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THE FIRST AMENDMENT . . . UNITED

Joel M. Gora*

INTRODUCTION

Perhaps the most important thing that the Supreme Court does is to protect those individual rights and enforce those government limits that comprise our civil liberties. The Supreme Court did precisely that in its 2010 decision, very controversial in many quarters, in *Citizens United v. Federal Election Commission*.[1] Despite all of the sturm and drang associated with the case, to my mind, this was basically a very simple case. Maybe I am just being simple-minded, but the First Amendment to the Constitution says that "Congress shall make no law . . . abridging the freedom of speech; or of the press . . . ." In the McCain-Feingold law of 2002, more formally known as the Bipartisan Campaign Reform Act of 2002 (BCRA),[2] Congress had done precisely that, by prohibiting *all* corporations and *all* labor unions from broadcasting advertisements near an election that merely name a federal candidate. And the Court's duty—its painful duty, as it said in *McCulloch v. Maryland*[3]—was to say no, the Constitution does not let you do that. In doing so, the Court steered the First Amendment ship back to its proper path of deterring and disallowing government restrictions on political speech and did so for the proper reasons. And in telling Congress it had acted improperly, the Court discharged its historic obligations going back, of course, to *Marbury v. Madison*,[4] to declare Acts of Congress inconsistent with the Constitution to be not the law of the land, i.e., to be "unconstitutional."

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* Professor of Law, Brooklyn Law School. I want to thank President Joan Wexler and Dean Michael Gerber and the Brooklyn Law School Dean's Summer Research Stipend Program for supporting this article. In the interests of full disclosure, I should note that I was one of the lawyers challenging the campaign finance restrictions on First Amendment grounds in both *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

1. *Citizens United*, 130 S. Ct. 876 (2010).
2. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 203–204, 116 Stat. 81.
3. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).
4. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

Not everyone agrees that the Court got it right in the *Citizens United* case and properly exercised its power of judicial review. Indeed the reaction to the opinion has been incredibly intemperate in so many quarters. And, unlike few Supreme Court decisions in recent years, it not only influenced the conduct of the 2010 elections, but it was an issue in them. So the case for the decision's correctness will require somewhat more detail.

Here is one narrative about the case. Corporations are stealing our democracy. There has been an avalanche of secret corporate money, most of it coming from those sneaky foreigners, trying to buy our elections. This has been made possible solely by the Supreme Court's decision in *Citizens United*, where a cabal of five right-wing Justices, in a calculated fit of judicial activism, distorted and twisted the law to hand the 2010 elections to the right wingers and the Tea Partiers. Why, it feels like *Bush v. Gore*[5] all over again. Had it not been for the Supreme Court's hideous decision—maybe the worst decision since *Dred Scott*[6]—the Democrats would have retained their huge majorities in Congress and the states and President Obama would have continued to have the enormous popularity he so rightfully deserves. All because of the Supreme Court decision in *Citizens United*. Indeed, they ought to be impeached and replaced by Justices who will be properly deferential to the wisdom and expertise of our elected officials, especially when they are writing the rules governing whether they will stay in power. If you read the *New York Times*, or listened to NPR or watched MSNBC, or took your cue from President Barack Obama and former House Speaker Nancy Pelosi, that is the story you probably heard.[7]

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5. Bush v. Gore, 531 U.S. 98 (2000).

6. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

7. Speaking of cues, there reached a point where the coordinated narrative pattern became so obvious that it almost took on the aspects of an orchestrated campaign. A left-wing group would make the charge that they had discovered evidence that corporate money or foreign money or foreign corporate money was secretly overwhelming the election, the press would pick up the charge and give it credence, even though it was overstated at best and dishonest at worst, and then Democratic party leaders would trumpet the charge as evidence that the evils unleashed by the Supreme Court ruling were, as predicted, overwhelming us. The false claim that the Chamber of Commerce was using vast amounts of foreign corporate money to do so was a prime example. *See* Jeff Patch, *Guilty Until Proven Innocent*, CENTER FOR COMPETITIVE POL. BLOG, Oct. 7, 2010, http://www.campaignfreedom.org/blog/detail/

There is a different narrative about *Citizens United*. It goes something like this. Congress passed a law which made it a crime for a group of individuals (who formed a corporation) to broadcast a movie or even advertisements of a movie which was highly critical of the leading candidate for President of the United States. When the group took their case to the Supreme Court, not only did the government defend that law, but the government also argued that Congress could pass a law making it a crime for a group of people like that even to publish a book that was highly critical of a leading candidate for President of the United States, or even of the President himself during an election season. Under this narrative, and given no more than the text of the First Amendment to guide us, it is almost the constitutional equivalent of res ipsa loquitur to conclude that the laws in question cannot stand and that the Court had a duty to call out the Congress for passing such a law. If you read the *Wall Street Journal*, or listen to Rush Limbaugh, or watch Fox News Channel, or take your cue from Senator Mitch McConnell, that's the story you heard.

In my view, the truth is not somewhere in between. Maybe it is because of my own personal narrative with these issues.

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guilty-until-proven-innocent (describing circulation and coverage of claim). Indeed when the meme, as they say, reached a frantic peak, I was not surprised to see, prominently displayed in the *New York Times*' Week in Review, a picture of Richard Nixon, the ultimate liberal bogeyman, a reference to Watergate, and the suggestion that the campaign funding that the Supreme Court had so wrongly unleashed was at least as bad as that, if not worse. *See* Jill Abramson, *Return of the Secret Donors*, N.Y. TIMES, Oct. 17, 2010, at WK1, *available at* http://www.nytimes.com/2010/10/17/weekinreview/17abramson.html. So much of this was teed off by the President's false State of the Union charge that the Court's decision had opened the "floodgates" for foreign money to dominate our elections. But even the *New York Times* was moved finally to call the President out for his gross exaggerations of the role of foreign money in the elections. See Eric Lichtblau, *Topic of Foreign Money in U.S. Races Hits Hustings*, N.Y. TIMES, Oct. 9, 2010, at A14 (responding to the President's claim that "'groups that receive foreign money are spending huge sums to influence American elections,'" (citing President Obama) by noting that: "a closer examination shows that there is little evidence that what the chamber does in collecting overseas dues is improper or even unusual, according to both liberal and conservative election-law lawyers and campaign finance documents").

I. THE ARC OF HISTORY: FROM *BUCKLEY* TO *CITIZENS UNITED*

My own personal odyssey in dealing with the clash between campaign finance laws and First Amendment limitations goes back almost forty years to when I was a young ACLU lawyer and Congress enacted the Federal Election Campaign Act,[8] which supplies the basic structure of federal election campaign law today. In 1972, before the ink had even been dry on the brand new law, President Richard Nixon's Department of Justice brought the very first lawsuit under the Act against a small group of left-wing dissenters who had paid for a two-page ad in the *New York Times* calling for President Nixon's impeachment for his conduct of the war in Cambodia.[9] The government's legal theory was that it was an election year, the ad was critical of President Nixon, up for re-election, therefore, the money was spent for the purpose of influencing the outcome of the election and was punishable under the new law—a theory that the Court would resoundingly reject in the famous case of *Buckley v. Valeo*[10] a few years later. If that situation sounds like déjà vu all over again, with the *Citizens United* case involving a small group of right-wing dissenters who put out a movie/DVD critical of presidential candidate Hillary Clinton during an election year, it is. The Nixon impeachment ad was the classic example of the clash between campaign finance controls and free speech principles, a clash which almost four decades of court decisions, legislative revisions, and bureaucratic regulations have not abated, and indeed have made more acute. And the *Hillary: The Movie* case involved the same clash over the government's control of political speech.

Responding to the Nixon case started us at the ACLU down the path of resisting any restrictions on the funding of political speech, on the theory that no such restrictions were consistent with the central

8. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

9. United States v. Nat'l Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972); ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C 1973) (three-judge court), *vacated as moot sub nom*, Staats v. ACLU, 422 U.S. 1030 (1975).

10. Buckley v. Valeo, 424 U.S. 1 (1976).

meaning of the First Amendment: that it protects unrestrained and uninhibited discussion and criticism, from as many sources as possible, of government and the officials who run it or seek to run it. It slowly dawned on us, like the prisoner in Kafka's *Penal Colony*, that campaign finance limitations posed ferocious First Amendment problems, that they restrained criticism of government and entrenched incumbents and the forces of the status quo, and that restraints on independent speech are *particularly* objectionable; indeed, they so cut against First Amendment values that they are the Achilles' heel of campaign finance regulation. All these implications raised our consciousness, as we used to say, about how fraught with First Amendment perils the campaign finance laws were and are.

The arc that connects the Nixon impeachment ad case and the *Hillary: The Movie* case is the view that where political speech and association is concerned, First Amendment rights should be unified, universal, and indivisible. And that is precisely the theory that ruled the day in the *Citizens United* case. The decision was a great victory for the theory of the First Amendment long espoused by critics of campaign finance controls, and it almost seemed the Court was channeling the kinds of criticisms of the campaign finance laws and their enforcement that the *Buckley* plaintiffs had asserted way back then.

For the essence of the *Citizens United* decision rested on the following fundamental principles. Political speech is essential to an effective democracy. The more political speech you have the better democracy you will have. Campaign finance limitations necessarily and inherently involve controls on political speech. Government cannot be trusted not to rig those rules and set those controls to protect incumbents and the status quo. This danger requires courts to give a skeptical strict scrutiny to campaign finance laws. The campaign finance regulatory regime has become so complex and convoluted that it is tantamount to a de facto system of prior restraint, as well to a "caste system" with privileged speakers and pariah speakers which is anathema to First Amendment rights which have to be universal and indivisible. In one way or another, these themes that civil libertarian critics of the campaign finance system have sounded

over the years were embedded into the Court's analysis more than any time since *Buckley*.

