The Courts and Political Controversy

POLI 104I

Where are we going?

- 6/27 - the relationship between law and politics.
- 6/29 - incorporation (OB2 – 4a)
- 7/4 - incitement (OB2 – 5a)
- 7/6 - obscenity (OB2 – 5b (first half))
- 7/11 - executive power (OB1 – 4a-d)
- **7/13 - election law (OB1 - 8c)**
- 7/18 - threats (OB2 – 5b (second half))
- 7/20 - guns (OB2 365-387 + Bruen)
- 7/25 - privacy (OB2 – 11 + Dobbs)
- 7/27 - review

Article 2 of the Constitution

- Section 1: Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.
- The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.
- The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner choose the President. But in choosing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall choose from them by Ballot the Vice-President.
- The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

Constitutional Amendments

- 1st: Congress shall make no law respecting an **establishment of religion**, or prohibiting the free exercise thereof; or abridging the **freedom of speech**, or of the **press**; or the right of the people peaceably to **assemble**, and to petition the Government for a redress of grievances.
- 14th: [1868] Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are **citizens** of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the **privileges or immunities** of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without **due process of law**; nor deny to any person within its jurisdiction the **equal protection of the laws**.

Constitutional Amendments

- 12th: The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; -- the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; -- The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President. --]* The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States [1804].

Reading for 7/13

- election law (OB1 - 8c)
  - Bush v. Gore
  - Buckley v. Valeo
  - McConnell v. Federal Election Commission
  - Citizens United v. Federal Election Commission
  - Arizona Free NEterprise Club's Freedom Club Pac v. Bennett
  - Republican Party of Minnesota v. White (optional)
  - Rutan v. Republican Party of Illinois (optional)
  - McIntyre v. Ohio Elections Commission (optional)

Elections

- Bush v. Gore (2000): decided 7-2 (5-4); reversed.
  - Background: “Following the U.S. Supreme Court's decision in *Bush v. Palm Beach County Canvassing Board*, and concurrent with Vice President Al Gore's contest of the certification of Florida presidential election results, on December 8, 2000 the Florida Supreme Court ordered that the Circuit Court in Leon County tabulate by hand 9000 contested ballots from Miami-Dade County.
  - It also ordered that every county in Florida must immediately begin manually recounting all "under-votes" (ballots which did not indicate a vote for president) because there were enough contested ballots to place the outcome of the election in doubt.
  - Governor George Bush and his running mate, Richard Cheney, filed a request for review in the U.S. Supreme Court and sought an emergency petition for a stay of the Florida Supreme Court's decision. The U.S. Supreme Court granted review and issued the stay on December 9. It heard oral argument two days later.”

Elections

- Background (O'Brien): Since the 1960s, the Supreme Court has increasingly assumed a supervisory role in overseeing the electoral process….the Court has applied the Fourteenth Amendment equal protection clause to bar invidious forms of discrimination in the electoral process [,] and interpreted the First Amendment guarantee for freedoms of speech and association to protect some aspects of political parties, campaigns, and elections."
  - "Under the Fourteenth Amendment equal protection clause, the Court strictly scrutinizes electoral systems for discriminating against minorities and the poor by imposing special burdens on running for office and voting."
  - Smith v. Allwright (1944): "primaries and political parties…are integral to the operation of state and local governments and as such constitute "an agent of the state" subject to the proscriptions of the Fourteenth and Fifteenth Amendments."
  - Williams v. Rhodes (1968): restrictions on third parties unconstitutional.

Elections

- Cousins v. Wigoda (1975): the national party has a First Amendment right to determine the composition of its own convention (at the expense of state legislatures).
- Democratic Party v. LaFollette (1981): states cannot mandate that state delegates to a national party convention cast their votes for the winner of the state's presidential primary.

- Federal Election Campaign Act (1971):

Elections

- Bush v. Gore (2000): decided 7-2 (5-4); reversed.
  - Question Presented: “Did the Florida Supreme Court violate Article II Section 1 Clause 2 of the U.S. Constitution by making new election law? Do standardless manual recounts violate the Equal Protection and Due Process Clauses of the Constitution?”
  - Holding (7-2): “Standardless manual recounts violate the Fourteenth Amendment’s Equal Protection Clause.”
  - Holding (5-4): “No other recount method could be decided and executed within the election time limit per 3 U.S.C. § 5.”
  - “Noting that the Equal Protection clause guarantees individuals that their ballots cannot be devalued by "later arbitrary and disparate treatment," the per curiam opinion held 7-2 that the Florida Supreme Court's scheme for recounting ballots was unconstitutional.
  - The record suggested that different standards were applied from ballot to ballot, precinct to precinct, and county to county. Because of those and other procedural difficulties, the court held, 5 to 4, that no constitutional recount could be fashioned in the time remaining (which was short because the Florida legislature wanted to take advantage of the "safe harbor" provided by 3 USC Section 5).”

