between campaigning and voting in their ordinary language—they go to the rally in the morning to campaign, then go to the Board of Elections or other site to actually "vote," that is, to "elect" a candidate.

164 *See About Us*, CAMPAIGNS & ELECTIONS, http://www.campaignsandelections.com/corporate/about-us/ (last visited Aug. 26, 2013).

We understand that in some manner, "campaigning" goes on all the time. As Holmes wrote, "[e]very idea is an incitement."[165] Campaigning in that sense never ends, and all speech about political issues is intended, at some level, to incite listeners to action, which in a democratic society usually will eventually include voting.

The fact that "manner" was combined with "times" and "places" in the Constitution further suggests that it refers to the details of carrying out the formal process of voting. The traditional interpretive canon of *noscitur a socii* holds that words grouped in a list should be given related meanings.[166] If "time" refers to the dates and hours of an election,[167] and "places" to the location for voting, these mechanical details would comport with a reading of "manner" that limits the latter term to the process for voting and counting votes.

Legal history also points to the distinction between the "campaign" and the "election." Statutes and legal texts referencing the "time, place and manner of election" or "time, place and mode of election" were common in eighteenth century English-speaking countries.[168] These sources used the phrase

> to encompass the times, places and mechanics of voting; legislative districting; provisions for registration lists; the qualifications of electors and elected; strictures against election day misconduct; and the rules of decision (majority, plurality, or lot). . . . [T]he 'manner of election' in these documents seem not to have included governance of campaigns.[169]

Similarly, early American statutes in the colonies and states used "time, place and manner" (or "time, place and mode") to refer to such mechanics of voting.[170] For example, a New York statute from 1777 provided under the "mode for holding elections" the provisions for public notice and "the places for election, the supervising officers and elections judges, times of notice, return of poll lists, declaration of

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165 Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

166 See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 195 (2012) (citing Third Nat'l Bank in Nashville v. Impac Ltd., 432 U.S. 312, 322 (1977)).

167 The Court has rejected the idea that a state may ban editorials promoting—i.e, campaigning for—a candidate based on their "timing" close to an "election." *See* Mills v. Alabama, 384 U.S. 214, 220 (1966); *see also* Emineth v. Jaeger, 901 F. Supp. 2d. 1138, 1146 (D.N.D. 2012) (issuing preliminary injunction against a North Dakota law that forbids electioneering on election day). The Court apparently does not see the authority to regulate the "times" of an *election* as power to limit the hours for campaigning.

168 Natelson, *supra* note 160, at 9–16.

169 *Id.* at 12.

170 *Id.* at 13–16.

winner, and some voter qualifications."[171] A 1781 Maryland statute mandating the "manner" of holding elections also dealt with the time and place of the election, notice, the administration of oaths, announcement of the results, and the criteria (in that case, plurality vote) for winning.[172] Robert Natelson's research provides several other examples.[173] Natelson concludes:

> [R]egulating the "manner of election" encompassed the following:
>
> - Fixing the qualifications of the electors and of candidates;
> - Setting the time of the election, including terms of office;
> - Fixing the place of election, including description of district boundaries;
> - Determining whether election was to be a single-tier or double-tier process—i.e., whether voters decided the winner directly, or merely selected a class of people who either selected the ultimate winner or from whom the ultimate winner was chosen by lot;
> - Setting the rules for both tiers of a double-tier process;
> - Determining whether the victor needed a majority or a plurality;
> - Regulating the mechanics of voting, including provisions for notice, returns, ballots or *viva voce* voting, and counting;
> - Erecting procedures to resolve election disputes; and
> - Regulating Election Day behavior—e.g., providing for freedom for civil process and for punishment of Election Day misconduct.[174]

It did not encompass the idea of campaigning for office or otherwise attempting to persuade voters. From this, Natelson concludes further that the constitutional phrasing would seem to indicate a "subset of traditional 'manner' regulation," given that the Constitutional Convention had already specified qualifications for federal officeholders and terms of office.[175]

Only once has a state supreme court probed the meaning of a similar clause in the context of proposed campaign finance regulation.

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171 *Id.* at 16.

172 *Id.*

173 *See id.* at 12–17.

174 *Id.* at 17–18.

175 *Id.* at 4 n.8, 20; *see* U.S. CONST. art. I, §§ 2–3.

In *Vannatta v. Keisling*,[176] the Oregon Supreme Court examined whether the 1859 state constitutional grant of power to the legislature to "prescrib[e] the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct,"[177] granted the state power to regulate "campaigns."[178] The court began by noting that both modern dictionaries and those in use at the time of adoption define "campaign" and "election" as markedly different things.[179] An election, in the 19th century, was defined as "[t]he act of choosing a person to fill an office or employment, by any manifestation of preference, as by ballot, uplifted hands or viva voce."[180] Noting the historic difference in meaning between "electioneering" (campaigning) and "elections," and that "'elections' were a relatively narrowly defined concept," the court concluded that it "should construe 'elections' to refer to those events immediately associated with the act of selecting a particular candidate or deciding whether to adopt or reject an initiated or referred measure."[181] The authority to regulate "elections" and the "conduct of elections" was necessarily limited to:

> [L]aws that establish what offices will be elective, who will be eligible to run for and serve in them, when and how such persons must make their candidacy official, who will be eligible to vote in elections for those offices, and the like. In addition, the term 'regulating' appears to encompass the question of who generally will be eligible to vote, what the qualifications for that privilege will be, how one establishes eligibility, and the like. Finally, the term appears to authorize the legislature to designate public officials to oversee the elections process.
>
> The direction to enact laws prescribing the manner of *conducting* elections, by contrast, appears to be concerned with the mechanics of the elections themselves, i.e., with questions of where and how many polling places there will be, how they shall be operated, who may be present in them to ensure their proper operation, and the like.[182]

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176 Vannatta v. Keisling, 931 P.2d 770 (Or. 1997).

177 OR. CONST. art. II, § 8.

178 *Vannatta*, 931 P.2d at 779–80.

179 *Id.* at 780–82.

180 *Id.* at 780 (quoting 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

181 *Id.* at 780–81.

182 *Id*. at 781.

The court also noted that the Connecticut Constitution of 1818, on which this provision of the Oregon Constitution was based, was similarly narrow in scope.[183] Thus examinations of the early historical sources, as well as the common usage of the terms today, suggest that "elections" was not understood to encompass "campaigns" aimed at persuading voters.

Further adding to the precept that there is no express grant of constitutional power to regulate campaigns, note that Article II, referencing congressional power over the election of presidential electors, provides for no grant of power to regulate the "manner" of elections at all, only "time."[184] Of course, this makes perfect sense because the "manner" for electing the President, the Electoral College, is set forth in detail elsewhere in the document.[185] But that merely emphasizes the limited meaning of "manner" as it appears in Article I—if "manner" meant such things as campaigning, it is not covered elsewhere, and Article II would have been expected to retain the language of "manner" as a useful clause. If "manner" was intended to cover more than the formal process of selection, and to include the campaign, there would have been no reason to drop it from Article II.

Indeed, at the Constitutional Convention, the discussion given to the Times, Places and Manner Clause revolved entirely around election administration, not at all to the process of seeking to persuade citizens to vote in one way or another. Gouverneur Morris argued that "[s]tates might make false returns and then make no provisions for new elections."[186] And there was a clear concern that states might attempt to limit who was eligible to serve, or not provide for elections at all.[187]

Campaigns, then, deal with free speech and the right to organize and persuade. A campaign may or may not be held in connection with an election. Even dictatorships or monarchies may witness campaigning to shape ideas and popular pressure on the government, though no election may follow or be expected to follow.[188]

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183 *Id.* at 782 (citing W.C. Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200, 203 (1926)).

184 U.S. CONST. art. II.

185 *See id.* art. II, § 1; *id.* amend. XII.

186 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 241 (M. Farrand ed., 1911).

187 *See* THE FEDERALIST NO. 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 461 (Jonathan Elliot ed., 2d ed. 1891).

188 *See* JOHN MUELLER, CAPITALISM, DEMOCRACY, AND RALPH'S PRETTY GOOD GROCERY 147–50 (1999).

An election, on the other hand, is a practical means by which government perpetuates and legitimizes itself.[189] It is a method of selecting rulers that has many advantages, to be sure, but it is not the same as the free speech and persuasion that might (or might not) precede it.

Thus the right to vote takes on a very different dimension from the right to campaign. Citizens have no right to vote on faculty appointments at state-supported law schools, though they are free to campaign for more conservatives, more minorities or women, or whatever else they think appropriate. Citizens of Virginia have no right to vote for Maryland's Governor, though they are free to attempt to persuade Maryland citizens how to vote, and citizens of Annapolis have no right to vote for Baltimore's Mayor, though they, too, have a right to advocate in the latter election. Some states provide for voting for such down-ballot offices as County Coroner[190] and County Engineer.[191] Others do not. The right to speak on any of these subjects—to campaign, organize, launch protests, and attempt to persuade decisionmakers (including voters)—is universal and exists apart from any right to vote in a particular election.[192] Unfortunately, the Supreme Court has never undertaken a serious analysis of the reach of federal authority under the "Times, Places and Manner" clauses.[193] In fact, the Supreme Court did not decide its first campaign finance case, *Newberry v. United States*,[194] until 1921.[195] Unfortunately, even this analysis is truncated, and is overshadowed in the case by other issues and a certain level of semantic confusion.

Newberry is best understood with some historical context. Supporters of Truman Newberry, a candidate for U.S. Senate in Michigan, had spent a small fortune (at the time) to successfully promote Newberry for U.S. Senate against Henry Ford, the richest and arguably most famous and admired man in the country.[196] Despite his fame and public standing, and the fact that he was the handpicked candidate of

189 It is an alternative to monarchy, a self-perpetuating dictatorship (as in the old Soviet Politiburo or today's China), or anointment of a new rule by a recognized judge or lawgiver, as in ancient Israel, *see* 1 *Samuel* 9:15–16 (King James), to name just a few possibilities.

190 *See, e.g.*, OHIO REV. CODE ANN. § 313.01 (2012).

191 *See, e.g.*, NEB. REV. STAT. § 32-526 (2012).

192 *See* U.S. CONST. amend. I.

193 Natelson, *supra* note 160, at 6–7.

194 Newberry v. United States, 256 U.S. 232 (1921).

195 *Id.* at 232.

196 For a recounting of the tale of the Newberry-Ford contest of 1918, see PAULA BAKER, CURBING CAMPAIGN CASH: HENRY FORD, TRUMAN NEWBERRY, AND THE POLITICS OF PROGRESSIVE REFORM (2012).

President Woodrow Wilson, Ford was in many ways a thoroughly unfit candidate for the Senate. His extreme pacifism, his unpredictability, his many social resentments, and his suspicious nature, bordering on paranoia, were authentic concerns to many who knew him beyond his public image, as was his lack of knowledge about current events.[197]

Truman Newberry was a man of considerable means himself, scion to a wealthy Detroit family with massive holdings in copper and timber, a major shareholder in Ford's rival, the Packard Auto Company, and briefly Secretary of the Navy under Theodore Roosevelt.[198] Outside of Detroit social circles, however, he was all but unknown in the state.[199] Furthermore, because of World War I, he was on active military duty and therefore unable to personally campaign or even speak out on issues.[200] Even in a Republican-dominated state, as Michigan then was, a man of Ford's fame could only be defeated by someone who could reasonably match him in name recognition, and building that name recognition for someone such as Newberry would require spending money.[201] Ford ran unopposed in Michigan's Democratic primary, but also filed and ran in the state's Republican primary.[202] Therefore, Newberry would have to beat him twice to win the seat.

Newberry's campaign manager, Paul King, raised about $200,000 (approximately $3,000,000 in 2013 dollars)[203] from Newberry's family and friends to run the campaign.[204] A Michigan law, however, limited spending on the race to $3750.[205]

Wilson's Department of Justice launched a vindictive prosecution of Newberry and his supporters under federal law for violating the

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197 In the ensuing investigations, Ford testified to the Senate that the American Revolution happened in 1812, and that Benedict Arnold was a writer. When first approached about running by a Wilson confidante, he had asked, "What does a Senator have to do?" *Id.* at 75, 102. His anti-Semitism would also be seen by most people today as a disqualification, although that did not appear publicly until after the election. *See id.* at 40.

198 *See id.* at 1–2.

199 *See id.* at 14.

200 *See id.* at 2.

201 *See id.* at 65, 70, 77.

202 *Id.* at 76.

203 *See CPI Inflation Calculator*, BUREAU OF LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm (last visited Sep. 1, 2013) (to calculate, enter "200000" in the field marked "$" and select "1918" from the drop-down menu marked "in").

204 *See id.* at 82.

