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# Contingent Constitutionality, Legislative Facts, and Campaign Finance

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# CONTINGENT CONSTITUTIONALITY, LEGISLATIVE FACTS, AND CAMPAIGN FINANCE LAW

MICHAEL T. MORLEY\*

## ABSTRACT

*Many of the Supreme Court's important holdings concerning campaign finance law are not pure matters of constitutional interpretation. Rather, they are "contingent" constitutional determinations: the Court's conclusions rest in substantial part on legislative facts about the world that the Court finds, intuitively, or assumes to be true. While earlier commentators have recognized the need to improve legislative factfinding by the Supreme Court, other aspects of its treatment of legislative facts—particularly in the realm of campaign finance—require reform as well.*

*Stare decisis purportedly insulates the Court's purely legal holdings and interpretations from future challenge. Factually contingent constitutional rulings should, in contrast, be more susceptible to future revision. The facts underlying contingent holdings may change, litigants in a later case may present different evidence concerning those facts, social or technological developments may occur, new discoveries may be made, or a later court's assessments or assumptions concerning those facts may differ. The Court's campaign finance jurisprudence exhibits the opposite tendency of what theory would predict, however. The Court has proven much more willing to revisit its purely legal interpretations of the First Amendment than its constitutionally contingent holdings.*

*Many of the Court's campaign finance rulings pay insufficient attention to the importance of legislative facts. They reiterate holdings of prior cases as if they were pure declarations of law, without recognizing the underlying legislative facts upon which those holdings depend. This can lead future courts to overestimate these holdings' binding force, overlooking their dependence on certain facts. Several cases also make critical assertions concerning legislative facts without citing support either in the record or from extrinsic sources.*

*Perhaps the biggest impediment to the effective use of legislative facts in campaign finance cases is the vagueness of the decision rules the Court has crafted to implement the First Amendment in this field. Many of the Court's doctrines turn on standards—for example, whether an act poses a risk of apparent corruption—that are vague, underdefined, and fail to provide litigants and future courts with sufficient guidance concerning the nature and extent of evidence necessary to satisfy them. Such indeterminacy allows courts to resolve campaign finance cases based primarily on subjective, ad hoc intuitions and preferences rather than provable legislative facts.*

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## I. INTRODUCTION

Much of constitutional law is far less settled than we generally take it to be. For example, it is often stated, as a matter of black-letter law, that the Fourth Amendment exclusionary rule does not prohibit the government from using unconstitutionally seized evidence in grand jury proceedings.<sup>1</sup> This declaration, a reflection of the Supreme Court's holding in *United States v. Calandra*,<sup>2</sup> appears to be a matter of pure constitutional interpretation—that is, a pure statement of law.

That holding, however, is premised on the *Calandra* Court's assessment of various facts, including the extent to which applying the exclusionary rule in grand jury proceedings would interfere with the grand jury's operations or deter police misconduct.<sup>3</sup> *Calandra* stated, "Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. . . . [I]t is unrealistic to assume that application of the [exclusionary] rule to grand jury proceedings" would "deter[] . . . police misconduct . . . ."<sup>4</sup>

Thus, the Court's conclusion does not rest primarily on legal grounds, such as the Constitution's text, structure, or history, but rather on its assessment of a few key facts, including the extent to which applying the exclusionary rule to grand jury proceedings would deter police from engaging in unconstitutional searches. That fact

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1. See, e.g., *United States v. R. Enters.*, 498 U.S. 292, 298 (1990) ("[T]he Fourth Amendment exclusionary rule does not apply to grand jury proceedings."); *Investigations and Police Practices*, 43 GEO. L.J. ANN. REV. CRIM. PROC. 3, 241 (2014) ("[T]he government may introduce tainted evidence in . . . grand jury proceedings . . . ."); Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 24 (2010) ("[T]he exclusionary rule . . . does not preclude the government from using illegally-obtained evidence in grand jury proceedings . . . .").

2. 414 U.S. 338, 350-51 (1974).

3. *Id.* at 350 ("Against this potential damage to the role and functions of the grand jury, we must weigh the benefits to be derived from this proposed extension of the exclusionary rule.").

4. *Id.* at 351-52.

does not arise directly from the Constitution itself, but rather is an empirical assessment about the world as it existed at the time of the Court's ruling, and is by no means immutable, or even necessarily correct. Indeed, Professor Seth Stoughton, a former police officer, has demonstrated that the Supreme Court's assumptions about police officers' motivations are often faulty and that police frequently conduct searches and make arrests to further a wide range of goals other than achieving convictions.<sup>5</sup>

Justice Blackmun's opinion in *Ballew v. Georgia* presents an even more extreme example of the Justices' reliance on extrinsic facts in applying the Constitution.<sup>6</sup> The defendant had been convicted of obscenity in state court before a five-member jury.<sup>7</sup> He contended that his conviction violated the Sixth and Fourteenth Amendments,<sup>8</sup> which he argued required a jury of no less than six people in criminal cases.<sup>9</sup> Justice Blackmun held that, as a matter of fact, "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members."<sup>10</sup> Citing over nineteen sources, including books, studies, articles, and student notes,<sup>11</sup> he stated that empirical data suggests that "progressively smaller juries are less likely to foster effective group deliberation,"<sup>12</sup> "the accuracy of the results achieved by smaller and smaller panels" is doubtful,<sup>13</sup> and "verdicts of jury deliberation in criminal cases will vary . . . to the detriment of . . . the defense" as "juries become smaller."<sup>14</sup> His interpretation and application of the Sixth Amendment right to a jury trial rested primarily on this empirical research concerning group decision-making, rather than the text, original understanding, or history of application of the Sixth Amendment itself.<sup>15</sup>

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5. Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 852 (2014) ("[T]here are no formal mechanisms that would encourage officers to reevaluate the quality of their arrests based on the conviction results, and informal pressures actively discourage officer interest, leading officers to pay less attention to convictions than the Court assumes.").

6. 435 U.S. 223 (1978) (plurality opinion).

7. *Id.* at 226-27.

8. U.S. CONST. amend. VI, XIV.

9. *Ballew*, 435 U.S. at 227 (plurality opinion).

10. *Id.* at 239.

11. *Id.* at 231 n.10.

12. *Id.* at 232.

13. *Id.* at 234.

14. *Id.* at 236.

15. *Id.* at 232-34; see also *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (upholding a ban on partial-birth abortions based in part on the Court's assumption that, despite the absence of "reliable data to measure the phenomenon," it is "unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained" and that "[s]evere depression and loss of esteem can follow").

Not all constitutional holdings share this dynamic. For example, in *Mahler v. Eby*, the Court held that the Ex Post Facto Clause<sup>16</sup> did not preclude the petitioners from being deported under an amended immigration law based on crimes for which they had been convicted before the law's enactment.<sup>17</sup> Citing the Court's prior interpretation of the Ex Post Facto Clause in *Calder v. Bull*, *Mahler* declared, "The inhibition against the passage of an ex post facto law . . . applies only to criminal laws and not to a deportation act like this."<sup>18</sup> The Court adjudicated this issue solely as a matter of law, based exclusively on the Immigration Act and Ex Post Facto Clause, without taking into account any empirical facts, generalizations, or assumptions about the world.

All of these cases resulted in holdings that appear to provide definitive interpretations or applications of the Constitution. *Calandra* holds that the government may use unconstitutionally seized evidence in grand jury proceedings.<sup>19</sup> *Ballew* declares that the Sixth Amendment prohibits states from using a five-person petit jury in a criminal case.<sup>20</sup> *Mahler* concludes that the Ex Post Facto Clause does not bar the government from designating certain crimes as deportable offenses after they already have been committed.<sup>21</sup> The first two holdings, however, depend in large part on empirical, and potentially changing (or even incorrect) facts about the world beyond the four corners and legislative history of the constitutional clause at issue.

This Article introduces the phrase "contingent constitutionality" to refer to a constitutional holding that is based substantially upon—that is, contingent upon—potentially falsifiable facts about the world, commonly called "legislative facts."<sup>22</sup> As a matter of law, contingent constitutional holdings should be treated as far less settled than purely legal holdings (i.e., those based solely on the text, structure, original intent or understanding, or history of application of the constitutional or legal provision at issue), and courts should be more willing to reconsider them. The facts underlying contingent constitutional holdings may change, litigants in a later case may present dif-

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16. U.S. CONST. art. I, § 9, cl. 3.

17. 264 U.S. 32, 39 (1924).

18. *Id.* (citation omitted) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)).

19. *United States v. Calandra*, 414 U.S. 338, 350-51 (1974).

20. *Ballew v. Georgia*, 435 U.S. 223, 239 (1978).

21. *Mahler*, 264 U.S. at 39.

22. See *infra* notes 44-47 and accompanying text; cf. Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 14 (1988) ("Underlying every decision of an issue of law is a set of factual premises."). See generally Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 640 (1966).

ferent evidence concerning those facts, social change or technological developments may occur, new discoveries may be made, or a later court's assessments or assumptions concerning those facts may differ.

As holdings of prior cases are repeated in treatises, hornbooks, articles, and subsequent cases, in isolation from the reasoning of the underlying opinions, however, contingent constitutional rulings often come to be treated as direct interpretations of the Constitution itself that do not rest on intermediary factual findings or assumptions.<sup>23</sup> Conversely, subsequent cases instead sometimes treat the factual underpinnings of precedents as established legal principles, rather than purportedly empirical statements or assumptions about the world that are potentially susceptible to counterproof.<sup>24</sup>

This Article offers an analysis of contingent constitutionality, particularly in the campaign finance context.<sup>25</sup> Part II begins by exploring the concept of contingent constitutionality in greater depth, demonstrating that many important constitutional holdings rest on legislative facts that are subject to continued change, evolving understandings, and new evidence. It contends that the judiciary, and in particular the Supreme Court, should be more careful to ensure that its discussions of case holdings distinguish between those which are pure matters of law, and those which are contingent upon potentially changing extrinsic facts. Part II further contends that courts should be more willing to overturn contingent constitutional rulings than those involving primarily legal determinations. Moreover, when crafting legal tests and doctrines for applying constitutional provisions (i.e., constitutional decision rules),<sup>26</sup> the Court should consider whether it is reasonably possible for litigants to prove, or even provide meaningful evidence concerning, the legislative facts upon which those decision rules rely.

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23. See, e.g., *FEC v. Beaumont*, 539 U.S. 146, 161 (2003) (“[R]estrictions on political contributions have been treated as merely ‘marginal’ speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression.”); see also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) (“We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.”).

24. See, e.g., *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (citing *Citizens United v. FEC*, 558 U.S. 310, 342, 343 (2010)); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 395-97 (2000) (citing *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)); *McConnell v. FEC*, 540 U.S. 93, 135-36 (2003) (quoting *Buckley*, 424 U.S. at 21).