Elections

- Bush v. Gore (2000): decided 7-2 (5-4); reversed.
  - Majority (per curiam): “The petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, §1, cl. 2, of the United States Constitution and failing to comply with 3 U. S. C. §5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause.”
  - “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.“
  - “The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.”

Elections

- Bush v. Gore (2000): decided 7-2 (5-4); reversed.
  - Majority (per curiam): “For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right.”
  - “The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”

Elections

- Bush v. Gore (2000): decided 7-2 (5-4); reversed.
  - Majority (per curiam): “Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise.”
  - “The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," [citation to FL statute]. That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.”

Elections

- Bush v. Gore (2000): decided 7-2 (5-4); reversed.
  - Concurrence (Rehnquist, Scalia, Thomas): “In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns…”
  - “But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, §1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President. (Emphasis added.) Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.”
  - “If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the "safe harbor"provided by §5.”

Elections

- Bush v. Gore (2000): decided 7-2 (5-4); reversed.
  - Concurrence (Rehnquist, Scalia, Thomas): “In Florida, the legislature has chosen to hold statewide elections to appoint the State's 25 electors...in a Presidential election the clearly expressed intent of the legislature must prevail.”
  - “The State's Attorney General (who was supporting the Gore challenge) confirmed in oral argument here that never before the present election had a manual recount been conducted on the basis of the contention that "undervotes" should have been examined to determine voter intent.”
  - “Given all these factors, and in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor“ provision of 3 U. S. C. §5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date.”

Elections

- Bush v. Gore (2000): decided 7-2 (5-4); reversed.
  - Dissents (Souter, Breyer, Stevens, Ginsburg): Breyer and Souter (writing separately) agreed with the per curiam holding that the Florida Court's recount scheme violated the Equal Protection Clause, but they dissented with respect to the remedy, believing that a constitutional recount could be fashioned. Time is insubstantial when constitutional rights are at stake.
  - Stevens: “The federal questions that ultimately emerged in this case are not substantial. Article II provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." Ibid. (emphasis added). It does not create state legislatures out of whole cloth, but rather takes them as they come -- as creatures born of, and constrained by, their state constitutions…we have never before called into question the substantive standard by which a State determines that a vote has been legally cast.”

Elections

- Bush v. Gore (2000): decided 7-2 (5-4); reversed.
  - Souter: “If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedure provided in 3 U.S. C. §15…Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no State is required to conform to §5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of §5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress.”
  - Ginsburg: “The extraordinary setting of this case has obscured the ordinary principle that dictates its proper resolution: Federal courts defer to state high courts'interpretations of their state's own law. This principle reflects the core of federalism, on which all agree…THE CHIEF JUSTICE's solicitude for the Florida Legislature comes at the expense of the more fundamental solicitude we owe to the legislature's sovereign…Were the other members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court.”

Elections

- Cousins v. Wigoda (1975): the national party has a First Amendment right to determine the composition of its own convention (at the expense of state legislatures).
- Democratic Party v. LaFollette (1981): states cannot mandate that state delegates to a national party convention cast their votes for the winner of the state's presidential primary.

- Federal Election Campaign Act (1971): "limits the amount of money individuals and groups may contribute to candidates and political parties, imposes spending and reporting requirements, and creates an eight-member commission to oversee the law's implementation."

Elections

- Buckley v. Valeo (1976): decided (complications); affirmed in part and reversed in part
  - Background: “In the wake of the Watergate affair, Congress attempted to ferret out corruption in political campaigns by restricting financial contributions to candidates. Among other things, the law set limits on the amount of money an individual could contribute to a single campaign and it required reporting of contributions above a certain threshold amount. The Federal Election Commission was created to enforce the statute.”
  - Question Presented: “Did the limits placed on electoral expenditures by the Federal Election Campaign Act of 1971, and related provisions of the Internal Revenue Code of 1954, violate the First Amendment's freedom of speech and association clauses?”
  - Holding: restrictions on individual contributions to political campaigns and candidates do not violate the First Amendment because the limitations of the FECA enhance the "integrity of our system of representative democracy" by guarding against unscrupulous practices…
  - Holding: governmental restriction on independent expenditures in campaigns, the limitation on expenditures by candidates from their own personal or family resources, and the limitation on total campaign expenditures all violate the First Amendment because:
    - “Since these practices do not necessarily enhance the potential for corruption that individual contributions to candidates do, the Court found that restricting them did not serve a government interest great enough to warrant a curtailment on free speech and association.”