205 *See* Newberry v. United States, 256 U.S. 232, 245 (1921). With the sudden switch from selection of Senators by state legislatures to popular vote, the U.S. Congress had passed legislation that, as a temporary matter, adopted state law for the election of Senators. Thus the race was governed by Michigan state law. *Id.* at 243.

campaign spending limit in the state primary election.[206] The question that ultimately reached the U.S. Supreme Court was the reach of the Federal Corrupt Practices Act.[207]

Newberry's lawyer, former and future Supreme Court Justice Charles Evans Hughes, argued that the authority to regulate the "manner" of elections did not reach to the nominating process.[208] Of course, primaries in this time were a relatively new invention. The first mandatory statewide primary was held in Minnesota in 1901.[209] Only six states had presidential primaries in 1908 and only twelve in 1912.[210] While primaries soon after swept the country, their legal status remained unclear.[211] Thus the *Newberry* Court was dealing with new strictures and was, in some ways, uncertain how to talk about them. As a result, *Newberry* is often described as having held that primaries were outside the reach of the Time, Place and Manner Clause, and that only general elections fell within that clause.[212]

But that is misleading. Before primary elections, of course, the government played no role in regulating the nomination process.[213] In fact, before primaries and the arrival of the "Australian" (government-printed, secret) ballot, there was no official status at all to a "nomination."[214] It was merely an agreement—largely unenforceable against individuals—to support a particular candidate.[215] The party agreed to support that individual, printing ballots with the candidate's name, and working to energize and win over voters.[216] In other words, it was simply a step in the campaign. It was more akin to gaining the endorsement of the Chamber of Commerce or the AFL-CIO than to an election. Not surprisingly, then, the *Newberry* Court appears to have viewed primaries as part of the nominating process,[217] and thus

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206 *See id.* at 245.

207 *See id.* at 247.

208 *See id.* at 237–38.

209 *See* 2 ENCYCLOPEDIA OF US CAMPAIGNS, ELECTIONS AND ELECTORAL BEHAVIOR 179 (Kenneth F. Warren ed., 2008).

210 Mark R. Brown, *Ballot Fees as Impermissible Qualifications for Federal Office*, 54 AM. U. L. REV. 1283, 1297 n.91 (2005).

211 *See Newberry*, 256 U.S. at 247 (questioning whether Congress has the legal authority to regulate primaries).

212 *See* Natelson, *supra* note 160, at 6.

213 *See* CHARLES EDWARD MERRIAM, PRIMARY ELECTIONS: A STUDY OF THE HISTORY AND TENDENCIES OF PRIMARY ELECTION LEGISLATION 1–2 (1909) (discussing the early nomination process for congressional candidates).

214 *See id.*

215 *See id.*

216 *See id.*

217 Newberry v. United States, 256 U.S. 232, 250 (1921).

part of the campaign, not a state election itself—as if the party had simply greatly increased the number of delegates to its convention. As the plurality put it, "the ultimate question for solution here is whether under the grant of power to regulate 'the manner of holding elections' Congress may fix the maximum sum which a candidate therein may spend, or advise or cause to be contributed and spent by others to procure his nomination."[218] "The Seventeenth Amendment," continued the plurality, "which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election and the word now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors."[219]

The plurality did indeed argue that "primaries" were not an "election" covered by the constitutional clause, but that is because primaries were seen as part of the campaign preceding the election.[220] Primary voters were members of a private group that was deciding whom to support in an election, not electors in a government election. In a system in which primaries were new, it makes sense that the Court would think of primaries within the old paradigm of campaigning and elections. The Court viewed primaries as similar to the caucuses that had previously been used to choose candidates behind whom parties would coalesce and for whom their members would cast votes.[221] The Michigan law, therefore, did not extend to Newberry's primary expenditures because it could not extend to campaigning. In short, even if the Court had considered a primary to be an "election" covered by Article I, Section 4, it would not have considered that to be a grant of broad authority for the legislature to regulate the campaign for office. As the Court put it, "[o]ur immediate concern is with the clause which grants power by law to regulate the 'manner of holding elections for Senators and Representatives.'"[222] A primary, to the justices, was an endorsement process, not an election, and hence beyond the reach of government regulation.[223]

It is not surprising that the Court's language is confusing, for several trends were underway at the same time that dramatically changed campaigns and elections, including the imposition of primaries, the

218 *Id.* at 247.

219 *Id.* at 250.

220 *See id.*

221 *See id.*

222 *Id.* at 256.

223 *See id.* at 257.

adoption of the Australian ballot, and the earliest efforts to regulate campaign finance. But the Court was, in fact, separating the idea of a campaign from an election:

> If it be practically true that under present conditions a designated party candidate is necessary for an election—a preliminary thereto—nevertheless his selection is in no real sense part of the manner of holding the election. . . . Birth must precede but it is no part of either funeral or apotheosis.
>
> Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these.[224]

The fifth vote was provided by Justice McKenna, who agreed with the decision insofar as it discussed the Federal Corrupt Practices Act, which was adopted before the Seventeenth Amendment, but withheld judgment as to whether that might be changed by the Amendment, as being unnecessary to decide the case.[225] Thus, five justices agreed that the campaign—of which the primary was a part—was beyond the scope of the Times, Places and Manner Clause.

Justice White's concurrence in the judgment is also of value. Justice White would have held that primaries were "elections" within the meaning of the "Times, Places and Manner" clause.[226] But White's opinion indicates a grasp of the problem—that the law at issue did not really regulate the "manner" of holding an election. He argued that, while the state could regulate the primary election, the statute had been misconstrued by the trial judge, and that it could not be held to "restrict the right of the citizen to contribute to a campaign."[227] In this, his was the only opinion to adopt the modern understanding of a state-sponsored primary as an election rather than part of the campaign. But that only makes it more significant that he rejected the idea that the government could regulate the campaign leading up to that election. Thus, six justices in *Newberry* rejected the idea that the government could regulate campaign activity under the Times, Places and Manner Clause. This was not because a primary was an election that was not covered by the Times, Places and Manner Clause, as the

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224 *Id.* at 257.

225 *See id.* at 258 (McKenna, J., concurring).

226 *See id.* at 258–60 (White, J., concurring).

227 *Id.* at 274.

law did not regulate an election at all. Rather, it was an attempt to regulate part of the persuasive campaign. Campaigns, in turn, were not within the scope of congressional authority to regulate the times, places, and manner of an election.[228]

Justice Pitney's opinion, concurring in the judgment but rejecting the plurality's rationale, is a mirror image of the confusion in the plurality. Justice Pitney seems unsure whether the issue was whether or not a primary is an election, or whether the issue was whether the scope of the power to regulate the "manner" of holding an election includes campaigning and spending.[229] But as such, Justice Pitney's opinion reinforces the perception that the plurality (plus Justice McKenna) used the concept of the nomination as a proxy for regulating the campaign.

In the end, *Newberry*'s confused and fractured opinion is as close as the Court has ever come to a serious examination of the congressional power to regulate the "manner" of elections. What is clear is that five justices rejected the idea that the Times, Places and Manner Clause could be used to regulate campaigning before an election,[230] and a sixth wrote in such a manner as to suggest he would have rejected the notion had it been placed before the Court as a question of regulating campaign speech.[231]

The Court would eventually determine that primaries are elections covered by the Times, Places and Manner clause, but it would never again seriously examine whether the clause provides any basis to regulate campaigns, as opposed to elections. Rather, in *Burroughs v. United States*, the Court summarily and without analysis held that regulation of campaign activity, including the campaign finance restrictions of the Federal Corrupt Practices Act, falls within Congress's power.[232] The Court did not cite *Newberry* in the opinion. Instead, relying without discussion on *Yarbrough* and other cases involving what is clearly fraud in vote counting and interference with voters at the polls[233]—that is, relying on cases dealing with election fraud rather than anything relating to the persuasive campaign—the Court simply declared the broader scope of the clause.[234] In doing so, the Court conflated the idea of an "election" with the idea of a "campaign."

228 *See id.* at 257.

229 *See id.* at 275–95 (Pitney, J., concurring in part).

230 *See id.* at 257.

231 *See id.* at 274 (White, J., concurring).

232 Burroughs v. United States, 290 U.S. 534, 547–48 (1934).

233 *Id.* at 545–46.

234 *Id.* at 547–48.

Years later, *Buckley* simply accepted this holding, with the added caveat that directly funding campaigns could be justified under the spending clause.[235] As shown in Part III, this opened the door for a great deal of corruption and mischief.

Outside of campaign finance cases, the Court's most extensive analysis of Congress's power to regulate campaigns has come in the context of a pair of cases relating to ballots themselves. In *U.S. Term Limits, Inc. v. Thornton*,[236] in determining whether the state could establish ballot qualifications specifically intended to make it harder for some candidates (incumbents) to be elected, the Court noted that "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[237] Similarly, in *Cook v. Gralike*,[238] the Court rejected a government proposal to add select information about candidates to ballots that might affect voters' views on those candidates. The Court concluded that "in our commonsense view that term [manner] encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'"[239] Both cases, then, suggest that the government cannot be directly involved in the process of campaigning for or against candidates, or attempting to interfere with the choices that would otherwise be reached by the electorate. Unfortunately, the Court has not drawn on this insight in campaign cases, instead clinging to the declarative approach of *Burroughs* and *Buckley*.

This brief summary of argument—a bit of textualism, a bit of originalism, a bit of "commonsense" from the Court—will likely persuade those readers already inclined to textualism, originalism, and "commonsense" that there is no power to regulate campaigns expressly provided in the Constitution. For those less inclined to these traditional approaches to interpretation, the argument is assuredly less compelling. But that is not problematic because it is not necessary, at this point, to convince such readers that Congress has no power to legislate in the field of campaign finance and campaigns. Rather, I

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235 Buckley v. Valeo, 424 U.S. 1, 90 (1976).

236 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

237 *Id.* at 833–34.

238 Cook v. Gralike, 531 U.S. 510 (2001).

239 *Id.* at 523–24 (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)).

seek merely to make clear that there is not obvious authority in the Constitution giving Congress such power. Congress's power must come from a Constitutional provision other than Article I, Section 4. No express grant of power to regulate campaigns exists that would override other constitutional restrictions on government power—in particular, the First Amendment. With that recognition, the door must be open to consider if Congress may regulate campaigns or if, as I suggest, the structure, values, goals, and language of the Constitution limit congressional—and ultimately state—legislative authority over campaigns. Is it possible to move from the lack of any specific grant of power to regulate campaigns to deciding that, to the contrary, there ought to exist a doctrine of separation of campaign and state?

The Supreme Court has long recognized that political speech is intended to be at the core of the First Amendment. Whatever differences may exist about interpretations of the First Amendment, there is "practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[240] This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. Similarly, the "right of free association," which is at the heart of any organized campaign, is "at the foundation of a free society,"[241] and thus laws regulating it must be, "subject to the closest scrutiny."[242]

To regulate campaigns, then, is to regulate in "an area of the most fundamental First Amendment activities."[243] As the *Buckley* Court noted:

> 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."[244]

The Court continued, "[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely

240 Mills v. Alabama, 384 U.S. 214, 218–19 (1966).

241 Shelton v. Tucker, 364 U.S. 479, 486 (1960).

242 NAACP v. Alabama, 357 U.S. 449, 461 (1958).

243 Buckley v. Valeo, 424 U.S. 1, 14 (1976).

244 *Id.* (quoting Roth v. United States, 354 U.S. 476, 484 (1957) (alteration in original)).

to the conduct of campaigns for political office."[245] "Public discussion," the Court tells us, "is a political duty."[246]

The problem is that all of these statements are directly at odds with the idea that Congress has "broad authority to regulate . . . elections,"[247] at least if the term "elections" is interpreted to mean campaign activity as well as actual elections.[248] For what is campaign activity if not speech about politics? If "political expression [is] at the core of . . . the First Amendment,"[249] such that "protection of robust discussion is at its zenith,"[250] it simply cannot be an area in which Congress has "broad authority" to legislate[251] when set against constitutional language that is clearly intended to limit Congressional authority to legislate.[252] This idea of "broad authority" comes from the notion that Article I, Section 4 of the Constitution provides a specific grant of power to Congress to regulate in this area.[253] If, in fact, a careful consideration of the power—in which the Court has never engaged—shows that Article I, Section 4 does not provide Congress with a specific grant of power to regulate "campaigns," then it becomes possible to consider a robust doctrine of separation of campaign and state.

III. Separation of Campaign and State

Limitations on the power of government to regulate campaigns have been found in the Free Speech and Free Association Clauses of the First Amendment.[254] We see this most often in campaign finance,[255] but also in regulation of allegedly false campaign speech,[256]

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245 *Id.* at 15 (internal quotation marks omitted).

246 *Id.* at 53 (internal quotation marks omitted).

247 *See, e.g.*, Anthony H. Gamboa et. al., U.S. Gen. Accounting Office, GAO-01-470, Elections: The Scope of Congressional Authority in Election Administration 3 (2001).

248 *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 404 (2001) (Breyer, J., concurring).

249 *Buckley*, 424 U.S. at 39 (internal quotation marks omitted).

250 Meyer v. Grant, 486 U.S. 414, 425 (1988).

251 *Shrink Mo. Gov't PAC*, 528 U.S. at 404 (Breyer, J., concurring).

252 *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 481–82 (2007) ("'Congress shall make no law . . . abridging the freedom of speech.' The Framers' actual words put these cases in proper perspective.").

253 *See Buckley*, 424 U.S. at 131–32.

254 *See* U.S. Const. amend. I; *supra* notes 240–46 and accompanying text.

255 *See, e.g.*, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) (registration requirements); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) (reporting of expenditures and donors); *Buckley*, 424 U.S. 1 (regulation of contributions and expenditures and general disclosure requirements).

efforts to restrict campaign promises,[257] the rights of political parties to make campaign endorsements,[258] the timing of endorsements by newspapers,[259] and regulation of groups engaged broadly in political activity going beyond the immediacy of a campaign.[260] Much political campaign activity has also been protected, at least to some extent, by First Amendment decisions rendered outside the context of campaigns for office. For example, the Court has held that the state may not require organizers, who presumably could be political organizers, to register with the state for an organizer card bearing their name and title,[261] or require door-to-door proselytizers, who presumably could proselytize on behalf of a political candidate, to register in advance with local authorities.[262] The Court has made it exceedingly difficult to pursue defamation claims—statements that certainly could be made in the context of a campaign—against well-known political actors,[263] and it has adopted legal standards that make it difficult for the state to break up political rallies on the grounds that they pose a threat to public order.[264] These limitations have had important and largely salutary consequences for our democratic discourse and the functioning of a free democratic-republican form of government.