In *Citizens United* the Court was willing to use broad strokes to strike down a law that restricted speech in broad terms. Under the challenged law, *all* corporations and *all* labor unions were banned, under threat of criminal sanctions, from using their funds to speak out about government and politics in any way that even mentioned a politician or an incumbent officeholder running for election. What could be more quintessentially at the core of the First Amendment than such speech, and what more important role could the Court play than striking down a law that restrained such speech? The First Amendment has always been based on the idea that the more speech we have, the better off we are, as individuals and as a people. The *Citizens United* case eloquently reaffirmed and reinforced that overarching principle. In doing so the Court also reaffirmed a number of key corollaries.

First, our incredibly complex system of campaign finance rules and regulations—about who can speak and what can be said and when it can be said, presided over by the government bureaucrats at the Federal Election Commission, and backed up by criminal and civil penalties—has created, in effect, a de facto system of prior restraint. This creates a chilling effect on political speech all over the country, with people and organizations fearful that their ad in the newspaper criticizing the President of the United States might somehow be deemed illegal, an effect that is anathema to First Amendment values. Now the Court has swept those restraints away and allowed *any* group taking *any* form to espouse *any* position on the core political issues of the day on behalf of its members, contributors, officers, shareholders, and employees.

Second, the Court also took steps to dismantle the First Amendment "caste system" whereby whether someone or some group could speak depended on who or what they were or when they spoke or how they spoke. Before the decision, the right to speak depended in part on who was doing the speaking: business corporations, no, unless they were media corporations; non-profit corporations maybe, depending on where they got their funding;

labor unions, no. At the state level there was also a crazy-quilt system, with half the states allowing corporations and unions to speak out about politics and the other half not. The Court has swept those distinctions all aside: the right to speak cannot depend on the identity of the speaker. Under the First Amendment, there should be no second-class speech or second-class speakers.

In this regard, the Court explicitly and emphatically reaffirmed the First Amendment protections of the institutional press. In fact, the Court said that if the government could indeed restrict the First Amendment rights of corporations, that would include the power to limit media corporations as well, as the Government seemed to assert—a clearly unacceptable and unprecedented result. By recognizing full First Amendment rights of corporations, including media corporations, the Court avoided that outcome. It is quite surprising, therefore, that most of the media, rather than praising the decision that explicitly protected them, instead excoriated the Court for its ruling. Freedom for me, but not for thee, seemed to be the media mantra.[11]

Finally, the Court's ruling reconnected with the classic First Amendment tradition established by the great twentieth century Justices like Black, Douglas, and Warren who understood that the protection of free speech went hand in glove with the enhancement of democracy. The three Justices, among the most liberal ever to serve on the Court, could not have been plainer in their commitment to a uniform and universal view of free speech as the indispensable precondition for democracy. In a 1957 dissenting opinion on the rights of labor unions to speak out about politics, they said:

> Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that

11. NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE (HarperCollins 1992).

> the people have access to the views of every group in the community.[12]

Deeming a particular group "too powerful" to be allowed to speak was not a justification "for withholding First Amendment rights from any group—labor or corporate. First Amendment rights are part of the heritage of all persons and groups in this country."[13]

But the road to these recognitions was a long one. How did the Court get from there to here?

First, of course, there was the *Buckley* decision, the Court's first major ruling on the conflict between campaign finance restrictions by Congress and First Amendment limitations on Congress. There are two key ways that *Buckley* set the stage for *Citizens United*.

First, the Court strongly ruled that limitations on how much any group or individual could spend to communicate with the public about politics were direct limitations on such speech. This violated the principles that political speech should not be limited and that government was not to be trusted to impose or enforce such limits. Campaign spending limits could not be justified as enforcing an interest in some kind of rough political equality by

> equalizing the relative ability of individuals and groups to influence the outcome of elections . . . [because the] concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas.'"[14]

Nor could limitations on campaign spending by candidates, parties, independent groups and individuals be justified by the interest in

12. United States v. United Auto. Workers, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting).
13. *Id.* at 597 (citation omitted).
14. Buckley v. Valeo, 424 U.S. 48–49 (1976) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964)).

preventing corruption or the appearance of corruption. That would be taken care of by having limits on contributions to candidates, which the Court upheld, as well as disclosure of contributions to candidates and to independent partisan groups, which the Court upheld as well.

Second, the Court clearly held that, where speech by individuals independent of the candidate was concerned, only speech that "expressly advocated" the election or defeat of a candidate could be regulated; all other speech was valid commentary on issues, including the stands taken on issues by candidates, and was absolutely immune from government regulation, regardless of whose speech it was. That is how the Court dealt, in effect, with the Nixon impeachment ad case, by ruling that speech which criticized politicians, but stopped short of urging their election or defeat, was protected "issue advocacy" as it came to be known, whose protection was central to the First Amendment.

What about corporations, unions and other similar structural entities; what did *Buckley* say about limiting speech in those settings? *Buckley* did not deal directly with that issue, although the statute limiting independent political speech which the Court struck down did include corporations and unions in its definition, and some of the plaintiffs challenging those limitations were corporations. Some have argued that because of these features, *Buckley*, in effect, struck down limitations on corporate or union or other entity political speech. But the Court did not deal with the question explicitly, though it arguably dealt with it by implication.

Two years later, however, the Court most explicitly and emphatically did deal with those issues in *First National Bank of Boston v. Bellotti*,[15] which involved a Massachusetts law that prohibited corporations from spending funds to communicate their views to the public on referendum questions on the ballot—in that case, whether there should be a state personal income tax, which many corporations felt would be bad for business. The Court ruled that the First Amendment prohibited government from suppressing corporate political speech in that fashion. In doing so, it rejected

15. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

arguments based on the notion that corporations were artificial state-created entities that had no rights or whose rights could be dictated by the government that chartered them, that corporate spending might overwhelm the electoral process and "drown out" individual voices or that shareholders' rights would be undermined by such political spending of corporate funds. Of course, all of these arguments would be reprised in *Citizens United*.

Several years later, the Court expanded corporate speech rights even more by holding that non-profit ideological corporations could even engage in explicit partisan *candidate*-related, campaign-related electoral speech, so long as they were not themselves funded by business corporations (or presumably labor unions as well).[16]

So, that was the First Amendment legacy circa 1990—no limits on campaign spending by individuals and groups, including corporations, where elections were concerned, whether they be candidate elections or referendum elections.

In 1990 the Court decided a case that upheld a Michigan law that barred corporations—but not unions or media corporations—from making independent expenditures in state elections, including advocating the election or defeat of specific candidates. The case was *Austin v. Michigan Chamber of Commerce*,[17] and the Court ruled that because corporations have so much money, much of it acquired because of the corporate form that government permits them to take, and because the use of that money through expenditures could somehow distort the debate and affect the outcome of the elections, the government could directly limit that speech. Those of us on the losing side of the case insisted that this was an "express advocacy" case and the restraint on corporate expenditures was limited to such clearly election-related speech. Although the Court had earlier considered, without resolving, the validity of similar restrictions in the Taft-Hartley Act of 1947, *Austin* was the first time that the Court upheld a direct limitation on political speech by a corporation or union. Three Justices dissented—Scalia, Kennedy and O'Connor—

16. Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986).
17. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

believing that the Michigan law, with its direct restraint on corporate political speech, yet its cynical exemption of both union speech and media speech, represented the worst kind of partisan censorship antithetical to the principles of the First Amendment which limits the power of government to dictate the terms and conditions of political speech or the individuals and groups that can engage in it. They believed, along with us at the ACLU, that the protections of the First Amendment were universal and indivisible and not a caste system with a class of political untouchables.

To say there was a tension between *Buckley* and *Bellotti* on the one hand and *Austin* on the other was an understatement. *Buckley* had struck down limits on independent expenditures in absolutist terms, though not explicitly referring to corporate speech; *Bellotti* had struck down limits on corporate speech, though in the context of non-candidate elections, but *Austin* had held that corporate speech about candidates could be restrained because of what the Court perceived as its dangers to democracy.

The tension came to the fore dramatically a decade later when the so-called McCain-Feingold law came before the Court in a test case filed by Senator Mitch McConnell, a long-time campaign finance restrictions foe, who was joined by an alphabet soup list of across-the-spectrum strange political bedfellows including the AFL-CIO, the Chamber of Commerce, the National Rifle Association, and the ACLU.[18] All of these different groups were united in their opposition to a key feature of McCain-Feingold that banned *any* broadcast advertisement that even simply mentioned or listed the name of a federal candidate within sixty days of the election. This black out period meant, in effect, that some of the most powerful institutional voices in America, representing tens of millions of individual citizens, would effectively be silenced in their commentary and criticism of political candidates (so often incumbents seeking reelection) at precisely the moment when the widest circulation of critical opinions was essential to the electorate. That is when the incumbent politicians in Congress silenced these groups. Remember,

18. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

these were groups independent of any candidates, whose efforts could not, by law, be coordinated with any candidate, and who were engaged in core political speech at the key time when it was relevant.

To their discredit, in my view, a majority of the Justices, 5–4, upheld this restriction. The majority included Justice O'Connor, who had previously supported corporate speech and sided with the corporations in the *Austin* case. Relying heavily on *Austin*, the majority's specific reasoning in *McConnell* was that so many of the ads run by corporations and unions during the election season, even though they did not expressly advocate election or defeat, were so barbed and pointed that they were the "functional equivalent of express advocacy," and therefore, all such ads could be presumably subject to a facially valid ban.[19] Never mind that the ACLU, for example, might want to run an ad urging a Representative or Senator to vote one way or the other on a key piece of civil liberties legislation pending before the Congress in September or October of an election year, and without a whisper of partisan overtone or undertone. All were swept into the net of prohibition. The ACLU and others were dismissively told to go out and form a political action committee, i.e., a PAC, instead, to speak for the ACLU, even though in its ninety-year history the ACLU has never taken a single partisan political position with respect to candidate elections. In both its ruling and its approach, the *McConnell* majority displayed the kind of deference to legislative choices rarely seen in a First Amendment case and never before seen in a case involving such sweeping restraints on political speech. It did seem indeed that the great divide between the five Justices in the majority who upheld all the key features of McCain-Feingold, and the four dissenters who strenuously rejected those restraints, was that, where the proper functioning of democracy was concerned, the majority viewed more political speech as the problem, while the dissenters saw more political speech as the solution.