Elections

- Buckley v. Valeo (1976): decided (complications); affirmed in part, reversed in part
  - Majority (per curiam): “The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”
  - “Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non speech element or to reduce the exacting scrutiny required by the First Amendment.”
    - Contrast w/ United States v. O’Brien (burning a draft card).
  - Nor can the Act's contribution and expenditure limitations be sustained, as some of the parties suggest, by reference to the constitutional principles reflected in [cases]. Those cases stand for the proposition that the government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication.

Elections

- Buckley v. Valeo (1976): decided (complications); affirmed in part, reversed in part
  - Majority (per curiam): “A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.”
  - “The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”
  - “By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication…A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.”

Elections

- Buckley v. Valeo (1976): decided (complications); affirmed in part, reversed in part
  - Majority (per curiam): “In sum, although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.”
  - “It is unnecessary to look beyond the Act's primary purpose - to limit the actuality and appearance of corruption resulting from large individual financial contributions - in order to find a constitutionally sufficient justification for the $1,000 contribution limitation.”
  - “We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling.”

Elections

- Buckley v. Valeo (1976): decided (complications); affirmed in part, reversed in part
  - Majority (per curiam): “Apart from these First Amendment concerns, appellants argue that the contribution limitations work such an invidious discrimination between incumbents and challengers that the statutory provisions must be declared unconstitutional on their face. [But t]here is no such evidence to support the claim that the contribution limitations in themselves discriminate against major-party challengers to incumbents.”
  - [However], “the Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech…It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression "at the core of our electoral process and of the First Amendment freedoms."”
  - “We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify 608 (e) (1)'s ceiling on independent expenditures.”

Elections

- Buckley v. Valeo (1976): decided (complications); affirmed in part, reversed in part
  - Majority (per curiam): “Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”
  - “But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure `the widest possible dissemination of information from diverse and antagonistic sources,'" and "`to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" New York Times Co. v. Sullivan.
  - “The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion….The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise.”

Elections

- Post-Buckley developments:
  - Brown v. Socialist Workers 74 Campaign Committee (1982): requirements to disclose lists of contributors violates First Amendment right to freedom of association.
  - Federal Election Commission v. National Conservative Political Action Committee (NCPAC): FECA restrictions on campaign contributions by PACs violates First Amendment right to freedom of speech.
  - O'Brien (OB2:897): "In both *Buckley* and *NCPAC* the Court balanced the First Amendment right of association against Congress's intent in eliminating corruption in campaigns and electoral politics."
- Bipartisan Campaign Reform Act (2002; the "BCRA" or "McCain Feingold")
  - Increased regulation of soft money (42% of election spending) and issue/attack ads.
  - " Its key provisions were a) a ban on unrestricted ("soft money") donations made directly to political parties…and on the solicitation of those donations by elected officials; b) limits on the advertising that unions, corporations, and non-profit organizations can engage in up to 60 days prior to an election; and c) restrictions on political parties' use of their funds for advertising on behalf of candidates (in the form of "issue ads" or "coordinated expenditures")."

Elections

- McConnell v. Federal Election Commission (2003): decided 5-4, 8-1 *and* 9-0; affirmed in part and reversed in part.
- Background: Twelve challenges to the BCRA were consolidated and granted certiorari. “The BCRA contained an unusual provision providing for an early federal trial and a direct appeal to the Supreme Court of the United States, by-passing the typical federal judicial process. In May a special three-judge panel struck down portions of the Campaign Finance Reform Act's ban on soft-money donations but upheld some of the Act's restrictions on the kind of advertising that parties can engage in. The ruling was stayed until the Supreme Court could hear and decide the resulting appeals.”

Elections

- McConnell v. Federal Election Commission (2003): decided 5-4, 8-1 *and* 9-0; affirmed in part and reversed in part.
- Questions Presented:
- 1) Does the "soft money" ban of the Bipartisan Campaign Reform Act of 2002 exceed Congress's authority to regulate elections under Article 1, Section 4 of the United States Constitution and/or violate the First Amendment's protection of the freedom to speak?
- 2) Do regulations of the source, content, or timing of political advertising in the Campaign Finance Reform Act of 2002 violate the First Amendment's free speech clause?