Two serious problems, however, result from the Court's approach to campaign regulation, which is an amalgam of many strands of judicial thought, including concerns about autonomy,[265] privacy,[266] the right to be exposed to differing voices and views,[267] the right to nonpolitical information,[268] and, only occasionally, the functioning of a

256 *See, e.g.*, Pestrak v. Ohio Elections Comm'n, 926 F.2d 573 (6th Cir. 1991); Rickert v. State Pub. Disclosure Comm'n, 168 P.3d 826 (Wash. 2007).

257 *See, e.g.*, Brown v. Hartlage, 456 U.S. 45 (1982); *Pestrak*, 926 F.2d 573.

258 *See, e.g.*, Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214 (1989); *Pestrak*, 926 F.2d 573.

259 *See, e.g.*, Mills v. Alabama, 384 U.S. 214 (1966); *Pestrak*, 926 F.2d 573.

260 *See, e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958).

261 *See* Thomas v. Collins, 323 U.S. 516, 550–51 (1945); *see also* Meyer v. Grant, 486 U.S. 414, 421–22 (1988) (a similar ruling in a more political context).

262 *See* Watchtower Bible & Tract Soc'y v. Village of Stratton, 536 U.S. 150, 153, 165–69 (2002).

263 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 275–76 & n.15 (1964).

264 *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).

265 *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.").

266 *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); NAACP v. Alabama, 357 U.S. 449, 458–66 (1958).

267 First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776–83 (1978).

268 *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762–65 (1976).

healthy democracy.[269] First, it has not provided a logical framework for specifically protecting speech that the Court has consistently proclaimed to be at the heart of the First Amendment. Second, it has not provided the Court with the analytical tools needed to address the challenge posed by government efforts to manipulate and control campaigns, such as the differential contribution limits in *Davis*[270] or the government subsidies in *Arizona Free Enterprise Club*.[271]

A. The Problem of Scope and Line Drawing

The Federal Election Campaign Act Amendments of 1974,[272] as drafted and before the Court in *Buckley*, limited spending by citizens "relative to a clearly identified candidate" for office.[273] Contributions—including expenditures made in "coordination" with a candidate or committee—were restricted if made "for the purpose of influencing" an election.[274] It seems almost unnecessary to say that such phrases are at once both indeterminate and all-encompassing. As Justice Holmes wrote in *Gitlow v. New York*[275]:

> 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.[276]

When people speak about politics they typically hope, at some level, to influence elections, and it is often very difficult to speak about politics without speaking "relative to" a candidate for office. Courts have instinctively realized that a standard such as "for the purpose of influencing" or "relative to" cannot survive the First Amendment because it naturally encompasses virtually all speech about politics.[277] As a result, courts have sought ways to narrow such a defi-

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269 *See* Lillian R. BeVier, *First Amendment Basics Redux:* Buckley v. Valeo *to* FEC v. Wisconsin Right to Life, 2006-2007 CATO SUP. CT. REV. 77, 106–13 (discussing differing views of healthy democratic traits among the justices).

270 *See supra* notes 127–34 and accompanying text.

271 *See supra* notes 92–100 and accompanying text.

272 Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

273 *See* Buckley v. Valeo, 424 U.S. 1, 13 (1976).

274 *Id.* at 23.

275 Gitlow v. New York, 268 U.S. 652 (1925).

276 *Id.* at 673 (Holmes, J., dissenting).

277 *See Buckley*, 424 U.S. at 23, 44.

nition.[278] In *Buckley*, this narrowing came from restricting the definition to "[f]unds provided to a candidate or political party or campaign committee."[279] The Court also saw the need to restrict the meaning of the phrase "relative to," to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[280] The Court further narrowed this definition with its famous footnote fifty-two, which provided examples: "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.'"[281] Even having done that, however, the Court then struck down limits on independent spending.[282] It might be argued that the ability of the Court to make these interpretive (and counterintuitive) restrictions to the language of the statute illustrates that it is possible for the Court to work with such statutes while providing relatively broad protection for free speech. But it is perhaps better to point out that this illustrates the inability of the Court to make such narrowing interpretations in a meaningful manner.

No sooner had the ink dried in Volume 424 of the U.S. Reporter than self-styled "reformers" were vehemently attacking the *Buckley* framework as naive and meaningless.[283] They argued that the unlimited "independent spending" allowed by the Court still created political corruption or its appearance.[284] Furthermore, the Federal Election Commission ("FEC") adopted a reading of the Court's decision that suggested that contributions to committees that neither donated to, nor worked in conjunction with, a candidate committee could still be limited.[285] Given the Court's rationale in *Buckley*, such a reading could only survive by rank formalism focused on the word "contribution." Somewhat surprisingly, this interpretation was not challenged for over three decades. It was not until 2010 that the Court of Appeals for the District of Columbia Circuit ruled in a unanimous en

278 *See* United States v. Nat'l Comm. for Impeachment, 469 F.2d 1135, 1139–41 (2d Cir. 1972).

279 *Buckley*, 424 U.S. at 23 n.24.

280 *Id.* at 44.

281 *Id.* at 44 n.52.

282 The narrowed definition, however, was far from moot. *See infra* notes 287–305 and accompanying text.

283 John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 772 & n.22 (1997).

284 *Id.* at 772–73.

285 *See* SpeechNow.org v. FEC, 599 F.3d 686, 694–95 (D.C. Cir. 2010) (en banc).

banc decision that the interpretation was unconstitutional.[286] During the long interregnum, the FEC's position was that a group would qualify as a political committee if its major purpose was political activity and it spent money on communications including "express advocacy," meaning contributions to the group would be limited to $5000, with no corporate or union funds allowed.[287]

By avoiding "express advocacy,"[288] however, a group would not be deemed a political committee and so could accept unlimited sums from any domestic source, including corporations and unions.[289] This distinction was crucial for citizens attempting to speak out on public issues and campaigns without triggering the constraints of contribution limits and hundreds of pages of solicitation, accounting, and reporting regulations. It provided a reasonably bright line one could use to determine if the conduct envisioned was legal, or to structure one's conduct around the legal limit.[290]

Regulatory advocates, however, ridiculed the "express advocacy" standard as "magic words,"[291] derided unregulated speech as "sham issue advocacy,"[292] and claimed that the distinction between ads that included express advocacy and ads that did not was typically lost on the average viewer.[293] Indeed, they would eventually argue that ads

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286 *Id.* at 689.

287 *See id.* at 689 n.1, 691.

288 Ads that did not expressly advocate the election or defeat of candidates gradually became known as "issue advocacy," regardless of whether they actually addressed particular issues. *See id.* at 689 n.1.

289 *See* McConnell v. FEC, 540 U.S. 93, 206 (2003).

290 I use the qualifier "reasonably" with "bright line" because for the better part of two decades the FEC engaged in litigation—usually unsuccessfully—attacking speakers who it claimed had crossed the line separating issue advocacy from express advocacy. *See, e.g.*, FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1064 (4th Cir. 1997); Faucher v. FEC, 928 F.2d 468, 468 (1st Cir. 1991); FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987); FEC v. Cent. Long Island Tax Reform Immediately Comm., 616 F.2d 45, 45 (2d Cir. 1980). After early defeats in court, the FEC, in an attempt to bolster its position, cherry-picked language from *Furgatch* and adopted a regulation purportedly based on that case. *See Christian Action Network, Inc.*, 110 F.3d at 1054–55 & n.7. This regulation was then struck down by courts in *Virginia Society for Human Life, Inc. v. FEC*, and *Maine Right to Life Committee, Inc. v. FEC*, *Christian Action Network*. *See* Va. Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 394 (4th Cir. 2001); *Christian Action Network, Inc.*, 110 F.3d at 1064; Me. Right to Life Comm., Inc. v. FEC, 98 F.3d 1, 1 (1st Cir. 1996).

291 *See, e.g.*, Trevor Potter & Kirk L. Jowers, *The Frequently Mischaracterized Impact of the Courts on the FEC and Campaign Finance Law*, 51 CATH. U. L. REV. 839, 840–41 (2002).

292 *See, e.g.*, Andrew Pratt, *The End of Sham Issue Advocacy: The Case to Uphold Electioneering Communications in the Bipartisan Campaign Reform Act of 2002*, 87 MINN. L. REV. 1663, 1675 (2003).

293 *See* CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 26 (2001); JONATHAN S. KRASNO & DANIEL E.

that did not expressly advocate for the election or defeat of candidates were more likely to influence an election than ads that did include express advocacy.[294] Similarly, regulatory advocates argued—and convinced Congress to adopt as a core principle of the 2002 Bipartisan Campaign Reform Act—that the closer a political communication was to an election, the more likely it was intended to influence the outcome of the election, and hence the more it ought to be subject to regulation. Supporters of the effort went to great lengths to build an evidentiary record for what most people never contested—that political communications could influence how voters might vote.[295] This view eventually carried the day in the Court's meandering, lackadaisical opinion in *McConnell v. FEC*, in which the majority declared the distinction between express advocacy and issue advocacy to be "functionally meaningless."[296]

The Court's opinion was not, in one sense, without merit—there is reason to believe that issue ads influence elections,[297] that viewers do not notice the presence or absence of express advocacy, and that in some cases ads without express advocacy may be more effective in swaying voters. But the Court's ruling turned the telescope around. The "express advocacy" standard had been adopted in *Buckley* to protect speakers and speech, not to define ads that influenced or did not

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SELTZ, BUYING TIME: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS 3–4 (2000). These studies relied on surveys of University of Arizona students who watched ads and voiced their opinion about whether each particular ad was intended to influence an election or to influence public opinion on an issue. Roundly criticized for methodology and for fudging data, the studies were nonetheless given substantial credence by the courts considering the constitutionality of the Bipartisan Campaign Reform Act of 2002, though the Court ultimately did not base its decision on these studies. *See McConnell*, 540 U.S. at 126–28 nn.16–21; David Tell, *An Appearance of Corruption: The Bogus Research Undergirding Campaign Finance Reform*, WKLY. STANDARD, MAY 26, 2003, at 26–28; Thomas E. Mann, *No Merit in Brennan Center Smear Campaign*, PUB. CITIZEN (May 22, 2003), http://www.citizen.org/congress/article_redirect.cfm?ID=9780.

294 *See* Wis. Right to Life, Inc. v. FEC, 551 U.S. 449, 471 (2007).

295 *See, e.g.*, HOLMAN & MCLOUGHLIN, *supra* note 293, at 13; KRASNO & SELTZ, *supra* note 293, at 2–3.

296 *McConnell*, 540 U.S. at 193.

297 This was, in fact, foreseen by the Court in *Buckley*, which nevertheless held that the standard was necessary to protect free speech. *See* Buckley v. Valeo, 424 U.S. 1, 42–43 (1976). In fact, it was partly because of this that the Court struck down limits on independent spending, even with the narrow "express advocacy" definition—the Court believed that such restrictions would serve no purpose. *Id.* at 45 ("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.").

influence an election.[298] The standard was very much "functionally meaningful" to speakers, which was why regulatory advocates had spent the better part of three decades attacking it.[299]

More importantly, however, the long-running dispute over express advocacy illustrates the predicament facing the Court. In *Buckley* the Court knowingly adopted a standard that it recognized would be easily avoided by those seeking to speak. But having given the okay in principle to regulation of candidate- and campaign-related political speech, it faced steadily growing pressure to allow more regulation. Finally, in *McConnell*, the Court allowed the conceptual framework it had adopted to protect free speech to be used to regulate speech. Because "express advocacy" did not fulfill the government's purpose, and that purpose had been recognized as valid, the Court concluded that the speech-protective express advocacy standard should fall.[300] In theory, and in the Court's bold pronouncements, political speech and association were "a major purpose of . . . [the First] Amendment,"[301] "the foundation of a free society,"[302] and "at the core of the First Amendment,"[303] with judicial protection "at its zenith."[304] In practice, the Court's doctrine specifically provided that the more overtly political speech became, and the more likely it was to influence an election or be relative to a candidate, the more it was subject to government regulation and suppression.[305]

Both the effort to tie speech to its proximity to an election as a trigger for regulation and the effort to provide that speech is only "political" when it contains words of "express advocacy" are indicative of the futility of assuming "broad authority" to regulate campaigns. There is no "on" or "off" switch on American politics. No one seriously doubts that, as of this writing, politicians are jockeying for position or considering their possibilities for November 2014, for 2016, or beyond, and that interest groups are rallying supporters, lobbying congress, and in some cases, offering perks and favors to officeholders. The arbitrariness of the lines, or better put, the meaninglessness of the lines, can also be seen in considering the idea of another trigger for regulation, the "clearly identified candidate." Under the FEC defini-

298 *See id.* at 44–45, 78–80.

299 Smith, *The John Roberts Salvage Company*, *supra* note 57, at 912–13.

300 *McConnell*, 540 U.S. at 193.