25. Other scholars, calling for reform of appellate courts’ factfinding, have identified campaign finance jurisprudence as an area in which the Court relies on factual findings and assumptions in crafting constitutional doctrine. See, e.g., Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 28-31 (2011).

26. See *infra* note 32 and accompanying text.

Part III turns to the specific context of campaign finance law, distinguishing the Court's pure constitutional holdings from its contingent constitutional holdings. This Part argues that, in the campaign finance context, the Court has failed to recognize the importance of contingent constitutionality by refusing to reassess earlier cases' contingent constitutional holdings based on new or different evidence in subsequent cases. If anything, campaign finance jurisprudence exhibits the opposite tendency: the Court has been far more willing to readjust its purely legal interpretations of the First Amendment than it has been to revisit its factually contingent holdings.<sup>27</sup> Moreover, the Court's decision rules for applying the First Amendment in campaign finance cases have provided very little guidance to litigants concerning the nature and extent of evidence necessary to satisfy them. This Part explores these issues in three main areas of campaign finance law: the Court's refusal to recognize proxy speech as pure speech entitled to full constitutional protection,<sup>28</sup> its holdings concerning the validity of various contribution limits,<sup>29</sup> and its declaration that independent expenditures do not give rise to a risk of corruption.<sup>30</sup>

Part IV briefly concludes, arguing that the Court must be more attentive to the role of legislative facts in campaign finance cases. In particular, it should be willing to reassess its contingent constitutional rulings in this field in the face of new evidence in subsequent cases.

## II. CONTINGENT CONSTITUTIONALITY

At the foundation of every constitutional ruling lie operative propositions: pure statements of law in which the Court interprets the Constitution's meaning.<sup>31</sup> Typically, an operative proposition is a statement of the general principle that a constitutional provision embodies. For example, the Supreme Court has held that the First Amendment guarantees fundamental rights of political speech and association.<sup>32</sup>

Many scholars contend that most constitutional rulings also are based on decision rules: judicially created tests that courts employ to determine whether the underlying operative propositions have been

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27. See *infra* note 85.

28. See *infra* Section III.A.

29. See *infra* Section III.B.

30. See *infra* Section III.C.

31. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004); see Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1007 (2010).

32. NAACP v. Button, 371 U.S. 415, 431 (1963); see also Morse v. Frederick, 551 U.S. 393, 403 (2007) ("Political speech, of course, is at the core of what the First Amendment is designed to protect.").

violated.<sup>33</sup> For example, the Supreme Court has held that laws which substantially burden pure speech are “subject to strict scrutiny,” meaning they are valid only if they are narrowly tailored to serve a compelling governmental interest.<sup>34</sup> More limited restrictions on First Amendment activities, in contrast, are subject only to a “rigorous” form of intermediate scrutiny,<sup>35</sup> requiring the government to demonstrate that they are reasonably tailored to further an important interest.<sup>36</sup>

Stare decisis insulates both operative propositions and decision rules, to a substantial extent, from subsequent changes.<sup>37</sup> It counsels that “an argument that [the Court] got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent.”<sup>38</sup> The Court has described stare decisis as “a foundation stone of the rule of law.”<sup>39</sup> Although stare decisis is “not an inexorable command,”<sup>40</sup> departure from the doctrine “demands special justification,”<sup>41</sup> particularly where a principle has been applied in a “long line of precedents.”<sup>42</sup>

Most constitutional decision rules require the Court to assess certain facts.<sup>43</sup> A legal provision’s constitutionality seldom hinges

33. Berman, *supra* note 31, at 9; Laurin, *supra* note 31, at 1007-08. While the dispute is immaterial to this Article, some scholars question whether it is accurate, meaningful, or possible to distinguish between operative propositions and decision rules. See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 207-08 (1988).

34. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

35. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444-45 (2014); accord *Buckley v. Valeo*, 424 U.S. 1, 29 (1976).

36. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Buckley*, 424 U.S. at 25.

37. Some commentators have argued that stare decisis applies with greater force to operative principles than decision rules, since operative principles are the result of pure constitutional interpretation, whereas decision rules are based in part on practical implementation concerns. See Berman, *supra* note 31, at 113.

38. *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015).

39. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014); see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (describing stare decisis as “a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion’ ” (quoting THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed., 1888))).

40. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

41. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

42. *Bay Mills Indian Cmty.*, 134 S. Ct. at 2036. The Court considers several factors in determining whether to abandon stare decisis, including whether the precedent has proved unworkable, “the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009).

43. See, e.g., David L. Faigman, “Normative Constitutional Fact-Finding”: Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541, 551-65 (1991) (discussing the role of legislative facts in numerous landmark Supreme Court precedents); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT.



primarily on “adjudicative facts” about the particular parties that happen to be before the Court or the specific incident, instrument, or transaction giving rise to the case, however.<sup>44</sup> Instead, it usually depends on facts about the world, collectively called “legislative facts.”<sup>45</sup> These include facts about how people typically think, act, or feel under certain circumstances; the likely consequences of different incentives or courses of action; and social meaning.<sup>46</sup> “Facts having constitutional magnitude range widely, from the effect of a railroad licensing requirement on interstate commerce to the nature of man.”<sup>47</sup> Many legislative facts “are of a complex nature, built on an intricate structure of data and inferences.”<sup>48</sup>

When determining adjudicative facts, courts are generally bound by the rules of evidence. When determining legislative facts, in contrast, a court is neither required to follow the rules of evidence,<sup>49</sup> nor limited to the evidentiary record.<sup>50</sup> Rather, it is free to take judi-

REV. 75, 75 (1960) (“Judges make constitutional law as they make other kinds of law, on the basis of facts proved and assumed.”).

44. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 353 (2d ed. 1983). Adjudicative facts necessary to resolve constitutional claims are sometimes referred to as “constitutional facts,” Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 230-31 & n.17 (1985), and are subject to de novo review in certain contexts, such as in First Amendment cases, see *Miller v. Fenton*, 474 U.S. 104, 114, 117 (1985); see also, e.g., *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 508 n.27 (1984); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). See generally Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427 (2001) (identifying various types of cases in which the Supreme Court will review constitutional facts de novo). Monaghan contends that federal appellate courts generally have discretion to review constitutional facts de novo, but are not required to do so. See Monaghan, *supra* at 276.

45. See Karst, *supra* note 43, at 81, 98; see also Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 365-66 (1942). As with many attempts at categorization in the law, the line between adjudicative and legislative facts can sometimes be blurry. See, e.g., Frederick Schauer, *The Decline of “The Record”: A Comment on Posner*, 51 DUQ. L. REV. 51, 58-59 (2013) (discussing examples of facts that are “neither purely legislative nor purely adjudicative”).

46. Some commentators have referred to this category of facts as “social facts.” Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877, 881 n.26 (1988).

47. Faigman, *supra* note 43, at 551 (footnote omitted).

48. Karst, *supra* note 43, at 100.

49. See FED. R. EVID. 201(a) (providing that restrictions on a court’s ability to take judicial notice do not extend to legislative facts); Keeton, *supra* note 22, at 31 (“[B]oth trial and appellate courts, in making premise-fact decisions, are free to draw upon sources of knowledge not admissible under the formal rules of evidence that apply to adjudicative-fact finding.”).

50. See Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016, 2045 (2012) (“[F]ar more common is a willingness by appellate courts to consider new evidence on legislative facts at every turn . . . .”); Gorod, *supra* note 25, at 6 (“[N]othing in the current legal framework prevents a higher court from looking outside the record created by the parties and relying on its own factual findings to reverse the trial court’s decision.”).

cial notice of whatever legislative facts it wishes,<sup>51</sup> and an appellate court need not defer to a lower court's findings on those issues.<sup>52</sup> The Advisory Committee note to the Federal Rules of Evidence explains that a judge is "unrestricted in his investigation and conclusion" when determining legislative facts.<sup>53</sup> "He may make an independent search for persuasive data, or rest content with what he has or what the parties present."<sup>54</sup>

In general, the Court is likely to begin by scrutinizing the evidentiary record that the parties assembled below,<sup>55</sup> as well as their briefs on appeal. Briefs that focus on presenting legislative facts often are referred to as "Brandeis briefs," after Louis Brandeis' famous brief in *Muller v. Oregon*<sup>56</sup> containing over 100 pages of social science data and other evidence concerning the consequences of long working hours on women.<sup>57</sup>

In important constitutional cases, the Court typically receives numerous amicus briefs containing legislative facts, as well.<sup>58</sup> The Supreme Court virtually never denies leave to file an amicus brief.<sup>59</sup> "In a recent term, . . . a total of 399 amicus briefs were filed in 74 of the 79 cases decided. . . . Four or more amicus briefs were filed in over half of the decided cases."<sup>60</sup> Many of these briefs, akin to Brandeis-

51. Dobbins, *supra* note 50, at 2044; *see also* Schauer, *supra* note 45, at 58 ("[T]he phenomenon of reliance on external information to establish legislative facts has long been part of the appellate landscape."). *See generally* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012) (providing an empirical examination of the extent to which the Supreme Court conducts independent factual research).

52. *See* Keeton, *supra* note 22, at 41-43; *see also* Lockhart v. McCree, 476 U.S. 162, 168 n.3 (1986); Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1188, 1190 (2013) (recognizing that it is "widely believed" that appellate courts may review social facts "independently," but arguing that district courts' findings concerning social facts should be subject to clearly erroneous review).

53. FED. R. EVID. 201(a) adv. comm. note (quoting Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270-71 (1944)); *see also* Chastleton Corp. v. Sinclair, 264 U.S. 543, 548 (1924) ("[T]he Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law.").

54. FED. R. EVID. 201(a) adv. comm. note (quoting Morgan, *supra* note 53, at 270-71).

55. Ann Woolhandler emphasizes that litigants have a strong incentive to provide the Court with as much supporting evidence as they can concerning pertinent legislative facts. Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 118, 121 (1988).

56. 208 U.S. 412 (1908).

57. Dobbins, *supra* note 50, at 2049-50. *See generally* Marion E. Doro, *The Brandeis Brief*, 11 VAND. L. REV. 783 (1958). Some commentators have critiqued Brandeis briefs precisely because appellate courts can use them to adjudicate cases based on new facts that were not introduced in the district court. *See* John Frazier Jackson, *The Brandeis Brief—Too Little, Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL ADVOC. 1, 5 (1993).

58. *See* Dobbins, *supra* note 50, at 2051-54.

59. *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 751 (2013).