Elections

- McConnell v. Federal Election Commission (2003): decided 5-4, 8-1 *and* 9-0; affirmed in part and reversed in part.
- Holding: (5-4) “Because the regulations dealt mostly with soft-money contributions that were used to register voters and increase attendance at the polls, not with campaign expenditures (which are more explicitly a statement of political values and therefore deserve more protection), the Court held that the restriction on free speech was minimal. It then found that the restriction was justified by the government's legitimate interest in preventing "both the actual corruption threatened by large financial contributions and... the appearance of corruption" that might result from those contributions.”
- “In response to challenges that the law was too broad and unnecessarily regulated conduct that had not been shown to cause corruption (such as advertisements paid for by corporations or unions), the Court found that such regulation was necessary to prevent the groups from circumventing the law. Justices O'Connor and Stevens wrote that "money, like water, will always find an outlet" and that the government was therefore justified in taking steps to prevent schemes developed to get around the contribution limits.”

Elections

- McConnell v. Federal Election Commission (2003): decided 5-4, 8-1 *and* 9-0; affirmed in part and reversed in part.
  - Holding: “The Court also rejected the argument that Congress had exceeded its authority to regulate elections under Article I, Section 4 of the Constitution. The Court found that the law only affected state elections in which federal candidates were involved and also that it did not prevent states from creating separate election laws for state and local elections.”
  - Majority (Stevens, O’Connor): Titles I and II
  - Majority (Rehnquist): Titles III and IV
  - Majority (Breyer): Title V

Elections

- McConnell v. Federal Election Commission (2003): decided 5-4, 8-1 *and* 9-0; affirmed in part and reversed in part.
- Majority (Stevens, O'Connor): "Like the contribution limits we upheld in *Buckley*, §323's restrictions have only a marginal impact on the ability of contributors, candidates, officeholders, and parties to engage in effective political speech…Complex as its provisions may be, §323, in the main, does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders...We accordingly conclude that §323(b), on its face, is closely drawn to match the important governmental interests of preventing corruption and the appearance of corruption."
- Majority (Rehnquist): Titles III and IV
- Majority (Breyer): Title V

Elections

- McConnell v. Federal Election Commission (2003): decided 5-4, 8-1 *and* 9-0; affirmed in part and reversed in part.
- Majority (Stevens, O'Connor): "The major premise of plaintiffs' challenge to BCRA's use of the term "electioneering communication" is that *Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech…That position misapprehends our prior decisions, for the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law…a plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command."
- Majority (Rehnquist): Titles III and IV
- Majority (Breyer): Title V

Elections

- McConnell v. Federal Election Commission (2003): decided 5-4, 8-1 *and* 9-0; affirmed in part and reversed in part.
- Majority (Rehnquist): “Minors enjoy the protection of the First Amendment…Limitations on the amount that an individual may contribute to a candidate or political committee impinge on the protected freedoms of expression and association…When the Government burdens the right to contribute, we apply heightened scrutiny…We ask whether there is a "sufficiently important interest" and whether the statute is "closely drawn" to avoid unnecessary abridgment of First Amendment freedoms… For the foregoing reasons, we affirm the District Court's judgment finding the plaintiffs' challenges to BCRA §305, §307, and the millionaire provisions nonjusticiable, striking down as unconstitutional BCRA §318, and upholding BCRA §311.