301 Mills v. Alabama, 384 U.S. 214, 218 (1966).

302 Shelton v. Tucker, 364 U.S. 479, 486 (1960).

303 FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 493 (1985).

304 Meyer v. Grant, 486 U.S. 414, 425 (1988).

305 *See, e.g.*, *McConnell*, 540 U.S. at 206.

tion, every officeholder is automatically considered a "clearly identified candidate," presuming a reelection campaign absent a contrary statement.[306] Meanwhile, others who may be jockeying for position do not become a candidate until they file a formal statement.[307] In other words, the date on which a person might become a formal candidate is functionally meaningless as well. And a person who received a boost from another's efforts might feel indebted to that person, even though those efforts came before an actual declaration of candidacy.

Regulation of the political process, moreover, has a voracious appetite. Increasingly, campaign finance regulations are justified not because the regulated behavior itself is a likely source of corruption, but because it is necessary to prevent "circumvention" of other parts of the law.[308] The anticircumvention rationale, however, knows no end.[309] A democracy necessarily requires debate and efforts to influence voters. Thus, whenever some speech is limited, some other source of speech or political activity will become the primary source of influence, and hence the primary source of "corruption or its appearance."[310] Historically, the idea often expressed was that the First Amendment protected less important speech in order to ultimately protect the high-value political speech at the Amendment's core.[311] With the explicit adoption of the anticircumvention rationale in *McConnell*,[312] however, the equation is turned inside out—the "broad" authority to regulate core political speech is used to steadily expand the regulation of speech outward into less valuable speech in order to prevent "circumvention."[313] The regulation of candidate speech leads to the regulation of campaign and speech activities coordinated between candidates and their supporters; the regulation of coordinated speech leads to ever broader definitions of "coordination," so as to prevent the "wink or nod";[314] the regulation of independent speech follows to prevent circumvention of the limits on coordination; then

306 *See* 2 U.S.C. § 441i(e)(1) (2012).

307 *See id.*; 11 C.F.R. § 101.1 (2012). It is increasingly common for candidates now to engage in long "exploratory" periods before filing. *See, e.g.*, Marie Horrigan, *Fred Thompson's Long 'Exploration' Raises Money—and Confusion*, CONG. Q. (July 31, 2007), http://www.cq.com/doc/news-2563380?wr=bGFldXRDRDVoeG9waWdEUkRhMjZ0dw.

308 *See* Richard Briffault, WRTL II: *The Sharpest Turn in Campaign Finance's Long and Winding Road*, 1 ALB. GOV'T L. REV. 101, 127 (2008) [hereinafter Briffault, *The Sharpest Turn*].

309 Smith, *The John Roberts Salvage Company*, *supra* note 57, at 894–900.

310 *See* Buckley v. Valeo, 424 U.S. 1, 28, 80–81 (1976).

311 *See* BeVier, *supra* note 269, at 78.

312 *See* McConnell v. FEC, 540 U.S. 93, 134, 138–39, 170–71 (2003).

313 *See* Briffault, *The Sharpest Turn*, *supra* note 308, at 127.

314 *McConnell*, 540 U.S. at 221.

comes the regulation of independent speech that does not expressly advocate the election or defeat of a candidate, as "issue ads" can also influence the election.[315]

As regulation spreads outward, it pulls into its ambit more and more speech. Beginning with legislation in 2000 to require more disclosure of issue advocacy,[316] there has been a steady effort, accelerating since *Citizens United* was decided in 2010, to increase mandatory disclosure.[317] These efforts have only been tentatively tested in the courts,[318] but have the potential to eat into hard-won constitutional rights to protect the privacy of donors.[319] These efforts to increase compulsory disclosure ultimately threaten to lead to greater regulation of the political activity of nonprofit membership organizations as well.[320]

Yet this is the least of the threats that regulation poses to free speech. The dissenting justices in *McConnell* warned, correctly, that the logic of the Court's majority would ultimately lead to outright censorship of the press.[321] The majority stopped well short of outright disagreement.[322] In fact, some of the most prominent academics writing in the field have already openly urged censorship of the press as part of a regime of campaign regulation.[323] At least one court has

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315 *See id.* at 190–94, 221–22; Hasen, *supra* note 46, at 70; *see also* Briffault, *The Sharpest Turn*, *supra* note 308, at 128.

316 Act of July 1, 2000, Pub. L. No. 106-230, 144 Stat. 477; Smith, *The John Roberts Salvage Company*, *supra* note 57, at 894. Stifled by *Buckley,* which held that groups that did not engage in express advocacy or have a major purpose of political advocacy (defined within the narrow range of express advocacy) were not required to disclose their sources of funding, Buckley v. Valeo, 424 U.S. 1, 80 (1976), regulatory advocates turned to the tax code to attempt to mandate more disclosure, s*ee* Smith, *The John Roberts Salvage Company*, *supra* note 57, at 894.

317 *See, e.g.*, Doe v. Reed, 132 S. Ct. 449, 449–50 (2011) (Alito, J., dissenting).

318 *See id.*

319 *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428–29, 437–38 (1963); Talley v. California, 362 U.S. 60, 64–65 (1960); Bates v. Little Rock, 361 U.S. 516, 527 (1960); NAACP v. Alabama, 357 U.S. 449, 466 (1958).

320 *See* Robert Bauer, *Not Just a Private Matter: The Purposes of Disclosure in an Expanded Regulatory System*, 6 ELECTION L.J. 38, 55 ("When mandating disclosure, the state is also and necessarily establishing the ground for more substantive regulation, and so it is that the struggle over disclosure is not only a choice of whether to make more rather than less information available, but a fundamental decision about whether to regulate at all.").

321 *See* McConnell v. FEC, 540 U.S. 93, 283–86 (2003) (Thomas, J., concurring in part and dissenting in part); *id.* at 356–57 (Rehnquist, J., dissenting).

322 *Id.* at 156 n.51 (majority opinion); *see* Bradley A. Smith, McConnell v. Federal Election Commission*: Ideology Trumps Reality, Pragmatism*, 3 ELECTION L.J. 345, 351 (2004).

323 *See* Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1251–53 (1994); Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1630, 1646–47 (1999). S*ee generally* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1413 (1986).

succumbed to this notion as well.[324] Though that court was reversed on appeal—only a minority of the state Supreme Court judges were willing to entertain the constitutional argument, and the majority relied on a narrow issue of statutory interpretation to reverse[325]—it is hard to believe that any court would have entertained the notion of such censorship as recently as thirty years ago. Even when statutes contain an exception for the "press," they have the potential to resemble press licensing schemes—there is simply no sound basis for a regulatory agency, or a court, to determine who constitutes "the press."[326] In *New York Times Co. v. Sullivan*,[327] the Court noted that a paid advertisement was no less entitled to protection than a newspaper editorial.[328] In another example of the voracious appetite of regulation, the desire to regulate paid advertisements now threatens to lead to the regulation of editorial discretion. And yet, again, the regulators have a point. Once we accept the logic that peaceful, nonviolent, nondefamatory political speech poses a danger to the government so great as to justify regulation, such censorship, in many ways, makes sense—for the "press" and for everybody else.[329]

Also at risk are movies and books. It is often forgotten that the root of the much-maligned *Citizens United* case was the government's assertion that it could ban a movie or book containing even one line of "express advocacy," if that movie or book was financed in production or distribution by a corporation or union.[330] The FEC has, in fact, limited the distribution of movies[331] and investigated, pre-*Citizens United*, the role of a corporation in distributing a book.[332] These problems will only grow as modern technology allows easier self-publication of books and as production technology and low-cost distribution on DVDs or over the internet puts more and more people into

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324 San Juan Cnty. v. No New Gas Tax, No. 05-2-01205-3, 2005 WL 5167975 (Wash. Super. Ct. Oct. 26, 2005), *rev'd*, 157 P.3d 831 (Wash. 2007).

325 *No New Gas Tax*, 157 P.3d at 843–46.

326 *See* Statement of Reasons of Commissioners Bradley A. Smith, Michael E. Toner & David M. Mason, *In re* Wal-mart Stores, Inc., MUR 5315, at 2–4 (Fed. Election Comm'n Sep. 25, 2003).

327 N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

328 *Id.* at 266.

329 *See* SMITH, *supra* note 14, at 197–98; Smith, *The John Roberts Salvage Company*, *supra* note 57, at 895–97.

330 Transcript of Oral Argument at 26–31, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205).

331 Smith, *The John Roberts Salvage Company*, *supra* note 57, at 897.

332 *See* Statement of Reasons of Commissioners Matthew S. Petersen, Caroline C. Hunter & Donald F. McGahn II, *In re* George Soros, MUR 5642, at 1–2 (Fed. Election Comm'n Jan. 23, 2009).

the "movie" industry, or allows them to produce and circulate documentaries and commercials.[333]

Indeed, the internet generally is a problematic area for the regulatory project. After passage of McCain-Feingold, the FEC adopted rules that largely exempted the internet from regulation.[334] A coalition of "reform" advocates sued to overturn these rules as insufficiently regulatory to comply with the statute and was successful in federal court.[335] The FEC passed new rules that still left the internet largely unregulated, but with no future guarantees.[336] These internet challenges are, in many respects, technological variations on the problem of regulating books and movies. It makes almost no sense to suggest that large corporate media such as the *New York Times*, Fox, or ABC can operate unregulated web sites under the "press exemption," while the websites of grassroots groups and bloggers are regulated. Yet that only raises the further question of what to do when a blog reaches spectacular success, such as *Daily Kos*[337] or *Instapundit*.[338] Such blogs frequently incorporate and begin to take advertising, or seek capital infusions, to improve their product.[339] They too, it would seem, must be covered as "press." But regulatory advocates have been very hostile to a lightly regulated internet, even as they seem to have abandoned the fight, for now, as particularly unpopular.[340]

By accepting the position of "reformers" that political speech can be regulated, and that in fact the more likely it is to affect political attitudes the more it can be regulated, the Court has been left to fend off these extreme antispeech positions with a series of decisions that have an ad hoc quality to them. This is not to say that such decisions

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333 *See* Smith, *The John Roberts Salvage Company*, *supra* note 57, at 897–98. In 2008 there were multiple efforts to use modern technology to allow for more grassroots involvement in politics. SaysMe.TV, for example, would have allowed individuals to post ads on the web, which other individuals could book on low-cost cable stations. Noam Cohen, *Like Politics? Broadcast Your View for Only $6*, N.Y. TIMES, Aug. 18, 2008, at C1. All floundered under regulatory hurdles that could not yet be overcome. *See* CLARK HOWARD ET AL., CLARK HOWARD'S LIVING LARGE IN LEAN TIMES 101 (2011). The odd result was to discourage low-cost, grassroots messaging, and instead to require speakers to devote their efforts to more high-cost, traditional media advertising.

334 *See* Shays v. FEC, 337 F. Supp. 2d 28, 65–69 (D.D.C. 2004).

335 Shays v. FEC, 414 F.3d 76, 115 (D.C. Cir. 2005).

336 *See* Coordinated Communications, 75 Fed. Reg. 55,947 (Sept. 15, 2010) (to be codified at 11 C.F.R. § 109).

337 DAILY KOS, http://www.dailykos.com (last visited Aug. 25, 2013).

338 INSTAPUNDIT, http://pjmedia.com/instapundit (last visited Aug. 25, 2013).

339 *See, e.g.*, *FAQ*, INSTAPUNDIT, http://pjmedia.com/instapundit/faq/ (last visited Aug. 26, 2013) (advertising Amazon.com and its association with PJ Media).

340 *See* Smith, *The John Roberts Salvage Company*, *supra* note 57, at 898–99, 899 n.35.

are nonsensical. For example, *Buckley*'s basic distinction between contributions and expenditures is not devoid of merit. There is reason to believe that direct contributions to a candidate's campaign have a greater potential to be diverted to personal use of the candidate (i.e., to in fact be bribes), or to cause the candidate to shirk his duties and simply adopt the position of the contributor, than do independent expenditures.[341] Nor are they without purpose. For example, as discussed above, the *Buckley* Court recognized that the line between express advocacy and issue advocacy was flimsy, almost meaningless, in accomplishing the government's objectives, but quite significant for helping citizens to comply with the law and retaining some meaning to the First Amendment.[342]

Nevertheless, the Court's decisions from an early date became, as one commentator has described them, "a patternless mosaic."[343] Beyond the distinctions just outlined, at various times the Court has attempted to distinguish between political speech about ballot issues and political speech about candidates;[344] between speech by corporations and speech by individuals and unincorporated associations;[345] and between "ideological corporations" and other corporations[346]—an effort that led to the surprising determination that the Michigan State Chamber of Commerce was not an ideological organization.[347] It has provided for ad hoc determinations of when a person or organization must register with and disclose its activities to the state,[348] at one point reaching the rather odd conclusion that a party whose platform openly called for overthrowing the Constitution was entitled to greater protection under the First Amendment than citizens calling for peaceful

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341 *See* Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After* Austin, 21 CAP. U. L. REV. 381, 388–391 (1992); *see also* Richard Briffault, Nixon v. Shrink Missouri Government PAC*: The Beginning of the End of the* Buckley *Era?*, 85 MINN. L. REV. 1729, 1731–37 (2001) [hereinafter Briffault, *The Beginning of the End*] ("Having situated campaign finance law squarely in the domain of the First Amendment, *Buckley* then made a series of distinctions that enabled the Court to validate some campaign finance measures while invalidating others.").

342 *See* Buckley v. Valeo, 424 U.S. 1, 76–82 (1976).

343 Lowenstein, *supra* note 341, at 381; *see also* SMITH, *supra* note 14, at 134.

344 *Compare* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978), *with* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990).

345 *Compare Buckley*, 424 U.S. 1, *with Austin*, 494 U.S. 652 (independent expenditures), *and* FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982) (contributions).

346 *Compare* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986), *with Austin*, 494 U.S. 652.