One more piece would have to come into place to set the stage for the resolution of the *Buckley*/*Bellotti* versus *Austin*/*McConnell*

19. *Id.* at 206.

approaches to all of these difficult issues. That would be the arrival on the Court of Chief Justice John Roberts and Associate Justice Samuel Alito. Chief Justice Roberts replaced Chief Justice Rehnquist, who by the time of *McConnell* had changed his sharp anti-corporate speech position and voted to afford corporations significant First Amendment rights. So, that was presumably a wash. But Justice Alito replaced Justice O'Connor, who, despite her support in dissent for corporate free speech rights in *Austin*, changed her mind in *McConnell* and provided the swing vote to uphold the unprecedented ban on corporate—and union—free speech rights embodied in the McCain-Feingold law upheld in *McConnell*. And that would make a major difference: since Justice Alito's arrival, the Court has ruled for the First Amendment over campaign finance restrictions in four out of four cases, culminating in the decision in *Citizens United*.

So, with the arrival of two new Justices, joining the three Justices who had already expressed deep skepticism in dissent over campaign finance restrictions—Justices Scalia, Kennedy and Thomas—the stage was set for the beginning of a sea change in campaign finance law, and the three cases leading up to *Citizens United* would become important bell weathers of that ultimate outcome.

First, in 2006, the Court, for the first time, struck down a very low Vermont campaign contribution limit on the ground that it was stifling electoral competition. Even Justice Breyer pulled away from the liberals and joined the conservatives to invalidate the contribution ceiling.[20]

Next, in 2007, the Court decided another case that would clearly set the stage for *Citizens United*. That case also involved a conservative group—a non-profit corporation—that wanted to run a "grass roots lobbying" commercial urging Wisconsin's two United States Senators to take a certain action on legislative matters. Since the ad was to be run during the election season, it was outlawed by the McCain-Feingold ban on "electioneering communications," because one of the Senators was up for re-election. Seeking a narrow

20. Randall v. Sorrell, 548 U.S. 230 (2006). The Court also invalidated campaign expenditure limits as well, finding them core violations of *Buckley's* teachings.

ground of decision, the two new Justices ruled that since the ban was designed to reach only those ads which were campaign-related in that they were the "functional equivalent of express advocacy," and since this ad was not, therefore, it was protected by the First Amendment. The plurality opinion then laid down a series of guidelines for making that key determination with the strong message that the benefit of the doubt had to be given to the speaker, not the government. Employing a sports metaphor, Chief Justice Roberts said: "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."[21] The three other conservative Justices attacked this approach as a temporizing effort to spare *McConnell* and the "electioneering communication" statute, which they believed was fundamentally flawed and should be invalidated in its entirety.[22] From the other direction, however, the liberal Justices complained that even the temporizing approach had gutted the *McConnell* decision upholding of the law.[23]

In 2008, the Court decided another case involving a different provision of McCain-Feingold, one not dealing with corporate or union speech or other entity speech, but embodying the so-called, "millionaire's amendment" whereby federal contribution limits were raised for any candidate opposing another candidate who was using more than a modest amount of his or her own funds for the campaign.[24] Justified as an effort to "level the playing field" by its supporters, the provision was roundly condemned by the majority as a cynical attempt to use campaign finance regulations and restrictions to control political speech and manipulate electoral outcomes and to penalize those who would use their own personal funds to support their own campaign speech. Gone was any effort at placating Congress either in outcome or attitude. Evident instead was a new

21. Fed. Election Comm'n v. Wis. Right To Life, 551 U.S. 449, 474 (2007).

22. Justice Scalia tartly observed, "This faux judicial restraint is judicial obfuscation." *Id.* at 498 n.7 (Scalia, J., concurring).

23. Justice Souter wrote the lead dissent and reprised his opinion in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), with its broad encouragement for government regulation of campaign financing. *See Wis. Right To Life*, 551 U.S. at 504–36 (Souter, J., dissenting).

24. Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008).

majority's deep skepticism of the motives and methods of campaign finance controls.

II. THE *CITIZENS UNITED* CASE

And so the stage was set for the constitutional showdown in *Citizens United*.[25] It raised a fundamental question under the First Amendment: Can the government prevent a corporation from criticizing the people who run or seek to run the government?

The facts have become quite well known: A conservative group produced a movie critical of Senator Hillary Clinton during her 2008 run for President. Because of that timing, broadcasting ads for the movie possibly violated the McCain-Feingold campaign finance law, as did showing it on on-demand cable television. Remember that the Court narrowly upheld that law in 2003, but serious doubts about it persisted, and the Court in 2007 whittled down its coverage to reach only broadcast ads or communications which were "the functional equivalent of express advocacy." It seemed like the case simply raised another narrow question of the reach and validity of the specific provision, and many thought the case might go off on a point such as whether the law covered advertisements for movies or video-on-demand, or was it just targeted on thirty second television attack ads on candidates. Underneath these narrow issues was a foundational question: the ultimate basis for the government regulation was that Citizens United was a corporation, though a non-profit, and accepted some limited funding from business corporations. But that describes almost every cause organization in America, from the ACLU and the NAACP to the NRA and the National Right to Life Committee. So, how could this law be justified?

What made the issue even more important was that during the initial argument in the case the government took the position that even a book sharply critical of a candidate for President could be banned if it was published by a corporation—or presumably a union

25. Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876 (2010).

as well—as part of the government's right to control organizations from using their funds to speak out in any forum or through any medium about a politician up for election in any way that might be construed as advocating that politician's election or defeat. Though the government was relying on the Court's 1990 *Austin* ruling[26] that seemed to say so, that seemed a breathtaking assertion. And reassurance was hardly supplied by the government's position during re-argument that while the FEC was not likely to proceed against the publisher of a book, as a matter of administrative discretion, perhaps, publication of political pamphlets, more traditionally associated with campaigns and electioneering, might be interdicted if published by a corporation.[27] Would the breadth of the submission by the government be met with a correspondingly broad response from the Court and the Justices who had previously expressed skepticism or outright condemnation of the law?

The answer would soon come in a resounding ruling, written by Justice Anthony M. Kennedy, protecting corporate—and any organizational or institutional—speech about government and politics. I will discuss the ruling and its critics in a moment, but first let me set forth my own views on the proper approach and why I think the Court got it so right.

In my view, the proper approach in this area is to do what the Court did: take a unified, universal and indivisible view of the First Amendment, namely, that the rights it protects should be available to all those individuals and groups which seek to exercise them and inform the public. This unified approach says that all entities—be

26. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

27. *See* Transcript of Oral Argument at 64–68, *Citizens United*, 130 S.Ct. 876 (No. 08-205), 2009 WL 6325467. The re-argument was heard in September 2009 at a special session of the Court. It was Justice Sonia Sotomayor's first appearance on the Court following her appointment earlier that summer. Perhaps as a result of that, the Court, rather than deciding the case, set it for re-argument in a special September session. However, it did not really seem that her views on these issues would differ considerably from those of Justice Souter, whom she succeeded, since she had strongly supported campaign finance limitations and restrictions while a member of the New York City Campaign Finance Board and had later co-authored a law review article that contained a footnote suggesting that campaign contributions were akin to bribes. *See* Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 41 n.26 (1996). This left little doubt where she would come out on these issues. And, indeed, she would join the *Citizens United* dissenters four months later.

they for-profit corporations, non-profit corporations, media corporations, mom-and-pop corporations, labor unions or any other collective entity—are entitled to the same rights under the First Amendment, and government cannot restrict those rights because of the nature or form such organizations take. The rationale of that policy is that the importance of the speech, not the identity of the speaker, should be the touchstone for protection. There should not be any second-class speakers under the First Amendment. Rather, as Chief Justice Warren Burger once said, "[T]he First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms."[28] To argue that the First Amendment should only protect people, not entities, has the question precisely backward. We protect the speaker to protect the speech. The real issue is whether the prohibition abridges expression that the First Amendment is designed to protect. The law here deals with government efforts to regulate and control speech which is universally agreed to be at the core of the First Amendment: independent commentary and criticism about government and the people who run it during an election season. As the Supreme Court has noted time and again, speech concerning public affairs "is the essence of self-government."[29] Given these premises, how can the government possibly justify claiming the right to censor and prohibit the advertising and distribution of a movie critical of one of the most prominent political figures of our times, Hillary Clinton, at the time when she was running for the highest office in the land? What arguments could possibly be made to sustain this result?

A. The Flawed Arguments Against Protecting Corporate Political Speech

The defenders of the law, and the dissenters in Court, raised five key arguments to support the restriction on corporate—and union[30]—

28. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring).

29. Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

30. The statute at issue banned both corporations and unions from engaging in electioneering communications. Though the case only involved a non-profit corporation, the majority opinion treated the ban as covering unions as well, and, in striking down the statute on its face and invalidating the

political speech, in a long and impassioned opinion written by Justice John Paul Stevens.