Elections

- McConnell v. Federal Election Commission (2003): decided 5-4, 8-1 *and* 9-0; affirmed in part and reversed in part.
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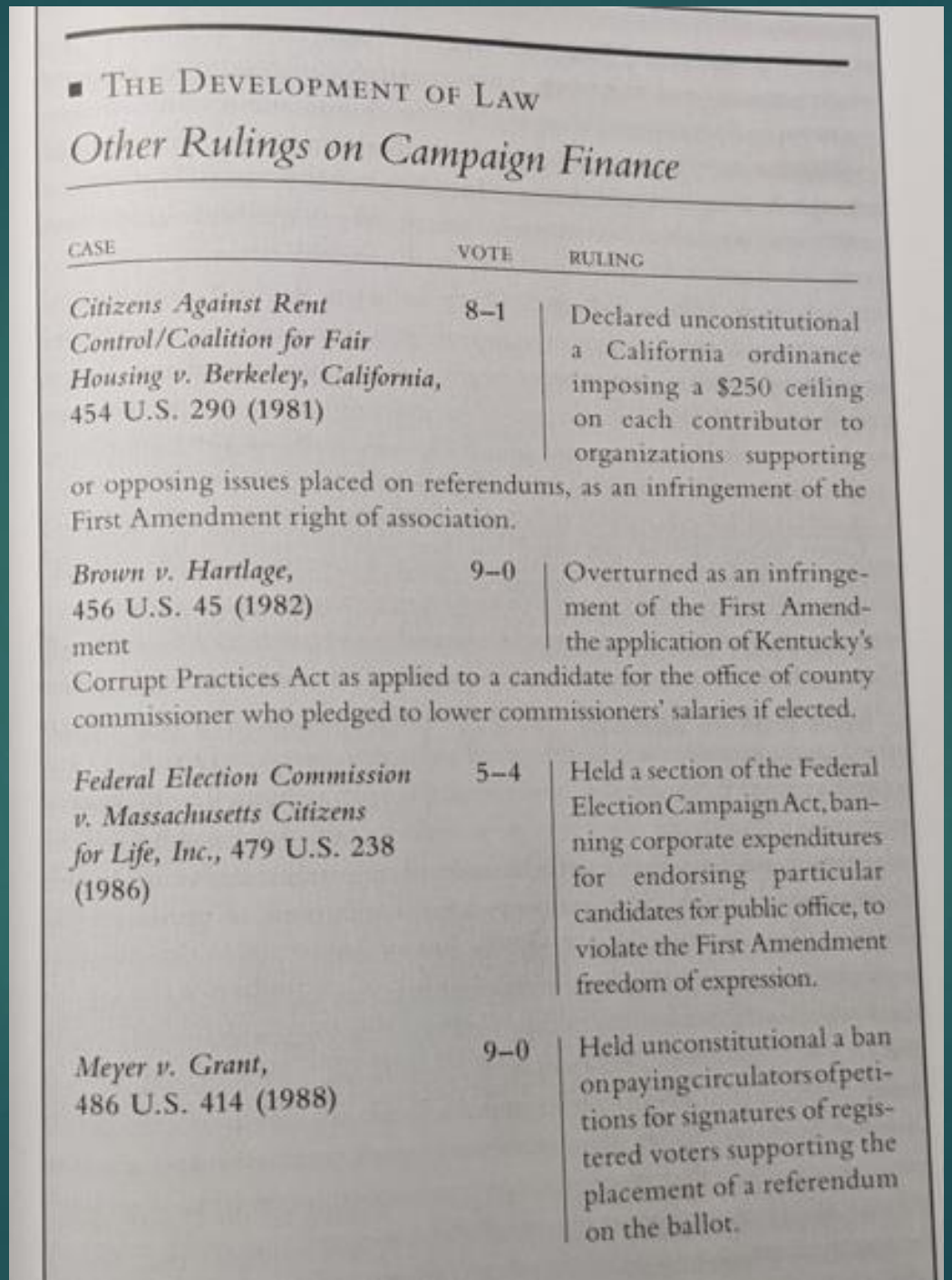
Elections

JUSTICES IN THE MAJORITY

HOLDING	VOTE	REHNQUIST	STEVENS	O'CONNOR	SCALIA	KENNEDY	SOUTER	THOMAS	GINSBURG	BREYER
Upheld ban on soft money	5–4		X	X			X		X	X
Upheld restrictions on issue ads by corporations and unions [overturned in *Citizens United*]	5–4		X	X			X		X	X
Struck down ban on contributions by individuals under 18	9–0	X	X	X	X	X	X	X	X	X
Upheld requirement that certain ads authorized by a candidate or committee clearly identify them	8–1	X	X	X	X	X	X		X	X
Upheld record-keeping requirement for broadcasters	5–4		X	X			X		X	X

Elections



■ THE DEVELOPMENT OF LAW

Other Rulings on Campaign Finance

CASE	VOTE	RULING
Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, California, 454 U.S. 290 (1981)	8–1	Declared unconstitutional a California ordinance imposing a $250 ceiling on each contributor to organizations supporting or opposing issues placed on referendums, as an infringement of the First Amendment right of association.
Brown v. Hartlage, 456 U.S. 45 (1982)	9–0	Overturned as an infringement of the First Amendment the application of Kentucky's Corrupt Practices Act as applied to a candidate for the office of county commissioner who pledged to lower commissioners' salaries if elected.
Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986)	5–4	Held a section of the Federal Election Campaign Act, banning corporate expenditures for endorsing particular candidates for public office, to violate the First Amendment freedom of expression.
Meyer v. Grant, 486 U.S. 414 (1988)	9–0	Held unconstitutional a ban on paying circulators of petitions for signatures of registered voters supporting the placement of a referendum on the ballot.