347 *Austin*, 494 U.S. at 653.

348 *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 354–56 (1995).

political change and supporting the Constitution.[349] It has distinguished between media corporations and nonmedia corporations,[350] although, as we have seen, that distinction will be increasingly difficult to maintain in today's changing media environment. It has tried to distinguish between contribution limits that allow acceptable levels of speech and those set so low as to offend the First Amendment.[351] In *Buckley* it placed on lower courts the obligation to determine what constitutes "express advocacy";[352] later lower courts would also be asked to determine "the functional equivalent of express advocacy."[353]

Such fine distinctions by courts, particularly lower courts, are not limited to the realm of campaign finance, although that certainly has been the focal point of the action. For example, courts are regularly asked to weigh whether or not a state interest is sufficiently compelling so as to justify regulation of campaign speech. Accordingly, lower courts have divided, finding that serving a "truth" telling function meets the test,[354] while "provid[ing] protection for candidates for public office [against untruthful statements]" does not.[355] This uncertainty then settles in quickly to the level of administrative law, where government agencies must "correctly and consistently negotiat[e] the thin line between fact and opinion in political speech [even though] political speech is usually as much opinion as fact."[356]

The lack of any logical stopping point in regulating campaign speech is indicated by the extent to which the Court itself has allowed its standards to remain indeterminate, at best, and subject to more or less open manipulation at worst. Thirty-seven years after *Buckley*, the Court is still engaged in a lengthy internal debate over so basic an

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349 *Compare* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91, 101–02 (1982), *with* Doe v. Reed, 697 F.3d 1235, 1237 (9th Cir. 2012).

350 *See Austin*, 494 U.S. at 666–67.

351 *Compare* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 393–95 (2000), *with* Randall v. Sorrell, 548 U.S. 230, 248–249 (2006). For a discussion of the difficult nature of making such a determination, see generally Richard Briffault, WRTL *and* Randall*: The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO ST. L.J. 807 (2007).

352 *See, e.g.*, FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1051 (4th Cir. 1997); FEC v. Furgatch, 807 F.2d 857, 858, 861 (9th Cir. 1987); FEC v. Cent. Long Island Tax Reform Immediately Comm., 616 F.2d 45, 52–53 (2d Cir. 1980).

353 *E.g.*, FEC v. Wis. Right to Life, Inc., 551 US 449, 456, 465 (2007) (internal quotation marks omitted).

354 Pestrak v. Ohio Elections Comm'n, 926 F.2d 573, 579 (6th Cir. 1991).

355 Rickert v. Pub. Disclosure Comm'n, 168 P.3d 826, 829–31 (Wash. 2007) (internal quotation marks omitted).

356 *Id.* at 829.

issue as the proper standard of review to be applied to campaign regulations.[357]

One of the consequences of the lack of any clear line or, better put, even any clear rationale for drawing a line at any particular point, once it is conceded that ordinary political speech creates evils that the legislature must be allowed to regulate, is that "the desired outcome of the case . . . becomes a driving force behind the selection of the appropriate level of judicial scrutiny."[358] And indeed the Court has at times confused, perhaps intentionally, the standards, and not only for the level of scrutiny. For example, in *Austin v. Michigan State Chamber of Commerce*, Justice Marshall, writing for the majority, intentionally mischaracterized the notion of "corruption" that had been adopted in *Buckley* in order to fit the case into the *Buckley* paradigm while sneaking in an equality rationale rejected by the *Buckley* Court.[359] In *Nixon v. Shrink Missouri Government PAC*,[360] the majority simply lowered the legal bar in order to get around the lack of empirical evidence to support the government's claimed "compelling interest."[361] One need not be shocked to discover that judges are human and may, intentionally or unintentionally, fall prey to results-oriented jurisprudence or to the latest hue and cry of the nation's newspapers.[362] To realize this is all the more reason to adopt a strong line when dealing with matters allegedly "at the core of the First Amendment."[363]

In particular, the confusion and arcane rules of campaign finance regulation, many of which stem from efforts to work with or around the Court's own decisions, were described in detail in a brief submitted in *Citizens United* by several former FEC Commissioners, and cited by the majority opinion:

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357 *See* Briffault, *The Beginning of the End*, *supra* note 341, at 1748–55.

358 J. Clark Kelso, *Mr. Smith Goes to Washington*, 1 ELECTION L.J. 75, 78 (2002) (reviewing SMITH, *supra* note 14). *See generally* Briffault, *The Beginning of the End*, *supra* note 341.

359 Elizabeth Garrett, *New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics*, 52 HOW. L.J. 655, 669–78 (2009); *see also* Lowenstein, *supra* note 341, at 404 n.90 (regarding the divergence of *Austin* and *Massachusetts Citizens for Life* from the *Buckley* standard).

360 Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

361 *Id.* at 387–88, 400; *see also* Kelso, *supra* note 358, at 78 ("Since contribution limitations could not satisfy the rigors of strict scrutiny . . . the Court simply lowered the bar.").

362 *PBS Newshour: Newsmaker Interview* (PBS television broadcast Apr. 2, 2001), *available at* http://www.pbs.org/newshour/bb/politics/jan-june01/mcconnell_04-02.html (showing Senator Mitch McConnell stating, "The New York Times and The Washington Post editorial pages . . . have opined on this subject once every six days over the last 24 months.").

363 *See supra* notes 240–53 and accompanying text.

> Campaign finance regulations now impose "unique and complex rules" on "71 distinct entities." These entities are subject to separate rules for 33 different types of political speech. 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.[364]

Of course, making sometimes-difficult distinctions is not in and of itself indicative that the judicial standards are unworkable or that Congress has no authority to legislate. But where such distinctions continue to multiply against a background rule that "Congress shall make no law,"[365] and where the substance of the regulation by definition impinges on "the core of the First Amendment,"[366] the question must be raised whether regulation is appropriate at all. If there is no rational limiting principle to such regulation, it may well suggest that the core background rule against regulation should be interpreted, if not as an absolute, at least as a strong presumption.[367]

B. Thumb on the Scale

These problems should call for the Court to draw a more robust line against regulation of campaign speech, but they do not necessarily call for the legislature to be out of the business of regulating and subsidizing campaigns completely—the "separation of campaign and state." But there is another, even greater reason for establishing such a "wall of separation"—the opportunity that government interference in campaigns gives to the government itself to place its thumb on the scale, attempting to shape election results by favoring or disfavoring candidates and ideas in the campaign; by shaping, restricting, and limiting speech in ways that would not be chosen by the electorate if left to its own devices; and by so doing, to make the people's choices in the voting booth dependent on the state, rather than the state dependent on the choices of the people.

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364 Citizens United v. FEC, 558 U.S. 310, 334 (2010) (internal citations omitted) (citing Brief Amici Curiae of Seven Former Chairmen & One Former Commissioner of the FEC Supporting Appellant at 11–12, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205)). The author is a signatory to this brief.

365 U.S. CONST. amend. I.

366 *See supra* notes 240–53 and accompanying text.

367 *Cf.* STEPHEN BREYER, ACTIVE LIBERTY 48 (2008) ("[The] First Amendment . . . seeks first and foremost to facilitate democratic self-government."). *But see* Smith, *The John Roberts Salvage Company*, *supra* note 57, at 910 (explaining why, at a minimum, language that begins "Congress shall make no law" must at least include a presumption against legislation in the area).

The Justices comprising the majority on campaign finance cases in the Roberts Court[368] have repeatedly voiced skepticism of letting the incumbent government attempt to shape the debate about its own performance. In *Austin*, Justice Scalia derided the idea "that government can[ ] be trusted to assure, through censorship, the 'fairness' of political debate" as "Orwellian."[369] He understood that the question was not merely one of personal fulfillment in the right to speak, or even one of assuring the free flow of information or guaranteeing an informed public. Rather, Justice Scalia recognized that it is uniquely dangerous to place government in control of assuring a "fair" election:

> The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition. Perhaps the Michigan Legislature was genuinely trying to assure a "balanced" presentation of political views; on the other hand, perhaps it was trying to give unincorporated unions (a not insubstantial force in Michigan) political advantage over major employers. Or perhaps it was trying to assure a "balanced" presentation because it knows that with evenly balanced speech incumbent officeholders generally win. The fundamental approach of the First Amendment, I had always thought, was to assume the worst . . . .[370]

In later opinions, Scalia regularly expressed concern that incumbent legislators would create a system of campaign regulation beneficial to themselves.[371] In *McConnell*, Justice Kennedy accused

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368 These justices include the Chief Justice and Justices Scalia, Kennedy, Thomas, and Alito. *See* Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2812 (2011); *Citizens United*, 558 U.S. at 316; Davis v. FEC, 554 U.S. 724, 727 (2008); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 454 (2007); *see also* Randall v. Sorrell, 548 U.S. 230, 235 (2006) (the same five justices joined by Justice Breyer).

369 Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 679–80 (1990) (Scalia, J., dissenting).

370 *Id.* at 692–93.

371 *See* McConnell v. FEC, 540 U.S. 93, 249–50 (2003) (Scalia, J., concurring in part and dissenting in part) ("[T]he present legislation *targets* for prohibition certain categories of campaign speech that are particularly harmful to incumbents. Is it accidental, do you think, that incumbents raise about three times as much 'hard money'—the sort of funding generally *not* restricted by this legislation—as do their challengers? Or that lobbyists (who seek the favor of incumbents) give 92 percent of their money in 'hard' contributions? Is it an oversight, do you suppose, that the so-called 'millionaire provisions' raise the contribution limit for a candidate running against an individual who devotes to the campaign (as challengers often do) great personal wealth, but do not raise the limit for a candidate running against an individual who devotes to the campaign (as incumbents often do) a massive election 'war chest'? And is it mere happenstance, do you estimate, that national-party funding, which is severely limited by the Act, is more likely to assist cash-strapped challengers than flush-with-hard-money incumbents? Was it unin-

Congress of enacting "an incumbency protection plan."[372] Justice Roberts indicated a tremendous distrust of government regulation at oral argument in *Citizens United*, pointedly deriding the government's assurances that the law would not be used to ban books: "[W]e don't put our First Amendment rights in the hands of [government] bureaucrats."[373]

It is not necessary to believe that legislators intentionally seek to alter election outcomes in a particular way to see the dangers of campaign regulation. In *McConnell*, Justice Scalia trenchantly noted the "Charlie Wilson Phenomenon," which he described as follows:

> There remains the problem of the Charlie Wilson Phenomenon, named after Charles Wilson, former president of General Motors, who is supposed to have said during the Senate hearing on his nomination as Secretary of Defense that "what's good for General Motors is good for the country." Those in power, even giving them the benefit of the greatest good will, are inclined to believe that what is good for them is good for the country.[374]

In short, regulating campaigns is inappropriate not merely because it threatens First Amendment rights in a direct way. It is inappropriate because it places the government in the position of using its unparalleled resources, monopoly on the use of force, and the power of law to attempt to influence electoral results.

What the Court grasps as well is that elections are both binding and competitive. In both *Davis* and *Bennett*, the dissenters argued that the First Amendment issues were either trivial or nonexistent, because no one's voice was silenced—rather, in each case, the statute simply gave one side of the issue more resources with which to speak.[375] The majority, however, grasped that the dissenters' rationale was insufficient. The point was not that the government was raising contribution limits, making it easier to speak. It was that the government was raising them for just one side in a zero-sum, competitive

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tended, by any chance, that incumbents are free personally to receive some soft money and even to solicit it for other organizations, while national parties are not?") (internal citations omitted).

372 *Id.* at 306 (Kennedy, J., concurring in part and dissenting in part).

373 Transcript of Second Oral Argument at 66, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205).

374 *McConnell*, 540 U.S. at 262–63 (Scalia, J., concurring in part and dissenting in part) (footnote omitted).

375 *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2830, 2833 (2011) (Kagan, J., dissenting); Davis v. FEC, 554 U.S. 724, 753 (2008) (Stevens, J., dissenting).

election.[376] To allow the government to simply finance one side of the debate would dramatically alter the face of U.S. politics and cast the legitimacy of elections into grave doubt.

Americans have long sought to safeguard against the use of government funds and government power in campaigns.[377] For example, every state has some type of law that restricts the use of government funds for the purpose of political campaigning.[378] At the federal level, the Hatch Act[379] has long placed limits on political activity by federal employees, even on their own time.[380] Similarly, even while incumbent office holders have huge advantages simply by virtue of being incumbents,[381] the norm has been to prevent use of government resources for activity outside an officeholder's formal duties. Thus, members of Congress are restricted from using their franking privilege or government-provided websites for campaign purposes.[382]

The Court has recognized this problem and attempted to police it on an ad hoc basis. For example, in *Cook v. Gralike*, the Court struck down a state law—in this case one passed by voter initiative—that attempted to mark congressional candidates with what were seen as disfavored positions on one issue.[383] Specifically, candidates who refused to pledge to use their office to seek a constitutional amendment to allow term limits on federal office-holders were to have next to their name on the ballot, "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS."[384] The Court recognized this as an effort to "handicap" certain candidates and to "imply that the [term limits] issue is an important—perhaps paramount—consideration in the citizen's choice."[385] Similarly, in *U.S. Term Limits, Inc. v. Thornton*, the Court rejected the idea that the legislature could attempt to disfavor certain classes of candidates in order "to dictate electoral out-

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376 *Davis*, 554 U.S. at 738.

377 *See supra* note 373 and accompanying text.

