

**CONSTITUTIONAL LAW: STRUCTURE AND
RIGHTS IN OUR FEDERAL SYSTEM**

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**CONSTITUTIONAL LAW: STRUCTURE AND
RIGHTS IN OUR FEDERAL SYSTEM**

SIXTH EDITION

2011 Supplement

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CHAPTER 2

SEPARATION OF POWERS: CONSTITUTIONAL CHECKS AND BALANCES

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§2.03 [G] Controlling the Removal of Officials

FREE ENTERPRISE FUND v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

United States Supreme Court.
__ U.S. __, __ S. Ct. __, __ L. Ed. 2d U__, 2010.S. LEXIS 5524 (2010)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court. . . .

We are asked. . . to consider a new situation not yet encountered by the Court. The question is whether these separate layers of protection may be combined. May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?

We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President. The President cannot "take Care that the Laws be faithfully executed" if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's "constitutional obligation to ensure the faithful execution of the laws." *Id.*, at 693.

I

A

After a series of celebrated accounting debacles, Congress enacted the Sarbanes-Oxley Act of

2002 (or Act), 116 Stat. 745. Among other measures, the Act introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board. The Board is composed of five members, appointed to staggered 5-year terms by the Securities and Exchange Commission. It was modeled on private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to Commission oversight. Congress created the Board as a private “nonprofit corporation,” and Board members and employees are not considered Government “officer[s] or employee[s]” for statutory purposes. [15 U. S. C. §§7211\(a\), \(b\)](#). The Board can thus recruit its members and employees from the private sector by paying salaries far above the standard Government pay scale.

Unlike the self-regulatory organizations, however, the Board is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry. Every accounting firm—both foreign and domestic—that participates in auditing public companies under the securities laws must register with the Board, pay it an annual fee, and comply with its rules and oversight. §§7211(a), 7212(a), (f), 7213, 7216(a)(1). The Board is charged with enforcing the Sarbanes-Oxley Act, the securities laws, the Commission’s rules, its own rules, and professional accounting standards. §§7215(b)(1), (c)(4). To this end, the Board may regulate every detail of an accounting firm’s practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and “such other requirements as the Board may prescribe.” §7213(a)(2)(B).

The Board promulgates auditing and ethics standards, performs routine inspections of all accounting firms, demands documents and testimony, and initiates formal investigations and disciplinary proceedings. §§7213–7215 (2006 ed. and Supp. II). The willful violation of any Board rule is treated as a willful violation of the Securities Exchange Act of 1934, 48 Stat. 881, [15 U. S. C. §78a](#) *et seq.*—a federal crime punishable by up to 20 years’ imprisonment or \$25 million in fines (\$5 million for a natural person). §§78ff(a), 7202(b)(1) (2006 ed.). And the Board itself can issue severe sanctions in its disciplinary proceedings, up to and including the permanent revocation of a firm’s registration, a permanent ban on a person’s associating with any registered firm, and money penalties of \$15 million (\$750,000 for a natural person). §7215(c)(4). Despite the provisions specifying that Board members are not Government officials for statutory purposes, the parties agree that the Board is “part of the Government” for constitutional purposes, *Lebron v. National Railroad Passenger Corporation*, [513 U. S. 374, 397](#) (1995), and that its members are “ ‘Officers of the United States’ ” who “exercis[e] significant authority pursuant to the laws of the United States,” *Buckley v. Valeo*, 424 U. S. 1, 125–126 (1976) (*per curiam*) (quoting Art. II, §2, cl. 2).

The Act places the Board under the SEC’s oversight, particularly with respect to the issuance of rules or the imposition of sanctions (both of which are subject to Commission approval and

alteration). §§7217(b)–(c). But the individual members of the Board—like the officers and directors of the self-regulatory organizations—are substantially insulated from the Commission’s control. The Commission cannot remove Board members at will, but only “for good cause shown,” “in accordance with” certain procedures. §7211(e)(6).

Those procedures require a Commission finding, “on the record” and “after notice and opportunity for a hearing,” that the Board member

“(A) has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws;

“(B) has willfully abused the authority of that member; or

“(C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.” §7217(d)(3).

Removal of a Board member requires a formal Commission order and is subject to judicial review. See [5 U.S.C. §§554\(a\), 556\(a\), 557\(a\), \(c\)\(B\)](#); [15 U.S.C. §78y\(a\)\(1\)](#). Similar procedures govern the Commission’s removal of officers and directors of the private self-regulatory organizations. See §78s(h)(4). The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey’s Executor* standard of “inefficiency, neglect of duty, or malfeasance in office,” [295 U.S., at 620](#) (internal quotation marks omitted); and we decide the case with that understanding.

B

Beckstead and Watts, LLP, is a Nevada accounting firm registered with the Board. The Board inspected the firm, released a report critical of its auditing procedures, and began a formal investigation. Beckstead and Watts and the Free Enterprise Fund, a nonprofit organization of which the firm is a member, then sued the Board and its members, seeking (among other things) a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers.

Before the District Court, petitioners argued that the Sarbanes-Oxley Act contravened the separation of powers by conferring wide-ranging executive power on Board members without subjecting them to Presidential control. Petitioners also challenged the Act under the Appointments Clause, which requires “Officers of the United States” to be appointed by the President with the Senate’s advice and consent. Art. II, §2, cl. 2. The Clause provides an exception for “inferior Officers,” whose appointment Congress may choose to vest “in the President alone, in the Courts of Law, or in the Heads of Departments.” *Ibid.* Because the Board

is appointed by the SEC, petitioners argued that (1) Board members are not “inferior Officers” who may be appointed by “Heads of Departments”; (2) even if they are, the Commission is not a “Departmen[t]”; and (3) even if it is, the several Commissioners (as opposed to the Chairman) are not its “Hea[d].” The United States intervened to defend the Act’s constitutionality. Both sides moved for summary judgment; the District Court determined that it had jurisdiction and granted summary judgment to respondents.

A divided Court of Appeals affirmed. [537 F. 3d 667](#) (CADC 2008). It agreed that the District Court had jurisdiction over petitioners’ claims. *Id.*, at [671](#). On the merits, the Court of Appeals recognized that the removal issue was “a question of first impression,” as neither that court nor this one “ha[d] considered a situation where a restriction on removal passes through two levels of control.” *Id.*, at [679](#). It ruled that the dual restraints on Board members’ removal are permissible because they do not “render the President unable to perform his constitutional duties.” *Id.*, at [683](#). The majority reasoned that although the President “does not directly select or supervise the Board’s members,” *id.*, at [681](#), the Board is subject to the comprehensive control of the Commission, and thus the President’s influence over the Commission implies a constitutionally sufficient influence over the Board as well. *Id.*, at 682–683. The majority also held that Board members are inferior officers subject to the Commission’s direction and supervision, *id.*, at 672–676, and that their appointment is otherwise consistent with the Appointments Clause, *id.*, at 676–678. . . .

II . . .

[The Court first held that the federal courts had jurisdiction to consider petitioners’ claims.]

III

We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution’s separation of powers.

A . . .

The removal of executive officers was discussed extensively in Congress when the first executive departments were created. The view that “prevailed, as most consonant to the text of the Constitution” and “to the requisite responsibility and harmony in the Executive Department,” was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not “expressly taken away, it remained with the President.” Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004). “This Decision of 1789 provides contemporaneous and weighty evidence of the Constitution’s meaning since many of the

Members of the First Congress had taken part in framing that instrument.” *Bowsher v. Synar*, 478 U. S. 714, 723–724 (1986) (internal quotation marks omitted). And it soon became the “settled and well understood construction of the Constitution.” *Ex parte Hennen*, 13 Pet. 230, 259 (1839).

The landmark case of *Myers v. United States* reaffirmed the principle that Article II confers on the President “the general administrative control of those executing the laws.” [272 U. S., at 164](#). It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman’s famous phrase. As we explained in *Myers*, the President therefore must have some “power of removing those for whom he can not continue to be responsible.” [Id., at 117](#).

Nearly a decade later in *Humphrey’s Executor*, this Court held that *Myers* did not prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies. That case concerned the members of the Federal Trade Commission, who held 7-year terms and could not be removed by the President except for “ ‘inefficiency, neglect of duty, or malfeasance in office.’ ” [295 U. S., at 620](#) (quoting [15 U. S. C. §41](#)). The Court distinguished *Myers* on the ground that *Myers* concerned “an officer [who] is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is.” [295 U. S., at 627](#). By contrast, the Court characterized the FTC as “quasi-legislative and quasi-judicial” rather than “purely executive,” and held that Congress could require it “to act ... independently of executive control.” *Id.*, at 627–629. Because “one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will,” the Court held that Congress had power to “fix the period during which [the Commissioners] shall continue in office, and to forbid their removal except for cause in the meantime.” [Id., at 629](#).

Humphrey’s Executor did not address the removal of inferior officers, whose appointment Congress may vest in heads of departments. If Congress does so, it is ordinarily the department head, rather than the President, who enjoys the power of removal. See *Myers, supra*, at 119, 127; *Hennen, supra*, at 259–260. This Court has upheld for-cause limitations on that power as well. . .

We again considered the status of inferior officers in *Morrison*. . . . We recognized that the independent counsel was undoubtedly an executive officer, rather than “ ‘quasi-legislative’ ” or “ ‘quasi-judicial,’ ” but we stated as “our present considered view” that Congress had power to impose good-cause restrictions on her removal. 487 U. S., at 689–691. The Court noted that the statute “g[a]ve the Attorney General,” an officer directly responsible to the President and “through [whom]” the President could act, “several means of supervising or controlling” the independent counsel—“[m]ost importantly ... the power to remove the counsel for good cause.” *Id.*, at 695–696 (internal quotation marks omitted). Under those circumstances, the Court

sustained the statute. *Morrison* did not, however, address the consequences of more than one level of good-cause tenure—leaving the issue, as both the court and dissent below recognized, “a question of first impression” in this Court. [537 F. 3d, at 679](#); see *id.*, at 698 (dissenting opinion).

B

As explained, we have previously upheld limited restrictions on the President’s removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President — or a subordinate he could remove at will — who decided whether the officer’s conduct merited removal under the good-cause standard.

The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President’s direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

The added layer of tenure protection makes a difference. Without a layer of insulation between the Commission and the Board, the Commission could remove a Board member at any time, and therefore would be fully responsible for what the Board does. The President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does.

A second level of tenure protection changes the nature of the President’s review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board’s conduct, to the same extent that he may hold the Commission accountable for everything else that it does. The Commissioners are not responsible for the Board’s actions. They are only responsible for their own determination of whether the Act’s rigorous good-cause standard is met. And even if the President disagrees with their determination, he is powerless to intervene—unless that determination is so unreasonable as to constitute “inefficiency, neglect of duty, or malfeasance in office.” *Humphrey’s Executor*, [295 U. S., at 620](#) (internal quotation marks omitted).

This novel structure does not merely add to the Board’s independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

That arrangement is contrary to Article II’s vesting of the executive power in the President.

Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. This violates the basic principle that the President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch." *Clinton v. Jones*, 520 U. S. 681, 712–713 (1997) (Breyer, J., concurring in judgment).

Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third? At oral argument, the Government was unwilling to concede that even *five* layers between the President and the Board would be too many. The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name.

Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, see *Freytag v. Commissioner*, 501 U. S. 868, 879–880 (1991), nor on whether "the encroached-upon branch approves the encroachment," *New York v. United States*, [505 U. S. 144, 182](#) (1992). The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.

The diffusion of power carries with it a diffusion of accountability. The people do not vote for the "Officers of the United States." Art. II, §2, cl. 2. They instead look to the President to guide the "assistants or deputies ... subject to his superintendence." The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton). Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.*, [No. 70, at 476 \(same\)](#). That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (J. Madison).

By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers.

Respondents and the dissent resist this conclusion, portraying the Board as “the kind of practical accommodation between the Legislature and the Executive that should be permitted in a ‘workable government.’” *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, [501 U. S. 252, 276](#) (1991) (*MWAA*) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, [343 U. S. 579, 635](#) (1952) (Jackson, J., concurring)); see, e.g., *post*, at 6 (opinion of Breyer, J.). . . .

No one doubts Congress’s power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws. And the “‘fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,’” for “‘[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.’” *Bowsher*, [478 U. S., at 736](#) (quoting *Chadha*, [462 U. S., at 944](#)).

One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people. This concern is largely absent from the dissent’s paean to the administrative state. . . .

In fact, the multilevel protection that the dissent endorses “provides a blueprint for extensive expansion of the legislative power.” *MWAA*, *supra*, at 277. In a system of checks and balances, “[p]ower abhors a vacuum,” and one branch’s handicap is another’s strength. [537 F. 3d, at 695, n. 4](#) (Kavanaugh, J., dissenting) (internal quotation marks omitted). “Even when a branch does not arrogate power to itself,” therefore, it must not “impair another in the performance of its constitutional duties.” *Loving v. United States*, [517 U. S. 748, 757](#) (1996). Congress has plenary control over the salary, duties, and even existence of executive offices. Only Presidential oversight can counter its influence. That is why the Constitution vests certain powers in the President that “the Legislature has no right to diminish or modify.” 1 Annals of Cong., at 463 (J. Madison).

The Framers created a structure in which “[a] dependence on the people” would be the “primary controul on the government.” The Federalist No. 51, at 349 (J. Madison). That dependence is maintained, not just by “parchment barriers,” *id.*, [No. 48, at 333 \(same\)](#), but by letting “[a]mbition . . . counteract ambition,” giving each branch “the necessary constitutional means, and personal motives, to resist encroachments of the others,” *id.*, [No. 51, at 349](#). A key “constitutional means” vested in the President — perhaps *the* key means — was “the power of appointing, overseeing, and controlling those who execute the laws.” 1 Annals of Cong., at 463.

And while a government of “opposite and rival interests” may sometimes inhibit the smooth functioning of administration, *The Federalist* No. 51, at 349, “[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” [Bowsher, supra, at 730](#).

Calls to abandon those protections in light of “the era’s perceived necessity,” *New York*, [505 U. S., at 187](#), are not unusual. Nor is the argument from bureaucratic expertise limited only to the field of accounting. The failures of accounting regulation may be a “pressing national problem,” but “a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse.” *Id.*, at 187–188. Neither respondents nor the dissent explains why the Board’s task, unlike so many others, requires *more* than one layer of insulation from the President—or, for that matter, why only two. The point is not to take issue with for-cause limitations in general; we do not do that. The question here is far more modest. We deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure. And though it may be criticized as “elementary arithmetical logic,” two layers are not the same as one.

The President has been given the power to oversee executive officers; he is not limited, as in Harry Truman’s lament, to “persuad[ing]” his unelected subordinates “to do what they ought to do without persuasion.” In its pursuit of a “workable government,” Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.

D

The United States concedes that some constraints on the removal of inferior executive officers might violate the Constitution. It contends, however, that the removal restrictions at issue here do not.

To begin with, the Government argues that the Commission’s removal power over the Board is “broad,” and could be construed as broader still, if necessary to avoid invalidation. But the Government does not contend that simple disagreement with the Board’s policies or priorities could constitute “good cause” for its removal. Nor do our precedents suggest as much. *Humphrey’s Executor*, for example, rejected a removal premised on a lack of agreement “ ‘on either the policies or the administering of the Federal Trade Commission,’ ” because the FTC was designed to be “ ‘independent in character,’ ” “free from ‘political domination or control,’ ” and not “ ‘subject to anybody in the government’ ” or “ ‘to the orders of the President.’ ” [295 U. S., at 619, 625](#). Accord, *Morrison*, [487 U. S., at 693](#) (noting that “the congressional determination to limit the removal power of the Attorney General was essential . . . to establish the necessary independence of the office”); *Wiener v. United States*, [357 U. S. 349, 356](#) (1958) (describing for-cause removal as “involving the rectitude” of an officer). And here there is judicial review of any effort to remove Board members, see [15 U. S. C. §78y\(a\)\(1\)](#), so the

Commission will not have the final word on the propriety of its own removal orders. The removal restrictions set forth in the statute mean what they say.

Indeed, this case presents an even more serious threat to executive control than an “ordinary” dual for-cause standard. Congress enacted an unusually high standard that must be met before Board members may be removed. A Board member cannot be removed except for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing. §7217(d)(3); see §78y(a). The Act does not even give the Commission power to fire Board members for violations of *other* laws that do not relate to the Act, the securities laws, or the Board’s authority. The President might have less than full confidence in, say, a Board member who cheats on his taxes; but that discovery is not listed among the grounds for removal under §7217(d)(3).

The rigorous standard that must be met before a Board member may be removed was drawn from statutes concerning private organizations like the New York Stock Exchange. Cf. §§78s(h)(4), 7217(d)(3). While we need not decide the question here, a removal standard appropriate for limiting Government control over private bodies may be inappropriate for officers wielding the executive power of the United States.

Alternatively, respondents portray the Act’s limitations on removal as irrelevant, because—as the Court of Appeals held—the Commission wields “at-will removal power over Board *functions* if not Board members.” [537 F. 3d, at 683](#) (emphasis added). The Commission’s general “oversight and enforcement authority over the Board,” §7217(a), is said to “blun[t] the constitutional impact of for-cause removal,” [537 F. 3d, at 683](#), and to leave the President no worse off than “if Congress had lodged the Board’s functions in the SEC’s own staff.”

Broad power over Board functions is not equivalent to the power to remove Board members. The Commission may, for example, approve the Board’s budget, §7219(b), issue binding regulations, §§7202(a), 7217(b)(5), relieve the Board of authority, §7217(d)(1), amend Board sanctions, §7217(c), or enforce Board rules on its own, §§7202(b)(1), (c). But altering the budget or powers of an agency as a whole is a problematic way to control an inferior officer. The Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it.

Even if Commission power over Board activities could substitute for authority over its members, we would still reject respondents’ premise that the Commission’s power in this regard is plenary. As described above, the Board is empowered to take significant enforcement actions, and does so largely independently of the Commission. Its powers are, of course, subject to some latent Commission control. But the Act nowhere gives the Commission effective power to start, stop, or alter individual Board investigations, executive activities typically carried out by officials

within the Executive Branch.

The Government and the dissent suggest that the Commission could govern and direct the Board's daily exercise of prosecutorial discretion by promulgating new SEC rules, or by amending those of the Board. Enacting general rules through the required notice and comment procedures is obviously a poor means of micromanaging the Board's affairs. So the Government offers another proposal, that the Commission require the Board by rule to "secure SEC approval for any actions that it now may take itself." That would surely constitute one of the "limitations upon the activities, functions, and operations of the Board" that the Act forbids, at least without Commission findings equivalent to those required to fire the Board instead. §7217(d)(2). The Board thus has significant independence in determining its priorities and intervening in the affairs of regulated firms (and the lives of their associated persons) without Commission preapproval or direction.

Finally, respondents suggest that our conclusion is contradicted by the past practice of Congress. But the Sarbanes-Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of for-cause removal—including at one level a sharply circumscribed definition of what constitutes "good cause," and rigorous procedures that must be followed prior to removal.

The parties have identified only a handful of isolated positions in which inferior officers might be protected by two levels of good-cause tenure. . . . The dissent here suggests that other such positions might exist, and complains that we do not resolve their status in this opinion. The dissent itself, however, stresses the very size and variety of the Federal Government, and those features discourage general pronouncements on matters neither briefed nor argued here. In any event, the dissent fails to support its premonitions of doom; none of the positions it identifies are similarly situated to the Board. . . .

Finally, the dissent wanders far afield when it suggests that today's opinion might increase the President's authority to remove military officers. Without expressing any view whatever on the scope of that authority, it is enough to note that we see little analogy between our Nation's armed services and the Public Company Accounting Oversight Board. . . .

IV

Petitioners' complaint argued that the Board's "freedom from Presidential oversight and control" rendered it "and all power and authority exercised by it" in violation of the Constitution. We reject such a broad holding. Instead, we agree with the Government that the unconstitutional tenure provisions are severable from the remainder of the statute. . . .

V

Petitioners raise three more challenges to the Board under the Appointments Clause. None has merit.

First, petitioners argue that Board members are principal officers requiring Presidential appointment with the Senate's advice and consent. We held in *Edmond v. United States*, 520 U. S. 651, 662–663 (1997), that “[w]hether one is an ‘inferior’ officer depends on whether he has a superior,” and that “‘inferior officers’ are officers whose work is directed and supervised at some level” by other officers appointed by the President with the Senate's consent. In particular, we noted that “[t]he power to remove officers” at will and without cause “is a powerful tool for control” of an inferior. *Id.*, at 664. As explained above, the statutory restrictions on the Commission's power to remove Board members are unconstitutional and void. Given that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, and given the Commission's other oversight authority, we have no hesitation in concluding that under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a “Hea[d] of Departmen[t].”

But, petitioners argue, the Commission is not a “Departmen[t]” like the “Executive departments” (e.g., State, Treasury, Defense) listed in [5 U. S. C. §101](#). In *Freytag*, [501 U. S.](#), at 887, n. 4, we specifically reserved the question whether a “principal agenc[y], such as ... the Securities and Exchange Commission,” is a “Departmen[t]” under the Appointments Clause. Four Justices, however, would have concluded that the Commission is indeed such a “Departmen[t],” see *id.*, at 918 (SCALIA, J., concurring in part and concurring in judgment), because it is a “free-standing, self-contained entity in the Executive Branch,” *id.*, at 915.

Respondents urge us to adopt this reasoning as to those entities not addressed by our opinion in *Freytag*, and we do. Respondents' reading of the Appointments Clause is consistent with the common, near-contemporary definition of a “department” as a “separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person.” 1 N. Webster, *American Dictionary of the English Language* (1828) (def. 2) (1995 facsimile ed.). It is also consistent with the early practice of Congress, which in 1792 authorized the Postmaster General to appoint “an assistant, and deputy postmasters, at all places where such shall be found necessary,” §3, 1 Stat. 234—thus treating him as the “Hea[d] of [a] Departmen[t]” without the title of Secretary or any role in the President's Cabinet. And it is consistent with our prior cases, which have never invalidated an appointment made by the head of such an establishment. See [Freytag, supra, at 917](#) ; cf. *Burnap v. United States*, [252 U. S. 512, 515](#) (1920); *United States v. Germaine*, [99 U. S. 508, 511](#) (1879). Because the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a “Departmen[t]” for the purposes of the Appointments Clause.