Elections

■ THE DEVELOPMENT OF LAW

Other Rulings on Campaign Finance (continued)

CASE	VOTE	RULING
Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)	6–3	Held that States may ban corporations, even nonprofit corporations, from making independent financial expenditures in support of or opposition to political candidates.
Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 694 (1996)	7–2	Held that the party expenditure provision of Federal Election Campaign Act of 1976 did not preclude the Republican party from making independent campaign expenditures and that applying the provisions to political parties would violate the First Amendment. Writing for the Court, Justice Breyer concluded that there was no evidence that "a limitation on political parties' independent expenditures [was] necessary to combat a substantial danger of corruption of the electoral system." Justices Stevens and Ginsburg dissented.
Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000)	6–3	Reaffirming the basic holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), which sustained a $1,000 cap on donations to federal candidates over First Amendment objections, the Court upheld Missouri's $1,075 limit on campaign contributions to candidates for state office. Writing for the Court, Justice Souter ruled that the prevention of corruption and the appearance of corruption was a constitutionally sufficient justification for such campaign contribution limits. Justices Kennedy, Scalia, and Thomas dissented, contending that the majority had abandoned "the rigors of our traditional First Amendment structure."
Federal Election Commission v. Colorado Republican Campaign Committee, 533 U.S. 431 (2001)	5–4	Writing for the Court, Justice Souter upheld the Federal Election Campaign Act's limitations on political parties' campaign expendi-

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tures made in conjunction with a candidate's campaign committee. Justice Thomas dissented and was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy.

Federal Election Commission v. Beaumont, 539 U.S. 146 (2003)	7–2	Upheld a 1907 restriction on corporations, including nonprofit advocacy corporations, from directly contributing to

or making expenditures for candidates for federal office. Justices Scalia and Thomas dissented.

Davis v. Federal Election Commission, 554 U.S. 724 (2008)	5–4	The Court invalidated Section 319, the so-called Millionaires' Amendment to the Bipartisan Campaign Reform

Act of 2002 (BCRA), for violating the First and Fifth Amendments. The Millionaires' Amendment provided equalizing advantages to a candidate relying primarily on contributed funds in campaigns against a self-financed candidate. House of Representatives candidate Jack Davis challenged the law in federal district court in anticipation that his personal expenditures would exceed the statutory limitation in an upcoming election. Davis claimed that the provision violated his First and Fifth Amendment rights through its disclosure requirements and contribution limitations. Under the law, a candidate for the House who spent more than $350,000 of his or her own money triggered additional reporting requirements and permitted the candidate's opponents to solicit three times the normal limit of $2,300 per contributor, as well as granted greater spending by the opponent's party on behalf of the candidate. Writing for the majority, Justice Alito held that the provisions forced self-financed candidates "to choose between the right to engage in unfettered political speech and subjection to discriminatory fund raising levels," and that "the resulting drag on First Amendment right" was unconstitutional. Justices Stevens and Ginsburg issued separate opinions, in part concurring and dissenting, which Justices Souter and Breyer joined. The decision invites further challenges to state laws, such as Arizona's, North Carolina's, and Maine's, that penalize private funding of elections and promote public funding of campaigns.

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- Citizens United v. Federal Election Commission (2010): decided 5-4, reversed in part and affirmed in part.
- Background: “Citizens United sought an injunction against the Federal Election Commission in the United States District Court for the District of Columbia to prevent the application of the Bipartisan Campaign Reform Act (BCRA) to its film *Hillary: The Movie*. *The Movie* expressed opinions about whether Senator Hillary Rodham Clinton would make a good president.”
- “In an attempt to regulate "big money" campaign contributions, the BCRA applies a variety of restrictions to "electioneering communications." Section 203 of the BCRA prevents corporations or labor unions from funding such communication from their general treasuries. Sections 201 and 311 require the disclosure of donors to such communication and a disclaimer when the communication is not authorized by the candidate it intends to support.”

Elections

- Citizens United v. Federal Election Commission (2010): decided 5-4, reversed in part and affirmed in part.
- Background: “Citizens United argued that: 1) Section 203 violates the First Amendment on its face and when applied to *The Movie* and its related advertisements, and that 2) Sections 201 and 203 are also unconstitutional as applied to the circumstances.”
- “The United States District Court denied the injunction. Section 203 on its face was not unconstitutional because the Supreme Court in *McConnell v. FEC* had already reached that determination. The District Court also held that *The Movie* was the functional equivalent of express advocacy, as it attempted to inform voters that Senator Clinton was unfit for office, and thus Section 203 was not unconstitutionally applied. Lastly, it held that Sections 201 and 203 were not unconstitutional as applied to the *The Movie* or its advertisements. The court reasoned that the *McConnell* decision recognized that disclosure of donors "might be unconstitutional if it imposed an unconstitutional burden on the freedom to associate in support of a particular cause," but those circumstances did not exist in Citizen United's claim.”