60. *Id.* at 756.

is briefs, presented the Court with legislative facts from outside the record.<sup>61</sup> Professor Allison Larsen's empirical research identifies problems with the Court's reliance on amici.<sup>62</sup> She demonstrates that a substantial number of amicus briefs "cite a study that [the amicus] funded itself," assert facts based on information that is not publicly accessible, or present evidence based on "methods which have been seriously questioned by others working in the field."<sup>63</sup>

Larsen's research further demonstrates that the Court also frequently uses the Internet to conduct its own "in house" research into legislative facts "without reliance on the parties or amici—at an astonishing rate."<sup>64</sup> The Court may be more willing to rely on such independent research in civil liberties cases than ones that turn primarily on economic issues.<sup>65</sup> Many commentators, including Larsen, have questioned the reliability of independent factual research that judges perform themselves.<sup>66</sup> She points out that the identities, qualifications, and biases of the authors of many websites, such as Wikipedia, often cannot be readily determined, and the websites' content is not subject to adversarial testing.<sup>67</sup> And judges sometimes do not even bother doing such research, instead deciding cases based on their own assumptions and intuitions about legislative facts.<sup>68</sup>

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61. Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1773 (2014); see also Gorod, *supra* note 25, at 35-37 (discussing the Supreme Court's receptivity to amicus briefs to help it engage in extra-record factfinding).

62. Larsen, *supra* note 61, at 1764.

63. *Id.*; see also Borgmann, *supra* note 52, at 1216 (contending that amicus briefs often contain "dubious factual assertions").

64. Larsen, *supra* note 51, at 1262; accord Dobbins, *supra* note 50, at 2057; Gorod, *supra* note 25, at 57.

65. Karst, *supra* note 43, at 96.

66. See, e.g., Larsen, *supra* note 51, at 1262-63 (pointing out that independent judicial factfinding creates risks including "the possibility of mistake, unfairness to the parties, and judicial enshrinement of biased data"); Layne S. Keele, *When the Mountain Goes to Mohammed: The Internet and Judicial Decision-Making*, 45 N.M. L. REV. 125, 149-51 (2014); see also Peggy C. Davis, *"There is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1542 (1987) (arguing that courts' assessment of legislative facts is "often superficial" and "deeply problematic"); Gorod, *supra* note 25, at 9, 11; cf. Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417 (2002) (outlining concerns with courts' factual research on the Internet); Maurice Rosenberg, *Improving the Courts' Ability to Absorb Scientific Information*, in SCIENCE AND TECHNOLOGY ADVICE TO THE PRESIDENT, CONGRESS, AND JUDICIARY 480, 482 (William T. Golden ed., 1988) ("The judiciary's current method of absorbing scientific information on legislative facts is haphazard, unruly and unreliable."). Keeton has a more sanguine view about the reliability of the judiciary's factfinding capabilities concerning legislative facts, though he recommends certain procedures to help ensure the accuracy of their findings. Keeton, *supra* note 22 at 46-48.

67. Larsen, *supra* note 51, at 1262-63.

68. See Faigman, *supra* note 43, at 544-45; Gorod, *supra* note 25, at 56-57 (recognizing that judges "may assume that a particular belief is established 'fact' even when there is no basis for that assumption"); Larsen, *supra* note 51, at 1260 (recognizing that a court "can

Unlike courts' legal interpretations, the factual premises of their rulings are not subject to *stare decisis*.<sup>69</sup> As Kurst explains, "Much of the law's vitality comes from the willingness of courts to re-examine findings of legislative fact to a far greater extent than they re-examine other propositions of law."<sup>70</sup> Litigants therefore should have the opportunity to challenge the legislative facts upon which a purportedly binding precedent is based, as a way of demonstrating that it is no longer valid.<sup>71</sup>

When courts, commentators, and litigants fail to distinguish between constitutional holdings that are based on pure interpretations of law, and those that rest in large part on legislative facts, they inadvertently overestimate the binding nature of the latter by overlooking the factual contingencies upon which they are based. And even when lower courts recognize that the Supreme Court's holdings are based on certain legislative facts, they might feel bound to continue accepting those legislative facts as true, even in future cases that involve different legal provisions and litigants, despite record evidence to the contrary.<sup>72</sup>

If litigants present evidence concerning a legislative fact that the Supreme Court did not consider, a later court should determine whether it affects the Court's holding, rather than waiting the years or decades it might otherwise take for the Court itself to reconsider the issue. Likewise, as social changes, technological advances, new research, or other developments undermine the legislative facts upon which a ruling is based, courts should be willing to reassess whether the factual premises, and therefore the holding, of a precedent remain valid. As Professor Stuart Minor Benjamin explains, "Appellate opinions are only as robust as the facts on which they are based. When those facts evaporate, the opinion on which they rest is weakened as well."<sup>73</sup>

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simply assert an emphatic view of [a] fact with nothing to support the view except for 'common experience'").

69. See *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (holding that *stare decisis* does not apply when "the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained'" (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting))); cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992) ("[N]o change in *Roe's* factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.").

70. Karst, *supra* note 43, at 108.

71. *Id.* at 109.

72. Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 970 (1955); Gorod, *supra* note 25, at 57, 64 (calling for lower courts to decline to apply findings of legislative facts from higher courts' precedents that appear incorrect).

73. Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 272 (1999).

The Supreme Court reserves to itself the “prerogative of overruling its own decisions” when they rest on “reasons rejected in some other line of decisions.”<sup>74</sup> But this principle does not compel a future court to follow a precedent that rests on facts that, based on the evidence before it, do not appear true. As is often the case with constitutional interpretation, this power may be abused, but it is a problem that the Supreme Court may readily resolve through summary reversals and remands.

It might be objected that emphasizing the contingent nature of precedents undermines their practical utility, because future litigants would be freer to challenge their factual underpinnings.<sup>75</sup> When a constitutional holding is based on certain legislative facts, however, it is more faithful to the underlying decision rule for future courts to confirm that those facts exist or continue to exist, rather than relying on the Supreme Court’s findings, assumptions, or intuitions concerning those facts in a previous case, potentially from decades earlier. If the Court finds itself in persistent disagreement with lower courts over the existence of particular legislative facts, the Court might consider either reformulating its description of those facts or modifying the decision rule to focus on different facts. Alternatively, if the Court wishes for a principle to apply regardless of whether a particular legislative fact is actually true, it should impose that principle as a matter of law—that is, as a matter of pure constitutional interpretation—without purporting to make it contingent upon a factual condition.

At a minimum, the Supreme Court itself should be willing to overturn a ruling that is contingent on legislative facts it no longer accepts as true. For the Court to be in a position to do so, it must: (i) be clear about which holdings are purely the result of direct constitutional interpretation, and which are contingent on legislative facts; (ii) craft constitutional decision rules that identify the legislative facts upon which its rulings are based in terms that give meaningful guidance to both litigants and future courts, rather than relying on vague standards that implicitly encourage future courts to rely on intuition; and (iii) avoid treating findings of legislative fact in precedents as assertions of law that carry binding force in subsequent cases.

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74. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); accord *United States v. O'Brien*, 560 U.S. 218, 224 (2010).

75. See Benjamin, *supra* note 73, at 287 (recognizing that focusing on the facts underlying constitutional rulings “undercut[s] the seeming permanence of appellate decisions”).

### III. LEGISLATIVE FACTS AND CAMPAIGN FINANCE

Modern campaign finance law is built around the fundamental constitutional distinction between political contributions and independent expenditures.<sup>76</sup> The Court has held that limits on contributions to candidates, political parties, and PACs impose only limited burdens on First Amendment rights and therefore are subject only to intermediate scrutiny.<sup>77</sup> Contribution limits generally survive such scrutiny because they are reasonably tailored to furthering the government's interest in fighting actual and apparent quid pro quo corruption.<sup>78</sup> Independent expenditures, in contrast, are funds that a person spends on political communications about federal elections without direct or indirect suggestions, guidance, or input from a candidate or political party.<sup>79</sup> Broadly speaking, the Supreme Court has held that, because independent expenditures constitute pure speech, limits upon them are subject to strict scrutiny and are almost invariably unconstitutional.<sup>80</sup>

This dichotomy between political contributions and independent expenditures relies extensively on legislative facts.<sup>81</sup> The Court's

76. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976).

77. See *id.* at 26-28.

78. *Id.* But see *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014) (holding that aggregate contribution limits are unconstitutional); *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) ("[T]he specific details of Act 64's contribution limits require us to hold that those limits violate the First Amendment, for they burden First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance."); *McConnell v. FEC*, 540 U.S. 93, 231-32 (2003) (invalidating prohibition on political contributions by minors).

79. 52 U.S.C. § 30101(17) (Supp. II 2014).

80. *Buckley*, 424 U.S. at 45-51; see also *infra* notes 179-92. But see *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 & n.3 (D.D.C. 2011) (three-judge court) (upholding law prohibiting foreign nationals other than lawful permanent residents from making independent expenditures in connection with federal elections), *aff'd without opinion*, 132 S. Ct. 1087 (2012).

81. Most broadly, *Buckley* and its progeny rest on some general and largely unobjectionable factual assertions about the importance of free political discussions in maintaining a vibrant democratic government. 424 U.S. at 14 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."). Justices have expressed similar sentiments throughout the Court's history. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (declaring that a "robust exchange of ideas" leads to the "discover[er] of truth"); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (agreeing that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth"). Of course, as an empirical matter, it is debatable whether full and robust political debate actually leads to a better-informed electorate. See Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 651 (2006) ("[R]esearch in cognitive psychology and behavioral economics shows that humans operate with significant, persistent perceptual biases that skew our interactions with information. These biases undercut the assumption that people reliably sift data to find truth.").

rulings in this area, however, often fail to identify the evidentiary or other basis that supports the Court's findings.<sup>82</sup> And subsequent cases often fail to distinguish between holdings that are pure interpretations of law and those that were contingent upon potentially changing facts.<sup>83</sup>

As discussed above,<sup>84</sup> sitting Justices might be particularly unwilling to revisit their purely legal interpretations of the First Amendment, especially due to stare decisis. Attacks on precedents' factual underpinnings, particularly attacks based on evidence the Court did not previously consider, conceptually represent the most viable approach for seeking change. Several of the findings or assumptions upon which the Court has based its holdings in campaign finance cases are, at a minimum, dubious and potentially susceptible to coun-

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A large body of empirical research suggests that exposure to accurate evidence or data often does not lead people to change their beliefs and can even cause them to cling to contrary beliefs with even greater intensity. See, e.g., Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 304 (2010); Monica Prasad et al., "There Must Be a Reason": *Osama, Saddam, and Inferred Justification*, 79 SOC. INQUIRY 142, 144, 148, 153 (2009). Further reducing the efficacy of political dialogue is what Dan Kahan and Donald Braman term "cultural cognition": a "series of interlocking social and psychological mechanisms that induce individuals to conform their factual beliefs about contested policies to their cultural evaluations of the activities subject to regulation." Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 171 (2006). They argue that, "[b]ecause cultural cognition determines what sorts of information individuals find reliable, culturally polarized beliefs . . . stubbornly persist in the face of scientific advances in understanding." *Id.*

Cognitive biases such as confirmation bias also can limit the impact of political debate. See, e.g., Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 329 (2015); Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098 (1979). Molly Wilson has warned that political campaigns actively take advantage of voters' cognitive biases, rather than attempting to persuade them through reason and evidence. Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679 (2010).