But petitioners are not done yet. They argue that the full Commission cannot constitutionally

appoint Board members, because only the Chairman of the Commission is the Commission's "Hea[d]." The Commission's powers, however, are generally vested in the Commissioners jointly, not the Chairman alone. See, e.g., [15 U. S. C. §§77s](#), 77t, 78u, 78w. The Commissioners do not report to the Chairman, who exercises administrative and executive functions subject to the full Commission's policies. See Reorg. Plan No. 10 of 1950, §1(b)(1), 64 Stat. 1265. The Chairman is also appointed from among the Commissioners by the President alone, *id.*, [§3](#), at [1266](#), which means that he cannot be regarded as "the head of an agency" for purposes of the Reorganization Act. See [5 U. S. C. §904](#). (The Commission as a whole, on the other hand, does meet the requirements of the Act, including its provision that "the head of an agency [may] be an individual or a commission or board with more than one member.")

As a constitutional matter, we see no reason why a multimember body may not be the "Hea[d]" of a "Departmen[t]" that it governs. The Appointments Clause necessarily contemplates collective appointments by the "Courts of Law," Art. II, §2, cl. 2, and each House of Congress, too, appoints its officers collectively, see Art. I, §2, cl. 5; *id.*, [§3](#), cl. 5. Petitioners argue that the Framers vested the nomination of principal officers in the President to avoid the perceived evils of collective appointments, but they reveal no similar concern with respect to inferior officers, whose appointments may be vested elsewhere, including in multimember bodies. Practice has also sanctioned the appointment of inferior officers by multimember agencies. *See Freytag, supra*, at 918 (SCALIA, J., [concurring in part and concurring in judgment](#)); see also Classification Act of 1923, ch. 265, §2, 42 Stat. 1488 (defining "the head of the department" to mean "the officer *or group of officers* ... who are not subordinate or responsible to any other officer of the department" (emphasis added)); [37 Op. Atty. Gen. 227, 231](#) (1933) (endorsing collective appointment by the Civil Service Commission). We conclude that the Board members have been validly appointed by the full Commission.

In light of the foregoing, petitioners are not entitled to broad injunctive relief against the Board's continued operations. But they are entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive. See *Bowsher*, [478 U. S., at 727, n. 5](#) (concluding that a separation of powers violation may create a "here-and-now" injury that can be remedied by a court (internal quotation marks omitted)).

* * *

The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority "would greatly diminish the intended and necessary responsibility of the chief magistrate himself." The Federalist No. 70, at 478.

While we have sustained in certain cases limits on the President’s removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President’s authority in this way.

The judgment of the United States Court of Appeals for the District of Columbia Circuit is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join, Dissenting. . . .

I agree that the Accounting Board members are inferior officers. See *ante*, at 28–29. But in my view the statute does not significantly interfere with the President’s “executive Power.” Art. II, §1. It violates no separation-of-powers principle. And the Court’s contrary holding threatens to disrupt severely the fair and efficient administration of the laws. I consequently dissent.

I

A

The legal question before us arises at the intersection of two general constitutional principles. On the one hand, Congress has broad power to enact statutes “necessary and proper” to the exercise of its specifically enumerated constitutional authority. Art. I, §8, cl. 18. As Chief Justice Marshall wrote for the Court nearly 200 years ago, the Necessary and Proper Clause reflects the Framers’ efforts to create a Constitution that would “endure for ages to come.” *McCulloch v. Maryland*, [4 Wheat. 316, 415](#) (1819). It embodies their recognition that it would be “unwise” to prescribe “the means by which government should, in all future time, execute its powers.” *Ibid.* Such “immutable rules” would deprive the Government of the needed flexibility to respond to future “exigencies which, if foreseen at all, must have been seen dimly.” *Ibid.* Thus the Necessary and Proper Clause affords Congress broad authority to “create” governmental “‘offices’ ” and to structure those offices “as it chooses.” *Buckley v. Valeo*, [424 U. S. 1, 138](#) (1976) (*per curiam*); cf. *Lottery Case*, [188 U. S. 321, 355](#) (1903). And Congress has drawn on that power over the past century to create numerous federal agencies in response to “various crises of human affairs” as they have arisen. [McCulloch, supra, at 415 \(emphasis deleted\)](#). Cf. *Wong Yang Sung v. McGrath*, 339 U. S. 33, 36–37 (1950).

On the other hand, the opening sections of Articles I, II, and III of the Constitution separately

and respectively vest “all legislative Powers” in Congress, the “executive Power” in the President, and the “judicial Power” in the Supreme Court (and such “inferior Courts as Congress may from time to time ordain and establish”). In doing so, these provisions imply a structural separation-of-powers principle. See, *e.g.*, *Miller v. French*, 530 U. S. 327, 341–342 (2000). And that principle, along with the instruction in Article II, §3 that the President “shall take Care that the Laws be faithfully executed,” limits Congress’ power to structure the Federal Government. See, *e.g.*, *INS v. Chadha*, [462 U. S. 919, 946](#) (1983); *Freytag v. Commissioner*, [501 U. S. 868, 878](#) (1991); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, [458 U. S. 50, 64](#) (1982); *Commodity Futures Trading Comm’n v. Schor*, 478 U. S. 833, 859–860 (1986). Indeed, this Court has held that the separation-of-powers principle guarantees the President the authority to dismiss certain Executive Branch officials at will. *Myers v. United States*, [272 U. S. 52](#) (1926).

But neither of these two principles is absolute in its application to removal cases. The Necessary and Proper Clause does not grant Congress power to free *all* Executive Branch officials from dismissal at the will of the President. *Ibid.* Nor does the separation-of-powers principle grant the President an absolute authority to remove *any and all* Executive Branch officials at will. Rather, depending on, say, the nature of the office, its function, or its subject matter, Congress sometimes may, consistent with the Constitution, limit the President’s authority to remove an officer from his post. See *Humphrey’s Executor v. United States*, [295 U. S. 602](#) (1935), overruling in part *Myers, supra*; *Morrison v. Olson*, [487 U. S. 654](#) (1988). And we must here decide whether the circumstances surrounding the statute at issue justify such a limitation.

In answering the question presented, we cannot look to more specific constitutional text, such as the text of the Appointments Clause or the Presentment Clause, upon which the Court has relied in other separation-of-powers cases. See, *e.g.*, *Chadha, supra*, at 946; *Buckley, supra*, at 124–125. That is because, with the exception of the general “vesting” and “take care” language, the Constitution is completely “silent with respect to the power of removal from office.” *Ex parte Hennen*, 13 Pet. 230, 258 (1839); [see also Morrison, supra](#), at 723 (SCALIA, J., *dissenting*) (“There is, of course, no provision in the Constitution stating who may remove executive officers ...”).

Nor does history offer significant help. The President’s power to remove Executive Branch officers “was not discussed in the Constitutional Convention.” *Myers, supra*, at 109–110. The First Congress enacted federal statutes that limited the President’s ability to *oversee* Executive Branch officials, including the Comptroller of the United States, federal district attorneys (precursors to today’s United States Attorneys), and, to a lesser extent, the Secretary of the Treasury. See, *e.g.*, Lessig, Readings By Our Unitary Executive, 15 *Cardozo L. Rev.* 175, 183–184 (1993); Teifer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 *B. U. L. Rev.* 59, 74–75 (1983); Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 *Wm. & Mary L. Rev.* 211, 240–241 (1989) (hereinafter Casper); H. Bruff, Balance of Forces: Separation of Powers in the Administrative State 414–417

(2006). But those statutes did not directly limit the President’s authority to *remove* any of those officials—“a subject” that was “much disputed” during “the early history of this government,” “and upon which a great diversity of opinion was entertained.” *Hennen, supra*, at 259; see also *United States ex rel. Goodrich v. Guthrie*, [17 How. 284, 306](#) (1855) (McLean, J., dissenting); Casper 233–237 (recounting the Debate of 1789). Scholars, like Members of this Court, have continued to disagree, not only about the inferences that should be drawn from the inconclusive historical record, but also about the nature of the original disagreement. Compare *ante*, at 11; [Myers, supra, at 114 \(majority opinion of Taft, C. J.\)](#); and Prakash, *New Light on the Decision of 1789*, [91 Cornell L. Rev. 1021](#) (2006), with, *e.g.*, [Myers, supra, at 194 \(McReynolds, J., dissenting\)](#); Corwin, *Tenure of Office and the Removal Power Under the Constitution*, [27 Colum. L. Rev. 353, 369](#) (1927); Lessig & Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 25–26 (1994) (hereinafter Lessig & Sunstein); and L. Fisher, *President and Congress: Power and Policy* 86–89 (1972).

Nor does this Court’s precedent fully answer the question presented. At least it does not clearly invalidate the provision in dispute. . . .

B

When previously deciding this kind of nontextual question, the Court has emphasized the importance of examining how a particular provision, taken in context, is likely to function. Thus, in *Crowell v. Benson*, [285 U.S. 22, 53](#) (1932), a foundational separation-of-powers case, the Court said that “regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required.” The Court repeated this injunction in *Schor* and again in *Morrison*. See *Schor, supra*, at 854 (stating that the Court must look “‘beyond form to the substance of what’ Congress has done”); *Morrison*, 487 U.S., at 689–690 (“The analysis contained in our removal cases is designed *not to define rigid categories* of those officials who may or may not be removed at will by the President,” but rather asks whether, given the “functions of the officials in question,” a removal provision “interfere[s] with the President’s exercise of the ‘executive power’ ” (emphasis added)). The Court has thereby written into law Justice Jackson’s wise perception that “the Constitution . . . contemplates that practice will integrate the dispersed powers into *a workable government*.” *Youngstown Sheet & Tube Co. v. Sawyer*, [343 U.S. 579, 635](#) (1952) (opinion concurring in judgment) (emphasis added). See also *ibid.* (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context”).

It is not surprising that the Court in these circumstances has looked to function and context, and not to bright-line rules. For one thing, that approach embodies the intent of the Framers. As Chief Justice Marshall long ago observed, our Constitution is fashioned so as to allow the three coordinate branches, including this Court, to exercise practical judgment in response to changing conditions and “exigencies,” which at the time of the founding could be seen only “dimly,” and

perhaps not at all. *McCulloch*, [4 Wheat.](#), at 415.

For another, a functional approach permits Congress and the President the flexibility needed to adapt statutory law to changing circumstances. That is why the “powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role” over time. *New York v. United States*, [505 U.S. 144, 157](#) (1992). . . .

Federal statutes now require or permit Government officials to provide, regulate, or otherwise administer, not only foreign affairs and defense, but also a wide variety of such subjects as taxes, welfare, social security, medicine, pharmaceutical drugs, education, highways, railroads, electricity, natural gas, nuclear power, financial instruments, banking, medical care, public health and safety, the environment, fair employment practices, consumer protection and much else besides. Those statutes create a host of different organizational structures. . . .

The upshot is that today vast numbers of statutes governing vast numbers of subjects, concerned with vast numbers of different problems, provide for, or foresee, their execution or administration through the work of administrators organized within many different kinds of administrative structures, exercising different kinds of administrative authority, to achieve their legislatively mandated objectives. And, given the nature of the Government’s work, it is not surprising that administrative units come in many different shapes and sizes.

The functional approach required by our precedents recognizes this administrative complexity and, more importantly, recognizes the various ways presidential power operates within this context—and the various ways in which a removal provision might affect that power. As human beings have known ever since Ulysses tied himself to the mast so as safely to hear the Sirens’ song, sometimes it is necessary to disable oneself in order to achieve a broader objective. Thus, legally enforceable commitments—such as contracts, statutes that cannot instantly be changed, and, as in the case before us, the establishment of independent administrative institutions—hold the potential to empower precisely because of their ability to constrain. If the President seeks to regulate through impartial adjudication, then insulation of the adjudicator from removal at will can help him achieve that goal. And to free a technical decisionmaker from the fear of removal without cause can similarly help create legitimacy with respect to that official’s regulatory actions by helping to insulate his technical decisions from nontechnical political pressure.

Neither is power always susceptible to the equations of elementary arithmetic. A rule that takes power from a President’s friends and allies may weaken him. But a rule that takes power from the President’s opponents may strengthen him. And what if the rule takes power from a functionally *neutral* independent authority? In that case, it is difficult to predict how the President’s power is affected in the abstract. . . .

II

A

To what extent then is the Act's "for cause" provision likely, as a practical matter, to limit the President's exercise of executive authority? In practical terms no "for cause" provision can, in isolation, define the full measure of executive power. This is because a legislative decision to place ultimate administrative authority in, say, the Secretary of Agriculture rather than the President, the way in which the statute defines the scope of the power the relevant administrator can exercise, the decision as to who controls the agency's budget requests and funding, the relationships between one agency or department and another, as well as more purely political factors (including Congress' ability to assert influence) are more likely to affect the President's power to get something done. . . .

Indeed, notwithstanding the majority's assertion that the removal authority is "*the* key" mechanism by which the President oversees inferior officers in the independent agencies, it appears that no President has ever actually sought to exercise that power by testing the scope of a "for cause" provision.

But even if we put all these other matters to the side, we should still conclude that the "for cause" restriction before us will not restrict presidential power significantly. For one thing, the restriction directly limits, not the President's power, but the power of an already independent agency. The Court seems to have forgotten that fact when it identifies its central constitutional problem: According to the Court, the President "is powerless to intervene" if he has determined that the Board members' "conduct merit[s] removal" because "[t]hat decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President's direct control." But so long as the President is *legitimately* foreclosed from removing the *Commissioners* except for cause (as the majority assumes), nullifying the Commission's power to remove Board members only for cause will not resolve the problem the Court has identified: The President will *still* be "powerless to intervene" by removing the Board members if the Commission reasonably decides not to do so.

In other words, the Court fails to show why *two* layers of "for cause" protection—Layer One insulating the Commissioners from the President, and Layer Two insulating the Board from the Commissioners—impose any more serious limitation upon the *President's* powers than *one* layer. Consider the four scenarios that might arise:

1. The President and the Commission both want to keep a Board member in office. Neither layer is relevant.
2. The President and the Commission both want to dismiss a Board member. Layer Two stops

them both from doing so without cause. The President's ability to remove the Commission (Layer One) is irrelevant, for he and the Commission are in agreement.

3. The President wants to dismiss a Board member, but the Commission wants to keep the member. Layer One allows the Commission to make that determination notwithstanding the President's contrary view. Layer Two is irrelevant because the Commission does not seek to remove the Board member.

4. The President wants to keep a Board member, but the Commission wants to dismiss the Board member. Here, Layer Two *helps the President*, for it hinders the Commission's ability to dismiss a Board member whom the President wants to keep in place.

Thus, the majority's decision to eliminate only *Layer Two* accomplishes virtually nothing. And that is because a removal restriction's effect upon presidential power depends not on the presence of a "double-layer" of for-cause removal, as the majority pretends, but rather on the real-world nature of the President's relationship with the Commission. If the President confronts a Commission that seeks to *resist* his policy preferences—a distinct possibility when, as here, a Commission's membership must reflect both political parties, [15 U. S. C. §78d\(a\)](#)—the restriction on the *Commission's* ability to remove a Board member is either irrelevant (as in scenario 3) or may actually help the President (as in scenario 4). And if the President faces a Commission that seeks to *implement* his policy preferences, Layer One is irrelevant, for the President and Commission see eye to eye.

In order to avoid this elementary logic, the Court creates two alternative scenarios. In the first, the Commission and the President *both* want to remove a Board member, but have varying judgments as to whether they have good "cause" to do so—*i.e.*, the President and the Commission both conclude that a Board member should be removed, but disagree as to whether that conclusion (which they have both reached) is *reasonable*. In the second, the President wants to remove a Board member and the Commission disagrees; but, notwithstanding its freedom to make reasonable decisions independent of the President (afforded by Layer One), the Commission (while apparently telling the President that it agrees with him and would like to remove the Board member) uses Layer Two as an "excuse" to pursue its actual aims—an excuse which, given Layer One, it does not need.

Both of these circumstances seem unusual. I do not know if they have ever occurred. But I do not deny their logical possibility. I simply doubt their importance. And the fact that, with respect to the President's power, the double layer of for-cause removal sometimes might help, sometimes might hurt, leads me to conclude that its overall effect is at most indeterminate.

But once we leave the realm of hypothetical logic and view the removal provision at issue in the context of the entire Act, its lack of practical effect becomes readily apparent. That is because the

statute provides the Commission with full authority and virtually comprehensive control over all of the Board’s functions. Those who created the Accounting Board modeled it, in terms of structure and authority, upon the semiprivate regulatory bodies prevalent in the area of financial regulation, such as the New York Stock Exchange and other similar self-regulating organizations. And those organizations—which rely on private financing and on officers drawn from the private sector—exercise rulemaking and adjudicatory authority that is pervasively controlled by, and is indeed “entirely derivative” of, the SEC. See *National Assn. of Securities Dealers, Inc. v. SEC*, [431 F. 3d 803, 806](#) (CA DC 2005).

Adhering to that model, the statute here gives the Accounting Board the power to adopt rules and standards “relating to the preparation of audit reports”; to adjudicate disciplinary proceedings involving accounting firms that fail to follow these rules; to impose sanctions; and to engage in other related activities, such as conducting inspections of accounting firms registered as the law requires and investigations to monitor compliance with the rules and related legal obligations. See [15 U. S. C. §§7211–7216](#). . . .

[T]he Court is simply wrong when it says that “the Act nowhere gives the Commission effective power to start, stop, or alter” Board investigations. *Ante*, at 23–24. On the contrary, the Commission’s control over the Board’s investigatory and legal functions is virtually absolute. Moreover, the Commission has general supervisory powers over the Accounting Board itself: It controls the Board’s budget, §§7219(b), (d)(1); it can assign to the Board any “duties or functions” that it “determines are necessary or appropriate,” §7211(c)(5); it has full “oversight and enforcement authority over the Board,” §7217(a), *including the authority to inspect the Board’s activities whenever it believes it “appropriate” to do so*, §7217(d)(2) (emphasis added). And it can censure the Board or its members, as well as remove the members from office, if the members, for example, fail to enforce the Act, violate any provisions of the Act, or abuse the authority granted to them under the Act, §7217(d)(3). . . .

What is left? The Commission’s inability to remove a Board member whose perfectly *reasonable* actions cause the Commission to overrule him with great frequency? What is the practical likelihood of that occurring, or, if it does, of the President’s serious concern about such a matter? Everyone concedes that the President’s control over the Commission is constitutionally sufficient. See *Humphrey’s Executor*, [295 U. S. 602](#); *Wiener*, [357 U. S. 349](#). And if the President’s control over the Commission is sufficient, and the Commission’s control over the Board is virtually absolute, then, as a practical matter, the President’s control over the Board should prove sufficient as well.

B

At the same time, Congress and the President had good reason for enacting the challenged “for cause” provision. First and foremost, the Board adjudicates cases. See [15 U. S. C. §7215](#). This

Court has long recognized the appropriateness of using “for cause” provisions to protect the personal independence of those who even only sometimes engage in adjudicatory functions. *Humphrey’s Executor, supra*, at 623–628; [see also Wiener, supra, at 355-356](#); *Morrison*, 487 U. S., at 690–691, and n. 30; *McAllister v. United States*, 141 U. S. 174, 191–201 (1891) (Field, J., dissenting). Indeed, as early as 1789 James Madison stated that “there may be strong reasons why an” executive “officer” such as the Comptroller of the United States “should not hold his office at the pleasure of the Executive branch” if one of his “principal dut[ies]” “partakes strongly of the judicial character.” The Court, however, all but ignores the Board’s adjudicatory functions when conducting its analysis. And when it finally does address that central function (in a footnote), it simply asserts that the Board *does not* “perform adjudicative ... functions,” an assertion that is inconsistent with the terms of the statute. . . .

Here, the justification for insulating the “technical experts” on the Board from fear of losing their jobs due to political influence is particularly strong. Congress deliberately sought to provide that kind of protection. See, e.g., 148 Cong. Rec. 12036, 12115, 13352–13355. It did so for good reason. . . .

In sum, Congress and the President could reasonably have thought it prudent to insulate the adjudicative Board members from fear of purely politically based removal. Cf. *Civil Service Comm’n v. Letter Carriers*, [413 U. S. 548, 565](#) (1973) (“[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent”). And in a world in which we count on the Federal Government to regulate matters as complex as, say, nuclear-power production, the Court’s assertion that we should simply learn to get by “without being” regulated “by experts” is, at best, unrealistic—at worst, dangerously so. *Ante*, at 18.

C

Where a “for cause” provision is so unlikely to restrict presidential power and so likely to further a legitimate institutional need, precedent strongly supports its constitutionality. First, in considering a related issue in *Nixon v. Administrator of General Services*, [433 U. S. 425](#) (1977), the Court made clear that when “determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.” *Id.*, at [443](#). The Court said the same in *Morrison*, where it upheld a restriction on the President’s removal power. [487 U. S., at 691](#) (“[T]he real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light”). Here, the removal restriction may somewhat diminish the *Commission’s* ability to control the Board, but it will have little, if any, negative effect in respect to the President’s ability to control the Board, let

alone to coordinate the Executive Branch. See Part II–A, *supra*. Indeed, given *Morrison*, where the Court upheld a restriction that significantly interfered with the President’s important historic power to control criminal prosecutions, a “ ‘purely executive’ ” function, 487 U. S., at 687–689, the constitutionality of the present restriction would seem to follow *a fortiori*.

Second, as previously pointed out, this Court has repeatedly upheld “for cause” provisions where they restrict the President’s power to remove an officer with adjudicatory responsibilities. Compare *Humphrey’s Executor*, 295 U. S., at 623–628; *Wiener*, [357 U. S., at 355](#); *Schor*, [478 U. S., at 854](#); *Morrison, supra, at 691*, n. 30. And we have also upheld such restrictions when they relate to officials with technical responsibilities that warrant a degree of special independence. *E.g., Humphrey’s Executor, supra, at 624*. The Accounting Board’s functions involve both kinds of responsibility. And, accordingly, the Accounting Board’s adjudicatory responsibilities, the technical nature of its job, the need to attract experts to that job, and the importance of demonstrating the nonpolitical nature of the job to the public strongly justify a statute that assures that Board members need not fear for their jobs when competently carrying out their tasks, while still maintaining the Commission as the ultimate authority over Board policies and actions. See Part II–B, *supra*.