378 *See, e.g.*, IOWA CODE ANN. § 68A.505 (West 2013); NEB. REV. STAT. ANN. § 49-14,101.02 (LexisNexis 2012); WASH. REV. CODE § 42.52.180 (2012).

379 Hatch Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147.

380 *See id.*

381 Jamin Raskin & Jon Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 304 (1993).

382 *See* 39 U.S.C. § 3210(a)(4) (2006); *see also* 18 U.S.C. § 607 (2012) (prohibiting use of federal offices for fundraisers).

383 Cook v. Gralike, 531 U.S. 510, 514–15, 525–27 (2001).

384 *See id.* at 524.

385 *Id.* at 525 (internal quotation marks omitted).

comes" by making it more difficult for some candidates to present their names to voters for selection.[386]

Gralike is particularly interesting because, like *Arizona Free Enterprise Club* and *Davis*, it could be considered merely an effort to provide more information and more speech, to voters. *Gralike* is different because the speech in question came at the ballot box, at the moment that the voter prepared to vote.[387] But that actually argues for a more lenient standard of review—after all, marking the ballot could more reasonably be deemed a part of the "election" than speech coming in the weeks or months before the election. But what the Court recognized is that the government was not regulating the manner of an "election," but was in reality campaigning, something it had no business doing.[388]

Of course, in *Arizona Free Enterprise Club*, the government subsidy was not contingent on a candidate's position on any issue—it was, in constitutional jargon, "content neutral."[389] At least, this is the point relied on by Justice Kagan and the dissenters in *Arizona Free Enterprise Club*.[390] However, the cases that the *Arizona Free Enterprise Club* dissenters rely upon are unconvincing. In none of those cases is the government directly engaged in shaping campaign or candidate speech. All of them involved government subsidies of speech unrelated to political campaigns. For example, *Rust v. Sullivan*[391] allowed the government to require certain information be provided to persons seeking subsidized abortions.[392] *National Endowment for the Arts v.*

386 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783, 833–34 (1995).

387 *See supra* note 383 and accompanying text.

388 *See Gralike*, 531 U.S. at 525; *see also* Cal. Prolife Council Political Action Comm. v. Scully, No. Civ. S-96-1965 LKK/DAD, 2001 U.S. Dist. LEXIS 26419, at *25–31 (E.D. Cal. Mar. 1, 2001) (striking down statute requiring "slate mailers" to identify candidates who did not support certain campaign finance reforms with dollar signs.)

389 *See supra* note 386 and accompanying text.

390 *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2837 (2011) (Kagan, J., dissenting) ("We have never . . . understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another.").

"Content neutrality" is generally a doctrine dealing with necessary limits on speech, generally referred to as "time, place, and manner" restrictions. *See* City of Ladue v. Gilleo, 512 U.S. 43, 51, 56 (1994). This doctrine allows the government to impose limits on speech that are unrelated to any interest in the content of the speech, the classic example being late-night limitations on noise or the use of sound trucks. *See* Kovacs v. Cooper, 336 U.S. 77, 89 (1949). Only secondarily has "content neutrality" become a basis for determining the acceptability of government subsidies. *See, e.g.*, Rosenberg v. Rector, 515 U.S. 819, 828–29 (1995).

391 Rust v. Sullivan, 500 U.S. 173 (1991).

392 *See id.* at 177–80, 203.

Finley[393] was similarly unrelated to campaign speech.[394] Additionally, the dissent's citations to cases involving state university budget allocations to student groups seem totally inapposite, not only because of the difference in the state's ability to control educational quality, but because the cases made clear that the government could not provide the subsidies only to some student groups and not to others.[395]

In fact, however, direct campaign subsidies are not content neutral in the way these other subsidies are. In the context of a campaign, individual candidates bring many strengths and weaknesses to the race. The decision to attempt to enhance or to equalize in one area by definition will alter that race, often in very predictable ways. Furthermore, the mere fact of subsidizing some candidates suggests that those candidates are favored, even if the others chose to turn down the subsidy. It also sends a message that funding one's campaign in a particular manner is preferred. Importantly, in each case cited by the dissent for the proposition that subsidies to candidates ought to be unquestionably constitutional, one person's success (the "subsidee") did not necessarily mean another's failure, let alone possible control of the machinery of government.[396]

What the dissent ignored, what the Court has for too long ignored, and what the *Arizona Free Enterprise Club* and *Davis* majorities implicitly realized but could or would not finger, is that there is no such thing as a content neutral regime regulating political campaign speech, and that a regulatory regime is most dangerous when the government begins to directly subsidize partisan campaigning:

> [T]here is something politically incestuous about the Government financing and, I believe, inevitably then regulating, the day-to-day procedures by which the Government is selected. . . . I think it is extraordinarily important that the Government not control the machinery by which the public expresses the range of its desires, demands, and dissent.[397]

The binary nature of elections indeed makes government involvement in campaigning much more salient than government subsidies

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393 Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

394 *See id.* at 572–73.

395 *See Arizona Free Enterprise Club*, 131 S. Ct. at 2834 (Kagan, J., dissenting) (citing *Rosenberger*, 515 U.S. at 824 and Bd. of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 234 (2000)).

396 *See, e.g.*, *Southworth*, 529 U.S. at 220–21; *Finley*, 524 U.S. at 574–75, 580–81; *Rosenberger*, 515 U.S. at 819, 824–25.

397 120 CONG. REC. 8202 (1974) (statement of Sen. Baker).

for other types of programs, even those that involve speech, such as the subsidies to university student groups or the arts.

Consider the core purpose of the government matching funds program at issue in *Arizona Free Enterprise Club*. Arizona's concern—the entire reason for the "matching funds" portion of the program—was to make it more likely that the candidates accepting the subsidy would win election.[398] It does not do to say that the government's purpose was to prevent corruption[399] or any of the other stated reasons sometimes given.[400] Once the government decided to grant subsidies, but to condition those subsidies on the candidates' conformation to certain other behaviors, it necessarily had to make sure that its preferred candidates—i.e., those accepting the subsidy—had a good chance of winning. But not just good—good enough that they thought their chances of winning were greater than their chances if they did not accept the subsidy. The program could only accomplish whatever stated purposes it might have if it gave candidates a better chance of winning, and that could only mean designing the process to favor those candidates.

Nor can the issue of favoritism be avoided by noting that the government did not consider what position the candidate took on any of the other myriad of issues that might surface in the election. The very act of subsidizing candidates who choose to raise funds in a particular manner is a way of choosing favorites. The plan in Arizona was referred to as "clean elections" and administered by the Citizens Clean Elections Commission.[401] Participating candidates were, therefore, regularly referred to as "clean" candidates.[402] It is hard to see this as anything but the "scarlet letter" approach properly rejected in *Gralike*.[403] Even without this "scarlet letter," the government's decision to subsidize some candidates' acts as an implicit endorsement of the candidates' means of financing the campaign. Campaign fundraising is part of the campaign itself. Campaigns craft messages with great

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398 *See*. *Arizona Free Enterprise Club*, 131 S. Ct. at 2820, 2824 (recognizing the burden that the matching funds scheme placed on nonparticipants).

399 *See, e.g.*, *id*. at 2825.

400 *See, e.g.*, *id*. at 2825–27 (including a desire to "level the playing field," to promote efficiency in public funding, and to encourage "participation without an undue drain on public resources").

401 *Id.* at 2813–14.

402 *See, e.g.*, Editorial, *Supreme Court Wrong in Gutting Clean Elections*, ARIZ. DAILY STAR (June 30, 2011, 12:00 AM), http://azstarnet.com/news/opinion/editorial/supreme-court-wrong-in-gutting-clean-elections/article_b30a4eaf-b75c-54ce-b47f-0fb8cbece424.html; Fenske, *supra* note 86.

403 *See* Cook v. Gralike, 531 U.S. 510, 525–26 (2001).

care and follow a myriad of strategies. Some seek large numbers of small contributions, hoping to use the psychological commitment of having donated to assure strong support.[404] Others rely on large contributions to save time and expense that would go into fundraising.[405] Telling a campaign how to raise funds interferes with campaign strategy as much as if the government were to subsidize candidates for advertising in some media but not others. Giving to some the seal of approval—"clean"—while denying it to others is not neutral.

Furthermore, the propriety of spending tax money is itself an issue in a campaign. Once the government has decided it has an interest in drawing candidates into the government financing system, it has a vested interest in increasing their odds of winning. Of course, some candidates will nonetheless choose to stay out of the system, often for ideological reasons—most probably that they favor lower levels of spending or limited government power to dispense subsidies. Which type of candidate do you believe is most likely to turn down government funding: a candidate who believes, on ideological grounds, in small, limited government, or a candidate who believes in larger, more activist government? As Justice Kagan might answer, "me too."[406]

Program specifics can also be designed to be "content neutral" on their face but with the intention to help or harm certain types of candidates. For example, the "clean elections" programs adopted in Arizona and Maine require candidates to collect a number of small contributions in order to become eligible for the tax subsidy.[407] Now imagine two candidates—one has strong support among students, who have the time, energy, and inclination to knock on doors gathering the small dollar contributions (in Arizona, five dollars), triggering the subsidies. The other has a base of support within the small business community. She has friends and supporters who will donate to the campaign, but raising the qualifying contributions is a much greater burden because her supporters lack the time to spend gathering small five-dollar contributions.[408] The system is "content neutral," but it is

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404 *See, e.g.*, Dan Eggen, *Small Donors Back Obama*, WASH. POST., Feb. 9, 2012, at A7.

405 *See, e.g.*, Will Oremus, *The Biggest Political Donations of All Time*, SLATE (Jan. 27, 2012, 4:30 PM), http://www.slate.com/articles/news_and_politics/politics/2012/01/sheldon_adelson_newt_gingrich_and_the_largest_campaign_donations_in_u_s_history_.html.

406 *Arizona Free Enterprise Club*, 131 S. Ct. at 2838 (Kagan, J., dissenting).

407 ARIZ. REV. STAT. ANN. § 16-946(B)(3) (2012) (West); ME. REV. STAT. tit. 21A, § 122(7)(A) (2009).

408 Whether these small contributions really are a serious sign of support is another question worth asking as well. *See* Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 601–03 (1999) [hereinafter Smith, *Some Problems*].

not "election neutral," which is the ultimate goal of the campaign. Worse, it is often quite possible to tell, in advance, which types of candidates will benefit, and to design the "content neutral" regulation accordingly.

This problem exists not only in the realm of public campaign subsidies, but generally in the design of the campaign finance regulatory system. For example, during the 1990s "reform" proposals that sought to ban or limit the fundraising technique known as "bundling"[409] were blocked by Democratic lawmakers who generally favored "reform," because "bundling" was a technique used most successfully by groups on the political left.[410] It is very simple to design "content neutral" campaign finance regimes aimed at one or more particular points of view or political coalitions.[411] But having the government directly fund particular candidates, or types of candidates, raises the stakes higher.

Indeed, the federal government already uses its more limited power over funding to alter political messages in a manner intended to benefit incumbents. In the 2003 McCain-Feingold bill, Congress adopted what has now become known as the "stand by your ad" provision of the law, now a source of running public jokes.[412] It requires that the candidate or his photo appears on the screen while the candidate states, "I am [insert name of candidate], a candidate for [insert Federal office sought], and I approved this advertisement."[413] These

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409 One description of "bundling," probably as good as any other, is as follows:

> Broadly it works like this: several $1,000 maximum contributions are solicited from, say, a corporation's executives and their families, and the checks are sent to a candidate all together in a large 'bundle.' While no individual has given more than the law allows, a lot of money has come from one place.

Frontline: A Citizen's Guide: Glossary, PBS, http://www.pbs.org/wgbh/pages/frontline/president/guide/glossary.html (last visited Aug. 26, 2013).

410 SMITH, *supra* note 14, at 178.

411 *See id.* at 176–79, 184–85, 196–97; *see also* Hayward, *supra* note, 55 at 430–31 (noting targeting of railroads in several states through content neutral regulations on corporations); *id.* at 434–36 (describing early "reform" efforts in New York). See generally *id.* for a discussion of the use of facially neutral "reform" to target particular interests. Even the earliest federal law banning corporate contributions, the Tillman Act, was aimed by Senator Tillman at his political enemies. Bradley A. Smith, *The Myth of Campaign Finance Reform*, NAT'L AFF., Winter 2010, at 75, 81.

412 *See, e.g.*, James DiGiovanna & Carey Burtt, *Kant Attack Ad*, YOUTUBE (Dec. 8, 2007), http://www.youtube.com/watch?v=7M-cmNdiFuI; *I'm Satan, and I Approve This Message*, FACEBOOK, https://www.facebook.com/SatanApproves (last visited Aug. 26, 2013); Hans Nichols, *He's Barack Obama, and He 'Approved This Message,'* BLOOMBERG (Jul. 31, 2012, 1:47 PM), http://go.bloomberg.com/political-capital/2012-07-31/hes-barack-obama-and-he-approved-this-message/.