Political discussions among like-minded people might lead them further from accurate conclusions in other ways. Rather than facilitating the determination of truth, collective deliberations can lead to the adoption of more extreme beliefs. See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 88-90 (2000). And to the extent that liberal and conservative beliefs are partly a function of brain anatomy or functioning, robust expression and political debates may not affect people's beliefs much at all. See, e.g., David M. Amodio et al., *Neurocognitive Correlates of Liberalism and Conservatism*, 10 NATURE NEUROSCIENCE 1246, 1247 (2007); Ryota Kanai et al., *Political Orientations Are Correlated with Brain Structure in Young Adults*, 21 CURRENT BIOLOGY 677 (2011).

Thus, while the Court's assumption that robust political debate will facilitate the determination of truth appears facially reasonable, it is the kind of reflexive, intuitive assertion that empirical research suggests, at a minimum, is likely overbroad and somewhat inaccurate. It is the type of legal fiction, however, that the Court has strong institutional reasons to accept as true, notwithstanding any counterproof.

82. See, e.g., *McCutcheon*, 134 S. Ct. at 1452; *Buckley*, 424 U.S. at 47.

83. See, e.g., *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc).

84. See *supra* Part II.

terproof in subsequent litigation. It bears emphasis, however, that the Court's rulings in this area have been the opposite of what one might expect. It has shown greater willingness to revisit its purely legal interpretations of the Constitution than the factual underpinnings of holdings that are contingent on critical legislative facts.<sup>85</sup>

The Court's campaign finance jurisprudence also demonstrates the importance of establishing constitutional decision rules that are susceptible to meaningful proof, rather than calling for courts to base their rulings in substantial part on guesses, intuitions, stereotypes, or assumptions. In crafting many of its decision rules in this area, it appears that the Court failed to consider the extent to which various legislative facts can be concretely proven or the quantum or type of evidence that would be sufficient to establish (or disprove) such facts.<sup>86</sup> Clearer, more specific constitutional decision rules would help litigants develop their cases and allow future courts to adjudicate campaign finance challenges more objectively.

This Part explores these issues as they arise in three different contexts in campaign finance law. Section A explores the Court's holding that political contributions are entitled to minimal constitutional protection as a type of speech. Section B discusses the Court's rulings concerning the validity (or invalidity) of various types of restrictions on political contributions. Finally, Section C analyzes the Court's conclusion that independent expenditures generally cannot be limited because they do not pose a risk of corruption.

### A. *Political Contributions as Speech*

One of the core tenets of campaign finance jurisprudence over the past forty years has been the Court's holding that contribution limits abridge First Amendment rights to a lesser extent than restrictions on independent expenditures (i.e., pure political speech) and therefore are subject only to intermediate scrutiny.<sup>87</sup> In *Buckley v. Valeo*, the Court held that a contribution limit "entails only a

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85. Compare *McConnell v. FEC*, 540 U.S. 93, 152-54 (2003) (holding that the government's compelling interest in preventing corruption extends to preventing the "purchase [of] influence" and the "sale of access" to officeholders), with *Citizens United v. FEC*, 558 U.S. 310, 359-60 (2010) ("The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . . . Ingratiation and access . . . are not corruption.").

86. See *infra* Sections III.B, III.C.

87. *Buckley*, 424 U.S. at 21-22.



marginal restriction" on freedom of expression, as well as a more substantial restriction on freedom of association (though not enough to trigger full constitutional protection).<sup>88</sup>

The Court's conclusion that political contributions entail only a minimal communicative element is based on a mix of pure legal principles and conceptually falsifiable legislative facts. First, the Court noted that "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."<sup>89</sup> This is definitionally true and does not appear susceptible of empirical proof or disproof. Even if a contributor writes a note in the memo field of a check to explain why she is providing the contribution, the contribution itself—the funds being given to the candidate—does not convey that information. It is unclear, however, whether the vagueness of the expression that a contribution embodies remains constitutionally significant from a purely legal perspective. Nearly a quarter-century after *Buckley*, the Court held in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* that:

[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.<sup>90</sup>

Second, the *Buckley* Court stated that the amount a person contributes does not send a meaningful message about the extent of his or her support for the candidate.<sup>91</sup> "At most," the Court opined, "the size of the contribution provides a very rough index of the intensity of the contributor's support."<sup>92</sup> The Court added that to determine the "intensity" of a contributor's support for a candidate based on the amount of his contribution, it would also be necessary to consider his "financial ability and his past contribution history."<sup>93</sup>

These legislative facts appear highly debatable and might reasonably be subject to counterproof in future litigation. Litigants might be able to present public opinion surveys to demonstrate that most members of the public draw a strong correlation between the amount a person contributes to a candidate and the extent to which that

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88. *Id.*; see also *id.* at 22 (recognizing that a contribution "serves to affiliate a person with a candidate" and "enables like-minded persons to pool their resources in furtherance of common political goals").

89. *Id.* at 21.

90. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (citation omitted).

91. *Buckley*, 424 U.S. at 20-21.

92. *Id.* at 21.

93. *Id.* at 21 n.22.

person “really” supports the candidate. Likewise, litigants could likely adduce evidence that most political parties and candidates regard people who contribute higher amounts as their strongest supporters. Indeed, many fundraising materials aimed at high-dollar contributors contain language to that effect.<sup>94</sup>

It is far from intuitive that a \$20 contribution sends substantially the same message as a \$2700 contribution. Political contributions present a clear case of “putting your money where your mouth is.” Talk is cheap; a verbal expression of support often may seem far less meaningful or significant than a monetary contribution. It is at least reasonably possible that evidence in a subsequent case may lead the Court to conclude that it underestimated the communicative value of political contributions.

Third, and perhaps most significantly, the Court reasoned that contributions are distinguishable from speech because, although they “may result in political expression” if the recipient spends the funds “to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.”<sup>95</sup> *California Medical Association (“CalMed”) v. FEC* elaborated that a person cannot claim full First Amendment protection for facilitating “proxy speech,” or speech by other people with which they agree.<sup>96</sup> The *CalMed* Court explained that a “sympathy of interests alone does not convert” speech by the recipient of a contribution into that of the contributor.<sup>97</sup>

This principle may be the most vulnerable part of the Court’s analysis of contribution limits. *Buckley* elsewhere holds that the act of spending money to subsidize speech may itself be treated as pure speech. As the Court said of independent expenditures, “[T]he dependence of a communication on the expenditure of money [does not] operate[] itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”<sup>98</sup> The reduced constitutional protection for contributions therefore does not stem from the fact that the contributor must spend money to subsidize the recipient’s political speech, but rather that the contributor is seeking to subsidize and adopt someone else’s message.

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94. See, e.g., Maggie Haberman, *Clinton Fund-Raising, for Starters*, N.Y. TIMES (Apr. 12, 2015, 7:43 PM), [http://www.nytimes.com/politics/first-draft/2015/04/12/clinton-fund-raising-for-starters/?\\_r=0](http://www.nytimes.com/politics/first-draft/2015/04/12/clinton-fund-raising-for-starters/?_r=0) (noting that supporters of Hillary Clinton who contributed the maximum permissible amount of \$2700 would “earn[] . . . status as ‘Hill-starters’”).

95. *Buckley*, 424 U.S. at 21.

96. 453 U.S. 182, 196 (1981) (holding that “speech by proxy” through contributions to a PAC “is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection”).

97. *Id.*

98. *Buckley*, 424 U.S. at 16.

Future litigants reasonably might be able to introduce expert and lay evidence demonstrating that the identity of a speaker can have more of an impact on whether an audience accepts a message than the content of the message itself. Listeners might be more willing to accept certain messages if they come from sources that share their values,<sup>99</sup> agree with them on most other issues, can speak from personal experience or knowledge, or otherwise have special credibility. Barack Obama can speak about the perceived need for some African-American men to play a greater role in their children's lives in a way that Mitt Romney, uttering the same words, could not.<sup>100</sup> Marco Rubio similarly claimed he was uniquely situated to defend the Republican Party's policies toward the poor, asking rhetorically, "If I'm our nominee, how is Hillary Clinton going to lecture me about living paycheck to paycheck?"<sup>101</sup> He continued, "I was raised paycheck to paycheck. . . . [H]ow is she going to lecture me about student loans? I owed over \$100,000 just four years ago."<sup>102</sup> More broadly, promises or messages directly from candidates may be much more effective than the same claims from third parties about those candidates.<sup>103</sup>

Aristotle's *Rhetoric* conveyed this idea through the concepts of *ethos* and *pathos*: appeals to the credibility of the speaker and the emotions of the audience, respectively.<sup>104</sup> To Aristotle, *ethos* was arguably the most important aspect of a message.<sup>105</sup> The Court likewise has recognized that the First Amendment protects the non-

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99. See Geoffrey L. Cohen, *Party over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCHOL. 808 (2003).

100. See Julie Bosman, *Obama Sharply Assails Absent Black Fathers*, N.Y. TIMES (June 16, 2008), [http://www.nytimes.com/2008/06/16/us/politics/15cnd-obama.html?\\_r=0](http://www.nytimes.com/2008/06/16/us/politics/15cnd-obama.html?_r=0) ("Too many fathers are M.I.A, too many fathers are AWOL, missing from too many lives and too many homes," Mr. Obama said . . . . Mr. Obama laid out his case in stark terms that would be difficult for a white candidate to make, telling the mostly black audience not to 'just sit in the house watching SportsCenter' . . . ."); see also Aamer Madhani, *Obama: There's No Longer Time for Excuses for Black Men*, USA TODAY (May 19, 2013), <http://www.usatoday.com/story/news/politics/2013/05/19/obama-morehouse-college-commencement/2324241/> ("Obama spoke in very personal terms to the 500 young men as he urged them to . . . become . . . good fathers and good husbands.").

101. James Pindell, *7 Key Moments from the Republican Presidential Debate*, BOSTON GLOBE (Aug. 7, 2015), <https://www.bostonglobe.com/news/politics/2015/08/07/top-moments-from-republican-presidential-debate/VRNAPmyMtw5mCIZYPHc8RN/story.html>.

102. *Id.*

103. Federal campaign finance law is premised, in part, on the notion that hearing directly from a candidate has special significance. When a candidate takes advantage of statutorily reduced rates to run an attack ad on cable television, the commercial must end with either a "full-screen view of the candidate" declaring that she authorized the advertisement, or a photograph of the candidate accompanied by a voice-over of the candidate conveying that message. 52 U.S.C. § 30120(d)(B)(i) (Supp. II 2014).