Third, consider how several cases fit together in a way that logically compels a holding of constitutionality here. In *Perkins*, 116 U. S., at 483, 484—which was reaffirmed in *Myers*, [272 U. S., at 127](#) and in *Morrison, supra, at 689*, n. 27—the Court upheld a removal restriction limiting the authority of the Secretary of the Navy to remove a “cadet-engineer,” whom the Court explicitly defined as an “inferior officer.” The Court said,

“We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments *it may limit and restrict the power of removal as it deems best for the public interest*. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.” [Perkins, supra, at 485 \(emphasis added; internal quotation marks omitted\)](#).

See also *Morrison, supra, at 723–724* (Scalia, J., dissenting) (agreeing that the power to remove an “inferior officer” who is appointed by a department head can be restricted). Cf. *ante, at 30–33* (holding that SEC Commissioners are “Heads of Departments”). . . .

Fourth, the Court has said that “[o]ur separation-of-powers jurisprudence generally focuses on the danger of one branch’s *aggrandizing its power* at the expense of another branch.” [Freytag, supra, at 878 \(emphasis added\)](#); accord, [Buckley, supra, at 129](#); [Schor, supra, at 856](#); [Morrison, supra, at 686](#); cf. [Bowsher, supra](#). Indeed, it has added that “the essence of the decision in *Myers*,” which is the only one of our cases to have struck down a “for cause” removal restriction, “was the judgment that the Constitution prevents Congress from ‘draw[ing] to itself

... *the power to remove.*' ” [Morrison, supra, at 686](#) (quoting [Myers, supra, at 161](#); emphasis added). Congress here has “drawn” no power to itself to remove the Board members. It has instead sought to *limit* its own power, by, for example, providing the Accounting Board with a revenue stream independent of the congressional appropriations process. See *supra*, at 19; see also Brief for Former SEC Chairmen 16. And this case thereby falls outside the ambit of the Court’s most serious constitutional concern.

In sum, the Court’s prior cases impose functional criteria that are readily met here. Once one goes beyond the Court’s elementary arithmetical logic (*i.e.*, “one plus one is greater than one”) our precedent virtually dictates a holding that the challenged “for cause” provision is constitutional.

D

We should ask one further question. Even if the “for cause” provision before us does not itself significantly interfere with the President’s authority or aggrandize Congress’ power, is it nonetheless necessary to adopt a bright-line rule forbidding the provision lest, through a series of such provisions, each itself upheld as reasonable, Congress might undercut the President’s central constitutional role? Cf. *Strauss* 625–626. The answer to this question is that no such need has been shown. Moreover, insofar as the Court seeks to create such a rule, it fails. And in failing it threatens a harm that is far more serious than any imaginable harm this “for cause” provision might bring about.

The Court fails to create a bright-line rule because of considerable uncertainty about the scope of its holding—an uncertainty that the Court’s opinion both reflects and generates. The Court suggests, for example, that its rule may not apply where an inferior officer “perform[s] adjudicative ... functions.” Cf. *ante*, at 26, n. 10. But the Accounting Board performs adjudicative functions. See *supra*, at 17–18. What, then, are we to make of the Court’s potential exception? And would such an exception apply to an administrative law judge who also has important administrative duties beyond pure adjudication? See, *e.g.*, [8 CFR §1003.9](#), [34 CFR §81.4](#) (2009). The Court elsewhere suggests that its rule may be limited to removal statutes that provide for “judicial review of a[n] effort to remove” an official for cause. But we have previously stated that *all* officers protected by a for-cause removal provision and later subject to termination are entitled to “notice and [a] hearing” in the “courts,” as without such review “the appointing power” otherwise “could remove at pleasure or for such cause as [only] it deemed sufficient.” *Reagan v. United States*, [182 U. S. 419, 425](#) (1901); *Shurtleff*, [189 U. S., at 314](#); cf. *Humphrey’s Executor, supra* (entertaining civil suit challenging removal). [But cf. Bowsher, supra, at 729](#). What weight, then, should be given to this hint of an exception?

The Court further seems to suggest that its holding may not apply to inferior officers who have a different relationship to their appointing agents than the relationship between the Commission

and the Board. But the only characteristic of the “relationship” between the Commission and the Board that the Court apparently deems relevant is that the relationship includes two layers of for-cause removal. Why then would any different relationship that also includes two layers of for-cause removal survive where this one has not? In a word, what differences are relevant? If the Court means to state that its holding in fact applies only where Congress has “enacted an *unusually high standard*” of for-cause removal—and does not otherwise render two layers of “ ‘ordinary’ ” for-cause removal unconstitutional—I should welcome the statement. But much of the majority’s opinion appears to avoid so narrow a holding in favor of a broad, basically mechanical rule—a rule that, as I have said, is divorced from the context of the case at hand. Compare Parts III–A, III–B, III–C, *ante*, with Parts II–A, II–B, II–C, *supra*. And such a mechanical rule cannot be cabined simply by saying that, *perhaps*, the rule does not apply to instances that, at least at first blush, seem highly similar. A judicial holding by its very nature is not “a restricted railroad ticket, good for” one “day and train only.” *Smith v. Allwright*, [321 U. S. 649, 669](#) (1944) (Roberts, J., dissenting).

The Court begins to reveal the practical problems inherent in its double for-cause rule when it suggests that its rule may not apply to “the civil service.” The “civil service” is defined by statute to include “all appointive positions in ... the Government of the United States,” excluding the military, but including *all* civil “officer[s]” up to and including those who are subject to Senate confirmation. [5 U. S. C. §§2101](#), 2102(a)(1)(B), 2104. The civil service thus includes many officers indistinguishable from the members of both the Commission and the Accounting Board. Indeed, as this Court recognized in *Myers*, the “competitive service”—the class within the broader civil service that enjoys the most robust career protection—“includes a *vast majority* of all the civil officers” in the United States. [272 U. S., at 173](#) (emphasis added); [5 U. S. C. §2102\(c\)](#).

But even if I assume that the majority categorically excludes the competitive service from the scope of its new rule, the exclusion would be insufficient. This is because the Court’s “double for-cause” rule applies to appointees who are “inferior officer[s].” *Ante*, at 2. And who are they? Courts and scholars have struggled for more than a century to define the constitutional term “inferior officers,” without much success. See 2 J. Story, *Commentaries on the Constitution* §1536, pp. 397–398 (3d ed. 1858) (“[T]here does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the constitution”); *Edmond v. United States*, [520 U. S. 651, 661](#) (1997) (“Our cases have not set forth an exclusive criterion for [defining] inferior officers”); Memorandum from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, to the General Counsels of the Executive Branch: Officers of the United States Within the Meaning of the Appointments Clause, p. 3 (Apr. 16, 2007) (hereinafter OLC Memo), online at <http://www.justice.gov/olc/2007/appointmentsclausev10.pdf> (“[T]he Supreme Court has not articulated the precise scope and application of the [Inferior Officer] Clause’s requirements”); Konecke, *The Appointments Clause and Military Judges: Inferior Appointment to a Principal*

Office, [5 Seton Hall Const. L. J. 489, 492](#) (1995) (same); Burkoff, Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo, [22 Wayne L. Rev. 1335, 1347, 1364](#) (1976) (describing our early precedent as “circular” and our later law as “not particularly useful”). The Court does not clarify the concept. But without defining who is an inferior officer, to whom the majority’s new rule applies, we cannot know the scope or the coherence of the legal rule that the Court creates. I understand the virtues of a common-law case-by-case approach. But here that kind of approach (when applied without more specificity than I can find in the Court’s opinion) threatens serious harm.

The problem is not simply that the term “inferior officer” is indefinite but also that efforts to define it inevitably conclude that the term’s sweep is unusually broad. Consider the Court’s definitions: Inferior officers are, *inter alia*, (1) those charged with “the administration and enforcement of the public law,” *Buckley*, [424 U. S., at 139](#); *ante*, at 2; (2) those granted “significant authority,” [424 U. S., at 126](#); *ante*, at 25; (3) those with “responsibility for conducting civil litigation in the courts of the United States,” [424 U. S., at 140](#); and (4) those “who can be said to hold an office,” *United States v. Germaine*, [99 U. S. 508, 510](#) (1879), that has been created either by “regulations” or by “statute,” *United States v. Mouat*, 124 U. S. 303, 307–308 (1888).

Consider the definitional conclusion that the Department of Justice more recently reached: An “inferior officer” is anyone who holds a “continuing” position and who is “invested by legal authority with a portion of the sovereign powers of the federal Government,” including, *inter alia*, the power to “arrest criminals,” “seize persons or property,” “issue regulations,” “issue ... authoritative legal opinions,” “conduc[t] civil litigation,” “collec[t] revenue,” represent “the United States to foreign nations,” “command” military force, or *enter into* “contracts” on behalf “of the nation.”

And consider the fact that those whom this Court has *held* to be “officers” include: (1) a district court clerk, *Hennen*, 13 Pet., at 258; (2) “thousands of clerks in the Departments of the Treasury, Interior and the othe[r]” departments, *Germaine, supra, at 511*, who are responsible for “the records, books, and papers appertaining to the office,” *Hennen, supra*, at 259; (3) a clerk to “the assistant treasurer” stationed “at Boston,” *United States v. Hartwell*, [6 Wall. 385, 392](#) (1868); (4 & 5) an “assistant-surgeon” and a “cadet-engineer” appointed by the Secretary of the Navy, *United States v. Moore*, [95 U. S. 760, 762](#) (1878); *Perkins*, [116 U. S., at 484](#); (6) election monitors, *Ex parte Siebold*, 100 U. S. 371, 397–399 (1880); (7) [United States attorneys, Myers, supra, at 159](#); (8) federal marshals, *Siebold, supra*, at 397; *Morrison*, [487 U. S., at 676](#); (9) military judges, *Weiss v. United States*, [510 U. S., 163, 170](#) (1994); (10) judges in Article I courts, *Freytag*, 501 U. S., at 880–881; and (11) the general counsel of the Department of Transportation, *Edmond v. United States*, [520 U. S. 651](#) (1997). Individual Members of the Court would add to the list the Federal Communication Commission’s managing director, the Federal Trade Commission’s “secretary,” the general counsel of the Commodity Futures Trading

Commission, and more generally, bureau chiefs, general counsels, and administrative law judges, see *Freytag, supra*, at 918–920 (SCALIA, J., concurring in part and concurring in judgment), as well as “ordinary commissioned military officers,” [Weiss, supra, at 182 \(Souter, J., concurring\)](#).

Reading the criteria above as stringently as possible, I still see no way to avoid sweeping hundreds, perhaps thousands of high level government officials within the scope of the Court’s holding, putting their job security and their administrative actions and decisions constitutionally at risk. To make even a conservative estimate, one would have to begin by listing federal departments, offices, bureaus and other agencies whose heads are by statute removable only “for cause.” I have found 48 such agencies, which I have listed in Appendix A, *infra*. Then it would be necessary to identify the senior officials in those agencies (just below the top) who themselves are removable only “for cause.” I have identified 573 such high-ranking officials, whom I have listed in Appendix B, *infra*. They include most of the leadership of the Nuclear Regulatory Commission (including that agency’s executive director as well as the directors of its Office of Nuclear Reactor Regulation and Office of Enforcement), virtually all of the leadership of the Social Security Administration, the executive directors of the Federal Energy Regulatory Commission and the Federal Trade Commission, as well as the general counsels of the Chemical Safety Board, the Federal Mine Safety and Health Review Commission, and the National Mediation Board.

This list is a conservative estimate because it consists only of career appointees in the Senior Executive Service (SES), see [5 U. S. C. §§2101a](#), 3132(a)(2), a group of high-ranking officials distinct from the “competitive service,” see §2101(a)(1)(C), who “serve in the key positions just below the top Presidential appointees,” Office of Personnel Management, About the Senior Executive Service, online at http://www.opm.gov/ses/about_ses/index.asp; §2102(a)(1)(C), and who are, without exception, subject to “removal” only for cause. §§7542–7543; see also §2302(a)(2) (substantially limiting conditions under which “a career appointee in the Senior Executive Service” may be “transfer[red], or reassign[ed]”). . . . Is the SES exempt from today’s rule or is it not? The Court, after listing reasons why the SES may be different, simply says that it will not “addres[s]” the matter. *Ante*, at 27. Perhaps it does not do so because it cannot do so without revealing the difficulty of distinguishing the SES from the Accounting Board and thereby also revealing the inherent instability of the legal rule it creates. . . .

The majority asserts that its opinion will not affect the Government’s ability to function while these many questions are litigated in the lower courts because the Court’s holding concerns only “the conditions under which th[e]se officers might some day be removed.” But this case was not brought by federal officials challenging their potential removal. It was brought by private individuals who were *subject to regulation* “‘here-and-now’ ” and who “object to the” very “existence” of the regulators themselves. *Ante*, at 33, 8 (emphasis added). And those private individuals have prevailed. Thus, any person similarly regulated by a federal official who is potentially subject to the Court’s amorphous new rule will be able to bring an “implied private

right of action directly under the Constitution” “seeking ... a declaratory judgment that” the official’s actions are “unconstitutional and an injunction preventing the” official “from exercising [his] powers.” Such a plaintiff need not even first exhaust his administrative remedies.

Nor is it clear that courts will always be able to cure such a constitutional defect merely by severing an offending removal provision. For a court’s “ability to devise [such] a judicial remedy ... often depends on how clearly” the “background constitutional rules at issue” have been “articulated”; severance will be unavailable “in a murky constitutional context,” which is precisely the context that the Court’s new rule creates. *Ayotte v. Planned Parenthood of Northern New Eng.*, [546 U.S. 320, 329, 330](#) (2006). Moreover, “the touchstone” of the severability analysis “is legislative intent,” *id.*, [at 330](#), and Congress has repeatedly expressed its judgment “over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service,” *Civil Service Comm’n*, [413 U.S., at 557](#); see also *Bush v. Lucas*, 462 U.S. 367, 380–388 (1983) (describing the history of “Congressional attention to the problem of politically-motivated removals”). And so it may well be that courts called upon to resolve the many questions the majority’s opinion raises will not only apply the Court’s new rule to its logical conclusion, but will also determine that the only available remedy to certain double for-cause problems is to invalidate entire agencies.

Thus, notwithstanding the majority’s assertions to the contrary, the potential consequences of today’s holding are worrying. The upshot, I believe, is a legal dilemma. To interpret the Court’s decision as applicable only in a few circumstances will make the rule less harmful but arbitrary. To interpret the rule more broadly will make the rule more rational, but destructive. . . .

Chapter 3

FEDERALISM LIMITS ON FEDERAL COURTS

§ 3.03 Eleventh Amendment

Page 314: [Add at end of Notes and Questions:]

(11) In *Sossamon v. Texas*, 563 U.S. ____ (2011), the Court held that when states accept federal funds they do not waive their sovereign immunity for suits for damages under the federal program. The Religious Land Use and Institutionalized Persons Act of 2000 forbids government entities from imposing a substantial burden on the religious exercise of an institutionalized person unless the government demonstrates that the burden is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest in any case where the burden is imposed in a program or activity that receives Federal financial assistance. The Act permitted aggrieved persons to assert a violation in a judicial proceeding and “obtain appropriate relief against a government.” The Court found that the “appropriate relief” is not a sufficiently unequivocal expression of state consent to be sued.

Chapter 4

FEDERALISM LIMITS ON THE ELECTED BRANCHES AND ON THE STATES

§4.02 SCOPE OF FEDERAL POWER

Page 362: [Add before Notes and Questions:]

UNITED STATES v. COMSTOCK

United States Supreme Court

— U.S. —, [130 S. Ct. 1949](#), 176 L. Ed. 2d 878, (2010)

JUSTICE BREYER delivered the opinion of the Court.

A federal civil-commitment statute authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released. [18 U.S.C. § 4248](#). We have previously examined similar statutes enacted under state law to determine whether they violate the Due Process Clause. See *Kansas v. Hendricks*, [521 U.S. 346, 356-358](#) (1997); *Kansas v. Crane*, [534 U.S. 407](#) (2002). But this case presents a different question. Here we ask whether the Federal Government has the authority under Article I of the Constitution to enact this federal civil-commitment program or whether its doing so falls beyond the reach of a government “of enumerated powers.” *McCulloch v. Maryland*, [4 Wheat. 316, 405](#), 4 L.Ed. 579 (1819). We conclude that the Constitution grants Congress the authority to enact § 4248 as “necessary and proper for carrying into Execution” the powers “vested by” the “Constitution in the Government of the United States.” Art. I, § 8, cl. 18.

I

The federal statute before us allows a district court to order the civil commitment of an individual who is currently “in the custody of the [Federal] Bureau of Prisons,” § 4248, if that individual (1) has previously “engaged or attempted to engage in sexually violent conduct or child molestation,” (2) currently “suffers from a serious mental illness, abnormality, or disorder,” and (3) “as a result of” that mental illness, abnormality, or disorder is “sexually dangerous to others,” in that “he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.” §§ 4247(a)(5)-(6).

In order to detain such a person, the Government (acting through the Department of Justice) must certify to a federal district judge that the prisoner meets the conditions just described, *i.e.*, that he has engaged in sexually violent activity or child molestation in the past and that he suffers from a mental illness that makes him correspondingly dangerous to others. § 4248(a). When such a certification is filed, the statute automatically stays the individual's release from prison, *ibid.*, thereby giving the Government an opportunity to prove its claims at a hearing through psychiatric (or other) evidence, §§ 4247(b)-(c), 4248(b). The statute provides that the prisoner “shall be represented by counsel” and shall have “an opportunity” at the hearing “to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine” the Government's witnesses. §§ 4247(d), 4248(c).

If the Government proves its claims by “clear and convincing evidence,” the court will order the prisoner's continued commitment in “the custody of the Attorney General,” who must “make all reasonable efforts to cause” the State where that person was tried, or the State where he is domiciled, to “assume responsibility for his custody, care, and treatment.” § 4248(d); cf. *Sullivan v. Freeman*, [944 F.2d 334, 337](#) (C.A.7 1991). If either State is willing to assume that responsibility, the Attorney General “shall release” the individual “to the appropriate official” of

that State. § 4248(d). But if, “notwithstanding such efforts, neither such State will assume such responsibility,” then “the Attorney General shall place the person for treatment in a suitable [federal] facility.” *Ibid.*; cf. § 4247(i)(A).

Confinement in the federal facility will last until either (1) the person's mental condition improves to the point where he is no longer dangerous (with or without appropriate ongoing treatment), in which case he will be released; or (2) a State assumes responsibility for his custody, care, and treatment, in which case he will be transferred to the custody of that State. §§ 4248(d)(1)-(2). The statute establishes a system for ongoing psychiatric and judicial review of the individual's case, including judicial hearings at the request of the confined person at six-month intervals. §§ 4247(e)(1)(B), (h).

In November and December 2006, the Government instituted proceedings in the Federal District Court for the Eastern District of North Carolina against the five respondents in this case. Three of the five had previously pleaded guilty in federal court to possession of child pornography, see [507 F.Supp.2d 522, 526, and n. 2](#) (2007); § 2252A(a), and the fourth had pleaded guilty to sexual abuse of a minor, see *United States v. Vigil*, No. 1:99CR00509-001 (D NM, Jan. 26, 2000); §§ 1153, 2243(a). With respect to each of them, the Government claimed that the respondent was about to be released from federal prison, that he had engaged in sexually violent conduct or child molestation in the past, and that he suffered from a mental illness that made him sexually dangerous to others. During that same time period, the Government instituted similar proceedings against the fifth respondent, who had been charged in federal court with aggravated sexual abuse of a minor, but was found mentally incompetent to stand trial. See *id.*, at [41-43](#); *United States v. Catron*, No. 04-778 (D Ariz., Mar. 27, 2006); § 4241(d).

Each of the five respondents moved to dismiss the civil-commitment proceeding on constitutional grounds. They claimed that the commitment proceeding is, in fact, criminal, not civil, in nature and consequently that it violates the Double Jeopardy Clause, the *Ex Post Facto* Clause, and the Sixth and Eighth Amendments. [507 F.Supp.2d, at 528](#). They claimed that the statute denies them substantive due process and equal protection of the laws. *Ibid.* They claimed that it violates their procedural due process rights by allowing a showing of sexual dangerousness to be made by clear and convincing evidence, instead of by proof beyond a reasonable doubt. *Ibid.* And, finally, they claimed that, in enacting the statute, Congress exceeded the powers granted to it by Art. I, § 8 of the Constitution, including those granted by the Commerce Clause and the Necessary and Proper Clause. [507 F.Supp.2d, at 528-529](#).

The District Court. . . granted their motion to dismiss. It agreed . . . that, in enacting the statute, Congress exceeded its Article I legislative powers, [507 F.Supp.2d, at 530-551](#). On appeal, the Court of Appeals for the Fourth Circuit upheld the dismissal on this latter, legislative-power ground. [551 F.3d 274, 278-284](#) (2009). . . .

The Government sought certiorari, and we granted its request, limited to the question of Congress' authority under Art. I, § 8 of the Constitution. . . .

The question presented is whether the Necessary and Proper Clause, Art. I, § 8, cl. 18, grants Congress authority sufficient to enact the statute before us. In resolving that question, we assume, but we do not decide, that other provisions of the Constitution - such as the Due Process Clause - do not prohibit civil commitment in these circumstances. Cf. *Hendricks*, [521 U.S. 346](#); *Addington v. Texas*, [441 U.S. 418](#) (1979). In other words, we assume for argument's sake that the Federal Constitution would permit a State to enact this statute, and we ask solely whether the Federal Government, exercising its enumerated powers, may enact such a statute as well. On that assumption, we conclude that the Constitution grants Congress legislative power sufficient to enact § 4248. We base this conclusion on five considerations, taken together.

First, the Necessary and Proper Clause grants Congress broad authority to enact federal legislation. Nearly 200 years ago, this Court stated that the Federal “[G]overnment is acknowledged by all to be one of enumerated powers,” *McCulloch*, [4 Wheat., at 405](#), which means that “[e]very law enacted by Congress must be based on one or more of” those powers, *United States v. Morrison*, [529 U.S. 598, 607](#) (2000). But, at the same time, “a government, entrusted with such” powers “must also be entrusted with ample means for their execution.” *McCulloch*, [4 Wheat., at 408](#). Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are “convenient, or useful” or “conducive” to the authority's “beneficial exercise.” *Id.*, [at 413, 418](#); see also *id.*, [at 421](#) (“[Congress can] legislate on that vast mass of incidental powers which must be involved in the constitution ...”). Chief Justice Marshall emphasized that the word “necessary” does not mean “absolutely necessary.” *Id.*, [at 413-415 \(emphasis deleted\)](#) In language that has come to define the scope of the Necessary and Proper Clause, he wrote:

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *McCulloch, supra, at 421*.