Elections

- Citizens United v. Federal Election Commission (2010): decided 5-4, reversed in part and affirmed in part.
- Questions Presented: 1) Did the Supreme Court's decision in *McConnell* resolve all constitutional as-applied challenges to the BCRA when it upheld the disclosure requirements of the statute as constitutional? [no]
- 2) Do the BCRA's disclosure requirements impose an unconstitutional burden when applied to electioneering requirements because they are protected "political speech" and not subject to regulation as "campaign speech"? [no]
- 3) If a communication lacks a clear plea to vote for or against a particular candidate, is it subject to regulation under the BCRA? [yes]
- 4) Should a feature length documentary about a candidate for political office be treated like the advertisements at issue in *McConnell* and therefore be subject to regulation under the BCRA? [yes]

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- Citizens United v. Federal Election Commission (2010): decided 5-4, reversed in part and affirmed in part.
- Holding: “ The Supreme Court overruled *Austin v. Michigan Chamber of Commerce* and portions of *McConnell v. FEC*. (In the prior cases, the Court had held that political speech may be banned based on the speaker's corporate identity.) By a 5-to-4 vote along ideological lines, the majority held that under the First Amendment corporate funding of independent political broadcasts in candidate elections cannot be limited. ”
- “The majority maintained that political speech is indispensable to a democracy, which is no less true because the speech comes from a corporation. The majority also held that the BCRA's disclosure requirements as applied to *The Movie* were constitutional, reasoning that disclosure is justified by a "governmental interest" in providing the "electorate with information" about election-related spending resources. The Court also upheld the disclosure requirements for political advertising sponsors and it upheld the ban on direct contributions to candidates from corporations and unions.”

Elections

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Elections

- Citizens United v. Federal Election Commission (2010): decided 5-4, reversed in part and affirmed in part.
- Majority (Kennedy): “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”
- “Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. 2 U. S. C. §441b. Limits on electioneering communications were upheld in McConnell v. Federal Election Comm'n, 540 U. S. 93, 203-209 (2003). The holding of McConnell rested to a large extent on an earlier case, Austin v. Michigan Chamber of Commerce, 494 U. S. 652 (1990). Austin had held that political speech may be banned based on the speaker's corporate identity.”

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- Citizens United v. Federal Election Commission (2010): decided 5-4, reversed in part and affirmed in part.
- Majority (Kennedy): “In this case we are asked to reconsider Austin and, in effect, McConnell. It has been noted that "Austin was a significant departure from ancient First Amendment principles," Federal Election Comm'n v. Wisconsin Right to Life, Inc., 551 U. S. 449, 490 (2007) (WRTL) (SCALIA, J., concurring in part and concurring in judgment). We agree with that conclusion and hold that stare decisis does not compel the continued acceptance of Austin. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”
- “ Section 441b's prohibition on corporate independent expenditures is…a ban on speech.”

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- Citizens United v. Federal Election Commission (2010): decided 5-4, reversed in part and affirmed in part.
- Majority (Kennedy): “Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people…The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it…For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest.”

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- Citizens United v. Federal Election Commission (2010): decided 5-4, reversed in part and affirmed in part.
- Majority (Kennedy): “The Court is..confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them.”
- “When Buckley identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption...The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”
- “A*ustin* is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures…Given our conclusion we are further required to overrule the part of *McConnell* that upheld BCRA §203's extension of §441b's restrictions on corporate independent expenditures.”

Elections

- Citizens United v. Federal Election Commission (2010): decided 5-4, reversed in part and affirmed in part.
- Majority (Kennedy): “The judgment of the District Court is reversed with respect to the constitutionality of 2 U. S. C. §441b's restrictions on corporate independent expenditures. The judgment is affirmed with respect to BCRA's disclaimer and disclosure requirements. The case is remanded for further proceedings consistent with this opinion.”
- Concurrence (Roberts, Alito): “In a separate concurring opinion, Chief Justice Roberts, joined by Justice Alito, emphasized the care with which the Court handles constitutional issues and its attempts to avoid constitutional issues when at all possible. Here, the Court had no narrower grounds upon which to rule, except to handle the First Amendment issues embodied within the case.
- Concurrence (Scalia): Criticizes Justice Stevens' understanding of the Framers’ view towards corporations. Justice Stevens argued that corporations are not members of society and that there are compelling governmental interests to curb corporations' ability to spend money during local and national elections.”