First, corporations should not have freedom of speech under the First Amendment, only people should, even though the text of the First Amendment is not so limited and courts have accorded corporations extensive constitutional rights for a long time, including freedom of speech. Think of this as the *impersonation* argument. Second, corporations have so much money that they will overwhelm the political process if they can spend it freely criticizing politicians, even though this had not happened in the two dozen states where corporations were already free to spend money on politics. This is the *distortion* argument. Third, corporate spending on political speech can corrupt our politicians, even though the speech at issue in the case was totally independent of and uncoordinated with any politicians, which the Court had always held a critical reason for protecting such independent speech. This is the *corruption* argument. Fourth, since corporations need charters from the government to operate, the government can limit the right of free speech as a condition of granting those charters and that permission. In my view this is basically an *extortion* argument. Finally, the rights of shareholders were invoked to justify the prohibition, despite the fact that the law's impact went well beyond that purpose. This is the *imposition* argument.

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broader ban on corporate or union expenditures contained in 2 U.S.C. § 441b, the Court's decision freed up union treasuries for explicit political advocacy as well. Despite the complaints by the dissenters and their supporters that the majority decision was an extreme act of judicial activism, those same voices were silent on the fact that the decision gave blanket protection to unions even though the issues of union speech—and whether it differed in any significant way from corporate speech—were not broadly before the Court. I guess activism depends on whose ox is being gored. As it turned out, labor did take early advantage of its new rights, and reports surfaced of heavy union spending in some elections in the months after *Citizens United*. *See* T.W. Farnam, *Unions Outspending Corporations on Campaign Ads Despite Court Ruling*, WASH. POST, July 7, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/07/06/AR2010070602133.html. Unions also announced plans soon after the decision for heavy spending in the 2010 elections. *See* Kevin Bogardus & Sean J. Miller, *Unions to Spend $100M in 2010 Campaign to Save Dem Majorities*, THE HILL, May 21, 2010, http://thehill.com/homenews/campaign/99103-unions-100m-to-save-the-dems. Labor benefitted from the *Citizens United* ruling because it freed up the ability to use union treasury funds, taken from members' and non-members' dues, to run express advocacy advertisements and save labor PAC funds for direct contributions to candidates. Before *Citizens United*, express advocacy funds could only come from PAC voluntarily contributed funds, and not from union dues.

These arguments certainly have a strong populist allure. But, when one unpacks them, they are ultimately not persuasive, and, indeed, quite troubling. In my view, accepting these arguments hinders democracy rather than advancing it because they allow putting government in charge of political and electoral speech.

First: the impersonation argument: only people should have free speech rights, not corporations. The First Amendment, of course, does not say that.[31] Indeed, for almost a century we have recognized the constitutional rights of all sorts of corporations and other entities—including business corporations, non-profit corporations, membership organizations, labor unions—to speak out on all sorts of issues.[32] In today's complex world, people can only amplify their individual voices by banding together with others in organizations of all sizes and shapes. We should celebrate that, not prohibit it. Of

31. Interestingly, the First Amendment *does* mention people in its protections of the right of assembly and petition. But it does not qualify who the beneficiaries of speech and press are: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The injunction is directed at Congress without limiting the beneficiaries, be they people or the organizations and entities that people create, like corporations and unions. Much ink has been spilled on the question of whether the Framers contemplated corporations or other similar entities as entitled to benefit from the injunction against Congress or whether the protection of the press was intended to grant the media special rights. *See Citizens United*, 130 S.Ct. at 899–901, 905–07; *id.* at 925–29 (Scalia, J., concurring); *id.* at 948–52 (Stevens, J., dissenting). People on the left who want to ban for-profit corporate speech but finesse the inconvenient fact that all modern news media—whom they want to protect—are corporations cling to the argument that the Framers gave special protection to the media. For my part, I think this is an improbable assertion, and it has been rejected by a majority of the Court—including stalwart liberals like Justices Brennan and Marshall—who agree that protections against defamation, for example, are the same for the New York Times as for two neighbors talking over the back fence. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 781–85 (1985) (Brennan, J., dissenting). In my mind, there is a simple explanation for the First Amendment's protection of both freedom of speech and press: speech protects spoken words and press protects printed words, the two methods of political communication back then. Moreover, the law of defamation has long recognized distinctions between spoken (slander) and written (libel) defamation, and I think the Framers wanted to be sure that you were just as free to damn the king in a pamphlet as in a speech. For a general discussion of these issues see Eugene Volokh, *The Freedom . . . of the Press," From 1791 to 1868 to Now—Freedom for the Press as an Industry, or the Press as a Technology?*, 160 U.PENN. L. REV. (forthcoming 2011) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802229.

32. The Court cited two dozen cases going back to 1936 where the Court protected the First Amendment rights of corporations. *Citizens United*, 130 S. Ct. at 899–900. Many of them were newspapers and other media corporations but many were not. By the way, the Supreme Court did not hand down its first decision protection an individual's rights under the First Amendment until 1931 in *Stromberg v. California*, 283 U.S. 359 (1931), though it considered, and rejected, First Amendment claims from individuals since around 1907. *See* Patterson v. Colorado, 205 U.S. 454 (1907). So, it is fair to say that the Supreme Court has been protecting the First Amendment rights of corporations and other entities formed by people for almost as long as it has been protecting the rights of people themselves.

course, organizations are not real people. But they are associations of individuals, and are made up of, are run by and embody the interests and concerns of real people. And the speech they produce on behalf of their entities should be entitled to no less protection than if it emanated from the individuals personally. Moreover, if we deny constitutional protections here, then we could limit or withhold the right of such organizations to exercise other First Amendment rights, such as the right to lobby on legislation, since they are not people, or to run ads urging the public to oppose legislation that might counter the interest of the people who work for or invest in the corporation. Can a corporation oppose a law proposed by politician X on the ground that it would require the corporation to close the plant in town? To say no, they are not people, and they cannot speak out in that fashion is not only questionable under the First Amendment, but begins to raise troubling questions of due process of law, by depriving the corporation, and the people whose interests it embodies, of the ability to defend its business interests in what it considers to be an effective manner through communicating with the public. And, if a corporation can speak out against the law, why can it not also speak out against the politician who would support such a law and urge the people to vote against that candidate so he cannot enact such laws? Far from being a threat to democracy, this kind of speech would seem to be a boon to it.

A variant of the only-people-have-free-speech argument that one hears a lot is the refrain that since corporations cannot vote in elections for candidates, they should not be able to speak about elections and candidates. But, of course, the ACLU does not vote either, nor can the AFL-CIO, not to mention the Atlanta Constitution, yet those entities "speak" about elections and candidates on a daily basis. Likewise, young people cannot vote; non-citizens cannot vote, even those who have been here as lawful, permanent resident aliens for decades. Yet we would presumably not allow any of them to be barred from speaking on the ground that they are barred from voting. Not to mention the hundreds and thousands of felons or ex-felons who are denied the right to vote by state law. Should they also be denied the right to speak out on politics and elections, particularly to

urge changes in the laws which deny them the right to vote? Now that would be an ironic blow to strike for democracy and equality: bar disenfranchised felons from speaking against the laws which disenfranchise them. Since the people who oppose such felon disenfranchisement laws are often the same people who oppose the *Citizens United* decision, I wonder how they might reconcile that tension.[33] The right to vote in elections, as important and central to democracy as it is, can in no way be deemed a prerequisite for or coextensive with the right to speak out about the issues and the candidates in those elections, especially where all people and groups are affected by the outcome of these elections.

Second, corporations have so much money that they will overwhelm the political process if they can spend it freely criticizing politicians. But a lot of individuals have tons of money too—most of it made through their successful ownership of corporations—George Soros and David Koch come quickly to mind—and we do not limit their right to speak. Why should we limit corporations on that ground? We have allowed the corporate owners of the New York Times to endorse a presidential candidate on page twenty-six, but made it a crime for the corporate owners of General Motors to pay for an ad with the same message on page twenty-five, even though the First Amendment protects freedom of speech and of the press equally and gives no special or greater rights to the press than to anyone else. [34] Moreover, if we can limit corporations, then that would seem to include media corporations as well, especially those owned by non-media entities. If General Electric can speak out about politicians, through its part ownership of NBC, why can't General Motors do likewise without having to buy a media arm to do so? Similarly, the double standard fiction that it is proper to allow the

33. The well-known Brennan Center for Justice, for example, probably among the most powerful—not to mention well-funded by foundations and corporations—voices for campaign finance controls and harshest critics of the Court's decision in *Citizens United*—is also spearheading the campaign against felon disenfranchisement. *See* Brennan Center for Justice, About Us, http://www.brennancenter.org/pages/about (last visited Mar. 25, 2011).

34. Of course now that General Motors is owned, basically, by the United States Government and the United Auto Workers Union, using it as an example of a business corporation which ought to have the same First Amendment rights as a media corporation is compromised a bit to say the least.

government to give media corporations greater protection, by exempting them from the campaign finance laws, than other corporations or groups, breaks down in practical application when we have energy companies like General Electric owning television networks like NBC.[35]

Moreover, approximately half the States have permitted independent corporate speech in their elections, and even corporate contributions to candidates, and the sky has not fallen. Instead more political speech, and a free flow of information to the public has resulted—a positive outcome for the First Amendment and for our democratic processes.

Indeed, it reminds me of the old adage about The Dog that Didn't Bark. During the 2008 Presidential campaigns, the federal law at the time allowed all corporations and all labor unions to spend any amount of money on any communication in any media at any time up to the election saying anything about any presidential candidate, so long as (1) it did not expressly advocate the election or defeat of that candidate or (2) if broadcast during the election season it was not the "functional equivalent" of expressly advocating the election or defeat of any candidate.[36] But any criticism of the views and policies and background of any federal candidate was fair game, subject to the two limitations I just mentioned. I have heard frequently that the giant corporations like Exxon have billions of dollars in profits lying around to overwhelm our democracy if allowed to do so. You would have thought that if there was ever a major national political candidate who seemed a threat to some of those corporations it would have been a former community organizer, nominated from the left wing of his party, railing against corporate "special interests" and

35. Indeed, the lines between media and non-media corporations can blur considerably. When a cable communications company like Comcast purchases an interest in a media company like NBC, does that give it more First Amendment protection than a widget company? Also, some have suggested that General Electric's corporate push to promote green energy was given a ready reception by NBC, the media corporation it partly owned. Why should the NBC speech be privileged if it furthers the interest of its corporate parent, the energy company? It seems it would be better to eliminate all of these distinctions and treat all speakers as equal under the First Amendment, especially in a world where bloggers and the internet have also broken down traditional categories of who is the media, and the Court has never accepted the special status of the press in any event.