We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. *Sabri v. United States*, [541 U.S. 600, 605](#) (2004) (using term “means-ends rationality” to describe the necessary relationship); *ibid.* (upholding Congress' “authority under the Necessary and Proper Clause” to enact a criminal statute in furtherance of the federal power granted by the Spending Clause); see *Gonzales v. Raich*, [545 U.S. 1, 22](#) (2005) (holding that because “Congress had a rational basis” for concluding that a statute implements Commerce Clause power, the statute falls within the scope of congressional “authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce ... among the several States’ ” (ellipsis in original)); see also *United States v. Lopez*, [514 U.S. 549, 557](#) (1995); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, [452 U.S. 264, 276](#) (1981).

Of course, as Chief Justice Marshall stated, a federal statute, in addition to being authorized by Art. I, § 8, must also “not [be] prohibited” by the [Constitution. McCulloch, supra, at 421](#). But as we have already stated, the present statute's validity under provisions of the Constitution other than the Necessary and Proper Clause is an issue that is not before us. Under the question

presented, the relevant inquiry is simply “whether the means chosen are ‘reasonably adapted’ to the attainment of a legitimate end under the commerce power” or under other powers that the Constitution grants Congress the authority to implement. [Gonzales, supra, at 37 \(SCALIA, J., concurring in judgment\)](#) (quoting *United States v. Darby*, [312 U.S. 100](#) (1941)).

We have also recognized that the Constitution “addresse[s]” the “choice of means”

“primarily ... to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.” *Burroughs v. United States*, [290 U.S. 534, 547-548](#) (1934).

Thus, the Constitution, which nowhere speaks explicitly about the creation of federal crimes beyond those related to “counterfeiting,” “treason,” or “Piracies and Felonies committed on the high Seas” or “against the Law of Nations,” Art. I, § 8, cls. 6, 10; Art. III, § 3, nonetheless grants Congress broad authority to create such crimes. See *McCulloch*, [4 Wheat., at 416](#), 4 L.Ed. 579 (“All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress”). And Congress routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth. Art. I, § 8, cls. 1, 3, 4, 7, 9; Amdts. 13-15. See, e.g., [Lottery Case, supra \(upholding criminal statute enacted in furtherance of the Commerce Clause\)](#); *Ex parte Yarbrough*, [110 U.S. 651](#), 4 S.Ct. 152, 28 L.Ed. 274 (1884) (upholding Congress' authority to enact Rev. Stat. § 5508, currently [18 U.S.C. § 241](#) (criminalizing civil-rights violations) and Rev. Stat. § 5520, currently [42 U.S.C. § 1973j](#) (criminalizing voting-rights violations) in furtherance of the Fourteenth and Fifteenth Amendments); [Sabri, supra, \(upholding criminal statute enacted in furtherance of the Spending Clause\)](#); *Jinks, supra*, at 462, n. 2, [123 S.Ct. 1667](#) (citing [McCulloch, supra, at 417](#)) (describing perjury and witness tampering as federal crimes enacted in furtherance of the power to constitute federal tribunals); see also [18 U.S.C. § 1691 et seq.](#) (postal crimes); § 151 *et seq.* (bankruptcy crimes); [8 U.S.C. §§ 1324-1328](#) (immigration crimes).
...

Neither Congress' power to criminalize conduct, nor its power to imprison individuals who engage in that conduct, nor its power to enact laws governing prisons and prisoners, is explicitly mentioned in the Constitution. But Congress nonetheless possesses broad authority to do each of those things in the course of “carrying into Execution” the enumerated powers “vested by” the “Constitution in the Government of the United States,” Art. I, § 8, cl. 18—authority granted by the Necessary and Proper Clause.

Second, the civil-commitment statute before us constitutes a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades. We recognize that even a longstanding history of related federal action does not demonstrate a statute's constitutionality. A history of involvement, however, can nonetheless be “helpful in reviewing the substance of a congressional statutory scheme,” [Gonzales, 545 U.S., at 21](#), and, in particular, the reasonableness

of the relation between the new statute and pre-existing federal interests.

Here, Congress has long been involved in the delivery of mental health care to federal prisoners, and has long provided for their civil commitment. . . .

Third, Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence. For one thing, the Federal Government is the custodian of its prisoners. As federal custodian, it has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose. Cf. *Youngberg v. Romeo*, [457 U.S. 307, 320](#) (1982) (“In operating an institution such as [a prison system], there are occasions in which it is necessary for the State to restrain the movement of residents—for example, to protect them *as well as others* from violence” (emphasis added)). . . . If a federal prisoner is infected with a communicable disease that threatens others, surely it would be “necessary and proper” for the Federal Government to take action, pursuant to its role as federal custodian, to refuse (at least until the threat diminishes) to release that individual among the general public, where he might infect others (even if not threatening an interstate epidemic, cf. Art. I, § 8, cl. 3). And if confinement of such an individual is a “necessary and proper” thing to do, then how could it not be similarly “necessary and proper” to confine an individual whose mental illness threatens others to the same degree?

Moreover, § 4248 is “reasonably adapted,” *Darby*, [312 U.S., at 121](#), to Congress' power to act as a responsible federal custodian. Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to “have serious difficulty in refraining from sexually violent conduct,” § 4247(a)(6), would pose an especially high danger to the public if released. Cf. H.R.Rep. No. 109-218, at 22-23. And Congress could also have reasonably concluded (as detailed in the Judicial Conference's report) that a reasonable number of such individuals would likely *not* be detained by the States if released from federal custody, in part because the Federal Government itself severed their claim to “legal residence in any State” by incarcerating them in remote federal prisons. H.R.Rep. No. 1319, at 2. Here Congress' desire to address the specific challenges identified in the Reports cited above, taken together with its responsibilities as a federal custodian, supports the conclusion that § 4248 satisfies “review for means-end rationality,” *i.e.*, that it satisfies the Constitution's insistence that a federal statute represent a rational means for implementing a constitutional grant of legislative authority. *Sabri*, [541 U.S., at 605](#).

Fourth, the statute properly accounts for state interests. Respondents and the dissent contend that § 4248 violates the Tenth Amendment because it “invades the province of state sovereignty” in an area typically left to state control. *New York v. United States*, [505 U.S. 144, 155](#) (THOMAS, J., dissenting). But the Tenth Amendment's text is clear: “The powers *not delegated to the United States* by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” (Emphasis added.) The powers “delegated to the United States by the Constitution” include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause. Virtually by definition, these powers are not powers that the Constitution “reserved to the States.”

Nor does this statute invade state sovereignty or otherwise improperly limit the scope of “powers that remain with the States.” To the contrary, it requires *accommodation* of state interests: The Attorney General must inform the State in which the federal prisoner “is domiciled or was tried” that he is detaining someone with respect to whom those States may wish to assert their authority, and he must encourage those States to assume custody of the individual. § 4248(d). He must also immediately “release” that person “to the appropriate official of” either State “if such State will assume [such] responsibility.” *Ibid.* And either State has the right, at any time, to assert its authority over the individual, which will prompt the individual's immediate transfer to State custody. § 4248(d)(1). Respondents contend that the States are nonetheless “powerless to *prevent* the detention of their citizens under § 4248, even if detention is contrary to the States' policy choices.” But that is not the most natural reading of the statute, see §§ 4248(d)(1)-(e), and the Solicitor General acknowledges that “the Federal Government would have no appropriate role” with respect to an individual covered by the statute once “the transfer to State responsibility and State control has occurred.” . . .

Fifth, the links between § 4248 and an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope. Invoking the cautionary instruction that we may not “pile inference upon inference” in order to sustain congressional action under Article I, *Lopez*, [514 U.S., at 567](#), respondents argue that, when legislating pursuant to the Necessary and Proper Clause, Congress' authority can be no more than one step removed from a specifically enumerated power. But this argument is irreconcilable with our precedents. . . .

[I]n *Sabri* we observed that “Congress has authority under the Spending Clause to appropriate federal moneys” and that it therefore “has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars” are not “siphoned off” by “corrupt public officers.” [541 U.S., at 605](#). We then further held that, in aid of that implied power to criminalize graft of “taxpayer dollars,” Congress has the *additional* prophylactic power to criminalize bribes or kickbacks even when the stolen funds have not been “traceably skimmed from specific federal payments.” *Ibid.* Similarly, in *United States v. Hall*, [98 U.S. 343](#) (1879), we held that the Necessary and Proper Clause grants Congress the power, in furtherance of Art. I, § 8, cls. 11-13, to award “pensions to the wounded and disabled” soldiers of the armed forces and their dependents, [98 U.S. at 351](#); and from that implied power we further inferred the “[i]mplied power” “to pass laws to ... punish” anyone who fraudulently appropriated such pensions, *id.*, at [346](#).

Indeed even the dissent acknowledges that Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power, and also the additional power to imprison people who violate those (inferentially authorized) laws, and the additional power to provide for the safe and reasonable management of those prisons, and the additional power to regulate the prisoners' behavior even after their release. Of course, each of those powers, like the powers addressed in *Sabri*, *Hall*, and *McCulloch*, is ultimately “derived from” an enumerated power. And, as the dissent agrees, that enumerated power is “the enumerated power that justifies the defendant's statute of conviction.” Neither we nor the dissent can point to a single specific enumerated power “that justifies a criminal defendant's arrest or conviction,” in *all* cases because Congress relies on different enumerated powers (often, but not exclusively, its Commerce Clause power) to enact its various federal criminal statutes. But every such statute

must itself be legitimately predicated on an enumerated power. And the same enumerated power that justifies the creation of a federal criminal statute, and that justifies the additional implied federal powers that the dissent considers legitimate, justifies civil commitment under § 4248 as well. Thus, we must reject respondents' argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress.

Nor need we fear that our holding today confers on Congress a general “police power, which the Founders denied the National Government and reposed in the States.” *Morrison*, [529 U.S., at 618](#). As the Solicitor General repeatedly confirmed at oral argument, § 4248 is narrow in scope. It has been applied to only a small fraction of federal prisoners. And its reach is limited to individuals already “in the custody of the” Federal Government. § 4248(a). . . .

The Framers demonstrated considerable foresight in drafting a Constitution capable of such resilience through time. As Chief Justice Marshall observed nearly 200 years ago, the Necessary and Proper Clause is part of “a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.” *McCulloch*, [4 Wheat., at 415](#), 4 L.Ed. 579 (emphasis deleted).

* * *

We take these five considerations together. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope. Taken together, these considerations lead us to conclude that the statute is a “necessary and proper” means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others. The Constitution consequently authorizes Congress to enact the statute.

We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution. Respondents are free to pursue those claims on remand, and any others they have preserved.

The judgment of the Court of Appeals for the Fourth Circuit with respect to Congress' power to enact this statute is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring in the judgment. . . .

When the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the

congressional-power chain but on the strength of the chain.

Concluding that a relation can be put into a verbal formulation that fits somewhere along a causal chain of federal powers is merely the beginning, not the end, of the constitutional inquiry. The inferences must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum* in a veritable game of “ ‘this is the house that Jack built.’ ” Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), 31 *The Papers of Thomas Jefferson* 547 (B. Oberg ed.2004). . . .

I

. . . It is correct in one sense to say that if the National Government has the power to act under the Necessary and Proper Clause then that power is not one reserved to the States. But the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place. It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.

The opinion of the Court should not be interpreted to hold that the only, or even the principal, constraints on the exercise of congressional power are the Constitution's express prohibitions. The Court's discussion of the Tenth Amendment invites the inference that restrictions flowing from the federal system are of no import when defining the limits of the National Government's power, as it proceeds by first asking whether the power is within the National Government's reach, and if so it discards federalism concerns entirely.

These remarks explain why the Court ignores important limitations stemming from federalism principles. Those principles are essential to an understanding of the function and province of the States in our constitutional structure.

II

As stated at the outset, in this case Congress has acted within its powers to ensure that an abrupt end to the federal detention of prisoners does not endanger third parties. Federal prisoners often lack a single home State to take charge of them due to their lengthy prison stays, so it is incumbent on the National Government to act. This obligation, parallel in some respects to duties defined in tort law, is not to put in motion a particular force (here an unstable and dangerous person) that endangers others. Having acted within its constitutional authority to detain the person, the National Government can acknowledge a duty to ensure that an abrupt end to the detention does not prejudice the States and their citizens. . . .

JUSTICE ALITO, concurring in the judgment [omitted]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins in all but Part III-A-1-b, dissenting. . . .

I

. . . The Constitution plainly sets forth the “few and defined” powers that Congress may exercise. Article I “vest[s]” in Congress “[a]ll legislative Powers herein granted,” § 1, and carefully enumerates those powers in § 8. The final clause of § 8, the Necessary and Proper Clause, authorizes Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Art. I, § 8, cl. 18. As the Clause’s placement at the end of § 8 indicates, the “foregoing Powers” are those granted to Congress in the preceding clauses of that section. The “other Powers” to which the Clause refers are those “vested” in Congress and the other branches by other specific provisions of the Constitution. . . .

McCulloch’s summation is descriptive of the Clause itself, providing that federal legislation is a valid exercise of Congress’ authority under the Clause if it satisfies a two-part test: First, the law must be directed toward a “legitimate” end, which *McCulloch* defines as one “within the scope of the [C]onstitution”—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution. Second, there must be a necessary and proper fit between the “means” (the federal law) and the “end” (the enumerated power or powers) it is designed to serve. *Ibid.* *McCulloch* accords Congress a certain amount of discretion in assessing means-end fit under this second inquiry. The means Congress selects will be deemed “necessary” if they are “appropriate” and “plainly adapted” to the exercise of an enumerated power, and “proper” if they are not otherwise “prohibited” by the Constitution and not “[in]consistent” with its “letter and spirit.” *Ibid.*

Critically, however, *McCulloch* underscores the linear relationship the Clause establishes between the two inquiries: Unless the end itself is “legitimate,” the fit between means and end is irrelevant. In other words, no matter how “necessary” or “proper” an Act of Congress may be to its objective, Congress lacks authority to legislate if the objective is anything other than “carrying into Execution” one or more of the Federal Government’s enumerated powers. Art. I, § 8, cl. 18. . . .

II

. . . No enumerated power in Article I, § 8, expressly delegates to Congress the power to enact a civil-commitment regime for sexually dangerous persons, nor does any other provision in the Constitution vest Congress or the other branches of the Federal Government with such a power. Accordingly, § 4248 can be a valid exercise of congressional authority only if it is “necessary and proper for carrying into Execution” one or more of those federal powers actually enumerated in the Constitution.

Section 4248 does not fall within any of those powers. The Government identifies no specific enumerated power or powers as a constitutional predicate for § 4248, and none are readily discernable. Indeed, not even the Commerce Clause—the enumerated power this Court has interpreted most expansively can justify federal civil detention of sex offenders. Under the Court’s precedents, Congress may not regulate noneconomic activity (such as sexual violence)

based solely on the effect such activity may have, in individual cases or in the aggregate, on interstate commerce. *Morrison*, [529 U.S., at 617-618](#); *United States v. Lopez*, [514 U.S. 549, 563-567](#) (1995). That limitation forecloses any claim that § 4248 carries into execution Congress' Commerce Clause power, and the Government has never argued otherwise. . . .

III

The Court perfunctorily genuflects to *McCulloch*'s framework for assessing Congress' Necessary and Proper Clause authority, and to the principle of dual sovereignty it helps to maintain, then promptly abandons both in favor of a novel five-factor test supporting its conclusion that § 4248 is a “‘necessary and proper’ ” adjunct to a jumble of *unenumerated* “authorit [ies].” The Court's newly minted test cannot be reconciled with the Clause's plain text or with two centuries of our precedents interpreting it. It also raises more questions than it answers. Must each of the five considerations exist before the Court sustains future federal legislation as proper exercises of Congress' Necessary and Proper Clause authority? What if the facts of a given case support a finding of only four considerations? Or three? And if three or four will suffice, *which* three or four are imperative? At a minimum, this shift from the two-step *McCulloch* framework to this five-consideration approach warrants an explanation as to why *McCulloch* is no longer good enough and which of the five considerations will bear the most weight in future cases, assuming some number less than five suffices. (Or, if not, why all five are required.) The Court provides no answers to these questions. . . .

Not long ago, this Court described the Necessary and Proper Clause as “the last, best hope of those who defend ultra vires congressional action.” *Printz, supra*, at 923. Regrettably, today's opinion breathes new life into that Clause, and the Court's protestations to the contrary notwithstanding, comes perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that “we *always* have rejected,” *Lopez*, [514 U.S., at 584](#) (THOMAS, J., concurring) In so doing, the Court endorses the precise abuse of power Article I is designed to prevent - the use of a limited grant of authority as a “pretext ... for the accomplishment of objects not entrusted to the government.” [McCulloch, supra, at 423](#).

I respectfully dissent.

Chapter 8

RIGHTS OF CONSCIENCE AND EXPRESSION

§8.03 EXPRESSION IN THE PUBLIC ARENA

[C] Vulgar, Graphic, Offensive, and Hate Speech

Page 1108: [Add before Notes and Questions:]

UNITED STATES v. STEVENS

Supreme Court of the United States

__ U.S. __, [*130 S. Ct. 1577*](#), __ L.Ed.2d __ (2010)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Congress enacted 18 U.S.C. § 48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct. The question presented is whether the prohibition in the statute is consistent with the freedom of speech guaranteed by the First Amendment.

I

Section 48 establishes a criminal penalty of up to five years in prison for anyone who knowingly “creates, sells, or possesses a depiction of animal cruelty,” if done “for commercial gain” in interstate or foreign commerce. § 48(a). A depiction of “animal cruelty” is defined as one “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,” if that conduct violates federal or state law where “the creation, sale, or possession takes place.” § 48(c)(1). In what is referred to as the “exceptions clause,” the law exempts from prohibition any depiction “that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.” § 48(b).

This case, however, involves an application of § 48 to depictions of animal fighting. Dogfighting, for example, is unlawful in all 50 States and the District of Columbia, Respondent Robert J. Stevens ran a business, “Dogs of Velvet and Steel,” and an associated Web site, through which he sold videos of pit bulls engaging in dogfights and attacking other animals. Among these videos were Japan Pit Fights and Pick-A-Winna: A Pit Bull Documentary, which include contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as

well as footage of American dogfights from the 1960's and 1970's. A third video, *Catch Dogs and Country Living*, depicts the use of pit bulls to hunt wild boar, as well as a “gruesome” scene of a pit bull attacking a domestic farm pig. On the basis of these videos, Stevens was indicted on three counts of violating § 48.

Stevens moved to dismiss the indictment, arguing that § 48 is facially invalid under the First Amendment. The District Court denied the motion. It held that the depictions subject to § 48, like obscenity or child pornography, are categorically unprotected by the First Amendment. It went on to hold that § 48 is not substantially overbroad, because the exceptions clause sufficiently narrows the statute to constitutional applications. The jury convicted Stevens on all counts, and the District Court sentenced him to three concurrent sentences of 37 months' imprisonment, followed by three years of supervised release.

The en banc Third Circuit, over a three-judge dissent, declared § 48 facially unconstitutional and vacated Stevens's conviction. The Court of Appeals first held that § 48 regulates speech that is protected by the First Amendment. The Court declined to recognize a new category of unprotected speech for depictions of animal cruelty, and rejected the Government's analogy between animal cruelty depictions and child pornography.

The Court of Appeals then held that § 48 could not survive strict scrutiny as a content-based regulation of protected speech. It found that the statute lacked a compelling government interest and was neither narrowly tailored to preventing animal cruelty nor the least restrictive means of doing so. It therefore held § 48 facially invalid.

In an extended footnote, the Third Circuit noted that § 48 “might also be unconstitutionally overbroad,” because it “potentially covers a great deal of constitutionally protected speech” and “sweeps [too] widely” to be limited only by prosecutorial discretion. But the Court of Appeals declined to rest its analysis on this ground.

We granted certiorari.

II

The Government's primary submission is that § 48 necessarily complies with the Constitution because the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment. We disagree.

The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech.” “[A]s a general matter, the First Amendment means that government has no power to

restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). Section 48 explicitly regulates expression based on content: The statute restricts “visual [and] auditory depiction[s],” such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed. As such, § 48 is “ ‘presumptively invalid,’ and the Government bears the burden to rebut that presumption.” *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)).

. . . The Government argues that “depictions of animal cruelty” should be added to the list. It contends that depictions of “illegal acts of animal cruelty” that are “made, sold, or possessed for commercial gain” necessarily “lack expressive value,” and may accordingly “be regulated as *unprotected* speech.” The claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether—that they fall into a “ ‘First Amendment Free Zone.’ ” *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

As the Government notes, the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. . . . But we are unaware of any similar tradition excluding *depictions* of animal cruelty from “the freedom of speech” codified in the First Amendment, and the Government points us to none.

The Government contends that “historical evidence” about the reach of the First Amendment is not “a necessary prerequisite for regulation today,” and that categories of speech may be exempted from the First Amendment’s protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress’s “ ‘legislative judgment that ... depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy of First Amendment protection,’ and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document “prescribing limits, and declaring that those limits may be passed at pleasure.”

Madison, 1 Cranch 137, 178, (1803).

. . . In *New York v. Ferber*, 458 U.S. 747 (1982), we noted that within these categories of unprotected speech, “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required,” because “the balance of competing interests is clearly struck.” The Government derives its proposed test from these descriptions in our precedents.

But such descriptions are just that-descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.

When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. In *Ferber*, for example, we classified child pornography as such a category, [458 U.S., at 763](#). We noted that the State of New York had a compelling interest in protecting children from abuse . . . But our decision did not rest on this “balance of competing interests” alone. We made clear that *Ferber* presented a special case: The market for child pornography was “intrinsically related” to the underlying abuse, and was therefore “an integral part of the production of such materials, an activity illegal throughout the Nation.” *Ferber* at 759, 761. . . .

Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that “depictions of animal cruelty” is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.

III

Because we decline to carve out from the First Amendment any novel exception for § 48, we review Stevens's First Amendment challenge under our existing doctrine.