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- Arizona Free NEterprise Club's Freedom Club Pac v. Bennett (2011):
- Background: "Arizona enacted a campaign finance law that provides matching funds to candidates who accept public financing. The law, passed in 1998, gives an initial sum to candidates for state office who accept public financing and then provides additional matching funds based on the amounts spent by privately financed opponents and by independent groups. In 2008, some Republican candidates and a political action committee, the Arizona Free Enterprise Club, filed suit arguing that to avoid triggering matching funds for their opponents, they had to limit their spending and, in essence, their freedom of speech. The U.S. District Court for District of Arizona found the matching-funds provision unconstitutional. But the U.S. Court of Appeals for the Ninth Circuit overturned the case, saying it found "minimal" impact on freedom of speech."

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- Arizona Free NEterprise Club's Freedom Club Pac v. Bennett (2011):
- Question Presented: "Does the First Amendment prohibit linking the funds participating candidates receive in an election to the amount of money raised by or spent on behalf of their opponents?
- Holding: Yes. The Supreme Court reversed the lower court order in a decision by Chief Justice John Roberts. "Arizona's matching funds scheme substantially burdens political speech and is not sufficiently justified by a compelling interest to survive First Amendment scrutiny," The holding does not contend that the First Amendment forbids all public financing.
- Dissent (Kagan, Ginsburg, Breyer, Sotomayor): "The First Amendment's core purpose is to foster a healthy, vibrant political system full of robust discussion and debate," Kagan argued, adding: "Nothing in Arizona's anti-corruption statute, the Arizona Citizens Clean Elections Act, violates this constitutional protection. To the contrary, the Act promotes the values underlying both the First Amendment and our entire Constitution by enhancing the 'opportunity for free political discussion to the end that government may be responsive to the will of the people.'"""

Elections

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- Question Presented: "Does the First Amendment prohibit linking the funds participating candidates receive in an election to the amount of money raised by or spent on behalf of their opponents?
- Holding: Yes. The Supreme Court reversed the lower court order in a decision by Chief Justice John Roberts. "Arizona's matching funds scheme substantially burdens political speech and is not sufficiently justified by a compelling interest to survive First Amendment scrutiny," The holding does not contend that the First Amendment forbids all public financing.
- Majority (Roberts): "Discussion of public issues and debate on the qualifications of candidates are integral to the operation" of our system of government. *Buckley* v. *Valeo*, As a result, the First Amendment " 'has its fullest and most urgent application' to speech uttered during a campaign for political office." Laws that burden political speech are" accordingly "subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.""

Elections

- Arizona Free NEterprise Club's Freedom Club Pac v. Bennett (2011):
- Majority (Roberts): "the matching funds provision "imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s]." *Id*., at 739. Under that provision, "the vigorous exercise of the right to use personal funds to finance campaign speech" leads to "advantages for opponents in the competitive context of electoral politics."
- "The burdens that this regime places on independent expenditure groups are akin to those imposed on the privately financed candidates themselves. Just as with the candidate the independent group supports, the more money spent on that candidate's behalf or in opposition to a publicly funded candidate, the more money the publicly funded candidate receives from the State. And just as with the privately financed candidate, the effect of a dollar spent on election speech is a guaranteed financial payout to the publicly funded candidate the group opposes. Moreover, spending one dollar can result in the flow of dollars to multiple candidates the group disapproves of, dollars directly controlled by the publicly funded candidate or candidates."

Elections

- Arizona Free NEterprise Club's Freedom Club Pac v. Bennett (2011):
- Majority (Roberts): "We have repeatedly rejected the argument that the government has a compelling state interest in "leveling the playing field" that can justify undue burdens on political speech..."Leveling the playing field" can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom--the "unfettered interchange of ideas"--not whatever the State may view as fair."
- ""[T]here is practically universal agreement that a major purpose of" the First Amendment "was to protect the free discussion of governmental affairs," "includ[ing] discussions of candidates." *Buckey v. Valeo.* That agreement "reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' " *Ibid.* (quoting *New York Times Co.* v. *Sullivan*). True when we said it and true today. Laws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand. The judgment of the Court of Appeals for the Ninth Circuit is reversed."

Elections

- Arizona Free NEterprise Club’s Freedom Club Pac v. Bennett (2011):
- Dissent (Kagan): "The First Amendment's core purpose is to foster a healthy, vibrant political system full of robust discussion and debate..."
- “Nothing in Arizona's anti-corruption statute, the Arizona Citizens Clean Elections Act, violates this constitutional protection. To the contrary, the Act promotes the values underlying both the First Amendment and our entire Constitution by enhancing the 'opportunity for free political discussion to the end that government may be responsive to the will of the people.’”””