36. *See* Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449 (2007).

their stranglehold on government, preaching transformational change and having never shown much interest in the corporate side of the ledger. And yet, corporate America was deafeningly silent during the 2008 presidential elections, and, so far as I know, Exxon did not spend a dime trying to defeat Barack Obama for President. Not to mention the fact that, nowadays, corporations are not the political monolith they once were, and come in various political shades, including those who are green, gay-friendly, and were major supporters of Obamacare.[37] In short, there is no indication whatsoever that the ruling in *Citizens United* will open the corporate floodgates or cause an avalanche of advertising and communicating. And if so, that would simply give us more political speech to inform our political process.[38]

Third, corporate spending on political speech can corrupt our politicians. Apart from the question of corporate speech drowning out the voices of individual citizens in general, a related argument against permitting corporations to speak about politicians is that such spending can corrupt or unduly influence our politicians. But it must be remembered that the speech at issue in *Citizens United* was independent speech—which, by definition, cannot be coordinated with any candidate. And one of the most settled principles in this entire field of campaign finance law, as the Court has repeatedly held for thirty-five years, from *Buckley* through *Citizens United*, is that *independent* campaign speech by individuals and groups is not corrupting—indeed, it is at the core of the First Amendment. Now, people may question that entire premise, and say that independent

37. Indeed, some companies which found themselves supporting candidates on the Republican side of the ledger risked being the target of high pressure boycott campaigns like the one directed at the Target stores because its president authorized a contribution to a group which then supported candidates opposed to same-sex marriage.

38. As indicated *supra* note 8, there has been much misinformation about the level of corporate spending on the 2010 elections and whether it increased significantly in the wake of the Court's decision. That there was more spending in general was clear and substantial spending by independent groups and individuals. But how much of that was funded by unions and corporations and involved express advocacy that would have been barred prior to the Court's ruling is very unclear. One thing that is clear is that independent spending did have a beneficial effect in helping to unseat many incumbents and leveling the playing field by offsetting the large fund-raising advantages that incumbents often have. *See* Bradley A. Smith, *The Incumbent's Bane:* Citizens United *and the 2010 Election*, WALL ST. J., Jan. 25, 2011, at A15.

speech for or against politicians can, indeed, influence them and should be limited for that reason. But the Court has never retreated from the position that independent speech in normal elections cannot corrupt, and its application in the context of corporate speech is entirely consistent with the analytic framework established in *Buckley*. So, why should an independent ad paid for by a corporation be treated any differently?

And if one does find special dangers in independent corporate—or union?[39]—speech about politicians, sufficient to warrant prohibition, what is the scope of that area of prohibition? Express advocacy only? The "functional equivalent" of express advocacy? Any speech that criticizes—or praises—a candidate's stand on an issue? Any speech that even just mentions the name of a candidate during an election season, as part of a "box score" of the candidate's performance on issues of concern to the sponsoring organization? The latter restraints would endanger "issue advocacy" and effectively put the ACLU and all the other cause organizations across the political spectrum out of the business of public criticism of political leaders.[40] Is that an outcome to be sought? The supposed dangers of independent corporate speech—which have been anything but manifest to this point—pale in comparison, in my view, to the harms to First Amendment rights—and to democratic debate and discourse—of

39. Estimates are that in 2008, unions, especially public sector unions, spent $400 million to help elect President Obama and a Democratic Congress, who then turned around and favored those unions to the tune of tens of billions of dollars in various stimulus and other legislative programs. *See* Michael Barone, *Big Labor is Humbled by Blanche Lincoln's Win*, REAL CLEAR POLITICS, June 14, 2010, http://www.realclearpolitics.com/articles/2010/06/14/big_labor_is_humbled_by_blanche_lincolns_win_105949.html. If corporate independent ads are to be viewed as corrupting, should all this union independent political spending be deemed similarly suspect?

40. It is a standard practice of such groups to create a "dirty dozen" list, whereby they rank the records of politicians on issues of concern to those groups. In effect, they "threaten" to give politicians a poor rating if they do not support the group's agenda. In one of the statutory provisions at issue in the *Buckley* litigation, Congress tried to regulate such activity but met a unanimously hostile circuit court that declared that such restrictions were facially unconstitutional. *See* Buckley v. Valeo, 519 F.2d 821, 869–79 (D.C. Cir. 1975), *aff'd in part*, *rev'd in part* 424 U.S. 1 (1976). How such "box scores" and their threatened use differ in any significant degree from a corporate-sponsored ad criticizing a candidate's stand on issues of interest to the corporation is difficult to fathom. As the Court correctly pointed out in *Citizens United*, the fact that such speech would have an effect on a candidate's position is not corruption; it is the essence of democracy.

ceding to government the power to control all such independent speech emanating from unions and corporations.[41]

The consequences for the right of the public to be informed about the records and conduct of candidates for office would be significant. Moreover, indeed, what happened to the public's right to know and the marketplace of ideas? If a corporation has something important to say, it would seem that the members of the public should be entitled to hear it and either accept it or reject it on the merits. That is the normal First Amendment default rule we have always followed. Why change that now?

Fourth, the government extortion gambit: since corporations need special government permission and privileges to exist, function, and make money, government can limit their right to free speech as a condition of granting corporate charters. That little piece of legal extortion should give us pause in an era where government has to give permission for so many businesses and professions to operate as well. Anyone who needs a license to practice law or be a doctor or open a hardware store could come under that rule. Can government tell all of those people and entities what they can say as a price of getting a license or permit? We should hesitate to use arguments that resonate with those used in the past to keep Communists and other political dissidents from getting licenses and benefits, which were claimed to be "privileges," not rights.[42] Why would we want to

41. The contention that independent political speech can be corrupting is supported by reliance on a decision where the Supreme Court ruled that due process was violated when a judge ruled on a case involving a company whose president had spent millions of dollars on independent expenditures in a judicial campaign to support that judge's election. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009). That decision, authored by the same Justice who wrote *Citizens United*, is claimed to be in such tension as to lead to incoherent results. *See* Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011). The dissenters in *Citizens United* voiced the same complaints. But *Caperton* involved the requirement that judges, not politicians, be unbiased and uninfluenced by off-the-bench relationships with or support by litigants. The gravamen is the concern with conflict of interest undermining judicial impartiality and objectivity, and the special status of the judicial process. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) (holding that courts are sufficiently special so that restrictions on the arguments that could be made by government-funded lawyers violate the First Amendment and impair the proper functioning of courts; such funding limitations might be permissible in other settings). Politicians, on the contrary, are not supposed to be unbiased, and when they wish to be responsive to the people and groups that support them and their policies, that is democracy, not impropriety.

42. Speiser v. Randall, 357 U.S. 513, 518 (1958).

resurrect a similar notion here? In addition, if corporations can be restricted in their electioneering political speech by a chartering process, the same power would apply to lobbying also. You can guarantee that many of the same groups and politicians who want to limit corporate political speech would dearly love to limit corporate lobbying activity as well, despite the First Amendment. It is a road that we should be glad the Court has refused to continue to travel. To be sure, centuries of corporate law have imposed manifold restrictions on the directors and managers of those corporations, and required them to use their best judgment in advancing the interests of the corporation. But if those managers feel that speaking out on a political issue or candidate is in the corporation's best interest, we should not allow the government to silence that speech on the grounds that it has the power to license that corporation in the first place.

Finally, the shareholder imposition argument holds that it would violate the rights of shareholders for corporate funds to be spent on politics against their will. But what if the shareholders approve the spending, or what if there are no shareholders because it is not a stock corporation or a publicly held company? Citizens United had no shareholders. Indeed, the vast majority of all corporations in America are small, mom-and-pop companies, with a sole proprietor; yet the federal ban on corporate electoral speech drew no such distinctions whatsoever. In addition, what about all of the charitable and community gifts that corporations make now without prior or explicit shareholder permission, not to mention the lobbying activities in which they might engage?[43] Should those corporate expenditures all be subject to state-approved restraint? Here, too, normal corporate law doctrines and processes should govern, not special rules that deny corporations and the people who comprise them their First

43. Many corporations make charitable contributions to museums that some shareholders may complain are sexist or racist in their policies or acquisitions, to cause organizations such as the ACLU, which some shareholders may resent, or to universities whose admissions policies may anger other shareholders. Should all of this corporate activity be subject to shareholder restraint? Or just political speech?

Amendment rights across the board by imposing a government-compelled prior restraint disguised as shareholder democracy.[44]

B. The Proper Protection of Political Speech

Happily, from my perspective, the Court rejected these various arguments for limiting and prohibiting the speech of corporations and unions. Instead, the Court adopted a unified, universal, and indivisible approach that makes First Amendment protection and rights available to all. All groups are entitled to the same rights under the First Amendment, and government cannot restrict those rights because of the nature or form such organizations take, the medium they use, or the message they communicate. There should not be any second-class speech or speakers under the First Amendment.

Let me briefly review what the Court did and why I think it was good for the First Amendment and for democracy.

In the *Citizens United* case, the Supreme Court invalidated the ban which prohibited, under threat of criminal penalty, all corporations and all labor unions from speaking out, on behalf of their directors, officers, employees, customers, shareholders, members, and supporters, about government and politics in any way that even mentioned a politician or an incumbent officeholder running for re-election. In my view, that was a landmark decision for the First Amendment and, yes, for our democracy. Like all great decisions, the Court went back to basics and relied on fundamental First Amendment principles embedded in *Buckley* and *Bellotti*, from which the Court in *Austin* and *McConnell* had strayed.