A

. . . [W]e granted the Solicitor General's petition for certiorari to determine whether 18 U.S.C. 48 is facially invalid under the Free Speech Clause of the First Amendment.

To succeed in a typical facial attack, Stevens would have to establish “that no set of circumstances exists under which [§ 48] would be valid,” *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the statute lacks any “plainly legitimate sweep,” *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997) (Stevens, J., concurring in judgments) . . .

In the First Amendment context, however, this Court recognizes “a second type of facial challenge,” whereby a law may be invalidated as overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008). Stevens argues that § 48 applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. The Government makes no effort to defend such a broad ban as constitutional. Instead, the Government’s entire defense of § 48 rests on interpreting the statute as narrowly limited to specific types of “extreme” material. As the parties have presented the issue, therefore, the constitutionality of § 48 hinges on how broadly it is construed. It is to that question that we now turn.

B

. . . We read § 48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute’s ban on a “depiction of animal cruelty” nowhere requires that the depicted conduct be cruel. That text applies to “any ... depiction” in which “a living animal is intentionally maimed, mutilated, tortured, wounded, or killed.” § 48(c)(1). “[M]aimed, mutilated, [and] tortured” convey cruelty, but “wounded” or “killed” do not suggest any such limitation.

. . . While not requiring cruelty, § 48 does require that the depicted conduct be “illegal.” But this requirement does not limit § 48 along the lines the Government suggests. There are myriad federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty. Protections of endangered species, for example, restrict even the humane “wound[ing] or kill[ing]” of “living animal[s].” § 48(c)(1). Livestock regulations are often designed to protect the health of human beings, and hunting and fishing rules (seasons, licensure, bag limits, weight requirements) can be designed to raise revenue, preserve animal populations, or prevent accidents. The text of § 48(c) draws no distinction based on the reason the intentional killing of an animal is made illegal, and includes, for example, the humane slaughter of a stolen cow.

What is more, the application of § 48 to depictions of illegal conduct extends to conduct that is illegal in only a single jurisdiction. Under subsection (c)(1), the depicted conduct need only be

illegal in “the State in which the creation, sale, or possession takes place, regardless of whether the ... wounding ... or killing took place in [that] State.” A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful. This provision greatly expands the scope of § 48, because although there may be “a broad societal consensus” against cruelty to animals there is substantial disagreement on what types of conduct are properly regarded as cruel. Both views about cruelty to animals and regulations having no connection to cruelty vary widely from place to place.

In the District of Columbia, for example, all hunting is unlawful. . . . Other jurisdictions permit or encourage hunting, and there is an enormous national market for hunting-related depictions in which a living animal is intentionally killed. Hunting periodicals have circulations in the hundreds of thousands or millions . . . [but] because the statute allows each jurisdiction to export its laws to the rest of the country, § 48(a) extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation's Capital.

C

The only thing standing between defendants who sell such depictions and five years in federal prison—other than the mercy of a prosecutor—is the statute's exceptions clause. Subsection (b) exempts from prohibition “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.” The Government argues that this clause substantially narrows the statute's reach: News reports about animal cruelty have “journalistic” value; pictures of bullfights in Spain have “historical” value; and instructional hunting videos have “educational” value.

The Government's attempt to narrow the statutory ban, however, requires an unrealistically broad reading of the exceptions clause. As the Government reads the clause, any material with “redeeming societal value,” [or] “ ‘at least some minimal value.’” But the text says “serious” value, and “serious” should be taken seriously. We decline the Government's invitation—advanced for the first time in this Court—to regard as “serious” anything that is not “scant.”

Quite apart from the requirement of “serious” value in § 48(b), the excepted speech must also fall within one of the enumerated categories. Much speech does not. Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson. According to Safari Club International and the Congressional Sportsmen's Foundation, many popular videos “have primarily entertainment value” and are designed to “entertai[n] the viewer, marke[t] hunting equipment, or increas[e] the hunting community.”

In *Miller* we held that “serious” value shields depictions of sex from regulation as obscenity. . .

. We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place. *Most* of what we say to one another lacks “religious, political, scientific, educational, journalistic, historical, or artistic value” (let alone serious value), but it is still sheltered from government regulation.

Thus, the protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception of § 48(b), but nonetheless fall within the broad reach of § 48(c).

D

Not to worry, the Government says [in its brief]: The Executive Branch construes § 48 to reach only “extreme” cruelty and it “neither has brought nor will bring a prosecution for anything less.” The Government hits this theme hard, invoking its prosecutorial discretion several times.. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.

This prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint. When this legislation was enacted, the Executive Branch announced that it would interpret § 48 as covering only depictions “of wanton cruelty to animals designed to appeal to a prurient interest in sex.” See Statement by President William J. Clinton upon Signing H.R. 1887, 34 Weekly Comp. Pres. Doc. 2557 (Dec. 9, 1999). No one suggests that the videos in this case fit that description. The Government’s assurance that it will apply § 48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.

The judgment of the United States Court of Appeals for the Third Circuit is affirmed.

It is so ordered.

JUSTICE ALITO dissenting.

The Court strikes down in its entirety a valuable statute, 18 U.S.C. § 48, that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty—in particular, the creation and commercial exploitation of “crush videos,” a form of depraved entertainment that has no social value. The Court’s approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted. Respondent was convicted under § 48 for selling videos depicting dogfights. On appeal, he argued, among other

things, that § 48 is unconstitutional as applied to the facts of this case, and he highlighted features of those videos that might distinguish them from other dogfight videos brought to our attention. Today's decision . . . strikes down § 48 using what has been aptly termed the “strong medicine” of the overbreadth doctrine, *United States v. Williams*, 553 U.S. 285, 293 (2008) a potion that generally should be administered only as “a last resort.” *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, [528 U.S. 32, 39](#) (1999).

II

The overbreadth doctrine “strike[s] a balance between competing social costs.” [Williams at 292](#). Specifically, the doctrine seeks to balance the “harmful effects” of “invalidating a law that in some of its applications is perfectly constitutional” against the possibility that “the threat of enforcement of an overbroad law [will] dete[r] people from engaging in constitutionally protected speech.” *Williams* at 292. “In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.” [Williams at 292](#).

In determining whether a statute's overbreadth is substantial, we consider a statute's application to real-world conduct, not fanciful hypotheticals . . . Similarly, “there must be a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.” *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

III

In holding that § 48 violates the overbreadth rule, the Court declines to decide whether, as the Government maintains, § 48 is constitutional as applied to two broad categories of depictions that exist in the real world: crush videos and depictions of deadly animal fights. Instead, the Court tacitly assumes for the sake of argument that § 48 is valid as applied to these depictions, but the Court concludes that § 48 reaches too much protected speech to survive. The Court relies primarily on depictions of hunters killing or wounding game and depictions of animals being slaughtered for food. I address the Court's examples below.

A

I turn first to depictions of hunting. As the Court notes, photographs and videos of hunters shooting game are common. But hunting is legal in all 50 States, and § 48 applies only to a depiction of conduct that is illegal in the jurisdiction in which the depiction is created, sold, or possessed. §§ 48(a), (c). Therefore, in all 50 States, the creation, sale, or possession for sale of the vast majority of hunting depictions indisputably falls outside § 48's reach.

Straining to find overbreadth, the Court suggests that § 48 prohibits the sale or possession in the

District of Columbia of any depiction of hunting because the District-undoubtedly because of its urban character-does not permit hunting within its boundaries. The Court also suggests that, because some States prohibit a particular type of hunting (*e.g.*, hunting with a crossbow or “canned” hunting) or the hunting of a particular animal (*e.g.*, the “sharp-tailed grouse”), § 48 makes it illegal for persons in such States to sell or possess for sale a depiction of hunting that was perfectly legal in the State in which the hunting took place.

. . . I would hold that § 48 does not apply to depictions of hunting. First, because § 48 targets depictions of “animal cruelty,” I would interpret that term to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, not to depictions of acts that happen to be illegal for reasons having nothing to do with the prevention of animal cruelty. . . . Virtually all state laws prohibiting animal cruelty either expressly define the term “animal” to exclude wildlife or else specifically exempt lawful hunting activities, so the statutory prohibition set forth in § 48(a) may reasonably be interpreted not to reach most if not all hunting depictions.

For these reasons, I am convinced that § 48 has no application to depictions of hunting. But even if § 48 did impermissibly reach the sale or possession of depictions of hunting in a few unusual situations (for example, the sale in Oregon of a depiction of hunting with a crossbow in Virginia or the sale in Washington State of the hunting of a sharp-tailed grouse in Idaho, see *ante*, at ----), those isolated applications would hardly show that § 48 bans a substantial amount of protected speech.

B

[Section omitted. Justice Alito uses a similar analysis for images of animal slaughtering as he used in part A.]

1

As the Court of Appeals recognized, “the primary conduct that Congress sought to address through its passage [of § 48] was the creation, sale, or possession of ‘crush videos.’ ” A sample crush video, which has been lodged with the Clerk, records the following event:

“[A] kitten, secured to the ground, watches and shrieks in pain as a woman thrusts her high-heeled shoe into its body, slams her heel into the kitten's eye socket and mouth loudly fracturing its skull, and stomps repeatedly on the animal's head. The kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead in a moist pile of blood-soaked hair and bone.”

It is undisputed that the *conduct* depicted in crush videos may constitutionally be prohibited. All 50 States and the District of Columbia have enacted statutes prohibiting animal cruelty. . . .

These videos, which “often appeal to persons with a very specific sexual fetish,” *id.*, at 2, were made in secret, generally without a live audience, and “the faces of the women inflicting the torture in the material often were not shown, nor could the location of the place where the cruelty was being inflicted or the date of the activity be ascertained from the depiction.” *Id.*, at 3. Thus, law enforcement authorities often were not able to identify the parties responsible for the torture.

. . . In light of the practical problems thwarting the prosecution of the creators of crush videos under state animal cruelty laws, Congress concluded that the only effective way of stopping the underlying criminal conduct was to prohibit the commercial exploitation of the videos of that conduct. And Congress' strategy appears to have been vindicated. We are told that “[b]y 2007, sponsors of § 48 declared the crush video industry dead. Even overseas Websites shut down in the wake of § 48.

2

The First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct. The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos. In addition, as noted above, Congress was presented with compelling evidence that the only way of preventing these crimes was to target the sale of the videos. Under these circumstances, I cannot believe that the First Amendment commands Congress to step aside and allow the underlying crimes to continue.

The most relevant of our prior decisions is *Ferber*, 458 U.S. 747, which concerned child pornography. The Court there held that child pornography is not protected speech, and I believe that *Ferber*'s reasoning dictates a similar conclusion here.

In *Ferber*, an important factor-I would say the most important factor-was that child pornography involves the commission of a crime that inflicts severe personal injury to the “children who are made to engage in sexual conduct for commercial purposes.’” *Id.*, at 753. The *Ferber* Court repeatedly described the production of child pornography as child “abuse,” “molestation,” or “exploitation.”

. . . Second, *Ferber* emphasized the fact that these underlying crimes could not be effectively combated without targeting the distribution of child pornography. As the Court put it, “the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.” *Ferber* at 759.

. . . Third, the *Ferber* Court noted that the value of child pornography “is exceedingly modest, if

not *de minimis*,” and that any such value was “overwhelmingly outweigh[ed]” by “the evil to be restricted.” [Id., at 762-763](#).

All three of these characteristics are shared by § 48, as applied to crush videos. First, the conduct depicted in crush videos is criminal in every State and the District of Columbia. Thus, any crush video made in this country records the actual commission of a criminal act that inflicts severe physical injury and excruciating pain and ultimately results in death. Those who record the underlying criminal acts are likely to be criminally culpable, either as aiders and abettors or conspirators. And in the tight and secretive market for these videos, some who sell the videos or possess them with the intent to make a profit may be similarly culpable. . . . To the extent that § 48 reaches such persons, it surely does not violate the First Amendment.

Second, the criminal acts shown in crush videos cannot be prevented without targeting the conduct prohibited by § 48—the creation, sale, and possession for sale of depictions of animal torture with the intention of realizing a commercial profit. The evidence presented to Congress posed a stark choice: Either ban the commercial exploitation of crush videos or tolerate a continuation of the criminal acts that they record. Faced with this evidence, Congress reasonably chose to target the lucrative crush video market.

Finally, the harm caused by the underlying crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess. Section 48 reaches only the actual recording of acts of animal torture; the statute does not apply to verbal descriptions or to simulations. And, unlike the child pornography statute in *Ferber* or its federal counterpart, § 48(b) provides an exception for depictions having any “serious religious, political, scientific, educational, journalistic, historical, or artistic value.”

It must be acknowledged that § 48 differs from a child pornography law in an important respect: preventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos. . . . But while protecting children is unquestionably *more* important than protecting animals, the Government also has a compelling interest in preventing the torture depicted in crush videos.

The animals used in crush videos are living creatures that experience excruciating pain. Our society has long banned such cruelty, which is illegal throughout the country. In *Ferber*, the Court noted that “virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating ‘child pornography,’ ” and the Court declined to “second-guess [that] legislative judgment.” [Ferber at 758](#). Here, likewise, the Court of Appeals erred in second-guessing the legislative judgment about the importance of preventing cruelty to animals.

. . .In short, *Ferber* is the case that sheds the most light on the constitutionality of Congress' effort to halt the production of crush videos. Applying the principles set forth in *Ferber*, I would hold that crush videos are not protected by the First Amendment.

B

Application of the *Ferber* framework also supports the constitutionality of § 48 as applied to depictions of brutal animal fights. (For convenience, I will focus on videos of dogfights, which appear to be the most common type of animal fight videos.)

First, such depictions, like crush videos, record the actual commission of a crime involving deadly violence. Dogfights are illegal in every State and the District of Columbia . . . and under federal law . . .

Second, Congress had an ample basis for concluding that the crimes depicted in these videos cannot be effectively controlled without targeting the videos. . . .

. . .Third, depictions of dogfights that fall within § 48's reach have by definition no appreciable social value. As noted, § 48(b) exempts depictions having any appreciable social value, and thus the mere inclusion of a depiction of a live fight in a larger work that aims at communicating an idea or a message with a modicum of social value would not run afoul of the statute.

Finally, the harm caused by the underlying criminal acts greatly outweighs any trifling value that the depictions might be thought to possess.

. . . For these dogs, unlike the animals killed in crush videos, the suffering lasts for years rather than minutes. As with crush videos, moreover, the statutory ban on commerce in dogfighting videos is also supported by compelling governmental interests in effectively enforcing the Nation's criminal laws and preventing criminals from profiting from their illegal activities.

In sum, § 48 may validly be applied to at least two broad real-world categories of expression covered by the statute: crush videos and dogfighting videos. Thus, the statute has a substantial core of constitutionally permissible applications. Moreover, for the reasons set forth above, the record does not show that § 48, properly interpreted, bans a substantial amount of protected speech in absolute terms. *A fortiori*, respondent has not met his burden of demonstrating that any impermissible applications of the statute are “substantial” in relation to its “plainly legitimate sweep.” Accordingly, I would reject respondent's claim that § 48 is facially unconstitutional under the overbreadth doctrine.

* * *

For these reasons, I respectfully dissent.

(6) In *Brown v. Entertainment Merchants Association*, ___ U. S. ___ (2011), the Supreme Court relied on its 2010 opinion in *United States v. Stevens* to strike down a California law restricting access to violent video games by minors. The California law at issue, Cal. Civ. Code Ann. §§ 1746–1746.5, prohibited the sale or rental of “violent video games” to minors, and required their packaging to be labeled “18.” The Act covered games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted” in a manner that “[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,” that is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.” Violation of the Act was punishable by a civil fine of up to \$1,000.

In a majority opinion written by Justice Scalia, and joined by Justices Kennedy, Ginsburg, Sotomayer, and Kagan, the Court held that the California law violated the First Amendment. The Court began its analysis by affirming what the state of California had conceded, that video games qualified for First Amendment protection. Video games, the Court observed, were like books, plays, and movies, in that they communicate ideas through familiar literary devices and features distinctive to their medium. Free speech principles, the Court held, do not vary with new and different media. California’s law, the Court held, violated one of the most basic principles of free speech law, that government lacks the power to restrict expression because of its message, ideas, subject matter, or content. California tried to convince the Court to treat violent expression targeting minors, particularly violent expression communicated through video games, as a new special category of expression that should be deemed exempt from First Amendment protection, akin to obscenity, incitement, and fighting words. California was thus attempting to make the same sort of argument that the United States government asserted, but failed to win, in the *Stevens* case, where it sought to convince the Court to carve out a special exempt category of expression for depictions of violent animal cruelty. California’s effort also failed. The Court reiterated its holding in *Stevens*, that a legislature cannot create new categories of unprotected speech simply by weighing the value of a particular category against its social costs and then punishing it if it fails the test.

The Court noted that the United States has no tradition of specially restricting children’s access to depictions of violence. The Court also found unpersuasive California’s argument that “interactive” video games present special problems, in that the player participates in the violent action on screen and determines its outcome. Having set up this analytic framework, the Court held that the California law should be subject to strict scrutiny, as content-based restriction of protected speech. The California law could not pass this test. The Court rejected the psychological studies cited by California, which purported to show a connection between exposure to violent video games and harmful effects on children. Those studies, the Court held, did not prove that exposure of violence to minors in video games caused minors to act aggressively. Whatever demonstrated effects the studies revealed, the Court held, were both small and indistinguishable from effects produced by other media. Given that California had declined to restrict those other media, such as Saturday morning cartoons, the Court held, California’s special targeted of video-game regulation was “wildly underinclusive.” California’s attack on video games alone, the Court observed, raised serious doubts about whether what was really afoot was the disfavoring particular speakers or viewpoints. The Court also rebuffed the

claim that the California law was justified as a means of providing assistance to parents who wished to restrict their children's access to violent videos. The Court was persuaded that the voluntary rating system used by the video-game industry had largely already accomplished that goal. Moreover, the Court argued, the California law was greatly overinclusive as a remedy for assisting parents, because not all of the children who are prohibited from purchasing violent video games have parents who disapprove of their doing so. Finding that the law could not withstand strict scrutiny, the Court struck it down.

Justice Alito, joined by Chief Justice Roberts, filed an opinion concurring in the judgment. Justice Alito disagreed with the majority's position on the merits, holding open the possibility that he and the Chief Justice might approve a more narrowly drawn restriction on violent video games. Justice Alito instead argued that the California law was too imprecise to provide the fair warning required by due process.

Justice Thomas and Justice Breyer each dissented. Justice Thomas, following one of his familiar themes, argued that the First Amendment contains no right to speak to minors without first going through their parents or guardians. Justice Breyer found California's general arguments persuasive, and argued that the case was not about censorship, but "education." The First Amendment, he argued, does not prevent a state from coming to the aid of parents in making decisions for their children about their access to expression that a legislature had determined, with the aid of social science data, to be harmful to children.

- (7) In *Snyder v. Phelps*, ___ U.S. ___ (2011), the Supreme Court dealt with the highly charged and notorious protests of the Westboro Baptist Church. The Westboro Church was founded by Fred Phelps in Topeka, Kansas in 1955. The congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military. For more than two decades, the Church has used the picketing of military funerals as a tactic for propagating its message. As the *Snyder* litigation reached the Supreme Court, the Church had picketed nearly 600 funerals. The *Snyder* case arose from a civil lawsuit brought by the family of Marine Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty. Phelps and the Westboro Church, following their standard tactics, set out to use Snyder's funeral for one its protests. The funeral was set for a Catholic church in Westminster, Maryland, the Snyders' hometown. The time and location were printed in local newspapers. Phelps became aware of Matthew Snyder's funeral and decided to travel to Maryland with six other Westboro Baptist parishioners (two of his daughters and four of his grandchildren) to picket. On the day of the memorial service, Phelps and six of his fellow Church members picketed on public land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral. They carried signs with messages such as: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." The Westboro Church had, in advance, notified local law enforcement authorities of their protest plans. They complied with police instructions in staging their protests. The actual picketing took place within a 10-by 25-foot plot of public land adjacent to a public street, behind a temporary fence. This was a location approximately 1,000 feet from the church at which the funeral service was conducted. The protest lasted about 30 minutes. The funeral procession passed within 200 to 300 feet of the picket location. Albert

Snyder, the father of Corporal Snyder, stated that he could see the tops of the picket signs, but not read their content. No protestors entered the church property or went to the cemetery. There was no use of profanity, and there was no violence associated with the event.

Several weeks following the funeral, a member of the Westboro Church who had been one of the picketers at the Snyder funeral posted on the Internet, on the Westboro web site, an attack on the Snyder family. The message was laced with religious denunciations of the Snyders, interspersed among lengthy Bible quotations. When Albert Snyder discovered the posting, which came to be known in the litigation by the nickname the “epic,” his distress and sense of offense were understandably intensified. The epic played a role in the lower court litigation in the civil suit, but essentially dropped out of the case at the Supreme Court level. The Court marginalized the importance of the epic by relegating all mention of it to a footnote, stating that Snyder had not included any mention of the epic in his Petition for Certiorari, and had not devoted anything other than one paragraph of attention to it in his opening briefing before the Supreme Court. In a cryptic reference, the Court said simply that in light of these facts “and the fact that an Internet posting may raise distinct issues in this context, we decline to consider the epic in deciding this case.”

Albert Snyder brought a diversity suit in federal court based on Maryland state tort claims, including defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. The Westboro Church was granted summary judgment on the defamation and publicity given to private life claims, but the trial judge allowed the remaining three claims to proceed to a jury trial. At that trial Snyder described the intensity of his emotional injury, testifying that was unable to separate the thought of his dead son from his thoughts of Westboro’s picketing, and that he often becomes tearful, angry, and physically ill when he thinks about it. Snyder’s personal testimony was in turn buttressed by expert witnesses, who explained that Snyder’s emotional anguish had resulted in severe depression and had exacerbated Snyder’s pre-existing health conditions. At the trial the jury found for Snyder on his claims for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims. The jury awarded Snyder \$2.9 million in compensatory damages and \$8 million in punitive damages. The trial judge sustained the \$2.9 million compensatory damages award, but reduced the punitive damages award to \$2.1 million. The United States Court of Appeals for the Fourth Circuit reversed, holding that the Church’s expression was protected by the First Amendment.

