SUPREME COURT OF THE UNITED STATES

No. 98–963

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL., PETITIONERS *v.* SHRINK MISSOURI GOVERNMENT PAC ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January 24, 2000]

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, concurring.

The dissenters accuse the Court of weakening the First Amendment. They believe that failing to adopt a "strict scrutiny" standard "balance[s] away First Amendment freedoms." *Post*, at 1 (opinion of THOMAS, J.). But the principal dissent oversimplifies the problem faced in the campaign finance context. It takes a difficult constitutional problem and turns it into a lopsided dispute between political expression and government censorship. Under the cover of this fiction and its accompanying formula, the dissent would make the Court absolute arbiter of a difficult question best left, in the main, to the political branches. I write separately to address the critical question of how the Court ought to review this kind of problem, and to explain why I believe the Court's choice here is correct.

If the dissent believes that the Court diminishes the importance of the First Amendment interests before us, it is wrong. The Court's opinion does not question the constitutional importance of political speech or that its protection lies at the heart of the First Amendment. Nor does it question the need for particularly careful, precise, and independent judicial review where, as here, that protec-

tion is at issue. But this is a case where constitutionally protected interests lie on both sides of the legal equation. For that reason there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words "strict scrutiny." Nor can we expect that mechanical application of the tests associated with "strict scrutiny"– the tests of "compelling interests" and "least restrictive means"– will properly resolve the difficult constitutional problem that campaign finance statutes pose. Cf. *Kovacs* v. *Cooper*, 336 U. S. 77, 96 (1949) (Frankfurter, J., concurring) (objecting, in the First Amendment context, to "oversimplified formulas"); see also *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 233–234 (1989) (STEVENS, J., concurring); *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 188–189 (1979) (Blackmun, J., concurring) (same).

On the one hand, a decision to contribute money to a campaign is a matter of First Amendment concern– not because money *is* speech (it is not); but because it *enables* speech. Through contributions the contributor associates himself with the candidate's cause, helps the candidate communicate a political message with which the contributor agrees, and helps the candidate win by attracting the votes of similarly minded voters. *Buckley* v. *Valeo*, 424 U. S. 1, 24–25 (1976) *(per curiam)*. Both political association and political communication are at stake.

On the other hand, restrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process– the means through which a free society democratically translates political speech into concrete governmental action. See *id.*, at 26–27; *Burroughs* v. *United States*, 290 U. S. 534, 545 (1934) (upholding 1925 Federal Corrupt Practices Act by emphasizing constitutional importance of safeguarding the electoral process); see also *Burson* v. *Freeman*, 504 U. S. 191, 199 (1992) (plurality opinion) (recog-

nizing compelling interest in preserving integrity of electoral process). Moreover, by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. Cf. *Reynolds* v. *Sims*, 377 U. S. 533, 565 (1964) (in the context of apportionment, the Constitution "demands" that each citizen have "an equally effective voice"). In doing so, they seek to build public confidence in that process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes. See *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966); *Whitney* v. *California*, 274 U. S. 357, 375–376 (1927) (Brandeis, J., concurring); A. Meiklejohn, Free Speech and Its Relation to Self-Government 24–27 (1948).

In service of these objectives, the statute imposes restrictions of degree. It does not deny the contributor the opportunity to associate with the candidate through a contribution, though it limits a contribution's size. Nor does it prevent the contributor from using money (alone or with others) to pay for the expression of the same views in other ways. Instead, it permits all supporters to contribute the same amount of money, in an attempt to make the process fairer and more democratic.

Under these circumstances, a presumption against constitutionality is out of place. I recognize that *Buckley* used language that could be interpreted to the contrary. It said, for example, that it rejected "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U. S., at 48–49. But those words cannot be taken literally. The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many– in Congress, for example, where constitutionally protected debate, Art. I, §6, is limited to provide every Member an equal opportunity to express his or her

views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the political rights of the entire electorate. See, *e.g.*, *Storer* v. *Brown*, 415 U. S. 724, 736 (1974). Regardless, as the result in *Buckley* made clear, the statement does not automatically invalidate a statute that seeks a fairer electoral debate through contribution limits, nor should it forbid the Court to take account of the competing constitutional interests just mentioned.