413 *See* 47 U.S.C. § 315(b)(2) (2006); 11 C.F.R. § 110.11(c) (2012).

messages appear on federal ads not because they are valuable to voters—compare them, for example, to the value gained from a candidate stating: "[G]ive me liberty or give me death;"[414] "[t]he only thing we have to fear is fear itself;"[415] or "I'll never raise your taxes!!!"[416]—but because incumbent lawmakers thought that they would discourage political ads with negative messages, which are generally more valuable to challengers than to incumbents.[417] In fact, the stand by your ad statement is not actually required by law. Rather, the candidate who does not include this statement loses the "lowest unit rate" that Congress requires broadcasters to offer to political candidates.[418] In short, the candidate who fails to use up ten percent of the typical thirty second ad with the government-favored statement finds himself at a disadvantage, hampered by the government for saying, for example, "My opponent's been in Washington too long—it's time for new leadership" rather than "I'm Joe and I approve this message." Recent congressional proposals would extend the length of this financially induced speech predicate by requiring even longer "disclaimers" on ads, in some cases taking up as much as half of a thirty second ad while yielding almost no useful information to most voters.[419]

Meanwhile, New York City's government funding plan requires political candidates to participate in a particular type of debate in order to gain public funds.[420] Whether or not "debates," as they are typically structured in the United States, are the best way to inform

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414 Patrick Henry, Liberty or Death, Address Before the Virginia Convention (Mar. 23, 1775), *in* 1 GREAT DEBATES IN AMERICAN HISTORY 162 (Marion Mills Miller ed., 1913).

415 Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), *available at* http://avalon.law.yale.edu/20th_century/froos1.asp.

416 Assuredly said by some candidate, somewhere, sometime. *See, e.g.*, Americans for Tax Reform, *Federal Taxpayer Protection Pledge: 113th Congressional List*, http://s3.amazonaws.com/atrfiles/files/files/112012-113thCongress.pdf (last visited Aug. 25, 2013).

417 For value to challengers, see BRUCE FELKNOR, POLITICAL MISCHIEF: SMEAR, SABOTAGE, AND REFORM IN U.S. ELECTIONS 29–44 (1992); Lynda Lee Kaid & Dorothy K. Davidson, *Elements of Videostyle: Candidate Presentation Through Television Advertising*, *in* NEW PERSPECTIVES ON POLITICAL ADVERTISING 184, 185–86 (Lynda Lee Kaid, Dan Nimmo & Keith R. Sanders eds., 1986); Matthew Blackwell, *A Framework of Dynamic Causal Inference in Political Science*, 57 AM. J. POL. SCI. 504, 505 (2013). For Congressional motives in enacting "stand by your ad," see DAVID MARK, GOING DIRTY: THE ART OF NEGATIVE CAMPAIGNING 159–60 (2009). For an excellent compilation of Congressional statements on the motives for passing McCain-Feingold generally, see Brief for Appellants The National Rifle Association at 7–10, app. 1a–38a, Nat'l Rifle Ass'n v. FEC, 539 U.S. 911 (2003) (No. 02-1676).

418 47 U.S.C. § 315(b)(2)(A) (2006).

419 *See* Bradley A. Smith, *Disclosure in a Post-*Citizens United *Real World*, 6 ST. THOMAS J.L. & PUB. POL'Y (forthcoming 2013).

420 *See Debate Program*, N.Y. CITY CAMPAIGN FIN. BOARD, http://www.nyccfb.info/debates/ (last visited Aug. 26, 2013).

the public is certainly up for grabs,[421] but admittedly most candidates choose to participate. Note again, however, that the government has a vested interest in helping candidates who agree to take the subsidy to win, or at least do as well or better than they would otherwise do. Because one candidate's victory is his opponent's defeat, the government develops a vested interest in helping candidates who have agreed to campaign in a particular way. This not only handicaps candidates who might prefer not to participate in the stifling format of American "debates," but also puts candidates at the mercy of potentially biased moderators because the candidates lose their negotiating power to shape a fair debate by threatening to withdraw.

The idea that underlies each of these types of provisions is that there is a preferred way for candidates to campaign, and that candidates who do not campaign in that manner ought to be disfavored by voters. In *Citizens United*, the Court noted that "[q]uite 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."[422] The granting of direct government subsidies to candidates, and the regulation of campaigns generally, whether or not they directly silence speech, inherently announce to the public who is the government's preferred candidate.

The dissent attempted to characterize the plaintiffs' claims in *Arizona Free Enterprise Club* as seeking to "speak free from response."[423] But this is not true. The *Arizona Free Enterprise Club* plaintiffs sought no restrictions on the speech of their political opponents.[424]

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421 *See* Bradley A. Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul*, 30 CONN. L. REV. 831, 851–62 (1998); *see also* Jeremy Paul, *Campaign Reform for the 21st Century: Putting Mouth Where Money Is*, 30 CONN. L. REV. 779, 782–84 (1998). There is a good deal of research on debates which tends to show that debates help voters decide how to vote and that perceptions of debates are dramatically shaped by the reactions of others. Very little addresses whether or not the standard American format actually informs voters. For a sampling of the literature, see generally William L. Benoit, Glenn J. Hansen & Rebecca M. Verser, *A Meta-analysis of the Effects of Viewing U.S. Presidential Debates*, 70 COMM. MONOGRAPHS 335 (2003); Jennifer Brubaker & Gary Hanson, *The Effect of Fox News and CNN's Post-Debate Commentator Analysis on Perceptions of Presidential Candidate Performance*, 74 S. COMM. J. 339 (2009); Steven Fein, George R. Goethals & Matthew Kugler, *Social Influence on Political Judgments: The Case of Presidential Debates*, 28 POL. PSYCHOL. 165 (2007); Gabriel S. Lenz & Chappell Lawson, *Looking the Part: Television Leads Less Informed Citizens to Vote Based on Candidates' Appearances*, 55 AM. J. POL. SCI. 574 (2011).

422 Citizens United v. FEC., 558 U.S. 310, 340–42 (2010).

423 Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2835 (2011) (Kagan, J., dissenting).

424 Indeed, quite the contrary, the Arizona statute attempted to limit the plaintiffs' speech by restricting contributions available to candidates and parties. *See id.* at 2815–17.

What they sought was not to have the government step in to favor their political opponents. No one would think that the government should step in with "matching funds" because one candidate was better looking, had greater name recognition, or had the endorsement of the *Arizona Republic* newspaper. Nor would we expect the government to subsidize one candidate because the other's supporters were more dedicated and willing to give more money to support the campaign of their favored candidate—a clear possibility under the Arizona system. To say, as the dissent did, that the plaintiffs could have taken the subsidy, and therefore have no complaint,[425] is a bit like arguing that nonbelievers could always convert, and so gain the benefit of state subsidies to religion. It simply fails to grasp the extent to which government regulation of campaigns—especially with direct public subsidies to candidates—hopelessly entangles the government in playing favorites and using the massive resources of the state to influence election outcomes.

C. Separation of Campaign and State

The solution to this dilemma is for the Court to forthrightly adopt a doctrine of separation of campaign and state. Separation of church and state, off which the idea of separation of campaign and state plays, is long-established. Of course, absolute separation of church and state is not possible,[426] and absolute separation of campaign and state is equally impossible. Incumbent officeholders will be allowed to speak, and their words and official actions, which can help their campaigns to retain office, will be reported by the press. Congress is constitutionally required to keep a record of its proceedings,[427] allowing incumbents to take actions to publicize speeches that may be beneficial to their efforts at reelection. Government-provided websites and franking privileges would seem to be legitimate expenses for allowing officeholders to communicate with constituents, but may also benefit reelection efforts even though members are prohibited from using them directly for campaign purposes.

But while separation of church and state is not absolute, it is a robust doctrine. Because difficult cases of church and state are regularly presented to courts, we often forget that the doctrine of separation has, in fact, made most questions of church and state entanglement easy. Few would argue that the government can offer

425 *See id.* at 2835–36 (Kagan, J., dissenting).

426 *See* Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).

427 U.S. CONST. art. I, § 5, cl. 3.

direct subsidies to churches, so long as it offers them to all churches.[428] Few would suggest that the government can directly pay for church expenses, such as pastors' salaries, church buildings, furnishings, and religious items.[429] Similarly, few would argue that the government can limit church expenditures on such items, or prohibit spending money to build churches.[430]

Yet the doctrine of separation of church and state is by no means specifically detailed in the Constitution. Rather, it flows naturally from the structure and purpose of the First Amendment.[431] It would be possible, for example, to interpret the First Amendment's Establishment Clause as merely preventing the government from favoring any particular religion or sect, rather than requiring a broad separation of church and state.[432] In fact, however, it is considered a violation of the First Amendment to allow the government to place any assessment on persons for religious purposes. The line of separation was based on both principles—"To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical"[433]—but also on the practical problems of state "intermeddling."[434]

Both concerns are relevant to government subsidies of campaigns, and the second is relevant to all regulation of campaigning. By adopting a doctrine of separation, the court has sought to avoid such "intermeddling," or what it terms "entanglement."[435]

In the establishment cases, the Court recognized a need to avoid the "potential for impermissible fostering of religion."[436] The Court recognized that religious believers, operating with the best of motives, "will inevitably experience great difficulty in remaining religiously neutral."[437] Further, the Court noted that efforts to assure neutrality

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428 *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002).

429 *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 617–21 (1971).

430 *See generally* U.S. CONST. amend. I.

431 *See supra* note 11 and accompanying text.

432 There is substantial evidence that many framers favored this approach. *See generally* LEO PFEFFER, CHURCH, STATE AND FREEDOM 63–70 (1953). Conversely, there is no evidence that any of the framers saw any role for the state to subsidize political campaigning.

433 Thomas Jefferson, *Opinions, Propagation of*, *in* THE JEFFERSONIAN CYCLOPEDIA 663 (John P. Foley ed., 1900); *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* Everson v. Bd. of Educ., 330 U.S. 1, 63–72 (1947) (Appendix to opinion of Rutledge, J., dissenting).

434 Madison, *supra* note 433, ¶ 11, at 69.

435 *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (establishing the *Lemo*n test, one prong of which concerns avoiding excessive entanglement of government and religion).

436 *Id.* at 619.

437 *Id.* at 618.

by the state would "inevitably" require "a comprehensive, discriminating, and continuing state surveillance."[438] The Court worried that the state would be required to audit and police the internal affairs of religious institutions once it began providing direct aid that could be used for sectarian schools.[439] The Court's establishment and free exercise jurisprudence are far too extensive to give them justice here, but the relevance and similarities to campaign regulation should be apparent.

Government regulation of campaigns, and in particular direct government subsidies for candidate campaigning, raise the same types of issues as government entanglement with religion. Beyond intentionally requiring persons to propagate core beliefs with which they disagree, government-funded campaigns will necessarily be audited to assure that public funds are not misused. Such audits will necessarily demand inquiries into how campaigns spent their money, why particular strategies were followed, and why certain hiring decisions and contracts relating to political speech were made.[440] The FEC routinely finds itself involved, for example, in attempting to determine whether or not mailing list exchanges, a common practice among political and advocacy groups, constitute fair value.[441] It is regularly required to determine what individuals discuss in their private meetings and what strategies they use to advance their political agenda.[442]

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438 *Id.* at 619.

439 *Id.* at 620; *see also id.* at 627 (Douglas, J., concurring).

440 *See, e.g.*, Statement of Reasons of Commissioners Danny Lee McDonald, Scott E. Thomas & Karl J. Sandstrom, *In re* Republican National Committee, MURs 4382 & 4401, at 4–9 (Fed. Election Comm'n Dec. 7, 2001) (involving detailed analysis of staff allocation by Republican National Committee and Dole for President campaign); Memorandum from Darlene Harris, Acting Deputy Sec'y, FEC, on Certification of MUR 4826, Dole for President, Inc. and Robert J. Dole (Sept. 13, 2000) (questioning whether non-profit organization's use of fundraising letter signed by candidate was intended to boost candidate's campaign). Documents pertaining to these and other matters under review ("MURs") may be accessed at http://eqs.nictusa.com/eqs/searcheqs.

441 *See, e.g.*, RHONDA J. VOSDINGH, FEC, GENERAL COUNSEL'S REPORT NO. 2 ON MUR 5396, at 1–5 (2004).

442 *See generally* Bradley A. Smith & Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145, 162–71 (2002). For specific examples, see Complaint Before the FEC at 9–10, National Republican Senatorial Campaign Comm. (May 6, 1993) (MUR 3774) (noting that political leaders meet regularly and suggesting that this is evidence of illegal "coordination"); LAWRENCE M. NOBEL, FEC, GENERAL COUNSEL'S REPORT ON MURS 4291, ET AL., at 12–18 (2000) (exploring in detail Democratic strategies and the content of numerous private discussions between candidates, party, and union officials).

In one of the more famous investigations, that of the Christian Coalition,[443] the FEC conducted eighty-one depositions of forty-eight witnesses, including candidates, campaign staff, and staff of nonprofits, and required the production of over 100,000 pages of internal strategy and administrative documents.[444] Advocates of regulation have themselves regularly bemoaned the fact that regulation of campaigns necessarily becomes entwined with partisan politics, and that decisions of the regulatory agencies are therefore suspect.[445]

The concern of the Court in the religion cases has focused on the ability of religious staff to keep their religious views separate from the secular mission for which state subsidies might be granted.[446] In campaign regulation, the issue is similar: can government officials keep their political leanings out of the regulatory and auditing process? Again, the concern of the plaintiffs in *Arizona Free Enterprise Club* and in *Davis* was not that their political opponents be denied any right to speak, but that the government not intentionally involve itself in an effort to assist those opposing views and candidates to defeat the plaintiffs.[447] Similarly, regulatory laws, be they limitations on campaign finance, "false statements" laws, or other regulation of campaigns, necessarily embroil the government in choosing sides in campaigns, helping some candidates and points of view and harming others, and engaging in lengthy and burdensome investigations of the political speech and activity of the citizenry.