In its ruling, the Court emphasized what no one seriously disputes, namely, that the primary purpose of the First Amendment's guarantees of freedom of speech, press, assembly, and petition is to

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44. Here, too, the contrast with unions is instructive. It is estimated that union membership, at least in private sector unions, is about sixty percent Democratic and forty percent Republican. Yet union political expenditures tend to favor Democrats over Republicans by a lopsided ninety-five percent to five percent margin. *See* Mark Tapscott, *Where the Cash Goes, the Democratic Policy Flows*, WASH. EXAMINER, Jan. 26, 2011, http://washingtonexaminer.com/opinion/special-reports/2011/01/special-report-where-cash-goes-democratic-policy-flows. Should union members be able to insist on parity in those expenditures, compatible with the political apportionment of the membership?

enhance democracy by insuring an informed electorate capable of governing its own affairs. The First Amendment has always been based on the idea that the more speech we have, the better off we are, as individuals and as a people. The *Citizens United* decision eloquently reaffirms and re-enforces that core constitutional principle.

As the Court put it:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . []In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.[] The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.[45]

That is why, the Court pointed out, we have a First Amendment:

> Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.[46]

And the decision restored a number of key First Amendment principles which had become obscured in the zeal to "reform" our elections.

The first principle is that we should never have to get the government's advance permission in order to criticize the

45. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 14–15 (1976)).

46. *Id.* at 898–99 (citations omitted).

government.[47] Yet our incredibly complex system of campaign finance rules and regulations, with unclear statutory meaning, made worse by uncertain ad hoc enforcement, backed up by criminal and civil penalties and enforced by government, has created a de facto system of prior restraint which causes a chilling effect on political speech all over the country in a fashion reminiscent of the royal system for licensing the press that our founders wrote the First Amendment to avoid. The chilling effect on speech that system caused, with people fearful that their ad in the newspaper criticizing the President of the United States might somehow be deemed illegal was anathema to First Amendment values. While one could seek an advance determination by the FEC about whether any particular ad was permitted, that was the whole problem. Now the Supreme Court has swept those restraints away and allowed any group to speak out, without prohibition or restraint, on the core political issues of the day on behalf of its members, contributors, shareholders, employees, and the like.

The second principle is that the First Amendment disfavors a "caste system" in electoral speech—with certain privileged speakers and certain pariah speakers—and the Court's decision has largely dismantled that system.[48] Before the Court's ruling, the right to speak turned on who was doing the speaking: business corporations, no, unless they were media corporations; nonprofit corporations, maybe, depending on where they got their funding; labor unions, no. At the state level, there was also a crazy-quilt system, with half the states allowing corporations and unions to speak out about politics, and the other half, not. That's all gone now. The Court made clear that the protection of political speech is so critical to democracy that, therefore, the right to speak about government and politics cannot depend on the identity of the speaker—individual, corporate, profit, nonprofit, union, media entity—all have equal rights to speak: no privileged speakers and no pariah speakers. Under the First

47. *Id.* at 894–96.
48. *Id.* at 898–99.

Amendment, where political speech is concerned, there can be no second-class speakers.

To reach this conclusion, the Court demonstrated why the *Austin* decision was a departure from the principles of *Buckley* and *Bellotti*.[49] *Austin* had said that corporate speech could be prohibited because the wealth of corporations acquired in the economic market place might "distort" the political debate; *McConnell* had relied on *Austin*. But the *Austin* principle proved too much. It was inconsistent with *Buckley's* rejection of limitations on expenditures where individuals and organizations were concerned, and individual wealth and influence came from the economic market place as well. And *Bellotti* had rejected a similar concern with distortion where corporate electoral speech was concerned. Finally, if the distortion rationale were accepted, this "would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations."[50] Since that would be impermissible, banning the speech of any other corporation would be impermissible as well, because the Court had consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers. Such consequences were too much weight for the anti-distortion rationale to bear, especially given the extraordinary breadth of application of the ban on corporate speech, applying to an estimated six million corporations, and producing "censorship . . . vast in its reach."[51]

Three other arguments were dispatched more quickly. The corruption argument, i.e., that independent speech by corporations or unions will corrupt the officeholder benefitted by that speech, came to grief on the deeply settled understanding from *Buckley* forward that, almost by definition, independent expenditures cannot be deemed corrupting.[52] In addition, the access and influence that might accompany the provision of independent political support was viewed not as corrupting, but as an understandable feature of politics, just as

49. *Id.* at 902–13.
50. *Id.* at 905.
51. *Citizens United*, 130 S. Ct. at 907.
52. *Id.* at 908–11.

a labor union's support for a candidate during an election might be rewarded by the candidate's support of the interests of that union after the election.[53] Organized labor spent hundreds of millions of dollars to help elect President Obama, and his policies have benefitted labor's interests on a number of fronts.

Likewise, the shareholder concern justification floundered on the fact that the categorical statutory ban seemed to have nothing whatsoever to do with this concern and was in no way tailored to fit those problems.[54] Finally, the concern with foreign influences—a surprising eruption of nativism from the liberal wing of the Court—was answered by the observation that the statute at issue was not limited to that concern, and the issue was saved for another day.[55]

Given the firestorm of criticism that the decision received almost immediately upon being announced, a person could be excused from not realizing that the Court did, in fact, *uphold* an important portion of the law: namely, the requirement that those organizations that engage in the kind of "electioneering communications" now fully protected by the First Amendment must disclose who they are during their broadcast advertisement, must disclaim affiliation with any candidate or political party, and must file periodic and publicly available reports within twenty-four hours with the government disclosing the identity of their significant contributors, institutional or individual. Citizens United had argued that the disclaimer and disclosure provisions should be applied only to the functional equivalent of express advocacy, but the Court rejected this narrow application and upheld the broad reach of the statute. In the Court's view, the proper First Amendment resolution was to permit the

53. Some experts have suggested that the decision will put pressure on Congress to raise contribution limits or relax prohibitions on corporate contributions. The Court did narrow the concept of corruption, but it only did so by harking back to the *Buckley* concept of quid pro quo corruption. Since *Buckley* upheld contribution limits, that should remain the same, so far as the Court is concerned. The prospect of seven-figure independent spending has materialized for several elections now, and while it should cause pause about the continuation of lopsidedly low contribution limits, that has not prompted change up to now, except for the modest increase of contribution limits in the McCain-Feingold Bill and the indexing of such limits for inflation. Perhaps legislative adjustment of the contribution limits and preclusions would be in order.

54. *Citizens United*, 130 S. Ct. at 911.

55. *Id.*

speech and the disclosure of it, so that there will be a win-win for the electorate: they will have the benefit of the speech and of knowing who supported it.

The Court's bottom line: "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[56]

In my view, as indicated above, the Court's *Citizen United* decision reconnects with the classic First Amendment tradition bequeathed to us by Justices like Black, Douglas, and Warren—champions of free speech who understood that First Amendment rights have to be universal and indivisible in order for democracy to flourish. The three Justices once clearly summarized the applicable principles as follows:

> Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communications be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.
>
> . . . .
>
> Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate. First Amendment rights are part of the heritage of all persons and groups in this country. They are not to be dispensed or withheld

56. *Id.* at 916.

> merely because we or the Congress thinks the person or group is worthy or unworthy.[57]

These words came from perhaps the three greatest liberals who ever sat on the Supreme Court. How could they have endorsed a ruling that would threaten democracy? Allowing government to dictate the terms of the political debate and the identity of the political speakers—*those* are the threats to democracy which the Court in the *Citizens United* case wisely rebuffed by broadly ruling that the First Amendment protects all individuals and groups that exercise its freedoms.

Many have said that campaign finance controls pit liberty of speech and press against equality and democratic participation.[58] But the clash between liberty and equality is a false clash and a false choice. Protecting the right of everyone and every entity to speak—liberty—will enhance the ability of everyone to participate more fully in the political process—equality. On the other hand, seeking to restrict liberty to achieve equality is a fool's errand. It will neither protect liberty nor achieve equality. In squarely recognizing that critical connection, the Court's opinion was a historic and heroic affirmation of the central meaning of the First Amendment. All individuals and groups are equally entitled to exercise their freedom of speech. Now *that* is the proper way to level the playing field.

Of course, there was a powerful and passionate dissent, objecting to the Court's methods and result. On the former point, one contention was that the Court could have decided the decision in *Citizens United's* favor on any one of a number of narrower grounds, thus avoiding the constitutional ruling. But since none of the dissenters thought those grounds worthy enough to invoke, this criticism seems to lack much seriousness. There was the typical argument about *stare decisis* and the overruling of precedent, but the majority's response was that the earlier decisions were wrong at the

57. United States v. Int'l Union United Auto., 352 U.S. 567, 593, 597 (1957) (Douglas, J., dissenting) (citation omitted).

58. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 39–50 (Alfred A. Knopf 2005).

time and where the protection of political speech is concerned, the niceties of *stare decisis* properly yielded to constitutional imperative. There was also a pitched battle over whether the Framers of the First Amendment would support the majority or the dissent, with the liberals invoking the kind of full-throated originalism that rarely comes from that quarter, to insist that the Framers would not have protected corporate speech, and the majority claiming that the kind of government control of political speech represented by the challenged statute was the primary type of evil that the First Amendment was intended to prevent. Finally, the broadest disagreement was about whether corporations should have the same First Amendment protection as individuals and what effect that will have on our democracy. While the dissenters conceded that corporations were entitled to have significant First Amendment protection and disclaimed any intent to roll back such rights across the board, they nonetheless believed that candidate-related electoral speech by rich corporations posed too much of a threat to democracy. Once again the battle lines were clear: the liberals think that political speech is the problem; the conservatives think it is the solution.