104. ARISTOTLE, ON RHETORIC 38-39 (George A. Kennedy trans., 2d ed. 2007).

105. See *id.*

rational, “emotive” aspects of communications, precisely because they “may often be the more important element of the overall message sought to be communicated.”<sup>106</sup>

A mailer, television advertisement, or other communication from a candidate or party may perfectly and perhaps even uniquely convey a potential contributor’s feelings and beliefs. She may wish to subsidize further dissemination of that communication (or similar ones), rather than attempt to fund her own imitation of it.<sup>107</sup> Many such contributors reasonably might believe that they cannot create their own mailers, websites, or other such communications of comparable efficacy, particularly since candidates, political parties, and PACs typically employ expensive consultants, public relations firms, and professional writers to prepare their materials.

The law of evidence recognizes this phenomenon as an adoptive admission. Through her words or actions, a person may embrace a third party’s statement as her own, and the statement will be legally attributed to her.<sup>108</sup> In the unique context of campaign finance jurisprudence, however, the Court deems such adoptive admissions as a less accurate representation of a person’s beliefs, and far less worthy of constitutional protection, than the person’s own independent speech. Litigants in future cases may reasonably be able to compile an evidentiary record to persuasively challenge the Court’s conclusion that contributions deserve reduced constitutional protection because “the transformation of contributions into political debate involves speech by someone other than the contributor.”<sup>109</sup>

Finally, the Court concluded that contribution limits impose no more than “marginal” restrictions on speech because they do not “in any way infringe the contributor’s freedom to discuss candidates and issues.”<sup>110</sup> The availability of alternate channels of communication is a factual issue that appears indisputable. As discussed above, however, a person’s physical freedom to personally discuss candidates and issues may not be nearly as meaningful as his ability to adopt and facilitate expression by others with whom he agrees.

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106. *Cohen v. California*, 403 U.S. 15, 26 (1971).

107. *See* *FEC v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480, 495 (1985) (“[C]ontributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money.”).

108. *See* *FED. R. EVID.* 801(d)(2)(B); *United States v. Williams*, 445 F.3d 724, 735 (4th Cir. 2006) (“The adoptive-admission doctrine permits statements of others to be treated by the jury as statements of the party—it is as if the party himself made the statement.”).

109. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

110. *Id.* at 20-21.

And the Supreme Court has come to recognize that alternative modes of political involvement are seldom practically available when a person has an interest in multiple candidates.<sup>111</sup>

Thus, the Court's conclusion that political contributions entail only a minimal expressive element is based on a mix of purely legal premises that have been weakened by subsequent holdings and legislative facts that may be open to counterproof in future cases. Post-*Buckley* case law has typically minimized or overlooked the factually contingent nature of this holding, however. Both the Supreme Court and lower courts often reiterate that political contributions involve minimal expressive content as if that assertion were a matter of pure constitutional law, rather than a conclusion based on the Court's factual conclusions in *Buckley*.<sup>112</sup> Based on empirical research, expert opinion, and evidence from political candidates and contributors, the Court may conclude that either contributions in general, or contributions specifically to subsidize "speech by proxy" in particular, are entitled to full constitutional protection.<sup>113</sup> Were the Court to conclude that contributions are a fully protected form of speech, contribution limits would be subject to strict scrutiny.<sup>114</sup>

### B. Limits on Political Contributions

The Court's precedents concerning the constitutionality of contribution limits purport to rest upon legislative facts, but in reality are based primarily on ad hoc subjective judgments. The decision rule the Court has crafted to determine the validity of contribution limits is so vague and underdefined that courts lack sufficient guidance in ascertaining whether it has been satisfied, and litigants have little direction as to the nature, weight, or extent of evidence they must adduce to carry their respective burdens. Moreover, the legislative facts that the decision rule treats as dispositive appear to depend mostly on judicial intuition.

*Buckley* held that contribution limits are constitutional if they are "closely drawn" to furthering the government's interest in preventing

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111. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1449 (2014) ("[P]ersonal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes. Other effective methods of supporting preferred candidates or causes without contributing money are reserved for a select few, such as entertainers capable of raising hundreds of thousands of dollars in a single evening.").

112. *See, e.g., id.* at 1444.

113. *Cf. id.* at 1462-63 (Thomas, J., concurring) (arguing that "[n]one of the [*Buckley*] Court's bases" for concluding "that contributions are different in kind from direct expenditures . . . withstands careful review").

114. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 410 (2000) (Thomas, J., dissenting).

quid pro quo corruption or the appearance of such corruption.<sup>115</sup> Applying that standard, the Court upheld the validity of limits on contributions to candidates.<sup>116</sup> The Court acknowledged that the extent of corruption created by candidate contributions “can never be reliably ascertained.”<sup>117</sup> It found that the risk of corruption was sufficient, however, to warrant contribution limits based on “deeply disturbing examples surfacing after the 1972 election” which demonstrated “that the problem [wa]s not an illusory one.”<sup>118</sup> The Court recognized that quid pro quo bribery was already independently prohibited and that disclosure requirements ensured that the government and public would know about any large contributions to a candidate.<sup>119</sup> It responded that Congress was “entitled” to conclude that contribution limits are “a necessary legislative concomitant” to those other measures.<sup>120</sup>

*Buckley* and its progeny leave unsettled a wide variety of issues concerning the standard for determining when the specter of corruption is sufficient to justify particular contribution limits or other such restrictions. The Court elaborated in a subsequent case that “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”<sup>121</sup> It remains unclear,

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115. *Buckley*, 424 U.S. at 25. The Court has also identified various interests that are constitutionally impermissible rationales for campaign finance restrictions. For example, the government may not limit contributions to “equaliz[e] the relative ability of individuals and groups to influence the outcome of elections.” *Id.* at 48. The Court explained that the First Amendment prohibits the government from “restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others.” *Id.* at 48-49; *see also McCutcheon*, 134 S. Ct. at 1450 (“[I]t is not an acceptable governmental objective to ‘level the playing field,’ or to ‘level electoral opportunities,’ or to ‘equaliz[e] the financial resources of candidates.’” (second alteration in original) (first quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2811 (2011); then quoting *Davis v. FEC*, 554 U.S. 724, 741 (2008); and then quoting *Buckley*, 424 U.S. at 56)). Likewise, the Government may not “determine for itself what speech and speakers are worthy of consideration” by “taking the right to speak from some and giving it to others.” *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010). Finally, the Government may not limit contributions to prevent contributors from gaining “influence [over] or access [to]” government officials, because “[i]ngratiation and access . . . are not corruption.” *Id.* at 360; *see also McCutcheon*, 134 S. Ct. at 1451 (“[T]he Government may not seek to limit the appearance of mere influence or access.”).

116. *Buckley*, 424 U.S. at 26 (“[L]imit[ing] the actuality and appearance of corruption resulting from large individual financial contributions” is “a constitutionally sufficient justification” for base limits on contributions to candidates.).

117. *Id.* at 27.

118. *Id.*

119. *Id.* at 27-28.

120. *Id.* at 28.

121. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000).

however, what exactly the government must prove in order to defend a particular contribution limit.<sup>122</sup> There are many possible interpretations, but none is entirely satisfactory.

It may be that a contribution limit is justified if a particular type of transaction has any potential to corrupt a candidate. The Court's precedents do not support such an interpretation, however. For example, as discussed in the next Section,<sup>123</sup> the Court has consistently held that the risk of corruption associated with independent expenditures is too remote to warrant restricting them. Alternatively, the Court could implicitly be applying a threshold, requiring the government to show that a certain percentage of instances of a particular type of transaction involves quid pro quo corruption or that some non-negligible number of such transactions has led to such corruption in the past. But the Court repeatedly has upheld contribution limits despite its recognition that the vast majority of even large contributions do not involve corruption.<sup>124</sup> Prohibiting a practice to prevent corruption when the overwhelming majority of instances of such conduct are not corrupt eviscerates any pretention of "closely drawn" tailoring.

It appears that the Court instead might be applying an objective standard, asking whether a particular type of contribution, in the Court's view, poses a reasonable likelihood of corrupting a candidate or officeholder. Such a standard places less weight on empirical evidence and appears to turn primarily on the Court's subjective intuitions about politics and politicians, making jurisprudence in this area unnecessarily subjective and unpredictable. Further, it is unclear what constitutes a "reasonable" or "unreasonable" likelihood of corruption or how a future court should go about attempting to make that determination. Relying on such an ad hoc approach, rather than more concrete principles, also tends to undermine the perceived legitimacy of the Court's rulings in this highly charged and politicized area.<sup>125</sup>

These difficulties are even greater when attempting to weigh the government's interest in combating "the appearance of corruption" posed by a particular type of contribution.<sup>126</sup> Conceptually, apparent

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122. See *id.* ("While *Buckley's* evidentiary showing exemplifies a sufficient justification for contribution limits, it does not speak to what may be necessary as a minimum.").

123. See *infra* Section III.C.

124. *Citizens United v. FEC*, 558 U.S. 310, 357 (2010) ("[R]estrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements."); see also *McCutcheon v. FEC*, 134 S. Ct. 1434, 1458 (2014).

125. Cf. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing that constitutional cases should rest on principles and reasoning that transcend immediate outcomes and generate consistent decisions).

126. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

corruption may exist even in the absence of actual corruption. The Court has failed, however, to provide standards for determining the magnitude or validity of such concerns. For example, is the appearance of corruption to be determined based solely on the perspective of a member of the general public, someone familiar with all the details of the transaction at issue, or someone familiar with campaign finance law and First Amendment doctrine? The ability of individuals to contribute unlimited amounts of money to SuperPACs,<sup>127</sup> and of SuperPACs (like other PACs) to spend unlimited amounts of money on political advertisements,<sup>128</sup> reasonably might be seen as potentially corrupting to a member of the public who is aware of neither the concept of an “independent expenditure” nor the Court’s view that such expenditures do not create a risk of corruption.<sup>129</sup>

Similarly, is the issue whether a reasonable person possibly could conclude that a particular transaction involves quid pro quo corruption, or that he likely would do so, or that a majority of the public would find the transaction questionable? The frustrating vagueness of the Court’s appearance-of-corruption standard allows it to effectively determine the constitutionality of campaign finance laws based primarily on its intuitions and assumptions, rather than more concrete legislative facts susceptible to proof or falsification.

The Court’s subsequent rulings concerning contribution limits purport to follow *Buckley*. The vagueness of *Buckley*’s decision rule for determining the validity of contribution limits and the indeterminacy of the legislative facts upon which it is based, however, have caused the Court to reach conflicting conclusions about different types of limits without clear differences in the underlying evidentiary records. The Court’s rulings concerning contribution limits appear to be based more on subjective ad hoc determinations than the underlying legislative facts that *Buckley* deems dispositive.

