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 KENNEDY, dissenting.

The Court's decision has lasting consequences for political speech in the course of elections, the speech upon which democracy depends. Yet in defining the controlling standard of review and applying it to the urgent claim presented, the Court seems almost indifferent. Its analysis would not be acceptable for the routine case of a single protester with a hand-scrawled sign, see *City of Ladue* v. *Gilleo,* 512 U. S. 43 (1994), a few demonstrators on a public sidewalk, see *United States* v. *Grace,* 461 U. S. 171 (1983), or a driver who taped over the motto on his license plate because he disagreed with its message, see *Wooley* v. *Maynard,* 430 U. S. 705 (1977). Surely the Court's approach is unacceptable for a case announcing a rule that suppresses one of our most essential and prevalent forms of political speech.

It would be no answer to say that this is a routine application of our analysis in *Buckley* v. *Valeo,* 424 U. S. 1 (1976) *(per curiam),* to a similar set of facts, so that a cavalier dismissal of the petitioners' claim is appropriate. The justifications for the case system and *stare decisis* must rest upon the Court's capacity, and responsibility, to acknowledge its missteps. It is our duty to face up to adverse, unintended consequences flowing from our own

prior decisions. With all respect, I submit the Court does not accept this obligation in the case before us. Instead, it perpetuates and compounds a serious distortion of the First Amendment resulting from our own intervention in *Buckley*. The Court is concerned about voter suspicion of the role of money in politics. Amidst an atmosphere of skepticism, however, it hardly inspires confidence for the Court to abandon the rigors of our traditional First Amendment structure.

I

Zev David Fredman asks us to evaluate his speech claim in the context of a system which favors candidates and officeholders whose campaigns are supported by soft money, usually funneled through political parties. The Court pays him no heed. The plain fact is that the compromise the Court invented in *Buckley* set the stage for a new kind of speech to enter the political system. It is covert speech. The Court has forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits, limits which take no account of rising campaign costs. The preferred method has been to conceal the real purpose of the speech. Soft money may be contributed to political parties in unlimited amounts, see *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 616 (1996), and is used often to fund so-called issue advocacy, advertisements that promote or attack a candidate's positions without specifically urging his or her election or defeat. Briffault, Issue Advocacy: Redrawing the Elections/Politics Line, 77 Tex. L. Rev. 1751, 1752–1753 (1999). Issue advocacy, like soft money, is unrestricted, see *Buckley*, *supra*, at 42–44, while straightforward speech in the form of financial contributions paid to a candidate, speech subject to full disclosure and prompt evaluation by the public, is not. Thus has the

Court's decision given us covert speech. This mocks the First Amendment. The current system would be unfortunate, and suspect under the First Amendment, had it evolved from a deliberate legislative choice; but its unhappy origins are in our earlier decree in *Buckley*, which by accepting half of what Congress did (limiting contributions) but rejecting the other (limiting expenditures) created a misshapen system, one which distorts the meaning of speech.

The irony that we would impose this regime in the name of free speech ought to be sufficient ground to reject *Buckley*'s wooden formula in the present case. The wrong goes deeper, however. By operation of the *Buckley* rule, a candidate cannot oppose this system in an effective way without selling out to it first. Soft money must be raised to attack the problem of soft money. In effect, the Court immunizes its own erroneous ruling from change. Rulings of this Court must never be viewed with more caution than when they provide immunity from their own correction in the political process and in the forum of unrestrained speech. The melancholy history of campaign finance in *Buckley*'s wake shows what can happen when we intervene in the dynamics of speech and expression by inventing an artificial scheme of our own.

The case in one sense might seem unimportant. It appears that Mr. Fredman was an outsider candidate who may not have had much of a chance. Yet, by binding him to the outdated limit of $1075 per contribution in a system where parties can raise soft money without limitation and a powerful press faces no restrictions on use of its own resources to back its preferred candidates, the Court tells Mr. Fredman he cannot challenge the status quo unless he first gives into it. This is not the First Amendment with which I am familiar.

To defend its extension of *Buckley* to present times, the Court, of course, recites the dangers of corruption, or the

appearance of corruption, when an interested person contributes money to a candidate. What the Court does not do is examine and defend the substitute it has encouraged, covert speech funded by unlimited soft money. In my view that system creates dangers greater than the one it has replaced. The first danger is the one already mentioned: that we require contributors of soft money and its beneficiaries to mask their real purpose. Second, we have an indirect system of accountability that is confusing, if not dispiriting, to the voter. The very disaffection or distrust that the Court cites as the justification for limits on direct contributions has now spread to the entire political discourse. *Buckley* has not worked.

My colleagues in the majority, in my respectful submission, do much disservice to our First Amendment jurisprudence by failing to acknowledge or evaluate the whole operation of the system that we ourselves created in *Buckley*. Our First Amendment principles surely tell us that an interest thought to be the compelling reason for enacting a law is cast into grave doubt when a worse evil surfaces in the law's actual operation. And our obligation to examine the operation of the law is all the more urgent when the new evil is itself a distortion of speech. By these measures the law before us cannot pass any serious standard of First Amendment review.

Among the facts the Court declines to take into account is the emergence of cyberspace communication by which political contributions can be reported almost simultaneously with payment. The public can then judge for itself whether the candidate or the officeholder has so overstepped that we no longer trust him or her to make a detached and neutral judgment. This is a far more immediate way to assess the integrity and the performance of our leaders than through the hidden world of soft money and covert speech.

Officeholders face a dilemma inherent in the democratic

process and one that has never been easy to resolve: how to exercise their best judgment while soliciting the continued support and loyalty of constituents whose interests may not always coincide with that judgment. Edmund Burke captured the tension in his *Speeches at Bristol*. "Your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you, if he sacrifices it to your opinion." E. Burke, Speeches of the Right Hon. Edmund Burke 130 (J. Burke ed. 1867). Whether our officeholders can discharge their duties in a proper way when they are beholden to certain interests both for reelection and for campaign support is, I should think, of constant concern not alone to citizens but to conscientious officeholders themselves. There are no easy answers, but the Constitution relies on one: open, robust, honest, unfettered speech that the voters can examine and assess in an ever-changing and more complex environment.

II

To this point my view may seem to be but a reflection of what JUSTICE THOMAS has written, and to a large extent I agree with his insightful and careful discussion of our precedents. If an ensuing chapter must be written, I may well come out as he does, for his reasoning and my own seem to point to the conclusion that the legislature can do little by way of imposing limits on political speech of this sort. For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising. For the reasons I have sought to express, there are serious constitutional questions to be confronted in enacting any such scheme, but I would not foreclose it at the outset. I would overrule *Buckley* and then free

Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it is possible to do so. Until any reexamination takes place, however, the existing distortion of speech caused by the half-way house we created in *Buckley* ought to be eliminated. The First Amendment ought to be allowed to take its own course without further obstruction from the artificial system we have imposed. It suffices here to say that the law in question does not come even close to passing any serious scrutiny.

For these reasons, though I am in substantial agreement with what JUSTICE THOMAS says in his opinion, I have thought it necessary to file a separate dissent.