In such circumstances– where a law significantly implicates competing constitutionally protected interests in complex ways– the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative). Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments– at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge. This approach is that taken in fact by *Buckley* for contributions, and is found generally where competing constitutional interests are implicated, such as privacy, see, *e.g.*, *Frisby* v. *Schultz*, 487 U. S. 474, 485–488 (1988) (balancing rights of privacy and expression); *Rowan* v. *Post Office Dept.*, 397 U. S. 728, 736 (1970) (same), First Amendment interests of listeners or viewers, see, *e.g.*, *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 192–194 (1997) (recognizing the speech interests of both viewers and cable operators); *Columbia Broad-*

casting System, Inc. v. *Democratic National Committee,* 412 U. S. 94, 102–103 (1973) ("Balancing the various First Amendment interests involved in the broadcast media . . . is a task of great delicacy and difficulty"); *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 389–390 (1969) (First Amendment permits the Federal Communications Commission to restrict the speech of some to enable the speech of others), and the integrity of the electoral process, see, *e.g.*, *Burson,* 504 U. S., at 198–211 (weighing First Amendment rights against electoral integrity necessary for right to vote); *Anderson* v. *Celebrezze,* 460 U. S. 780, 788–790 (1983) (same); *Storer* v. *Brown, supra,* at 730 (1974) ("[T]here must be a substantial regulation of elections if they are to be fair and honest"). The approach taken by these cases is consistent with that of other constitutional courts facing similarly complex constitutional problems. See, *e.g.*, *Bowman* v. *United Kingdom,* 26 Eur. H. R. Rep. 1 (European Ct. of Human Rights 1998) (demanding proportionality in the campaign finance context); *Libman* v. *Quebec (Attorney General),* 151 D. L. R.(4th) 385 (Canada 1997) (same). For the dissenters to call the approach *"sui generis," post,* at 1 (opinion of THOMAS, J.), overstates their case.

Applying this approach to the present case, I would uphold the statute essentially for the reasons stated by the Court. I agree that the legislature understands the problem– the threat to electoral integrity, the need for democratization– better than do we. We should defer to its political judgment that unlimited spending threatens the integrity of the electoral process. But we should not defer in respect to whether its solution, by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge. The statutory limit here, $1,075 (or 378, 1976 dollars), is low enough to raise such a question. But given the empirical information presented– the type of election

at issue; the record of adequate candidate financing post-reform; and the fact that the statute indexes the amount for inflation– I agree with the Court that the statute does not work disproportionate harm. The limit may have prevented the plaintiff, Zev David Fredman, from financing his own campaign for office, for Fredman's support among potential contributors was not sufficiently widespread. But any contribution statute (like any statute setting ballot eligibility requirements, see, *e.g.*, *Jenness* v. *Fortson*, 403 U. S. 431, 442 (1971)) will narrow the field of conceivable challengers to some degree. Undue insulation is a practical matter, and it cannot be inferred automatically from the fact that the limit makes ballot access more difficult for one previously unsuccessful candidate.

The approach I have outlined here is consistent with the approach this Court has taken in many complex First Amendment cases. See *supra*, at 4–5. The *Buckley* decision, as well, might be interpreted as embodying sufficient flexibility for the problem at hand. After all, *Buckley*'s holding seems to leave the political branches broad authority to enact laws regulating contributions that take the form of "soft money." It held public financing laws constitutional, 424 U. S., at 57, n. 65, 85–109. It says nothing one way or the other about such important proposed reforms as reduced-price media time. And later cases presuppose that the Federal Election Commission has the delegated authority to interpret broad statutory provisions in light of the campaign finance law's basic purposes, despite disagreements over whether the Commission has exercised that authority in a particular case. See *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 619–621 (1996) (whether claimed "independent expenditure" is a "coordinated expenditure"); accord, *id.*, at 648–650 (STEVENS, J., dissenting). Alternatively, it might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* expe-

rience stressed by JUSTICE KENNEDY, *post*, at 2–5 (dissenting opinion), making less absolute the contribution/expenditure line, particularly in respect to independently wealthy candidates, whose expenditures might be considered contributions to their own campaigns.

But what if I am wrong about *Buckley*? Suppose *Buckley* denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance. If so, like JUSTICE KENNEDY, I believe the Constitution would require us to reconsider *Buckley*. With that understanding I join the Court's opinion.