This Section will focus on three examples: *Nixon v. Shrink Missouri Government PAC*, which upheld state-level contribution limits;<sup>130</sup> *McConnell v. FEC*, which upheld federal limits on soft money contributions to state and local parties but invalidated a blanket prohibition on contributions from minors;<sup>131</sup> and *McCutcheon v. FEC*, which invalidated aggregate contribution limits.<sup>132</sup>

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127. *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc).

128. *See FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

129. *See Buckley*, 424 U.S. at 47.

130. 528 U.S. 377, 381-82 (2000).

131. 540 U.S. 93, 164-67, 231 (2003).

132. 134 S. Ct. 1434, 1452, 1461 (2014).



### 1. Shrink Missouri

In *Nixon v. Shrink Missouri Government PAC*, the Eighth Circuit had invalidated Missouri's limits on contributions to candidates for certain state offices.<sup>133</sup> Although *Buckley* had upheld the constitutionality of contribution limits, the Eighth Circuit properly recognized that this holding was not a pure interpretation of the Constitution, but rather was contingent upon legislative facts, including record evidence concerning "perfidy . . . in federal campaign financing in 1972."<sup>134</sup> The Eighth Circuit refused to "infer that [Missouri] state candidates for public office are corrupt or that they appear corrupt from the problems that resulted from undeniably large contributions made to federal campaigns over twenty-five years ago."<sup>135</sup> It therefore required the State to "prove that Missouri has a real problem with corruption or a perception thereof as a direct result of large campaign contributions."<sup>136</sup>

The State's only evidence, according to the court, was an affidavit of the senator who co-chaired the committee that enacted the contribution limits. The affidavit offered his opinion that "there was the 'real potential to buy votes' if the limits were not enacted, and that contributions greater than the limits 'have the appearance of buying votes.'"<sup>137</sup> The Eighth Circuit concluded that this evidence was insufficient as a matter of law to demonstrate that contribution limits would further the State's interest in combatting corruption.<sup>138</sup>

The Supreme Court reversed, holding that *Buckley* is "authority for comparable state regulation" of political contributions.<sup>139</sup> Quoting extensively from *Buckley*, the Court held that Missouri's contribution limits furthered the State's interest in battling corruption.<sup>140</sup> It declared that "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible."<sup>141</sup> It went on to opine that the senator's affidavit, as well as some newspaper articles introduced in the district court (which the Eighth Circuit did not mention) discussing actions various government officials took that favorably impacted large contributors,

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133. *Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 519, 520, 522-23 (8th Cir. 1998) (citing Mo. Rev. Stat. § 130.032.1(1)), *rev'd sub nom.* *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

134. *Id.* at 522.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 382 (2000).

140. *Id.* at 386-90 (quoting *Buckley v. Valeo*, 424 U.S. 1, 15-16, 20-22, 24-28, 30 (1976)).

141. *Id.* at 391.

“substantiat[e]” concerns about corruption in Missouri.<sup>142</sup> The Court concluded, “[T]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.”<sup>143</sup>

*Buckley* treated the validity of limits on contributions to federal candidates as a constitutional issue to be resolved in large part based on certain underlying legislative facts, most notably including the risk of actual or apparent corruption such contributions cause. *Nixon*, however, significantly downplayed the contingent nature of *Buckley*’s holding, treating contribution limits, in effect, as *prima facie* valid. The Court was largely unwilling to consider evidence concerning Missouri politics in particular or the remarkable differences in circumstances between present-day Missouri and the federal government of a quarter-century earlier. Nor was the Court receptive to possible differences in public perception of federal corruption and Missouri politicians.

## 2. McConnell

In *McConnell v. FEC*,<sup>144</sup> the Court upheld the constitutionality of a provision in the Bipartisan Campaign Reform Act (“BCRA”) limiting “soft money” contributions to political parties.<sup>145</sup> Soft money is a label applied to funds used by political parties to pay for something other than contributions to federal candidates, coordinated expenditures with federal candidates, or communications that clearly advocate the election or defeat of a federal candidate.<sup>146</sup> Prior to BCRA, the most common uses of soft money were for activities aimed at state or local elections, voter registration drives, get-out-the-vote campaigns, generic party advertising, and issue advocacy.<sup>147</sup> During that pre-BCRA era, federal contribution limits did not apply to soft money; political parties could accept unlimited amounts of such funds. BCRA effectively eliminated soft money; the Act provides that any funds that a national, state, or local political party uses in connection with a federal election must be raised in compliance with federal contribution limits.<sup>148</sup>

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142. *Id.* at 393.

143. *Id.* at 395.

144. 540 U.S. 93 (2003).

145. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 101(a)-(b), 116 Stat. 81, 82-86 (codified at 52 U.S.C. § 30125 (Supp. II 2014)).

146. See *McConnell v. FEC*, 540 U.S. 93, 123 (2003).

147. *Id.*; see also Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 181-82 (1998).

148. Bipartisan Campaign Reform Act of 2002 § 323.

The Court upheld BCRA's extension of contribution limits to soft money,<sup>149</sup> including section 323(b), which limits soft money contributions to state and local political party committees.<sup>150</sup> The Court held that section 323(b) was "designed to foreclose" circumvention of limits on contributions to national political parties "by sharply curbing state committees' ability to use large soft-money contributions to influence federal elections."<sup>151</sup> The Court pointed out that federal candidates and national parties sometimes "ask donors who have reached the limit on their direct contributions to donate to state committees."<sup>152</sup> It opined that "[t]here is at least as much evidence as there was in *Buckley* that such donations have the intent—and in at least some cases the effect—of gaining influence over federal officeholders."<sup>153</sup> The Court went on to observe that it was " 'neither novel nor implausible,' for Congress to conclude that . . . federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties."<sup>154</sup> It later reiterated that "[c]ommon sense dictates" that federal candidates would be grateful for soft money contributions to state parties to be used to subsidize voter registration or get-out-the-vote efforts that may benefit them.<sup>155</sup>

To the extent the Court relied on "common sense" rather than record evidence in reaching its conclusions, it may have improperly reduced the government's burden in defending the constitutionality of laws that impinge upon First Amendment rights. This approach effectively shifts the burden to those challenging the law to demonstrate that the Court's "common sense" is wrong by proving a negative: that contribution limits do not give rise to a potential for corruption. It is unclear what evidence would be necessary to accomplish such a task, such as the absence of any bribery prosecutions based on contributions to state parties, or testimony from candidates as to the relative lack of importance of soft money contributions to state and local political parties.

Supporters of campaign finance reform should not necessarily embrace the Court's use of "common sense" as a barometer for determining the constitutionality of contribution limits, however. As discussed in the next Section, the Court's intuitions have led it to conclude—in the apparent absence of empirical evidence—that inde-

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149. *McConnell*, 540 U.S. at 169, 173.

150. See Bipartisan Campaign Reform Act of 2002 § 323(b).

151. *McConnell*, 540 U.S. at 161.

152. *Id.* at 164-65.

153. *Id.*

154. *Id.* at 165 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000)).

155. *Id.* at 167.

pendent expenditures categorically do not give rise to a risk of quid pro quo corruption.<sup>156</sup> And even the *McConnell* Court's common sense did not lead it to uniformly uphold restrictions on contributions. Another BCRA provision prohibited minors from contributing to candidates or political parties.<sup>157</sup> *McConnell* held that this prohibition violated minors' First Amendment rights.<sup>158</sup> The government argued that the ban prevented parents from circumventing their contribution limits by funneling additional contributions through their children.<sup>159</sup> It had presented evidence in the district court of four instances of parents doing so.<sup>160</sup>

The Supreme Court rejected this rationale on the grounds that the government offered "scant evidence" that such circumvention was actually occurring.<sup>161</sup> It stated, "Absent a more convincing case of the claimed evil, this interest is simply too attenuated for § 318 to withstand heightened scrutiny."<sup>162</sup> The Court also pointed out that BCRA's prohibition on making a contribution in another person's name already prohibits parents from contributing funds through their children.<sup>163</sup>

The Court's unwillingness to recognize the potential for circumvention through minors' contributions stands in stark contrast with its concern over soft money contributions to state and local parties. With both provisions, the government asked the Court to speculate that a lack of regulation could lead to corruption. The Court was willing to assume that soft money contributions to state parties would cause federal officeholders to be grateful and lead to potential corruption<sup>164</sup> but, as discussed below, refused to apply similar reasoning to independent expenditures.<sup>165</sup> It was also unwilling to assume that contributors might route money through their children to circumvent contribution limits.<sup>166</sup>

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156. See *infra* Section III.C.

157. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 318, 116 Stat. 81, 109 (codified at 52 U.S.C. § 30126 (Supp. II 2014)).

158. *McConnell*, 540 U.S. at 231.

159. *Id.* at 232.

160. *McConnell v. FEC*, 251 F. Supp. 2d 176, 717-18 (D.D.C. 2003) (opinion of Kollar-Kotelly, J.), *aff'd in part, rev'd in part*, 540 U.S. 93, 203 (2003).

161. *McConnell*, 540 U.S. at 232.

162. *Id.*

163. *Id.* (citing 2 U.S.C. § 441f (recodified at 52 U.S.C. § 30122 (Supp. II 2014))). The Court further held that a complete prohibition on contributions from minors was "overinclusive" and that more narrowly tailored means of preventing circumvention were available. *Id.*

164. *Id.* at 165.

165. See *infra* Section III.C.

166. *McConnell*, 540 U.S. at 232.

The contrasts among these rulings arise in part from the indeterminacy of the decision rules the Court is applying. Neither *Buckley* nor its progeny clearly or specifically identify how “real” or “certain” a potential for corruption must be, the extent to which the government must show that corruption of that type has occurred in the past, or the frequency with which it will occur. Moreover, the legislative facts underlying these holdings cannot definitively be ascertained based on objective evidence. They unavoidably rest in substantial part on the Court’s subjective judgments about human nature, tolerance for risk, and speculation about the future. Consequently, the Court has flexibility to accept a relatively minimal showing in one context, approving contribution limits on soft money contributions to state and local parties, while insisting on a heightened showing in another context, by invalidating a prohibition on contributions from minors.

### 3. McCutcheon

Finally, in *McCutcheon v. FEC*,<sup>167</sup> the Supreme Court held that the risk of actual and apparent corruption was insufficient to support aggregate limits on the total amount that a person may contribute to all candidates and political committees in an election cycle.<sup>168</sup> The Court reasoned that, so long as each contribution a person makes is under the statutory base limit, there is no reason to effectively limit the number of such non-corrupting contributions she may make through an aggregate limit.<sup>169</sup>

The government also had failed to show that contributors would likely try to circumvent the base limit on contributions to a particular candidate by making large contributions to numerous other entities that would, in turn, contribute to that candidate. In one of the most critical sentences in the opinion, the Court stated, “[T]here is not the same risk of quid pro quo corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly.”<sup>170</sup> The Court did not cite any evidence, whether anecdotal, expert, or even polling, to support this critical assumption. Rather, it explained that when a contributor provides funds to a PAC, and the PAC in turn decides to contribute

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167. 134 S. Ct. 1434 (2014).