The Supreme Court, in an opinion by Chief Justice Roberts, ruled 8-1 that the speech of the Westboro Church was insulated from liability by the First Amendment. Only Justice Alito dissented. The Court began its analysis by invoking the long line of Supreme Court cases holding that the First Amendment operates as a limiting force on state tort law claims involving freedom of expression, cases such as *Hustler Magazine, Inc. v. Falwell*. The key inquiry in this line of precedent, the Court held, was whether the speech falls within the class of expression deemed to be a matter of public concern. The public concern inquiry focuses on whether the expression may be fairly considered as relating to “any matter of political, social, or other concern to the community,” or “is a subject of general interest and of value and concern to the public.” Expression is not disqualified from being categorized as a matter of public concern merely because it is deemed inappropriate or controversial character. To determine whether speech is of public or private concern, the Court explain, it must independently examine the “content, form, and context,” of the speech “as revealed by the whole record.” The “content” of

Westboro's signs, the Court held, plainly related to public, rather than private, matters. The placards highlighted issues of public import -- the political and moral conduct of the United States and its citizens, the fate of the Nation, homosexuality in the military, and scandals involving the Catholic clergy. Westboro conveyed its views on those issues in a manner designed to reach as broad a public audience as possible.

The Court held that even if a few of the signs were viewed as containing messages related to a particular individual, that would not alter the dominant theme of Westboro's public message. But what of the "context" of the speech, a military funeral? The Court was unwilling to hold that the mere fact that the Westboro Church chose to use Matthew Snyder's funeral as the launching pad for its expression did not transform the Church's speech from public to private. While it was true that the Church was in a sense exploiting the occasion of the funeral to heighten the attention paid to its message, and this may have been particularly hurtful to Snyder, this did not diminish the First Amendment protection that the Church's speech would otherwise enjoy. The Court conceded that the Church's speech could be subjected to reasonable time, place, or manner restrictions. It also noted that Maryland currently has a law restricting funeral picketing, but that law was not in effect at the time of the events. The Court said that in this posture it would not opine on whether the restrictions in the Maryland law would be upheld as "reasonable time, place, or manner" regulations.

Against this backdrop, the Court reversed all the tort liability awards. The emotional distress claim, the Court held, could not stand, because the jury was permitted to award liability merely on the finding that the picketing was "outrageous." Following its prior decision in *Hustler*, the Court held that this was too subjective and unpredictable a standard to satisfy First Amendment principles. Such a standard posed too great a danger that the jury would punish Westboro for its views on matters of public concern. Nor, the Court held, could Snyder recover for the tort of intrusion upon seclusion. Snyder argued that he was a member of a captive audience at his son's funeral, and that the actions of the Church thus constituted an intrusion on his private space, because he could not leave his own son's funeral. The Court found this unpersuasive, noting that Westboro Church members stayed well away from the memorial service, that Snyder could see no more than the tops of the picketers' signs, and that there was no indication that the picketing interfered with the funeral service itself. Once the two substantive tort claims were deemed to be inconsistent with the First Amendment, it followed that the conspiracy claim based upon them would also fail. The Court summarized its decision by noting that Westboro had been engaged in expressing its views on matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The Church did not, in any literal sense, disrupt Mathew Snyder's funeral. The Church's strategic decision to picket Snyder's funeral did not alter the nature of its speech. Chief Justice Roberts' opinion concluded: "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and -- as it did here -- inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course--to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case."

Justice Alito wrote an impassioned dissent in *Snyder*. His opening statement framed his argument: "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case. Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable

loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew's funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury.”

(8) In *Holder v. Humanitarian Law Project*, the Supreme Court, ___ U.S. ___ (2010), in a 6-3 ruling written by Chief Justice John Roberts, upheld a federal statute, [18 U.S.C. § 2339B](#)(a)(1), prohibiting the provision of “material support or resources” to certain foreign organizations that engage in terrorist activity. Congress grounded the law in its finding that the specified organizations “are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose). The term “material support” was defined in the law:

[T]he term ‘material support or resources’ means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.”

[18 U.S.C. § 2339A](#)(b)(1); see also 18 U.S.C. § 2339B(g)(4).

The Secretary of State is vested with the authority to designate an entity a “foreign terrorist organization.” 8 U.S.C. §§ 1189(a)(1), (d)(4). In 1997, the Secretary of State designated 30 groups as foreign terrorist organizations, including the two groups at issue in *Holder v. Humanitarian Law Project*, the Kurdistan Workers' Party (also known as the Partiya Karkeran Kurdistan, or PKK), founded in 1974 with the aim of establishing an independent Kurdish state in southeastern Turkey and the Liberation Tigers of Tamil Eelam (LTTE), founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka. The plaintiffs in the case sought to provide support to these groups, including training them on how to use humanitarian and international law to peacefully resolve disputes, and teaching them how to petition various representative bodies, such as the United Nations, for relief.

Subjecting the statute to strict-scrutiny review, the Court upheld the law. The Court began with the broad proposition, which was not contested in the case, that “combating terrorism is an urgent objective of the highest order.” The key to the Court’s decision was its judgment that the issue of whether “foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question.” Congress, the Court observed, had made a specific finding on the issue, determining that “[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct.” The Court concluded that this finding was justified, describing the PKK and LTTE as “deadly groups,” and noting that the PKK’s

insurgency had claimed more than 22,000 lives, and that LTTE had engaged in extensive suicide bombings and political assassinations, including killings of the Sri Lankan President, Security Minister, and Deputy Defense Minister. The Court held that “money is fungible,” and that terrorist organizations do not maintain “firewalls” that prevent contributions aimed at lawful activity from being diverted to terrorist actions. In response to the objection of Justice Breyer in dissent (joined by Justice Ginsburg and Justice Sotomayor) that there was no natural stopping point to this reasoning, the Court stated that “Congress has settled on just such a natural stopping place: The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group's legitimacy is not covered.” The Court also rejected the dissent’s argument that the government should be required to produce hard proof - with “detail,” “specific facts,” and “specific evidence” that plaintiffs’ proposed activities would support terrorist attacks. In the field of national security and international affairs, the Court held, the government “is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.” Citing the unique separation of powers elements implicated in national security matters, the Court held that “Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not.”

§ 8.03 [I] Corporate Speech

CITIZENS UNITED v. FEDERAL ELECTION COMMISSION

Supreme Court of the United States

__ U.S. __, [130 S. Ct. 876](#), __ L.Ed.2d __ (2010)

JUSTICE KENNEDY delivered the opinion of the Court.

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 (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.

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. We turn to the case now before us.

I

A

Citizens United is a nonprofit corporation. It brought this action in the United States District Court for the District of Columbia. A three-judge court later convened to hear the cause. The resulting judgment gives rise to this appeal.

Citizens United has an annual budget of about \$12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.

In January 2008, Citizens United released a film entitled *Hillary: The Movie*. We refer to the film as *Hillary*. It is a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Hillary* mentions Senator Clinton by name and depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton. *Hillary* was released in theaters and on DVD, but

Citizens United wanted to increase distribution by making it available through video-on-demand.

Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program. In December 2007, a cable company offered, for a payment of \$1.2 million, to make *Hillary* available on a video-on-demand channel called “Elections '08.” App. 255a-257a. Some video-on-demand services require viewers to pay a small fee to view a selected program, but here the proposal was to make *Hillary* available to viewers free of charge.

To implement the proposal, Citizens United was prepared to pay for the video-on-demand; and to promote the film, it produced two 10-second ads and one 30-second ad for *Hillary*. Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie's Website address. *Id.*, at 26a-27a. Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.

B

Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited-and still does prohibit-corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. BCRA § 203 amended § 441b to prohibit any “electioneering communication” as well. 2 U.S.C. § 441b(b)(2) (2006 ed.). An electioneering communication is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary or 60 days of a general election. § 434(f)(3)(A). The Federal Election Commission's (FEC) regulations further define an electioneering communication as a communication that is “publicly distributed.” 11 CFR § 100.29(a)(2) (2009). “In the case of a candidate for nomination for President ... *publicly distributed* means” that the communication “[c]an be received by 50,000 or more persons in a State where a primary election ... is being held within 30 days.” § 100.29(b)(3)(ii). Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a “separate segregated fund” (known as a political action committee, or PAC) for these purposes. 2 U.S.C. § 441b(b)(2). The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union. *Ibid.*

C

Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by § 441b's ban on corporate-funded independent expenditures, thus subjecting the corporation

to civil and criminal penalties under § 437g. In December 2007, Citizens United sought declaratory and injunctive relief against the FEC. It argued that (1) § 441b is unconstitutional as applied to *Hillary*; and (2) BCRA's disclaimer and disclosure requirements, BCRA §§ 201 and 311, are unconstitutional as applied to *Hillary* and to the three ads for the movie.

The District Court denied Citizens United's motion for a preliminary injunction, 530 F.Supp.2d 274 (D.D.C.2008) (*per curiam*), and then granted the FEC's motion for summary judgment, . . . The court held that § 441b was facially constitutional under *McConnell*, and that § 441b was constitutional as applied to *Hillary* because it was “susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her.” The court also rejected Citizens United's challenge to BCRA's disclaimer and disclosure requirements. It noted that “the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment.”

II

Before considering whether *Austin* should be overruled, we first address whether Citizens United's claim that § 441b cannot be applied to *Hillary* may be resolved on other, narrower grounds.

A

Citizens United contends that § 441b does not cover *Hillary*, as a matter of statutory interpretation, because the film does not qualify as an “electioneering communication.” § 441b(b)(2). . . . Under the definition of electioneering communication, the video-on-demand showing of *Hillary* on cable television would have been a “cable ... communication” that “refer[red] to a clearly identified candidate for Federal office” and that was made within 30 days of a primary election. 2 U.S.C. § 434(f)(3)(A)(i). Citizens United, however, argues that *Hillary* was not “publicly distributed,” because a single video-on-demand transmission is sent only to a requesting cable converter box and each separate transmission, in most instances, will be seen by just one household-not 50,000 or more persons. 11 CFR § 100.29(a)(2); see § 100.29(b)(3)(ii).

This argument ignores the regulation's instruction on how to determine whether a cable transmission “[c]an be received by 50,000 or more persons.” § 100.29(b)(3)(ii). The regulation provides that the number of people who can receive a cable transmission is determined by the number of cable subscribers in the relevant area. §§ 100.29(b)(7)(i)(G), (ii). Here, Citizens United wanted to use a cable video-on-demand system that had 34.5 million subscribers nationwide.. Thus, *Hillary* could have been received by 50,000 persons or more.

. . . Section 441b covers *Hillary*.

B

Citizens United next argues that § 441b may not be applied to *Hillary* under the approach taken in *WRTL*. *McConnell* decided that § 441b(b)(2)'s definition of an “electioneering communication” was facially constitutional insofar as it restricted speech that was “the functional equivalent of express advocacy” for or against a specific candidate. 540 U.S., at 206, 124 S.Ct. 619. *WRTL* then found an unconstitutional application of § 441b where the speech was not “express advocacy or its functional equivalent.” 551 U.S., at 481, 127 S.Ct. 2652. . . . [T]he functional-equivalent test is objective: “a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.*, at 469-470, 127 S.Ct. 2652.

Under this test, *Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency. . . .

Citizens United argues that *Hillary* is just “a documentary film that examines certain historical events.” Brief for Appellant 35. We disagree. The movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for President. . .

As the District Court found, there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy.

C

Citizens United further contends that § 441b should be invalidated as applied to movies shown through video-on-demand, arguing that this delivery system has a lower risk of distorting the political process than do television ads.

Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. . . .

D

Citizens United also asks us to carve out an exception to § 441b's expenditure ban for nonprofit corporate political speech funded overwhelmingly by individuals. As an alternative to reconsidering *Austin*, the Government also seems to prefer this approach. This line of analysis,

however, would be unavailing.

. . . We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject.

E

As the foregoing analysis confirms, the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment. . . . Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin*. . . .

III

The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech.” . . .

The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under § 441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.

And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur . . .

PACs have to comply with these regulations just to speak. This might explain why fewer than

2,000 of the millions of corporations in this country have PACs. PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "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." *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. (Government could repress speech by "attacking all levels of the production and dissemination of ideas," for "effective public communication requires the speaker to make use of the services of others"). If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

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. The First Amendment " 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971)).

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." . . . We shall employ it here.

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. . . . As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite 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. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to

perform their functions. [Justice Kennedy points to exceptions in schools, prisons, and the military].

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.

A

1

The Court has recognized that First Amendment protection extends to corporations. This protection has been extended by explicit holdings to the context of political speech

At least since the latter part of the 19th century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates. Yet not until 1947 did Congress first prohibit independent expenditures by corporations and labor unions in § 304 of the Labor Management Relations Act 1947.

For almost three decades thereafter, the Court did not reach the question whether restrictions on corporate and union expenditures are constitutional. . . .

2

In *Buckley*, the Court addressed various challenges to the Federal Election Campaign Act of 1971 (FECA) as amended in 1974.

Before addressing the constitutionality of § 608(e)'s independent expenditure ban, *Buckley* first upheld § 608(b), FECA's limits on direct contributions to candidates. The *Buckley* Court recognized a “sufficiently important” governmental interest in “the prevention of corruption and the appearance of corruption.”

The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that “the independent expenditure ceiling ... fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process. *Buckley* invalidated § 608(e)'s restrictions on independent expenditures, with only one Justice dissenting.

Less than two years after *Buckley*, *Bellotti* reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity. *Bellotti* could not have been clearer when it struck down a state-law prohibition on corporate independent expenditures related to referenda issues:

“We thus find no support in the First ... Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment

loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.... [That proposition] amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

* * *

“In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.”

It is important to note that the reasoning and holding of *Bellotti* did not rest on the existence of a viewpoint-discriminatory statute. It rested on the principle that the Government lacks the power to ban corporations from speaking.

Bellotti did not address the constitutionality of the State's ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under *Bellotti*'s central principle: that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity. See *ibid*.

3

. . . *Austin* “uph[eld] a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court's] history.” There, the Michigan Chamber of Commerce sought to use general treasury funds to run a newspaper ad supporting a specific candidate. Michigan law, however, prohibited corporate independent expenditures that supported or opposed any candidate for state office. A violation of the law was punishable as a felony. The Court sustained the speech prohibition.

To bypass *Buckley* and *Bellotti*, the *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest. *Austin* found a compelling governmental interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.”

B

The Court is thus 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. No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity.

1

As for *Austin*'s antidistortion rationale . . . [it] cannot support § 441b.

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. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. The Government responds “that the FEC has never applied this statute to a book,” and if it did, “there would be quite [a] good as-applied challenge.” This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.

Political speech is “indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.” *Bellotti*, [435 U.S., at 777](#). . . . This protection for speech is inconsistent with *Austin*'s antidistortion rationale. *Austin* sought to defend the antidistortion rationale as a means to prevent corporations from obtaining “‘an unfair advantage in the political marketplace’ ” by using “‘resources amassed in the economic marketplace.’ . . . First Amendment's protections do not depend on the speaker's “financial ability to engage in public discussion.”

The Court reaffirmed these conclusions when it invalidated the BCRA provision that increased the cap on contributions to one candidate if the opponent made certain expenditures from personal funds.

Austin's antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations. . . . Media corporations are now exempt from § 441b's ban on corporate expenditures. See 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i). Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have “immense aggregations of wealth,” and the views expressed by media corporations often “have little or no correlation to the public's support” for those views. Thus, under the Government's reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment.

The law's exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale. And the exemption results in a further, separate reason for finding this law invalid: Again by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. The exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news. So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated

business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.

The censorship we now confront is vast in its reach. . . . By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of “destroying the liberty” of some factions is “worse than the disease.” The Federalist No. 10. Factions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false.

The nonprofit corporations, from presenting both facts and opinions to the public. This makes *Austin's* antidistortion rationale all the more an aberration. . . .

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

2

What we have said also shows the invalidity of other arguments made by the Government. For the most part relinquishing the antidistortion rationale, the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. In *Buckley*, the Court found this interest “sufficiently important” to allow limits on contributions but did not extend that reasoning to expenditure limits.

. . . The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here.

. . . Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States.

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 appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. . . .

. . . When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.

3

The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest, like *Austin's* antidistortion rationale, would allow the Government to ban the political speech even of media corporations. . . . Under the Government's view, that potential disagreement could give the Government the authority to restrict the media corporation's political speech. The First Amendment does not allow that power. There is, furthermore, little evidence of abuse that cannot be corrected by shareholders "through the procedures of corporate democracy."

Those reasons are sufficient to reject this shareholder-protection interest; and, moreover, the statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time. As to the second, the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders. As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment.

4

We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process. . . .

C

Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error. . .

. . . [I]t must be concluded that *Austin* was not well reasoned. The Government defends *Austin*, relying almost entirely on “the quid pro quo interest, the corruption interest or the shareholder interest,” and not *Austin's* expressed antidistortion rationale. . . .

Austin is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws. Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.

Rapid changes in technology-and the creative dynamic inherent in the concept of free expression-counsel against upholding a law that restricts political speech in certain media or by certain speakers. . . .

Due consideration leads to this conclusion: *Austin*, [494 U.S. 652](#), should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

D

Austin 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. The *McConnell* Court relied on the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin*, and we have found this interest unconvincing and insufficient. This part of *McConnell* is now overruled.

IV

A

Citizens United next challenges BCRA's disclaimer and disclosure provisions as applied to *Hillary* and the three advertisements for the movie. Under BCRA § 311, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that “ _____ is responsible for the content of this advertising.” 2 U.S.C. § 441d(d)(2). The required statement must be made in a “clearly spoken manner,” and displayed on the screen in a “clearly readable manner” for at least four seconds. It must state that the communication “is not authorized by any candidate or candidate's committee”; it must also display the name and address (or Web site address) of the person or group that funded the advertisement. § 441d(a)(3). Under BCRA § 201, any person who spends more than \$10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC. 2 U.S.C. § 434(f)(1). That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. § 434(f)(2).

Disclaimer and disclosure requirements may burden the ability to speak, but they “impose no ceiling on campaign-related activities,” [Buckley at 64](#) and “do not prevent anyone from speaking,” [McConnell at 201](#). . The Court has subjected these requirements to “exacting scrutiny,” which requires a “substantial relation” between the disclosure requirement and a “sufficiently important” governmental interest. [Buckley at 64](#), 66; see [McConnell at 231-232](#)

In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in “provid[ing] the electorate with information” about the sources of election-related spending.

Although both provisions were facially upheld, the Court acknowledged that as-applied challenges would be available if a group could show a “ ‘reasonable probability’ ” that disclosure of its contributors' names “ ‘will subject them to threats, harassment, or reprisals from either Government officials or private parties.’ ”

For the reasons stated below, we find the statute valid as applied to the ads for the movie and to the movie itself.

B

Citizens United sought to broadcast one 30-second and two 10-second ads to promote *Hillary*. Under FEC regulations, a communication that “[p]roposes a commercial transaction” was not subject to 2 U.S.C. § 441b's restrictions on corporate or union funding of electioneering communications. 11 CFR § 114.15(b)(3)(ii). The regulations, however, do not exempt those communications from the disclaimer and disclosure requirements in BCRA §§ 201 and 311. See 72 Fed.Reg. 72901 (2007).

Citizens United argues that the disclaimer requirements in § 311 are unconstitutional as applied to its ads. It contends that the governmental interest in providing information to the electorate

does not justify requiring disclaimers for any commercial advertisements, including the ones at issue here. We disagree.

. . . The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech.

Citizens United also disputes that an informational interest justifies the application of § 201 to its ads, which only attempt to persuade viewers to see the film. Even if it disclosed the funding sources for the ads, Citizens United says, the information would not help viewers make informed choices in the political marketplace.

Last, Citizens United argues that disclosure requirements can chill donations to an organization by exposing donors to retaliation. . . .

. . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

C

For the same reasons we uphold the application of BCRA §§ 201 and 311 to the ads, we affirm their application to *Hillary*. We find no constitutional impediment to the application of BCRA's disclaimer and disclosure requirements to a movie broadcast via video-on-demand. And there has been no showing that, as applied in this case, these requirements would impose a chill on speech or expression.

V

Modern day movies, television comedies, or skits on Youtube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the “purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value” in order to engage in political speech. 2 U.S.C. § 431(9)(A)(i). Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design.

Some members of the public might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation's course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make. “The First Amendment underwrites the freedom to experiment and to create in the realm of thought

and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.” [McConnell at 341](#).

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.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, concurring.

The Court properly rejects that theory, and I join its opinion in full. The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer. I write separately to address the important principles of judicial restraint and *stare decisis* implicated in this case.

[Remainder of the ROBERTS’ concurring opinion omitted.]

JUSTICE SCALIA with whom Justice ALITO joins, and with whom JUSTICE THOMAS joins in part, concurring. [JUSTICE THOMAS does not join Part IV of the Court’s opinion.]

I join the opinion of the Court.

I write separately to address Justice Steven’s [opinion]. . . . This section of the dissent purports to show that today's decision is not supported by the original understanding of the First Amendment. The dissent attempts this demonstration, however, in splendid isolation from the text of the First Amendment. It never shows why “the freedom of speech” that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form. To be sure, in 1791 (as now) corporations could pursue only the objectives set forth in their charters; but the dissent provides no evidence that their speech in the pursuit of those objectives could be censored.

Instead of taking this straightforward approach to determining the Amendment's meaning, the

dissent embarks on a detailed exploration of the Framers' views about the “role of corporations in society.” The Framers didn't like corporations, the dissent concludes, and therefore it follows (as might the day) that corporations had no rights of free speech. Of course the Framers' personal affection or disaffection for corporations is relevant only insofar as it can be thought to be reflected in the understood meaning of the text they enacted-not, as the dissent suggests, as a freestanding substitute for that text. But the dissent's distortion of proper analysis is even worse than that. Though faced with a constitutional text that makes no distinction between types of speakers, the dissent feels no necessity to provide even an isolated statement from the founding era to the effect that corporations are *not* covered, but places the burden on petitioners to bring forward statements showing that they *are* (“there is not a scintilla of evidence to support the notion that anyone believed [the First Amendment] would preclude regulatory distinctions based on the corporate form,”).

Despite the corporation-hating quotations the dissent has dredged up, it is far from clear that by the end of the 18th century corporations were despised. If so, how came there to be so many of them? The dissent's statement that there were few business corporations during the eighteenth century-“only a few hundred during all of the 18th century”-is misleading. There were approximately 335 charters issued to business corporations in the United States by the end of the 18th century. Moreover, what seems like a small number by today's standards surely does not indicate the relative importance of corporations when the Nation was considerably smaller. As I have previously noted, “[b]y the end of the eighteenth century the corporation was a familiar figure in American economic life.”