III. THE LESSONS LEARNED

So what do we take away from this vitally important case? First, the holdings were that the government may not prevent corporations and unions from criticizing politicians running for office, even including expressly advocating their election or defeat. However, such speech remains subject to various forms of disclosure. In some ways, this seems like a modest and certainly not a very radical approach and result.

But, secondly, I should confess that in many ways both the result and the reasoning channel concepts that the ACLU and others have been advancing for decades in the debate over campaign finance restrictions and First Amendment rights.[59] These include the

59. The ACLU changed its policy on many campaign finance issues a few months after *Citizens United* to approve restrictions on, for example, contributions to candidates, a position that it had

fundamental concepts that political speech is essential to an effective democracy, that the more political speech you have, the better democracy you will have, that campaign finance limitations necessarily and inherently involve controls on political speech, that government cannot be trusted not to rig those rules to protect incumbents and the status quo, that this requires courts to give a skeptical strict scrutiny to campaign finance controls, that the campaign finance regulatory regime has become so complex and convoluted that it is tantamount to a de facto system of prior restraint, that a "caste system" with privileged speakers and pariah speakers is anathema to First Amendment principles, and thus, finally, that the rights in this area have to be universal and indivisible. In one way or another, these are all themes that civil libertarian critics of the campaign finance system have sounded over the years, which the Court majority has, more than any time since *Buckley* and *Bellotti*, embedded into its analysis. So, in terms of attitude and framework and approach, the case reflects the marked shift that had become increasingly noticeable in the more recent cases.

Third, in terms of doctrinal change versus practical change, of course corporations and unions are now free to engage in express advocacy of election or defeat. But as suggested earlier, this is not that great an expansion of rights over what the law was previously. Ever since *Buckley*, those entities were free to engage in any public commentary or criticism of candidates for office as long as they stopped short of express advocacy, and to spend as much as they wanted on such speech. With McCain-Feingold, upheld in *McConnell* in 2003, there was a prohibition on broadcast ads that mentioned candidates during the election season; but in 2007 that prohibition was narrowed to encompass only such broadcast advertisements which contained the functional equivalent of express advocacy. While *Citizens United* certainly eliminates the remaining restraint on

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previously rejected. But, despite rolling back some of its policy in the area of campaign finance, it reaffirmed its view that all organizations, including business and for-profit corporations, should have the kinds of First Amendment rights to make independent expenditures safeguarded in *Citizens United*. *See* Floyd Abrams, Ira Glasser & Joel Gora, Op-Ed., *The ACLU Approves Limits on Speech*, WALL ST. J., Apr. 30, 2010, at A15.

content and allows speakers to conclude with the bottom line—vote for or against the person—that new entitlement does not add that much to what could have been said before. And though the dissenters would still prohibit this corporate speech because of their concern about its impact on elections and democracy, even they would accord corporations and other entities broad First Amendment protection and not accept the theory that as creatures of the state, corporations can be subject to broad limitations by the state. So the analytical gap between the two sides was perhaps smaller than the overheated rhetoric in the opinions might suggest.

Fourth, while the case only involved a nonprofit ideological corporation, the ruling and its reasoning protect the rights of unions and their members and for-profit corporations and the people associated with them as well. It is interesting that in all of the charges of "judicial activism" hurled at the Court, very few complained that the decision freed unions and their members equally with corporations and nonprofits from the statutory restraints.

Likewise, the case also was perhaps more significant in terms of the governing doctrine concerning the nature of the government interests that can sustain campaign finance controls. Ever since *Buckley*, the Court had insisted that independent campaign speech, which by definition cannot be coordinated with a candidate, could not be limited on the grounds that it might corrupt or unduly influence the candidate/officeholder beneficiary of that speech. Over the years, the concept of corruption had been expanded considerably from the core of quid pro quo arrangements, bordering on bribery, to the much broader notion that those who provide financial support for a candidate may have undue influence or improper access, or that the situation might create "the appearance of" undue influence or improper access. With such a broad concept of the kind of concern that might justify campaign finance regulations, most would be sustained.[60] *Citizens United* altered that approach and insisted that only hardcore corruption was a compelling concern to be guarded

60. *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

against; that influence and access occasioned by independent speech supporting a candidate was not sufficient to justify restricting that speech. Instead, if a candidate gives an audience to a group which supported him or her, that is basically politics, not corruption, and an informed citizenry could be trusted to weigh and measure it accordingly. The dissenters, on the other hand, worried that corporations would use the threat of mounting large advertising campaigns against politicians as a cudgel to win legislative or official concessions from officeholders. Of course they could do that before *Citizens United*, so long as Express Advocacy was avoided. In this regard, the decision clearly harkened back to *Buckley* which did not see a threat to electoral integrity in the possibility of unrestricted independent campaign spending.

Also significant was the Court's warm embrace of broad disclosure of independent campaign spending as perhaps a political antidote to expected negative reaction to the main part of the ruling. The opinion may very well have broadened the kinds of speech vulnerable to disclosure, so that groups like the ACLU may have lost the right to protect the anonymity of their members and contributors as the price to be paid for criticizing elected government officials in ways subject to disclosure.

Other big losers are the political parties, and indeed, the candidates as well. Now that corporations and unions are largely free to use, in effect, "soft money" to directly attack candidates and urge their election or defeat, candidates and the parties that support them are disadvantaged because they can only use so-called "hard money" to fight back. This is a serious consequence of the necessary vindication of First Amendment rights of independent groups, but it requires some compensation in terms either of significant public financing, much higher contribution limits, or allowing parties to coordinate their spending with their candidates without limitation.[61]

61. On the latter point, immodestly, please see PETER J. WALLISON & JOEL M. GORA, BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM (2009), discussing the need to enhance the ability of the parties to aid their candidates, especially in light of the expanded electoral influence of corporations and unions that *Citizens United* makes possible. Legislation

That's what the Court did in *Citizens United*.

IV. THE POPULAR MYTH-CONCEPTIONS ABOUT THE DECISION

Let me describe, briefly, what the Court did *not* do, despite the myths that have swirled around the decision since the day it came down.

First, the Court did not protect only Exxon and other big business corporations. The beneficiaries of the ruling also include the ACLU, the NAACP, the Sierra Club, and all the other non-profit cause organizations; the New York Times and all the other media corporations; all the mom-and-pop corporations; and every labor union in America. Indeed, early returns indicate that labor has been a particularly potent beneficiary since unions can now spend members' dues on direct political advocacy, freeing up their voluntarily-contributed PAC funds for candidate contributions. During this past election, according to some reports, the biggest spending labor unions, particularly major public employee unions, comfortably kept pace with business groups, including Karl Rove's projects. These groups should be thanking the Supreme Court rather than condemning it.[62]

Second, the Court did not overturn 100 years of precedent, as some in high office have suggested. It overruled the 1990 *Austin* case, and the portions of the 2003 *McConnell* case that relied on *Austin*.

Third, the Court did not allow foreign corporations to take over our elections. The law currently bars foreign spending on our elections, and the Court explicitly stated that it's decision did not involve those provisions.

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to ease the restrictions on party use of hard money in coordination with their candidates has been introduced and has support from many quarters of the campaign finance community.

62. There have been varying estimates of what was spent by the different independent groups in the 2010 elections. Some claim that unions spent approximately $200 million at the national level to support Democratic candidates. *See* Douglas E. Schoen, *The Union Threat to the Democrats' Future*, WALL ST. J., Jan. 20, 2011, at A17. Indeed, among the big spenders last year, the top public employee unions—AFSCME, the SEIU, and the NEA—reported spending $172 million, as compared to the $140 million spent by the Chamber of Commerce and the American Crossroads group. *See* Brody Mullins & John D. McKinnon, *Campaign's Big Spenders*, WALL ST. J., Oct. 22, 2010, at A1.

Fourth, the Court did not allow corporations to "buy" candidates or elections, since the decision was only about independent expenditures, not contributions, as the Court explicitly pointed out, and independent expenditures have been protected since *Buckley* on the theory that they generally cannot corrupt the candidates they benefit. Now one can argue that the distinction is a questionable one, but it has been deeply etched in our law since *Buckley*, and the Court in *Citizens United* emphasized that distinction.

Fifth, the Court did not allow corporations to drown out democracy. There has been a mischievous campaign of misinformation on this issue to convey the impression that the Court decision would—and did—unleash an "avalanche" of corporate spending to swamp democracy. As we all know, corporations have been free in half the states to do what the Court now said the Constitution permits them to do, and there was barely a ripple, let alone an avalanche. At the federal level, corporations were free in 2008 to attack Senator Obama fiercely, so long as they did not engage in the "functional equivalent of express advocacy." Yet there were almost no such ads. Close to zero. Speaking of zero, the Target Company can tell you how easy it has been for corporations to take advantage of the *Citizens United* ruling and take over our politics. And as the dust settles on last fall's congressional elections, we are starting to learn that Democrats maintained a funding edge over Republicans and that outside groups did not seem to make a difference in most competitive districts.[63] The avalanche that swept

63. *See* Michael Luo & Griff Palmer, *For Democrats, Financial Edge in Campaigns*, N.Y. TIMES, Oct. 27, 2010, at A1. The highly respected and truly non-partisan Campaign Finance Institute reported that the sharply increased independent spending in the 2010 elections "did not dictate the results." *See* Press Release, Campaign Fin. Inst., Non-Party Spending Doubled in 2010 but Did Not Dictate the Results (Nov. 5, 2010), *available at* http://www.cfinst.org/Press/PReleases/10-11-05/Non-Party_Spending_Doubled_But_Did_Not_Dictate_Results.aspx [hereinafter CFI]. Likewise, a study of money spent on advertising by the top outside groups, most of it spent in supporting Republican candidates, shows that last year did not represent a significant increase in the proportion of such spending as part of overall campaign spending compared to prior elections. *See* Alex Isenstadt, *Study Downplays Outside Groups' Power*, POLITICO, Jan. 13, 2011, http://politico.com/news/stories/0111/47589.html (referring to a Wesleyan University study of advertising and noting that the report "rebuts the widely-held belief that Republicans vastly outspent Democrats on the airwaves").

the Democrats out of office at the federal and state levels was not made of corporate cash.