168. *Id.* at 1456, *invalidating* 2 U.S.C. § 441a(a)(3) (2012) (recodified at 52 U.S.C. § 30116(a)(3) (Supp. II 2014)).

169. *McCutcheon*, 134 S. Ct. at 1452.

170. *Id.*

that money to a candidate, “such action occurs at the [PAC’s] discretion—not the donor’s,” because the donor “must by law cede control over the funds.”<sup>171</sup>

The Court recognized that when a donor makes the maximum permissible contribution to many of a party’s candidates, “all members of the party or supporters of the cause may benefit, and the leaders of the party or cause may feel particular gratitude.”<sup>172</sup> It did not believe, however, that “such shared interest, standing alone,” presents “an opportunity for quid pro quo corruption.”<sup>173</sup> While *McCutcheon* was correctly decided, it is another example of how the boundary between legal holdings and findings of legislative fact is blurry, and many legislative facts the Court must ascertain are difficult to establish.

#### 4. *Reconsidering the Role of Legislative Facts in Contribution Limits*

The precedents discussed throughout this Section establish many principles. Contribution limits generally are permissible because they impose only limited restrictions on association and minimal restrictions on speech.<sup>174</sup> Limits on soft money contributions to political parties are constitutional,<sup>175</sup> aggregate contribution limits<sup>176</sup> and prohibitions on contributions by minors<sup>177</sup> are not. Each of these assertions appears to be a pure statement of law directly interpreting the Constitution but, in truth, each rests on factual assertions and assumptions that, at least in concept, remain subject to challenge in future cases. When courts, commentators, and counsel either assert these propositions divorced from the facts upon which they are contingent, or instead quote an opinion’s factual premises as if they were binding legal rulings, they subtly misrepresent and, over time, undermine the contingent nature of these holdings.

This pastiche of rulings concerning contribution limits stems in part from the vagueness of the underlying decision rule the Court is purporting to apply. The Court has held that contributions may be limited to prevent corruption, but it has not adopted a clear or consistent position on whether the corruption must be proven or may be merely assumed; the frequency, likelihood, and extent of corruption necessary to warrant such restrictions; when other statutory re-

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171. *Id.*

172. *Id.* at 1461.

173. *Id.*

174. *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976).

175. *McConnell v. FEC*, 540 U.S. 93, 169, 173 (2003).

176. *McCutcheon*, 134 S. Ct. at 1434.

177. *McConnell*, 540 U.S. at 231-32.

strictions may be deemed sufficient to prevent such corruption; or the perspective from which an act must be viewed to determine whether it appears corrupt. Accordingly, it is difficult for a litigant to determine in advance of a ruling whether any collection of evidence is sufficient to make a restriction constitutional. Greater specificity in the decision rule would help future courts base their rulings on legislative facts rather than assumptions or intuition.

### C. Independent Expenditures

As discussed earlier, nearly a half-century of campaign finance case law is built upon *Buckley*'s dichotomy between contributions and independent expenditures. That dichotomy, in turn, is based on the Court's assertion in *Buckley* that independent expenditures do not give rise to a constitutionally cognizable risk of corruption.<sup>178</sup> *Buckley* declared that the "absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."<sup>179</sup> A substantial chunk of modern campaign finance law rests upon this seemingly unassuming premise.

Based on this assertion, the Court consistently has struck down limits on independent expenditures by nearly every type of speaker that has come before it, including individuals,<sup>180</sup> PACs,<sup>181</sup> political parties<sup>182</sup> and, in its much-maligned decision in *Citizens-United*,<sup>183</sup> corporations.<sup>184</sup> Similarly, the overwhelming majority of circuits has

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178. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

179. *Id.*

180. *Id.* at 51 (holding that FECA's "independent expenditure limitation is unconstitutional under the First Amendment"). *But see* *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 & n.3 (D.D.C. 2011) (three-judge court) (upholding law prohibiting foreign nationals other than lawful permanent residents from making independent expenditures in connection with federal elections), *aff'd without opinion*, 132 S. Ct. 1087 (2012).

181. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985) ("[T]he PACs' [independent] expenditures are entitled to full First Amendment protection . . .").

182. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 614 (1996) (holding that a political party's independent expenditures "fall[] within the scope of the Court's precedents that extend First Amendment protection to independent expenditures").

183. *Citizens United v. FEC*, 558 U.S. 310 (2010); *see, e.g.*, Lili Levi, *Plan B for Campaign-Finance Reform: Can the FCC Help Save American Politics After Citizens United?*, 61 CATH. U. L. REV. 97, 98 (2011); William Alan Nelson II, *Buying the Electorate: An Empirical Study of the Current Campaign Finance Landscape and How the Supreme Court Erred in Not Revisiting Citizens United*, 61 CLEV. ST. L. REV. 443, 446 (2013).

184. *Citizens United*, 558 U.S. at 365 (invalidating prohibition on corporate independent expenditures because "the Government may not suppress political speech on the basis of the speaker's corporate identity"); *see also* *FEC v. Mass. Citizens for Life, Inc.*,

held that political committees that solely make independent expenditures (colloquially referred to as “SuperPACs”) have a First Amendment right to accept unlimited contributions.<sup>185</sup> As the D.C. Circuit explained:

In light of the [Supreme] Court’s holding *as a matter of law* that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. The Court has effectively held that there is no corrupting “quid” for which a candidate might in exchange offer a corrupt “quo.”

. . . .

. . . [T]he government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations.<sup>186</sup>

Some courts have gone even further, allowing political committees that make political contributions to establish separate, segregated accounts (“*Carey* accounts”) that may accept unlimited contributions to fund their independent expenditures.<sup>187</sup>

Thus, both SuperPACs and *Carey* accounts—and the hundreds of millions of dollars in political spending for which they account<sup>188</sup>—owe their existence to the *Buckley* Court’s assertion that independent expenditures cannot be corrupting because the “ab-

479 U.S. 238, 263 (1986) (holding that “restriction of independent spending” is unconstitutional as applied to” certain non-profit corporations).

185. *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc) (holding that contribution limits are “unconstitutional as applied to individuals’ contributions” to “an unincorporated nonprofit association” that “intends to engage in express advocacy” and will “operate exclusively through ‘independent expenditures’ ”); see *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011) (“[T]here is no valid governmental interest sufficient to justify imposing limits on fundraising by independent-expenditure organizations.”); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010) (“Nor has the City shown that contributions to the Chamber PACs for use as independent expenditures raise the specter of corruption or the appearance thereof.”); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008) (“[I]t is ‘implausible’ that contributions to independent expenditure political committees are corrupting.”); see also *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 n.1 (2d Cir. 2013) (“[T]he threat of quid pro quo corruption does not arise when individuals make contributions to groups that engage in independent spending on political speech.”).

186. *SpeechNow.org*, 599 F.3d at 694-96 (emphasis added).

187. See *Carey v. FEC*, 791 F. Supp. 2d 121, 126-27, 131 (D.D.C. 2011) (three-judge panel); see also *Republican Party v. King*, 741 F.3d 1089, 1096-97 (10th Cir. 2013); *Thalheimer v. City of San Diego*, No. 09-CV-2862-IEG (BGS), 2012 U.S. Dist. LEXIS 6563, at \*38-40 (S.D. Cal. Jan. 20, 2012).

188. *2012 Outside Spending, by Super PAC*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S> (last visited Apr. 1, 2016) (noting that 1310 SuperPACs spent a total of \$609,417,654 in 2012); see also Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1672-75 (2012).



sence of . . . coordination” between the candidate and the entity making the expenditure “undermines” its value to that candidate.<sup>189</sup> On its face, this appears to be a factual assertion. Yet, as others have recognized,<sup>190</sup> *Buckley* did not provide any empirical basis for this assertion, and it has seldom been subject to empirical analysis or reconsideration in later cases. Like the Court’s view in *McCutcheon* that an officeholder cannot be corrupted by contributions to candidates other than himself,<sup>191</sup> its conclusion in *Buckley* concerning independent expenditures’ lack of corrupting influence appears to be a matter of intuition, rather than evidence. And, through repetition, this intuition has hardened into a principle that, in the words of the en banc D.C. Circuit, is now deemed settled “as a matter of law.”<sup>192</sup>

If the Court wished to interpret the First Amendment as categorically prohibiting restrictions on independent expenditures, it should have framed that conclusion as a direct interpretation of the Constitution itself: a true matter of law.<sup>193</sup> *Buckley*’s approach, however, presents the right to engage in unlimited independent expenditures as a contingent assertion. If a future litigant were able to demonstrate that independent expenditures can corrupt politicians, the right to make such expenditures without limit would evaporate. But, as with the Court’s decision rule concerning contribution limits,<sup>194</sup> it has never explained the nature of the factual showing that would be necessary to demonstrate the corrupting potential of independent expenditures.

Thus, putting aside the substance of the Court’s doctrine concerning independent expenditures, *Buckley*’s reasoning concerning independent expenditures is the worst of all worlds for all sides. For supporters of unlimited independent expenditures, *Buckley* frames that right in unnecessarily precarious terms. If *Buckley* is read literally, the right does not exist as a matter of pure constitutional interpretation, but rather is contingent upon the Court’s factual belief that independent expenditures are categorically unable to create a risk of actual or apparent corruption. Even if the Court respects stare decisis and does not change its interpretation of the First Amendment, the right to make unlimited independent expenditures can be overturned if a future litigant convinces the Court that they pose some unspecified risk of actual or apparent corruption. And as independent

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189. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

190. See, e.g., Gorod, *supra* note 25, at 30; Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 63, 94-95 (2013).

191. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450-52 (2014).

192. *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (en banc).

193. Cf. Larsen, *supra* note 190, at 109 (arguing that the Court was “not really finding facts” but rather “building bright line rules”).

194. See *supra* Section III.B.

expenditures exceed a billion dollars per election cycle,<sup>195</sup> it is virtually inevitable that, at the very least, some sort of apparent quid pro quo incident will eventually occur.

For opponents of independent expenditures, *Buckley* presents a tantalizing target that somehow is always hovering just out of reach. *Buckley*—as interpreted and applied in *Citizens United*<sup>196</sup>—suggests that the Constitution would not protect the right to engage in unlimited independent expenditures if they were shown to give rise to actual or apparent quid pro quo corruption. Yet the Court has never clarified what, exactly, a litigant must demonstrate to satisfy this standard. How many apparent quid pro quo arrangements must be proven for independent expenditures to become subject to regulation? Would public opinion polls about the appearance of corruption be sufficient? Opinion testimony from current or former members of Congress?