Even if we thought it proper to apply the dissent's approach of excluding from First Amendment coverage what the Founders disliked, and even if we agreed that the Founders disliked founding-era corporations; modern corporations might not qualify for exclusion. Most of the Founders' resentment towards corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed.^{FN3} Modern corporations do not have such privileges, and would probably have been favored by most of our enterprising Founders-excluding, perhaps, Thomas Jefferson and others favoring perpetuation of an agrarian society. Moreover, if the Founders' specific intent with respect to corporations is what matters, why does the dissent ignore the Founders' views about other legal entities that have more in common with modern business corporations than the founding-era corporations? At the time of the founding, religious, educational, and literary corporations were incorporated under general incorporation statutes, much as business corporations are today.

The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak. To the contrary, colleges, towns and cities, religious institutions, and guilds had long been organized as corporations at common law and under the King's charter. . .

The dissent says that when the Framers “constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.” That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women-not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak *in association with other individual persons*. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of “an individual American.” It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different-or at least it cannot be denied the right to speak on the simplistic ground that it is not “an individual American.”

But to return to, and summarize, my principal point, which is the conformity of today's opinion with the original meaning of the First Amendment. The Amendment is written in terms of “speech,” not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals-and the dissent offers no evidence about the original meaning of the text to support any such exclusion. We are therefore simply left with the question whether the speech at issue in this case is “speech” covered by the First Amendment. No one says otherwise. A documentary film critical of a potential Presidential candidate is core political speech, and its nature as such does not change simply because it was funded by a corporation. Nor does the character of that funding produce any reduction whatever in the “inherent worth of the speech” and “its capacity for informing the public.” Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.

JUSTICE STEVENS, with whom JUSTICE BREYER, and Justice SOTOMAYOR join, concurring in part and dissenting in part.

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election. Neither Citizens United's nor any other corporation's speech has been “banned.” All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided. Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by *for-profit* corporations and unions to decide

this case.

The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

The majority's approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907, ch. 420, 34 Stat. 864. We have unanimously concluded that this "reflects a permissible assessment of the dangers posed by those entities to the electoral process," *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (*NRWC*), and have accepted the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," *id.*, at 209-210. The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law. . .

In his landmark concurrence in *Ashwander v. TVA*, [297 U.S. 288, 346](#) (1936), Justice Brandeis stressed the importance of adhering to rules the Court has "developed ... for its own governance" when deciding constitutional questions. Because departures from those rules always enhance the risk of error, I shall review the background of this case in some detail before explaining why the Court's analysis rests on a faulty understanding of *Austin* and *McConnell* and of our campaign finance jurisprudence more generally.^{FN1} I regret the length of what follows, but the importance and novelty of the Court's opinion require a full response. Although I concur in the Court's decision to sustain BCRA's disclosure provisions and join Part IV of its opinion, I emphatically dissent from its principal holding.

I

The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution. . . .

II

The final principle of judicial process that the majority violates is the most transparent: *stare decisis*. I am not an absolutist when it comes to *stare decisis*, in the campaign finance area or in any other. No one is. But if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine. “[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 864 (1992). No such justification exists in this case, and to the contrary there are powerful prudential reasons to keep faith with our precedents.

The Court's central argument for why *stare decisis* ought to be trumped is that it does not like *Austin*. The opinion “was not well reasoned,” our colleagues assert, and it conflicts with First Amendment principles.. This, of course, is the Court's merits argument, the many defects in which we will soon consider. I am perfectly willing to concede that if one of our precedents were dead wrong in its reasoning or irreconcilable with the rest of our doctrine, there would be a compelling basis for revisiting it. But neither is true of *Austin*, . . . and restating a merits argument with additional vigor does not give it extra weight in the *stare decisis* calculus.

Perhaps in recognition of this point, the Court supplements its merits case with a smattering of assertions. The Court proclaims that “*Austin* is undermined by experience since its announcement.” This is a curious claim to make in a case that lacks a developed record. The majority has no empirical evidence with which to substantiate the claim; we just have its *ipse dixit* that the real world has not been kind to *Austin*. Nor does the majority bother to specify in what sense *Austin* has been “undermined.” Instead it treats the reader to a string of non sequiturs: “Our Nation's speech dynamic is changing,” . . . s]peakers have become adept at presenting citizens with sound bites, talking points, and scripted messages,” *ibid.*; “[c]orporations . . . do not have monolithic views,” *ibid.* How any of these ruminations weakens the force of *stare decisis*, escapes my comprehension.

The majority also contends that the Government's hesitation to rely on *Austin*'s antidistortion rationale “diminish[es]” “the principle of adhering to that precedent.” Why it diminishes the value of *stare decisis* is left unexplained. We have never thought fit to overrule a precedent because a litigant has taken any particular tack. Nor should we. Our decisions can often be defended on multiple grounds, and a litigant may have strategic or case-specific reasons for emphasizing only a subset of them. Members of the public, moreover, often rely on our bottom-

line holdings far more than our precise legal arguments; surely this is true for the legislatures that have been regulating corporate electioneering since *Austin*. The task of evaluating the continued viability of precedents falls to this Court, not to the parties.

. . . In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*, “the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion” that “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.” *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

III

The novelty of the Court's procedural dereliction and its approach to *stare decisis* is matched by the novelty of its ruling on the merits. The ruling rests on several premises. First, the Court claims that *Austin* and *McConnell* have “banned” corporate speech. Second, it claims that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corporation. Third, it claims that *Austin* and *McConnell* were radical outliers in our First Amendment tradition and our campaign finance jurisprudence. Each of these claims is wrong.

The So-Called “Ban”

Pervading the Court's analysis is the ominous image of a “categorical ba[n]” on corporate speech. Indeed, the majority invokes the specter of a “ban” on nearly every page of its opinion. This characterization is highly misleading, and needs to be corrected.

In fact it already has been. Our cases have repeatedly pointed out that, “[c]ontrary to the [majority's] critical assumptions,” the statutes upheld in *Austin* and *McConnell* do “not impose an *absolute* ban on all forms of corporate political spending.” . . . For starters, both statutes provide exemptions for PACs, separate segregated funds established by a corporation for political purposes. . . .

Under BCRA, any corporation's “stockholders and their families and its executive or administrative personnel and their families” can pool their resources to finance electioneering communications. 2 U.S.C. § 441b(b)(4)(A)(i). A significant and growing number of corporations avail themselves of this option; ^{FN29} during the most recent election cycle, corporate and union PACs raised nearly a billion dollars.

Administering a PAC entails some administrative burden, but so does complying with the

disclaimer, disclosure, and reporting requirements that the Court today upholds and no one has suggested that the burden is severe for a sophisticated for-profit corporation. To the extent the majority is worried about this issue, it is important to keep in mind that we have no record to show how substantial the burden really is, just the majority's own unsupported factfinding. Like all other natural persons, every shareholder of every corporation remains entirely free under *Austin* and *McConnell* to do however much electioneering she pleases outside of the corporate form. The owners of a “mom & pop” store can simply place ads in their own names, rather than the store's. If ideologically aligned individuals wish to make unlimited expenditures through the corporate form, they may utilize an *MCFL* organization that has policies in place to avoid becoming a conduit for business or union interests. See *MCFL*, 479 U.S., at 263-264.

Identity-Based Distinctions

The second pillar of the Court's opinion is its assertion that “the Government cannot restrict political speech based on the speaker's ... identity.” . . . Like its paeans to unfettered discourse, the Court's denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality.

“Our jurisprudence over the past 216 years has rejected an absolutist interpretation” of the First Amendment. *WRTL*, [551 U.S., at 482](#). The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech, or of the press.” Apart perhaps from measures designed to protect the press, that text might seem to permit no distinctions of any kind. Yet in a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems. . . .

. . . In short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.

Our First Amendment Tradition

A third fulcrum of the Court's opinion is the idea that *Austin* and *McConnell* are radical outliers, “aberration[s],” in our First Amendment tradition. The Court has it exactly backwards. It is today's holding that is the radical departure from what had been settled First Amendment law. To see why, it is useful to take a long view.

1. *Original Understandings*

Let us start from the beginning. The Court invokes “ancient First Amendment principles,” and original understandings to defend today's ruling, yet it makes only a perfunctory attempt to ground its analysis in the principles or understandings of those who drafted and ratified the Amendment. Perhaps this is because there is not a scintilla of evidence to support the notion that anyone believed it would preclude regulatory distinctions based on the corporate form. To the extent that the Framers' views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority's position.

This is not only because the Framers and their contemporaries conceived of speech more narrowly than we now think of it, see Bork, *Neutral Principles and Some First Amendment Problems*, [47 Ind. L.J. 1, 22](#) (1971), but also because they held very different views about the nature of the First Amendment right and the role of corporations in society. Those few corporations that existed at the founding were authorized by grant of a special legislative charter. Corporate sponsors would petition the legislature, and the legislature, if amenable, would issue a charter that specified the corporation's powers and purposes and “authoritatively fixed the scope and content of corporate organization,” including “the internal structure of the corporation.” J. Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970*, pp. 15-16 (1970) (reprint 2004). Corporations were created, supervised, and conceptualized as quasi-public entities, “designed to serve a social function for the state.” Handlin & Handlin, *Origin of the American Business Corporation*, 5 *J. Econ. Hist.* 1, 22 (1945). It was “assumed that [they] were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare.” R. Seavoy, *Origins of the American Business Corporation, 1784-1855*, p. 5 (1982).

. . . The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind. While individuals might join together to exercise their speech rights, business corporations, at least, were plainly not seen as facilitating such associational or expressive ends. Even “the notion that business corporations could invoke the First Amendment would probably have been quite a novelty,” given that “at the time, the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign.” Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 *Hastings Const. L.Q.* 541, 578 (1991); cf. *Trustees of Dartmouth College v. Woodward*, 4 *Wheat.* 518, 636, 4 *L.Ed.* 629 (1819) (Marshall, C.J.) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it”). . . . In light of these background practices and understandings, it seems to me implausible that the Framers believed “the freedom of speech” would extend equally to all corporate speakers, much less that it would preclude legislatures from taking limited measures to guard against corporate capture of elections.

The Court observes that the Framers drew on diverse intellectual sources, communicated through newspapers, and aimed to provide greater freedom of speech than had existed in England. From these (accurate) observations, the Court concludes that “[t]he First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media.” This conclusion is far from certain, given that many historians believe the Framers were focused on prior restraints on publication and did not understand the First Amendment to “prevent the subsequent punishment of such [publications] as may be deemed contrary to the public welfare.” *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714 (1931). Yet, even if the majority's conclusion were correct, it would tell us only that the First Amendment was understood to protect political speech *in certain media*. It would tell us little about whether the Amendment was understood to protect general treasury electioneering expenditures *by corporations, and to what extent*.

Justice Scalia criticizes the foregoing discussion for failing to adduce statements from the founding era showing that corporations were understood to be excluded from the First Amendment's free speech guarantee. Of course, Justice Scalia adduces no statements to suggest the contrary proposition, or even to suggest that the contrary proposition better reflects the kind of right that the drafters and ratifiers of the Free Speech Clause thought they were enshrining. Although Justice Scalia makes a perfectly sensible argument that an individual's right to speak entails a right to speak with others for a common cause, he does not explain why those two rights must be precisely identical, or why that principle applies to electioneering by corporations that serve no “common cause.” Nothing in his account dislodges my basic point that members of the founding generation held a cautious view of corporate power and a narrow view of corporate rights (not that they “despised” corporations), and that they conceptualized speech in individualistic terms. If no prominent Framer bothered to articulate that corporate speech would have lesser status than individual speech, that may well be because the contrary proposition—if not also the very notion of “corporate speech”—was inconceivable.

Justice Scalia also emphasizes the unqualified nature of the First Amendment text. Yet he would seemingly read out the Free Press Clause: How else could he claim that my purported views on newspapers must track my views on corporations generally? Like virtually all modern lawyers, Justice Scalia presumably believes that the First Amendment restricts the Executive, even though its language refers to Congress alone. In any event, the text only leads us back to the questions who or what is guaranteed “the freedom of speech,” and, just as critically, what that freedom consists of and under what circumstances it may be limited. Justice Scalia appears to believe that because corporations are created and utilized by individuals, it follows (as night the day) that their electioneering must be equally protected by the First Amendment and equally immunized from expenditure limits. That conclusion certainly does not follow as a logical matter, and Justice Scalia fails to explain why the original public meaning leads it to follow as a matter of interpretation.

The truth is we cannot be certain how a law such as BCRA § 203 meshes with the original meaning of the First Amendment. I have given several reasons why I believe the Constitution

would have been understood then, and ought to be understood now, to permit reasonable restrictions on corporate electioneering, and I will give many more reasons in the pages to come. The Court enlists the Framers in its defense without seriously grappling with their understandings of corporations or the free speech right, or with the republican principles that underlay those understandings.

In fairness, our campaign finance jurisprudence has never attended very closely to the views of the Framers, see *Randall v. Sorrell*, [548 U.S. 230, 280](#) (2006) (Stevens, J., dissenting), whose political universe differed profoundly from that of today. We have long since held that corporations are covered by the First Amendment, and many legal scholars have long since rejected the concession theory of the corporation. But “historical context is usually relevant,” *ibid.*, and in light of the Court's effort to cast itself as guardian of ancient values, it pays to remember that nothing in our constitutional history dictates today's outcome. To the contrary, this history helps illuminate just how extraordinarily dissonant the decision is.

2. Legislative and Judicial Interpretation

A century of more recent history puts to rest any notion that today's ruling is faithful to our First Amendment tradition. At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, ch. 420, 34 Stat. 864, banning all corporate contributions to candidates. The Senate Report on the legislation observed that “[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any *953 argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials.” S.Rep. No. 3056, 59th Cong., 1st Sess., 2 (1906). President Roosevelt, in his 1905 annual message to Congress, declared:

“ ‘All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts.’ ” *United States v. Automobile Workers*, 352 U.S. 567, 572, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957) (quoting [40 Cong. Rec. 96](#)).

Over the years, the limitations on corporate political spending have been modified in a number of ways, as Congress responded to changes in the American economy and political practices that threatened to displace the commonweal. Justice Souter recently traced these developments at

length. The Taft-Hartley Act of 1947 is of special significance for this case. In that Act passed more than 60 years ago, Congress extended the prohibition on corporate support of candidates to cover not only direct contributions, but independent expenditures as well. Labor Management Relations Act, 1947, § 304, 61 Stat. 159. The bar on contributions “was being so narrowly construed” that corporations were easily able to defeat the purposes of the Act by supporting candidates through other means.

Our colleagues emphasize that in two cases from the middle of the 20th century, several Justices wrote separately to criticize the expenditure restriction as applied to unions, even though the Court declined to pass on its constitutionality. Two features of these cases are of far greater relevance. First, those Justices were writing separately; which is to say, their position failed to command a majority. Prior to today, this was a fact we found significant in evaluating precedents. Second, each case in this line expressed support for the principle that corporate and union political speech financed with PAC funds, collected voluntarily from the organization's stockholders or members, receives greater protection than speech financed with general treasury funds.

By the time Congress passed FECA in 1971, the bar on corporate contributions and expenditures had become such an accepted part of federal campaign finance regulation that when a large number of plaintiffs, including several nonprofit corporations, challenged virtually every aspect of the Act in *Buckley*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, no one even bothered to argue that the bar as such was unconstitutional. *Buckley* famously (or infamously) distinguished direct contributions from independent expenditures, but its silence on corporations only reinforced the understanding that corporate expenditures could be treated differently from individual expenditures. “Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law.” *McConnell*, [540 U.S., at 203](#).

Thus, it was unremarkable, in a 1982 case holding that Congress could bar nonprofit corporations from soliciting nonmembers for PAC funds, that then-Justice Rehnquist wrote for a unanimous Court that Congress' “careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations ... warrants considerable deference,” and “reflects a permissible assessment of the dangers posed by those entities to the electoral process.” . . .

The corporate/individual distinction was not questioned by the Court's disposition, in 1986, of a challenge to the expenditure restriction as applied to a distinctive type of nonprofit corporation. In *MCFL*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539, we stated again “that ‘the special characteristics of the corporate structure require particularly careful regulation,’ ” *id.*, [at 256](#).

Four years later, in *Austin*, 494 U.S. 652, we considered whether corporations falling outside the

MCFL exception could be barred from using general treasury funds to make independent expenditures in support of, or in opposition to, candidates. We held they could be. Once again recognizing the importance of “the integrity of the marketplace of political ideas” in candidate elections. . .

In the 20 years since *Austin*, we have reaffirmed its holding and rationale a number of times, see, e.g., *Beaumont*, 539 U.S., at 153-156, 123 S.Ct. 2200, most importantly in *McConnell*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491, where we upheld the provision challenged here, § 203 of BCRA.

When we asked in *McConnell* “whether a compelling governmental interest justify[ed]” § 203, we found the question “easily answered”: “We have repeatedly sustained legislation aimed at ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.’ ” [540 U.S., at 205](#) (quoting *Austin*, 494 U.S., at 660, 110 S.Ct. 1391).

3. *Buckley and Bellotti*

Against this extensive background of congressional regulation of corporate campaign spending, and our repeated affirmation of this regulation as constitutionally sound, the majority dismisses *Austin* as “a significant departure from ancient First Amendment principles. . . . [I]n the Court’s view, *Buckley* and *Bellotti* decisively rejected the possibility of distinguishing corporations from natural persons in the 1970’s; it just so happens that in every single case in which the Court has reviewed campaign finance legislation in the decades since, the majority failed to grasp this truth. The Federal Congress and dozens of state legislatures, we now know, have been similarly deluded.

The majority emphasizes *Buckley*’s statement that “ ‘[t]he 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.’ ” But this elegant phrase cannot bear the weight that our colleagues have placed on it. For one thing, the Constitution does, in fact, permit numerous “restrictions on the speech of some in order to prevent a few from drowning out the many”: for example, restrictions on ballot access and on legislators’ floor time. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring). . . .

The case on which the majority places even greater weight than *Buckley*, however, is *Bellotti*, 435 U.S. 765, claiming it “could not have been clearer” that *Bellotti*’s holding forbade distinctions between corporate and individual expenditures like the one at issue here. The Court’s reliance is odd. The only thing about *Bellotti* that could not be clearer is that it declined to adopt the majority’s position. *Bellotti* ruled, in an explicit limitation on the scope of its holding, that “our consideration of a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for

election to public office.” 435 U.S., at 788, n. 26, 98 S.Ct. 1407; see also *id.*, at 787-788, 98 S.Ct. 1407 (acknowledging that the interests in preserving public confidence in Government and protecting dissenting shareholders may be “weighty ... in the context of partisan candidate elections”). *Bellotti*, in other words, did not touch the question presented in *Austin* and *McConnell*, and the opinion squarely disavowed the proposition for which the majority cites it.

The majority attempts to explain away the distinction *Bellotti* drew—between general corporate speech and campaign speech intended to promote or prevent the election of specific candidates for office as inconsistent with the rest of the opinion and with *Buckley*. Yet the basis for this distinction is perfectly coherent: The anticorruption interests that animate regulations of corporate participation in candidate elections, the “importance” of which “has never been doubted,” 435 U.S., at 788, n. 26, 98 S.Ct. 1407, do not apply equally to regulations of corporate participation in referenda. A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation's retaliation. . . . The majority likewise overlooks the fact that, over the past 30 years, our cases have repeatedly recognized the candidate/issue distinction. The Court's critique of *Bellotti*'s puts it in the strange position of trying to elevate *Bellotti* to canonical status, while simultaneously disparaging a critical piece of its analysis as unsupported and irreconcilable with *Buckley*. *Bellotti*, apparently, is both the font of all wisdom and internally incoherent.

The *Bellotti* Court confronted a dramatically different factual situation from the one that confronts us in this case: a state statute that barred business corporations' expenditures on some referenda but not others. . . .

Bellotti thus involved a *viewpoint-discriminatory* statute, created to effect a particular policy outcome. Even Justice Rehnquist, in dissent, had to acknowledge that “a very persuasive argument could be made that the [Massachusetts Legislature], desiring to impose a personal income tax but more than once defeated in that desire by the combination of the Commonwealth's referendum provision and corporate expenditures in opposition to such a tax, simply decided to muzzle corporations on this sort of issue so that it could succeed in its desire.” *Id.*, at 827, n. 6. To make matters worse, the law at issue did not make any allowance for corporations to spend money through PACs. This really was a complete ban on a specific, preidentified subject.

The majority grasps a quotational straw from *Bellotti*, that speech does not fall entirely outside the protection of the First Amendment merely because it comes from a corporation. Of course not, but no one suggests the contrary and neither *Austin* nor *McConnell* held otherwise. They held that even though the expenditures at issue were subject to First Amendment scrutiny, the restrictions on those expenditures were justified by a compelling state interest. We acknowledged in *Bellotti* that numerous “interests of the highest importance” can justify campaign finance regulation. But we found no evidence that these interests were served by the Massachusetts law. We left open the possibility that our decision might have been different if

there had been “record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests.” *Ibid.*

Austin and *McConnell*, then, sit perfectly well with *Bellotti*. Indeed, all six Members of the *Austin* majority had been on the Court at the time of *Bellotti*, and none so much as hinted in *Austin* that they saw any tension between the decisions. The difference between the cases is not that *Austin* and *McConnell* rejected First Amendment protection for corporations whereas *Bellotti* accepted it. The difference is that the statute at issue in *Bellotti* smacked of viewpoint discrimination, targeted one class of corporations, and provided no PAC option; and the State has a greater interest in regulating independent corporate expenditures on candidate elections than on referenda, because in a functioning democracy the public must have faith that its representatives owe their positions to the people, not to the corporations with the deepest pockets.

* * *

In sum, over the course of the past century Congress has demonstrated a recurrent need to regulate corporate participation in candidate elections to “ ‘[p]reserv[e] the integrity of the electoral process, preven[t] corruption, ... sustai[n] the active, alert responsibility of the individual citizen,’ ” protect the expressive interests of shareholders, and “ ‘[p]reserv [e] ... the individual citizen's confidence in government.’ ” *McConnell*, [540 U.S., at 206-207, n. 88](#) (quoting *Bellotti*, [435 U.S., at 788-789](#)). . . . Time and again, we have recognized these realities in approving measures that Congress and the States have taken. None of the cases the majority cites is to the contrary. The only thing new about *Austin* was the dissent, with its stunning failure to appreciate the legitimacy of interests recognized in the name of democratic integrity since the days of the Progressives.