The government, noted Madison, must be dependent "on the people alone," not the other way round.[448] The Court sensed this in the *Davis* and *Arizona Free Enterprise Club* opinions, but having erroneously accepted in *Buckley* a broad role for the government to subsidize and regulate campaigns[449]—as opposed to elections—it lacked the intellectual tools to effectively defend its position. The answer is to reject the assertion of broad government power to regulate political

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443 FEC v. Christian Coalition, 52 F. Supp. 2d 45, 48 (D.D.C. 1999).

444 James Bopp, Jr. & Heidi K. Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way to Regulate Issue Advocacy?*, 1 ELECTION L.J. 209, 226–27 (2002).

445 *See, e.g.*, DEMOCRACY 21, NO BITE, NO BARK, NO POINT 15–18 (2002); BROOKS JACKSON, BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED 64 (1990); Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 590 (2000).

446 *See* Lemon v. Kurtzman, 403 U.S. 602, 617–21 (1971).

447 *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2816 (2011); Davis v. FEC, 554 U.S. 724, 742–44 (2008).

448 THE FEDERALIST NO. 52, at 327–30 (James Madison) (Clinton Rossiter ed., 1961).

449 Buckley v. Valeo, 424 U.S. 1, 85–108 (1976).

speech, made in *Buckley*[450] and *Burroughs*,[451] and to adopt a broad principle of separation of campaign and state.

IV. Some Issues For a Doctrine of Separation

Adoption of the principle I have laid out above will not, of course, settle all issues of campaign regulation, just as adoption of the principle of separation of church and state does not resolve all issues of state regulation that might affect churches or religion. It would, however, largely clear the landscape and resolve the most important cases.

In this section, I want to briefly address a few of the issues that will come from the adoption of a doctrine of separation of campaign and state. I make no pretense of having resolved, or even identified, all such issues, but at least three merit a quick response here.

A. Should the Doctrine Apply to the States?

A first question is whether such a doctrine applies to state governments. In particular, a significant portion of this article was devoted to explaining why Article I, Section 4 of the Constitution does not affirmatively grant power to the federal government to regulate campaigns. But Article I, Section 4 certainly does not limit the states, and by its terms seems to presuppose state regulation of elections.

Of course, states have the power to regulate elections, but this merely begs again the question, does this encompass the power to regulate "campaigns," particularly in light of the incorporation of the First Amendment to apply to the states? Because, as I have attempted to show, campaigns are quintessentially about the rights of speech and association, all of those limits would apply. Hence, just as the incorporation of the First Amendment has made applicable the doctrine of separation in the context of religion, so should it be in the context of speech and association.

B. The Problem of Line Drawing Remains.

I have noted that one reason for a doctrine of separation is the problem of line drawing, and the lack of any principled stopping point once it is assumed that government authority to regulate "elections" extends to regulating speech about candidates, issues, and elections, and regulating the association of persons for political purposes. One

450 *See supra* notes 22–41 and accompanying text.

451 *See supra* notes 15–21 and accompanying text.

simple response, however, is that adoption of the separation doctrine would not remove courts from the equation or put an end to all line drawing, or even the arbitrary line drawing. Certainly the Court's adoption of "a wall of separation" in the arena of church and state has not kept the Court from having to regularly police the wall, with a series of decisions and shifting tests that have drawn substantial criticism over the years, from both the left and the right.[452]

But for all its importance, and for all the heat generated when issues of church and state come to the fore, most battles focus on a very narrow ground. It is fair to say that the big battles over the terrain of church and state have been largely resolved. The State clearly cannot provide direct operational subsidies for the purpose of sectarian propaganda;[453] it cannot direct churches to include certain disclaimers or other messages in their communications (except to the extent that such disclaimers or messages are applicable outside the realm of the church and to nonreligious speech as well, as with notices to employees of wage and hour laws or notices to the public regarding the taxability of contributions); and it cannot police statements of theology for their truth or falsity (again, except to the extent that they would otherwise fall, for any speaker, into the realm of fraud or defamation).[454] The government cannot force churches to register with the state, and to report the names of their adherents and their levels of financial support, if any, to the state.[455] It is broadly understood that individuals and organizations are free to support, or to withhold their support, from churches, to the extent desired.[456] It is understood that public schools cannot discriminate against sectarian student groups, nor can they favor them or favor any particular sectarian theology.[457] The government may not favor or discriminate against churches on the basis of their sources of financing, or their models for financing their missionary work.[458] In the political realm, by contrast, all of these issues remain unresolved and are regularly the subject of state laws.

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452 *See generally* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Wallace v. Jaffree, 472 U.S. 38 (1985); Lemon v. Kurtzman, 403 U.S. 625 (1971); Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

453 *See supra* notes 428–30 and accompanying text.

454 *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); *Lemon*, 403 U.S. at 625.

455 *See* U.S. CONST. amend. I.

456 *See Everson*, 330 U.S. at 15–16.

457 *See id.* at 15–17.

458 *See id.*

In short, the major issues of church and state relations have been firmly resolved. There is no collision between some alleged "broad authority" of the state to regulate religion, including proselytizing, and the First Amendment. Disputes—as emotional as they sometimes are—tend to be relegated to the margin.[459]

Further, a doctrine of separation of campaign and state will actually be easier to define and enforce than the separation of church and state. Many of the issues that are currently at the core of the Court's establishment and free exercise jurisprudence relate to efforts to apply the doctrine of separation in areas where it has either been largely ignored or not been applied but, perhaps, logically should be, such as with ecumenical prayer at public meetings;[460] mottos including religious references inscribed on coinage or government buildings;[461] the placement of the Ten Commandments or other references to religious law in public buildings or spaces;[462] and placement of crèches in public spaces using public funds.[463] These issues are further brought to the fore by a changing demographic in which the population is increasingly diverse in its religion, or in not accepting any religious belief at all. Such deep-rooted traditions are strikingly lacking in the world of political campaigning. Though regulatory advocates sometimes talk of "100 years of history" of campaign finance laws, the fact is that heavy regulation of campaign speech and finance is a development of the 1970s, as are government subsidies for campaigns.[464]

There will, of course, be lines to draw, and there will be occasional policing as government authorities either unknowingly or willfully overstep their boundaries. May the State ban campaigning within 100 feet of a polling place? Is that an election regulation or a campaign regulation? I do not think it matters significantly. Nor, assuming the state may do so, does it matter significantly if the line is drawn at 50 feet, 100 feet, or 200 feet, so long as it is not drawn at

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459 *See, e.g.*, Trunk v. City of San Diego, 629 F.3d 1099, 1102 (9th Cir. 2011), *cert. denied sub nom.* Mount Soledad Memorial Ass'n v. Trunk, 132 S. Ct. 2535 (2012) (maintenance of a war memorial centered around a forty-three foot high cross on government park land); ACLU v. Capital Square Review and Advisory Bd. 243 F.3d 289, 293 (6th Cir. 2001) (determining whether plaque with state motto, "With God, All Things are Possible," could be placed outside state capitol building).

460 *See* Marsh v. Chambers, 463 U.S. 783, 784–86 (1983).

461 *See* Aronow v. United States, 432 F.2d 242, 243–44 (9th Cir. 1970).

462 *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 850–52 (2005).

463 *See* Lynch v. Donnelly, 465 U.S. 668, 670–72 (1984).

464 *See, e.g.*, Matthew A. Melone, Citizens United *and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DEPAUL L. REV. 29, 30 (2010) ("Serious efforts at [campaign finance] reform began in the 1970s . . . .").

something like a five mile radius. This type of question is precisely the type of question that is at the fringe of the First Amendment, not at its core, unlikely to be a common occurrence, and unlikely to be adopted in an effort to manipulate election results. And many of these lines have been drawn: for example, may the government prohibit election-day editorials in newspapers? No.[465] May it do so on the web? Presumably not.[466] May it require equal time in nonscarce resources, such as newspapers or websites? No.[467]

Conversely, regulation of the time, place, and manner of elections, properly defined, would be allowed.[468] The government must establish polling hours and determine a method for voting (including whether to use geographic, single-member districts or some other method), provide a procedure for the fair counting of ballots, and so forth. The Voting Rights Act, which addresses election procedures but does not address speech and campaigning, would be unthreatened.[469]

Adoption of a doctrine of separation of campaign and state provides a security that is missing from the current ad hoc nature of the Court's efforts to police state overreach. The litigation that will continue on the margins is, in constitutional terms, insignificant.

C. A Doctrine of Separation of Campaign and State Would Deprive the State of Weapons Needed for Its Own Self-Preservation

Ultimately, the argument for the separation of campaign and state will be attacked for the same reason that all of the Court's decisions holding back state regulation of campaigns have been at-

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465 Mills v. Alabama, 384 U.S. 214, 220 (1966).

466 *See, e.g.*, *id.*

467 *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that state "right of reply" statute violates First Amendment).

468 *See* Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989).

469 It has been suggested to me that one case that may be threatened by a doctrine of separation is *Terry v. Adams*, 345 U.S. 461 (1953), a complex case in which the Court ruled illegal the "Jaybird Primary," a privately run election exclusively involving white, voting-eligible citizens in Fort Bend County, Texas, to select a candidate for the Democratic primary. *Id.* at 470. I disagree. Following this Jaybird Primary, losing candidates were pressured by private and public parties not to compete in the Democratic Party primary, and none did. *Id.* at 461. *Terry* is not controversial if one agrees with the majority opinion that state action was present in the Jaybird primary. *Id.* at 471. If one does not agree, then *Terry* is presumably incorrect with or without a doctrine of separation. *See id.* at 494 (Minton, J., dissenting); John G. Kester, *Constitutional Restrictions on Political Parties*, 60 VA. L. REV. 735, 753 (1974). Lowenstein argues that overruling *Terry* would have little practical effect, anyway. Daniel H. Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1749 (1993).

tacked—because some people believe such regulation is a good thing. In this Article I have clearly hinted at reasons why it may not be a good thing, but those arguments are set forth in more detail in other venues.[470] Suffice to say that if the Justices are truly interested in defending First Amendment liberties, and truly believe that free speech is not in conflict with "healthy campaigns in a healthy democracy,"[471] then something more robust than *Buckley* is needed, and separation of campaign and state fits within both the Constitution's structure and language.

But does it go too far? In particular, does it cut off compulsory disclosure, or perhaps other desired avenues of regulation? My own views on the desirability of disclosure are somewhat ambivalent. I have supported disclosure,[472] yet I have also been cognizant of its costs and critical of excessive disclosure.[473] Those policy arguments aside, to this objection the answer is, at one level, it does not matter. That is, if incorporation of a doctrine of separation of campaign and state provides a firmer footing for analyzing state intrusions on First Amendment rights and preventing state manipulation of the electoral system, that may be a small price to pay.[474] This is, after all, how the Constitution works. It is the results-oriented jurisprudence of those who favor regulation of political speech that has left us with the twisted, ineffectual legal and legislative landscape we face today.

In *Burroughs*, the Court, in nearly hysterical tones, adopted the mantra of progressive reformers—money corrupts—as a Constitu-

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470 *See, e.g.*, RAYMOND J. LA RAJA, SMALL CHANGE: MONEY, POLITICAL PARTIES, AND CAMPAIGN FINANCE REFORM (2008); SAMPLES, *supra* note 119; RODNEY A. SMITH, MONEY, POWER AND ELECTIONS: HOW CAMPAIGN FINANCE REFORM SUBVERTS AMERICAN DEMOCRACY (2006); PETER J. WALLISON & JOEL M. GORA, BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM (2009); Kelso, *supra* note, 358, at 81–83. For some of my own work, see for example, SMITH, *supra* note 14; Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996); Bradley A. Smith, *In Defense of Political Anonymity*, CITY J., Winter 2010, at 74 [hereinafter Smith, *In Defense of Political Anonymity*]; Bradley A. Smith, *Regulation and the Decline of Grassroots Politics*, 50 CATH. U. L. REV. 1 (2000); Smith, *Some Problems*, *supra* note 408; Smith, *The John Roberts Salvage Company*, *supra* note 57.

471 This alleged conflict and phrasing was set forth by then–House Minority Leader Richard Gephardt in comments in 1997. *See Free Speech and Campaign Finance Reform: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 40 (1997) (statement of Rep. Richard A Gephardt).

472 *See* SMITH, *supra* note 14, at 32, 135; Smith, *Money Talks*, *supra* note 27, at 61.

473 *See* Smith, *In Defense of Political Anonymity*, *supra* note 470, at 78.

474 Even a robust separation doctrine would not appear to run afoul of generally applicable rules, such as the FCC rule that broadcast advertising prominently feature the identity of the entity paying for the communication. *See* 47 C.F.R. § 73.1212 (2012).

tional principle allowing for heavy regulation of the political system.[475] What seems not to have occurred to the Court at all is that the First Amendment, with its emphasis on restricting legislative power to regulate political speech, may itself be the defense mechanism of the people against far worse evils than a few corrupt or shirking members of Congress.

CONCLUSION

Whether it recognizes it or not, the Court is, in cases such as *Davis* and *Arizona Free Enterprise Club*, moving toward a recognition that state interference in political campaigns is irreconcilable with both the First Amendment and with a democracy accountable to the people. It exposes the nation not only to suppression of freedom, but more importantly, to the erosion of democracy and control of the people itself.

A doctrine of separation of campaign and state would create a useful framework for recognizing state authority to regulate elections while preserving the "core of the First Amendment" and a government "dependent on the people"[476] by keeping the state out of the realm of regulating political speech.

475 *See* Burroughs v. United States, 290 U.S. 534, 540–48 (1934).

476 THE FEDERALIST NO. 52, at 323 (Alexander Hamilton) (Clinton Rossiter ed., 1961).