To the extent courts such as the D.C. Circuit declare that independent expenditures are not corrupting *as a matter of law*,<sup>197</sup> they confuse legislative facts with legal holdings. Such confusion elevates a holding that purports to be contingent upon certain underlying facts into a direct interpretation of the Constitution itself. The Court itself treated its factual findings about independent expenditures as if they were legally binding holdings protected by stare decisis in *American Tradition Partnership v. Bullock*.<sup>198</sup> The plaintiffs in *Bullock* filed a lawsuit in Montana state court, challenging a Montana law that prohibited corporations from making independent expenditures concerning state candidates or political parties.<sup>199</sup> The State introduced affidavits and deposition excerpts in defense of the ban describing Montana's long history of corruption.<sup>200</sup> In the early 1900s, corporations had spent tremendous sums of money to influence state elections and officeholders, and effectively controlled state government.<sup>201</sup>

The State's evidence showed that contemporary Montana remained subject to outside corporate influence because "the resources upon which its economy depends . . . depend upon distant markets."<sup>202</sup> One affidavit explained that "even small expenditures of

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195. See Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1916 (2013).

196. *Citizens United v. FEC*, 558 U.S. 310, 359-61 (2010).

197. See, e.g., *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010) (en banc).

198. 132 S. Ct. 2490, 2491 (2012).

199. *Id.* (citing MONT. CODE ANN. § 13-35-227(1) (2011)).

200. *W. Tradition P'ship v. Att'y Gen.*, 271 P.3d 1, 6-7 (Mont. 2011), *rev'd sub nom.* *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012).

201. *Id.* at 8-9.

202. *Id.* at 9.

money can impact Montana elections.”<sup>203</sup> Due to the state’s small population, campaigns in Montana are “marked by person-to-person contact and a low cost of advertising compared to other states.”<sup>204</sup> Allowing unlimited corporate independent expenditures would shift the emphasis of campaigns to fundraising.<sup>205</sup> Former state officials also testified that, because they had funded their statewide campaigns with a total of only a few hundred dollars, they “could have been derailed by an opposing expenditure of even a couple of thousand dollars.”<sup>206</sup>

Based on this evidence, the Montana Supreme Court upheld the state’s ban on independent expenditures by corporations.<sup>207</sup> Although *Citizens United* had been decided only the year before, the court concluded that it was not controlling, since its holding was based on the U.S. Supreme Court’s factual findings concerning federal elections and the evidence before it.<sup>208</sup> The Montana Supreme Court emphasized, “[T]he factual record before a court is critical to determining the validity of a governmental provision restricting speech.”<sup>209</sup>

The Montana Supreme Court concluded that the State had “unique and compelling interests” in prohibiting corporate independent expenditures.<sup>210</sup> It held, “Issues of corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government.”<sup>211</sup>

It is doubtful that the evidence before the court was sufficient to justify a prohibition on independent expenditures by corporations. Some of the evidence the court relied upon involved the corrupting effect of large campaign contributions and therefore was marginally, if at all, relevant to corporate independent expenditures.<sup>212</sup> Similarly, it does not appear that any of the examples of bribery the court discussed involved independent expenditures. Much of the opinion

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203. *Id.*

204. *Id.* at 10.

205. *Id.*

206. *Id.*

207. *Id.* at 13.

208. *Id.* at 6 (“*Citizens United* was decided under its facts or lack of facts . . .”).

209. *Id.*

210. *Id.* at 11.

211. *Id.*

212. See, e.g., *id.* at 10 (explaining evidence that “voters were concerned that they ‘didn’t really count’ in the political process unless they can make a material financial contribution”); *id.* (“[Three] of [four] Americans believe that campaign contributions affect judicial decisions in states where judges are elected.”).

focused more on concerns about corporate “influence” over Montana elections and “control” of state government<sup>213</sup> than specific quid pro quo corruption, which the U.S. Supreme Court has held is the only valid basis for restricting political spending.<sup>214</sup> The Montana Supreme Court also feared that unlimited independent expenditures would reduce voters’ interest and willingness to participate in the political process.<sup>215</sup> Such concerns appear completely speculative and, in any event, are not grounds for limiting First Amendment activities.

Despite the shortcomings of the Montana Supreme Court’s opinion, it properly recognized that *Buckley’s* and *Citizens United’s* holdings concerning independent expenditures were not matters of pure constitutional interpretation, but rather were contingent on certain legislative facts. And the Montana Supreme Court believed that the State had established that different legislative facts existed concerning Montana elections, thereby warranting restrictions on corporate independent expenditures in Montana that may be unconstitutional elsewhere, under different circumstances.

The U.S. Supreme Court reversed in a terse, one-paragraph, 5-4 decision.<sup>216</sup> It noted that *Citizens United* had invalidated a federal law that was “similar” to Montana’s on the grounds that “political speech does not lose First Amendment protection simply because its source is a corporation.”<sup>217</sup> The Court held that “[t]here can be no serious doubt” that “the holding of *Citizens United* applies to the Montana state law.”<sup>218</sup> It added that Montana’s arguments “either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.”<sup>219</sup> Four Justices strenuously dissented, pointing out that *Citizens United* should not “bar the Montana Supreme Court’s finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana.”<sup>220</sup>

The *Bullock* majority exemplifies the Court’s careless treatment of legislative facts in campaign finance cases. If the Court wished to categorically preclude any governmental entity from limiting independent expenditures as a matter of law, without regard to the existence of extrinsic facts, then it should have framed its conclusion in

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213. *Id.* at 9-10.

214. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450-51 (2014); *Citizens United v. FEC*, 558 U.S. 310, 340-41, 359-61 (2010).

215. *W. Tradition P’ship*, 271 P.3d at 11.

216. *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (quoting *Citizens United v. FEC*, 558 U.S. 310, 342 (2010)).

217. *Id.* (quoting *Citizens United*, 558 U.S. at 342).

218. *Id.*

219. *Id.*

220. *Id.* (Breyer, J., dissenting).

*Buckley* and *Citizens United* as a purely legal assertion, rather than a factually contingent holding. If, instead, an entity's First Amendment right to engage in unlimited independent expenditures hinges on the existence or absence of certain facts, the Court should be clearer and more specific about what a litigant must establish to satisfy the Court's standard, and more willing to examine future litigants' factual records.

As discussed above with regard to contributions,<sup>221</sup> it is unclear what evidence either a supporter of unlimited independent expenditures or a governmental entity seeking to regulate them must adduce to establish whether such expenditures by particular entities or in certain elections may lead to actual or apparent corruption. Would public opinion polls be sufficient? How much, if any, background must people be given about the distinctions among contributions, coordinated expenditures, and independent expenditures before being polled? Would testimony from former government officials be sufficient? Can the Court draw important inferences from evidence that government officials have acted favorably toward individuals or entities who had made independent expenditures supporting their candidacies? The *Bullock* Court's approach, which effectively precludes litigants from demonstrating that independent expenditures can give rise to actual or apparent corruption under certain circumstances, improperly disregards the contingent nature of *Buckley*'s and *Citizens United*'s holdings.

Above all, the Court must avoid allowing a litigant to attempt to establish a legislative fact through definitional sophistry. *Buckley* held that independent expenditures cannot give rise to a risk of corruption because, by definition, they do not involve "prearrangement and coordination" between the speaker and a candidate.<sup>222</sup> The Court, in large part, defined away the possibility of corruption. Under the Court's view, if Congress were to redefine "contribution" as the transfer of funds to a candidate for reasons unrelated to a quid pro quo transaction, then a contribution could not, by definition, give rise to a risk of corruption, either. Money given to a candidate as part of a bribe or other corrupt quid pro quo arrangement would be excluded from the definition of "contribution." If the Court wishes to continue determining the constitutionality of restrictions on First Amendment activities based on the likelihood they might involve actual or apparent corruption, then it cannot allow the risk of corruption to be simply defined out of existence.

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221. See *supra* Section III.B.

222. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976). If an expenditure was prearranged with a candidate, it would be deemed a coordinated expenditure rather than an independent expenditure, see 52 U.S.C. § 30101(17) (Supp. II 2014), and treated as a contribution subject to base limits, *id.* § 30116(a)(7)(C).

## IV. CONCLUSION

The judiciary—the Supreme Court in particular—has paid insufficient attention to the critical role of legislative facts in its constitutional holdings, particularly in campaign finance jurisprudence. Most basically, in discussing precedents, courts sometimes fail to distinguish between holdings that are pure statements of law, based solely on the Constitution itself, and those that are contingent upon underlying legislative facts. When factually contingent holdings get repeated in later cases, divorced from their underlying factual premises, they appear to be statements of law subject to *stare decisis* and sometimes are treated as such. Moreover, when a court treats a contingent holding as binding without assessing the continued accuracy of the underlying facts, it affords the holding improperly strong binding force. At least in theory, both legislative facts and legal holdings that are contingent upon them should be subject to challenge in future litigation, in which the litigants may compile a very different evidentiary record, without regard to *stare decisis*.<sup>223</sup>

In campaign finance cases, the Court also has paid inadequate attention to whether the legislative facts upon which its decision rules are based are reasonably susceptible to meaningful proof. Many of the Court's standards are far too vague, giving litigants scant guidance as to how they can be satisfied. Such indeterminacy leaves courts free to resolve important constitutional questions based primarily on intuition, reaching conclusions that can be both difficult to predict and reconcile with each other.

These are not partisan critiques. Few people find current campaign finance law completely satisfactory. In some respects, paying greater attention to the role of legislative facts in the Court's campaign finance jurisprudence may lead to greater constitutional protection. The Court may conclude, for example, that it has underestimated the extent to which contributions constitute a form of constitutionally protected speech. In other respects, it may lead to reduced protection; for example, courts may find themselves more open to considering evidence (if it exists) of actual or apparent *quid pro quo* corruption from independent expenditures. At a minimum, greater focus on the issue can lead to more coherent, predictable, and perhaps even persuasive rulings.

More generally, focusing on the factually contingent nature of many constitutional rulings offers an exciting and potentially unsettling perspective on constitutional law. The need to reduce constitutional law to hornbook principles, treatises, and outlines often abstracts away from its true, much more complex nature. Principles of

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223. See generally Larsen, *supra* note 190 (arguing that factual statements from the Supreme Court should not be treated as authoritative in future cases).

constitutional law that appear established—at least unless the Court changes its interpretation of the Constitution—instead depend upon certain facts about the world. Those facts might not have been adequately proven in a prior case or may be subject to new or different evidence in future cases. Focusing on the factually contingent nature of constitutional rulings, rather than their legal holdings alone, is like perceiving what appears to be a solid block of wood instead as a collection of atoms, separated by gulfs of space. What appears to be definitive is, upon closer perception, contingent; what appears to be an assertion of law is, upon closer analysis, largely factual. Such shifts in focus can lead to illuminating insights, even when we already know that such complexity is lying just beneath the surface.