IV

Having explained why this is not an appropriate case in which to revisit *Austin* and *McConnell* and why these decisions sit perfectly well with “First Amendment principles,” I come at last to the interests that are at stake. The majority recognizes that *Austin* and *McConnell* may be defended on anticorruption, antidistortion, and shareholder protection rationales. It badly errs both in explaining the nature of these rationales, which overlap and complement each other, and in applying them to the case at hand.

The Anticorruption Interest

Undergirding the majority's approach to the merits is the claim that the only “sufficiently important governmental interest in preventing corruption or the appearance of corruption” is one that is “limited to *quid pro quo* corruption.” This is the same “crabbed view of corruption” that was espoused by Justice Kennedy in *McConnell* and squarely rejected by the Court in that case. 540 U.S., at 152. While it is true that we have not always spoken about corruption in a clear or

consistent voice, the approach taken by the majority cannot be right, in my judgment. It disregards our constitutional history and the fundamental demands of a democratic society.

On numerous occasions we have recognized Congress' legitimate interest in preventing the money that is spent on elections from exerting an “ ‘undue influence on an officeholder's judgment’ ” and from creating “ ‘the appearance of such influence,’ ” beyond the sphere of *quid pro quo* relationships. Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other's backs-and which amply supported Congress' determination to target a limited set of especially destructive practices.

. . . Many of the relationships of dependency [between politicians and sponsors of electioneering may] have a *quid pro quo* basis, but other arrangements were more subtle. Her analysis shows the great difficulty in delimiting the precise scope of the *quid pro quo* category, as well as the adverse consequences that *all* such arrangements may have. There are threats of corruption that are far more destructive to a democratic society than the odd bribe. Yet the majority's understanding of corruption would leave lawmakers impotent to address all but the most discrete abuses.

Our “undue influence” cases have allowed the American people to cast a wider net through legislative experiments designed to ensure, to some minimal extent, “that officeholders will decide issues ... on the merits or the desires of their constituencies,” and not “according to the wishes of those who have made large financial contributions”-or expenditures-“valued by the officeholder.” *McConnell*, 540 U.S., at 153. . . . At stake in the legislative efforts to address this threat is therefore not only the legitimacy and quality of Government but also the public's faith therein, not only “the capacity of this democracy to represent its constituents [but also] the confidence of its citizens in their capacity to govern themselves,” *WRTL*, [551 U.S., at 507](#) (Souter, J., dissenting). . .

Quid Pro Quo Corruption

There is no need to take my side in the debate over the scope of the anticorruption interest to see that the Court's merits holding is wrong. Even under the majority's “crabbed view of corruption,” *McConnell*, 540 U.S., at 152, 124 S.Ct. 619, the Government should not lose this case.

“The importance of the governmental interest in preventing [corruption through the creation of political debts] has never been doubted.” *Bellotti*, 435 U.S., at 788, n. 26, 98 S.Ct. 1407. Even in

the cases that have construed the anticorruption interest most narrowly, we have never suggested that such *quid pro quo* debts must take the form of outright vote buying or bribes, which have long been distinct crimes. Rather, they encompass the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder. See *McConnell*, 540 U.S., at 143. . .

The *Austin* Court did not rest its holding on *quid pro quo* corruption, as it found the broader corruption implicated by the antidistortion and shareholder protection rationales a sufficient basis for Michigan's restriction on corporate electioneering. 494 U.S., at 658-660, 110 S.Ct. 1391. Concurring in that opinion, I took the position that “the danger of either the fact, or the appearance, of *quid pro quo* relationships [also] provides an adequate justification for state regulation” of these independent expenditures. *Id.*, at 678, 110 S.Ct. 1391. I did not see this position as inconsistent with *Buckley*'s analysis of individual expenditures. Corporations, as a class, tend to be more attuned to the complexities of the legislative process and more directly affected by tax and appropriations measures that receive little public scrutiny; they also have vastly more money with which to try to buy access and votes. . . . The unparalleled resources, professional lobbyists, and single-minded focus they bring to this effort, I believed, make *quid pro quo* corruption and its appearance inherently more likely when they (or their conduits or trade groups) spend unrestricted sums on elections.

It is with regret rather than satisfaction that I can now say that time has borne out my concerns. The legislative and judicial proceedings relating to BCRA generated a substantial body of evidence suggesting that, as corporations grew more and more adept at crafting “issue ads” to help or harm a particular candidate, these nominally independent expenditures began to corrupt the political process in a very direct sense. The sponsors of these ads were routinely granted special access after the campaign was over; “candidates and officials knew who their friends were,” *McConnell*, 540 U.S., at 129. Many corporate independent expenditures, it seemed, had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements. In an age in which money and television ads are the coin of the campaign realm, it is hardly surprising that corporations deployed these ads to curry favor with, and to gain influence over, public officials.

The majority appears to think it decisive that the BCRA record does not contain “direct examples of votes being exchanged for ... expenditures.” It would have been quite remarkable if Congress had created a record detailing such behavior by its own Members. Proving that a specific vote was exchanged for a specific expenditure has always been next to impossible: Elected officials have diverse motivations, and no one will acknowledge that he sold a vote. . .

When the *McConnell* Court affirmed the judgment of the District Court regarding § 203, we did not rest our holding on a narrow notion of *quid pro quo* corruption. Instead we relied on the governmental interest in combating the unique forms of corruption threatened by corporations, as

recognized in *Austin's* antidistortion and shareholder protection rationales, 540 U.S., at 205 (citing *Austin*, 494 U.S., at 660, as well as the interest in preventing circumvention of contribution limits, [540 U.S., at 128-129](#)). Had we felt constrained by the view of today's Court that *quid pro quo* corruption and its appearance are the only interests that count in this field, we of course would have looked closely at that issue. And. . . it is a very real possibility that we would have found one or both of those interests satisfied and § 203 appropriately tailored to them.

The majority's rejection of the *Buckley* anticorruption rationale on the ground that independent corporate expenditures “do not give rise to [*quid pro quo*] corruption or the appearance of corruption,” is thus unfair as well as unreasonable.

Deference and Incumbent Self-Protection

Rather than show any deference to a coordinate branch of Government, the majority thus rejects the anticorruption rationale without serious analysis. Today's opinion provides no clear rationale for being so dismissive of Congress, but the prior individual opinions on which it relies have offered one: the incentives of the legislators who passed BCRA. Section 203, our colleagues have suggested, may be little more than “an incumbency protection plan,” *McConnell*, [540 U.S., at 306](#) (Kennedy, J., concurring in judgment in part and dissenting in part).

In my view, we should instead start by acknowledging that “Congress surely has both wisdom and experience in these matters that is far superior to ours.” *Colorado Republican Federal Campaign Comm. v. FEC*, [518 U.S. 604](#) (1996) (Stevens, J., dissenting). whiff of self-interest, is to deprive them of the ability to regulate electioneering. . . .

This is not to say that deference would be appropriate if there were a solid basis for believing that a legislative action was motivated by the desire to protect incumbents or that it will degrade the competitiveness of the electoral process. . . .

We have no record evidence from which to conclude that BCRA § 203, or any of the dozens of state laws that the Court today calls into question, reflects or fosters such invidious discrimination. . . .

. . . [W]e do not have a solid theoretical basis for condemning § 203 as a front for incumbent self-protection, and it seems equally if not more plausible that restrictions on corporate electioneering will be self-denying. Nor do we have a good empirical case for skepticism, as the Court's failure to cite any empirical research attests. Nor does the legislative history give reason for concern. . . .

Austin and Corporate Expenditures

Just as the majority gives short shrift to the general societal interests at stake in campaign finance regulation, it also overlooks the distinctive considerations raised by the regulation of *corporate*

expenditures. The majority fails to appreciate that *Austin's* antidistortion rationale is itself an anticorruption rationale, tied to the special concerns raised by corporations. Understood properly, “antidistortion” is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process. It is manifestly not just an “ ‘equalizing’ ” ideal in disguise.

1. *Antidistortion*

The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it. *Austin* set forth some of the basic differences. Unlike natural persons, corporations have “limited liability” for their owners and managers, “perpetual life,” separation of ownership and control, “and favorable treatment of the accumulation and distribution of assets ... that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments.” Unlike voters in U.S. elections, corporations may be foreign controlled. Unlike other interest groups, business corporations have been “effectively delegated responsibility for ensuring society's economic welfare”; they inescapably structure the life of every citizen. “ [T]he resources in the treasury of a business corporation, ’ ” furthermore, “ ‘are not an indication of popular support for the corporation's political ideas.’ ” . . .

It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.

These basic points help explain why corporate electioneering is not only more likely to impair compelling governmental interests, but also why restrictions on that electioneering are less likely to encroach upon First Amendment freedoms. One fundamental concern of the First Amendment is to “protec[t] the individual's interest in self-expression.” *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.*, [447 U.S. 530](#) (1980). A regulation such as BCRA § 203 may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice. “Within the realm of [campaign spending] generally,” corporate spending is “furthest from the core of political expression.” *Beaumont*, [539 U.S.](#), at 161, n. 8.

It is an interesting question “who” is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. Some individuals associated with the

corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation's electoral message will *conflict* with their personal convictions. Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least.

Corporate expenditures are distinguishable from individual expenditures in this respect. I have taken the view that a legislature may place reasonable restrictions on individuals' electioneering expenditures in the service of the governmental interests explained above, and in recognition of the fact that such restrictions are not direct restraints on speech but rather on its financing. But those restrictions concededly present a tougher case, because the primary conduct of actual, flesh-and-blood persons is involved. Some of those individuals might feel that they need to spend large sums of money on behalf of a particular candidate to vindicate the intensity of their electoral preferences. This is obviously not the situation with business corporations, as their routine practice of giving “substantial sums to *both* major national parties” makes pellucidly clear. *McConnell*, 540 U.S., at 148.. “[C]orporate participation” in elections, any business executive will tell you, “is more transactional than ideological.”

. . . In short, regulations such as § 203 and the statute upheld in *Austin* impose only a limited burden on First Amendment freedoms not only because they target a narrow subset of expenditures and leave untouched the broader “public dialogue,” but also because they leave untouched the speech of natural persons. . . .

Austin recognized that there are substantial reasons why a legislature might conclude that unregulated general treasury expenditures will give corporations “unfai[r] influence” in the electoral process, 494 U.S., at 660 and distort public debate in ways that undermine rather than advance the interests of listeners. The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match. The structure of a business corporation, furthermore, draws a line between the corporation's economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim “to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities.” . . . In a state election such as the one at issue in *Austin*, the interests of nonresident corporations may be fundamentally adverse to the interests of local voters. Consequently, when corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears “little or no correlation” to the ideas of natural persons or to any broader notion of the public good, 494 U.S., at 660 The opinions of real people may be marginalized. “The expenditure restrictions of [2 U.S.C.] § 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas.” *MCFL*, 479 U.S.at 259.

In addition to this immediate drowning out of noncorporate voices, there may be deleterious effects that follow soon thereafter. Corporate “domination” of electioneering, *Austin*, 494 U.S., at

659, can generate the impression that corporations dominate our democracy. When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders “ ‘call the tune’ ” and a reduced “ ‘willingness of voters to take part in democratic governance.’ ” *McConnell*, 540 U.S., at 144 (quoting *Shrink Missouri*, 528 U.S., at 390). To the extent that corporations are allowed to exert undue influence in electoral races, the speech of the eventual winners of those races may also be chilled. Politicians who fear that a certain corporation can make or break their reelection chances may be cowed into silence about that corporation. On a variety of levels, unregulated corporate electioneering might diminish the ability of citizens to “hold officials accountable to the people,” and disserve the goal of a public debate that is “uninhibited, robust, and wide-open,” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). At the least, I stress again, a legislature is entitled to credit these concerns and to take tailored measures in response.

The majority's unwillingness to distinguish between corporations and humans similarly blinds it to the possibility that corporations' “war chests” and their special “advantages” in the legal realm, *Austin*, 494 U.S., at 659, may translate into special advantages in the market for legislation. When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. The corporate form, by contrast, “provides a simple way to channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger dividends or appreciation in the stock price caused by the passage of private interest legislation.” Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters, 69 U. Chi. L.Rev. 1103, 1113 (2002). Corporations, that is, are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is “far more destructive” than what noncorporations are capable of. *Ibid.* It is for reasons such as these that our campaign finance jurisprudence has long appreciated that “the ‘differing structures and purposes’ of different entities ‘may require different forms of regulation in order to protect the integrity of the electoral process.’ ” *NRWC*, [459 U.S., at 210](#) (quoting *California Medical Assn.*, 453 U.S., at 201).

The Court's facile depiction of corporate electioneering assumes away all of these complexities. Our colleagues ridicule the idea of regulating expenditures based on “nothing more” than a fear that corporations have a special “ability to persuade,” as if corporations were our society's ablest debaters and viewpoint-neutral laws such as § 203 were created to suppress their best arguments. In their haste to knock down yet another straw man, our colleagues simply ignore the fundamental concerns of the *Austin* Court and the legislatures that have passed laws like § 203: to safeguard the integrity, competitiveness, and democratic responsiveness of the electoral

process. . . .

. . . Our colleagues have raised some interesting and difficult questions about Congress' authority to regulate electioneering by the press, and about how to define what constitutes the press. *But that is not the case before us.* Section 203 does not apply to media corporations, and even if it did, Citizens United is not a media corporation. There would be absolutely no reason to consider the issue of media corporations if the majority did not, first, transform Citizens United's as-applied challenge into a facial challenge and, second, invent the theory that legislatures must eschew all “identity”-based distinctions and treat a local nonprofit news outlet exactly the same as General Motors. . . .

The Court's blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve. It will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process. Americans may be forgiven if they do not feel the Court has advanced the cause of self-government today.

2. Shareholder Protection

There is yet another way in which laws such as § 203 can serve First Amendment values. Interwoven with *Austin's* concern to protect the integrity of the electoral process is a concern to protect the rights of shareholders from a kind of coerced speech: electioneering expenditures that do not “reflec [t] [their] support.” [494 U.S., at 660-661](#). When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions.

The PAC mechanism, by contrast, helps assure that those who pay for an electioneering communication actually support its content and that managers do not use general treasuries to advance personal agendas. *Ibid.* It “ ‘allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members.’ ” *McConnell*, 540 U.S., at 204 (quoting *Beaumont*, 539 U.S., at 163). A rule that privileges the use of PACs thus does more than facilitate the political speech of like-minded shareholders; it also curbs the rent seeking behavior of executives and respects the views of dissenters. *Austin's* acceptance of restrictions on general treasury spending “simply allows people who have invested in the business corporation for purely economic reasons”-the vast majority of investors, one assumes-“to avoid being taken

advantage of, without sacrificing their economic objectives.” Winkler, *Beyond Bellotti*, 32 Loyola (LA) L.Rev. 133, 201 (1998).

The concern to protect dissenting shareholders and union members has a long history in campaign finance reform. It provided a central motivation for the Tillman Act in 1907 and subsequent legislation.

The Court dismisses this interest on the ground that abuses of shareholder money can be corrected “through the procedures of corporate democracy,” and, it seems, through Internet-based disclosures. I fail to understand how this addresses the concerns of dissenting union members, who will also be affected by today's ruling, and I fail to understand why the Court is so confident in these mechanisms. By “corporate democracy,” presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that “these rights are so limited as to be almost nonexistent,” given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule. . . . Most American households that own stock do so through intermediaries such as mutual funds and pension plans, which makes it more difficult both to monitor and to alter particular holdings.

If and when shareholders learn that a corporation has been spending general treasury money on objectionable electioneering, they can divest. Even assuming that they reliably learn as much, however, this solution is only partial. The injury to the shareholders' expressive rights has already occurred; they might have preferred to keep that corporation's stock in their portfolio for any number of economic reasons; and they may incur a capital gains tax or other penalty from selling their shares, changing their pension plan, or the like. The shareholder protection rationale has been criticized as underinclusive, in that corporations also spend money on lobbying and charitable contributions in ways that any particular shareholder might disapprove.

Recognizing the limits of the shareholder protection rationale, the *Austin* Court did not hold it out as an adequate and independent ground for sustaining the statute in question. Rather, the Court applied it to reinforce the antidistortion rationale, in two main ways. First, the problem of dissenting shareholders shows that even if electioneering expenditures can advance the political views of some members of a corporation, they will often compromise the views of others. Second, it provides an additional reason, beyond the distinctive legal attributes of the corporate form, for doubting that these “expenditures reflect actual public support for the political ideas espoused.” The shareholder protection rationale, in other words, bolsters the conclusion that restrictions on corporate electioneering can serve both speakers' and listeners' interests, as well as the anticorruption interest. And it supplies yet another reason why corporate expenditures merit less protection than individual expenditures.

Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality. Our colleagues have arrived at the conclusion that *Austin* must be overruled and that § 203 is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court's lawmaking power. Their conclusion that the societal interest in avoiding corruption and the appearance of corruption does not provide an adequate justification for regulating corporate expenditures on candidate elections relies on an incorrect description of that interest, along with a failure to acknowledge the relevance of established facts and the considered judgments of state and federal legislatures over many decades.

In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority's rejection of this principle “elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests.” *Bellotti*, 435 U.S., at 817, n. 13 (White, J., dissenting). At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

I would affirm the judgment of the District Court.

JUSTICE THOMAS, concurring in part and dissenting in part.

I join all but Part IV of the Court's opinion.

Political speech is entitled to robust protection under the First Amendment. Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) has never been reconcilable with that protection. By striking down § 203, the Court takes an important first step toward restoring full constitutional protection to speech that is “indispensable to the effective and intelligent use of the processes of popular government.” *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003).

Congress may not abridge the “right to anonymous speech” based on the “ ‘simple interest in

providing voters with additional relevant information.” In continuing to hold otherwise, the Court misapprehends the import of “recent events” that some *amici* describe “in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation.” The Court properly recognizes these events as “cause for concern,” *ibid.*, but fails to acknowledge their constitutional significance. In my view, *amici*’s submissions show why the Court’s insistence on upholding §§ 201 and 311 will ultimately prove as misguided (and ill fated) as was its prior approval of § 203. . . .

. . . I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in “core political speech, the ‘primary object of First Amendment protection.’ *McConnell*, [540 U.S., at 264](#). Accordingly, I respectfully dissent from the Court’s judgment upholding BCRA §§ 201 and 311.

§8.04 CONSCIENCE AND EXPRESSION IN SPECIAL SETTINGS

[B] Universities

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NOTES AND QUESTIONS

1. In *Christian Legal Society Chapter of the University of California, Hastings v. Martinez*, ___ U.S. ___ (2010), the Supreme Court dealt with a challenge brought by the Christian Legal Society to a policy of the Hastings Law School, a state university law school in San Francisco that is part of the University of California system. The policy, which the Supreme Court described as an “all-comers” policy, imposed an open membership rule on all officially recognized student groups, a rule that required the student group to accept all comers as voting members even if those individuals disagree with the mission of the group. The Hastings chapter of the Christian Legal Society, a national organization, required its members to sign a “Statement of Faith” and to live their lives according to certain tenets, including the principle that sexual activity should not occur outside of marriage between a man and a woman. Consistent with this belief, the Society would not accept gay and lesbian members, placing it in conflict with the non-discrimination policy that Hastings mandated for all of its registered student organizations. The Christian Legal Society sought a waiver from Hastings, arguing that to force it to accept gay and lesbian members violated its First Amendment rights of freedom of speech and freedom of association, relying on decisions such as *Boy Scouts of America v. Dale*. By a 5-4 vote, in a decision written by Justice Ruth Bader Ginsburg, the Supreme Court rejected the Christian Legal Society’s claim, holding that the Hastings Law School could require adherence to its all-comers non-discrimination policy as a condition of official recognition as a registered student organization. Justice Ginsburg’s opinion for the Court held that the First Amendment rights of the Christian Legal Society had to be measured in light of the special deference that courts pay to public universities in making judgments germane to the educational process, judgments that are not limited to the classroom, but that extend to extracurricular activities as well. Exclusion, Justice Ginsburg reasoned, has two sides. “Hastings, caught in the crossfire between a group’s desire to exclude and students’ demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.” The Court observed that just as Hastings would not allow its professors to teach only classes to those students who adhere to certain beliefs, it could reach the educational judgment that it should not grant official status to student groups who engage in similar discrimination. Moreover, the Court reasoned, it would be difficult for Hastings to police student groups to determine which forms of discrimination were truly belief-based, and which were mere cover for discrimination. The Court held that the Hastings Law School was entitled to reach the judgment that an all-comers policy would advance the valid educational goals of encouraging tolerance, conflict-resolution skills, and a readiness to find common ground. Finally, the Court reasoned, the non-

discrimination policy followed by the Hastings Law School was consistent with the broader non-discrimination policies of the state of California. Hastings, the Court reasoned, could make the judgment that it would not subsidize discrimination that ran contrary to the state's declared public policies. The Court in *Christian Legal Society* made much of the fact that the Hastings policy did not force the Society to accept gay and lesbian members. It merely conditioned status as a registered student organization on such acceptance. The Christian Legal Society could still exist, and could even gain access to school facilities, and the use of chalkboards and bulletin boards to advertise Society events. All that the Hastings rule did was prevent the Society from receiving the other benefits that came with recognition as an official registered student organization, such as eligibility for funding assistance through the funds generated by required student fees, use of the Law School's name and logo, participation in a student organization fair, access to the Law School's official student services newsletter, and use of the Law School's e-mail service with an official Hastings organizational e-mail address. As the Court saw the matter, the Christian Legal Society could remain true to its principles if it chose, and reject these fringe benefits of official recognition, but still function within the Law School as an unofficial student organization, or it could accept the benefits and agree to adhere to the Hastings policy. Indeed, the Court appeared to concede that the First Amendment rights of the Christian Legal Society would have been violated if the government had forced the society to accept gay and lesbian members against its will, through an outright criminal prohibition. The Court noted, however, that "[i]n diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits." A less restrictive First Amendment standard applied, to the Hastings registered student organization, program, the Court reasoned, because through it Hastings was "dangling the carrot of subsidy, not wielding the stick of prohibition."