Sixth, the Court did not allow secret, corporate slush funds to contaminate our politics free from any public scrutiny. *On the contrary*. The undisclosed First Amendment story of this past Supreme Court term, I am saddened to report, is that the Court, save for the valiant Justice Clarence Thomas, has thrown associational privacy and political anonymity under the bus. In the din of disapproval of the *Citizens United* decision, one understandably may not have noticed that the Court did, in fact, *uphold* relatively intrusive disclaimer and disclosure requirements on the speech and speakers that it just freed from prohibition. And the disclosures upheld went *well beyond* what groups like the ACLU thought were justified and what the *Buckley* case had allowed. In that case, the Court clearly held that the only independent speech that could be subject to *any* forms of registration or disclosure was that which expressly advocated the election or defeat of a federal candidate. Too narrow, said eight of the nine Justices in *Citizens United*. Now, any person or group that even mentions a politician in an election-season broadcast advertisement, regardless of the context or thrust of the ad, is subject to the statute's disclosure regime. Indeed, Justice Kennedy was quite explicit that one of the reasons why it would *not* be dangerous to democracy to let corporations and unions have full speech rights concerning candidates and politics was that, for the first time, there would be disclosure as well:

> A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. . . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.[64]

64. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 916 (2010).

Muted was any significant appreciation of the chilling effect that disclosure can have, even apart from those groups that can show specific threats of harassment of their members and supporters.[65]

Nor, lastly, did the Court rule that corporations are people. It did rule that corporations formed by people, like other organizations formed by people—the Georgia State University College of Law comes happily to mind—cannot be denied First Amendment rights. We have understood this for a century. It should have come as no big surprise. Indeed, in the modern age, when the soap-box orator of an earlier era will have a hard time making himself or herself heard above the roar of the crowd, the protection of group rights is critical to the effectuation of individual rights. The Supreme Court majority understood this well, and for that all of us individuals, who comprise We the People, should be grateful.

V. THE AFTERMATH

In my view, the President, the media, and the leaders of Congress did not acquit themselves admirably in the wake of the Court's decision.

First, the President. The day of the decision, and particularly again a week later, during his State of the Union address, he directly attacked the Supreme Court over the decision, an attack which was

65. That same embrace of disclosure and transparency also led to the result in *Doe v. Reed*, 130 S. Ct. 2811 (2010), where the widespread public disclosure of the identities—names and addresses—of people who signed petitions to put what was perceived to be an anti-gay referendum on the ballot was approved by the Court, with only Justice Thomas dissenting in favor of political privacy, though Justice Alito did suggest that a door should be kept open for as-applied harassment challenges. But the overwhelming majority of the Court supported public disclosure and denigrated the privacy concerns. While there were a number of arguably sound legal grounds for the result—signing the petition is a public act; many referenda are not particularly controversial and don't require protection of privacy; electoral fraud needs to be discouraged—arguably what was really going on was a campaign to expose and intimidate people who politically opposed same-sex marriage. Though not extremely widespread, there had been enough incidents in different parts of the country to raise a concern about the effects of disclosure, but the majority brushed it aside. At least we still have the secret ballot.

For a general critique of the efficacy of disclosure to combat corruption, see Bruce Cain, *Disclosure and Corruption Revisited*, The Conversation, November 1, 2010, Cato Unbound, *available at* http://www.cato-unbound.org/2010/11/19/bruce-cain/disclosure-and-corruption-revisited. For a powerful description of the anti-challenger, pro-incumbent harms of disclosure, see James L. Huffman, *How Donor Disclosure Hurts Democracy*, WALL ST. J., April 11, 2011, at A13.

unprecedented in the history of Presidential–Court relations. With all due respect, the President, a former constitutional law professor, should have thought carefully before misrepresenting the Supreme Court decision—even the *New York Times* said he did so—and for his extraordinary attack on the Supreme Court, both in his press conference the day of the decision and in his unprecedented diatribe against the Court, as the Justices had to sit there silently during his State of the Union address, unable to respond. No one can remember a President treating the Supreme Court Justices so disrespectfully and to their faces, knowing they could not respond—except for Justice Alito's apparent quiet disagreement, "that's not true"—and knowing that his remarks would cause the Democrats to give a standing ovation to his attack on the Court's decision and almost wave their fists in the faces of the Justices. Imagine if a Republican President had attacked the sitting Justices like that in front of a Republican-controlled Congress after the Court had just handed down a decision protecting the rights of detainees at Guantanamo, and said that the decision would result in Americans dying at the hands of freed terrorists. The press would have roundly condemned the President for undermining the independence of the judiciary. Yet, in President Obama's case there was very little outcry.

Second, perhaps the press gave the President a pass because most of the press agreed with him about the Court's decision. It still passes my understanding, though, how a decision which says that the power of Congress to regulate corporate speech could not be accepted because then Congress would be empowered to regulate the corporate news media could be so attacked by the media whose rights were reaffirmed by the Court. Either the press really believes that they have special rights under the First Amendment, which other institutions lack, a superiority that the Supreme Court has consistently rejected, or they do not want the competition in the market place of ideas from other business corporations. Neither possibility is very flattering to the press.

Finally, the Congressional response to the Court's decision, beyond the disgraceful performance at the State of the Union, was equally troubling. Congressional leaders immediately announced

their condemnation of the Court's decision and their intent to pass legislation to "blunt" the impact of the decision and figure out various ways to "get around" the Court's ruling. Some proposed a constitutional amendment that would give government broad power to regulate campaign expenditures or to regulate corporate speech. Most legislative reaction coalesced around the proposed, so-called DISCLOSE Act, a catchy acronym standing for Democracy is Strengthened by Casting Light on Spending on Elections.[66] A critic suggested that DISCLOSE really stood for "Democratic Incumbents Seeking to Contain Losses by Outlawing Speech in Elections."[67]

In its various incarnations, the bill would have expanded government regulation of political funding well beyond current law and well beyond any valid response to the Court's decision or anything authorized by that decision. In an unseemly burst of nativism and xenophobia, American corporations with any significant foreign stock ownership would be banned from exercising their *Citizens United* free speech rights. Federal government contractors would likewise be banned from exercising those rights if they wanted to keep their government contracts, in a questionable mandatory tradeoff of government contracts for First Amendment rights, and even affecting groups like Planned Parenthood which receive government funding. Under one proposal, any company that employed a registered lobbyist would be barred from exercising its *Citizens United* rights. Labor unions, however, were exempt from many of these restrictions and coercions, and so was the National Rifle Association, in a political deal that drew widespread condemnation as a cynical maneuver to gather more votes for the bill. Extremely expanded and burdensome shareholder approval requirements were proposed that, as a practical matter, would prevent most such corporations from exercising their rights. The same was true of enhanced disclosure and "stand by your ad" requirements, which would mandate that top corporate—but not union—officials

66. *See* S. 3628, 111th Cong. (2010).

67. The quote is from Bradley Smith, and it is referenced in several places. *See, e.g.*, George F. Will, Editorial, *Putting the Clamps on Free Speech*, WASH. POST, July 11, 2010, at A17.

appear personally in any broadcast ads, that the five top donors to a group be identified in the ads, and that disclosure of supporters be accelerated and intensified.[68] Indeed, some of these proposals were so objectionable that liberal groups like the Sierra Club and the Alliance for Justice condemned the requirements as threatening disclosure of their key supporters.

All of this seemed like exactly what the Supreme Court warned against, namely, the manipulation of campaign finance rules for partisan political advantage. In this instance it was a clear effort by Democrats to mute the corporate voices they feared would be raised on behalf of Republicans in the fall elections. Indeed, unlike any other piece of federal campaign finance regulation, this law would have been effective immediately, rather than waiting for one election cycle before taking effect. The bill was unsuccessful because all Republicans were united against it, and the Democrats threatened to bring it up again during last winter's lame-duck session of Congress, but that did not materialize. But pushing for a revised version of DISCLOSE is high on the list of campaign finance pro-regulatory groups and the Democratic leadership in Congress.

Meanwhile, what has happened outside of Washington? Well what did not happen was the feared avalanche of special interest corporate money polluting our politics. To be sure, there was a good deal of campaign spending, because this was such a heated election, and there was a lot of money spent on independent ads for or against candidates in hotly-contested races, some of which originated with corporations. But the onslaught of corporate money simply failed to materialize, and preliminary reports of spending, as evaluated by independent groups without a political ax to grind, have shown little

68. Under various proposals, 501(c)(4) advocacy organizations, which presently do not have publicly to disclose their donors, would be required to do so if they sponsored advertisements that related to political candidates. This would have a wide-ranging effect on groups like the ACLU, the NAACP, and the myriad of cause organizations that are formed under that provision of the tax code and frequently engage in "educational" campaigns with a clear political impact. During the 2000 presidential elections, for example, the NAACP ran an extensive nationwide ad campaign attacking then-Governor George Bush on race issues. The ads were apparently funded by wealthy supporters who were able to remain anonymous but would not under the proposed legislation. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 175 n.68 (2003). *See generally* Elizabeth Wasserman, *Non-profits Walk Fine Line On Political Activity*, MSNBC, July 25, 2008, http://www.msnbc.msn.com/id/25838144/ns/us_news-giving.

evidence of corporate domination or anything close to that.[69] Despite the high stakes and high passions of this election season, there has been no dramatic increase in corporate—or union—spending for political speech. What *has* happened is that some corporations exercising their long-standing rights under relevant state law to spend money on politics have seen a pressure group backlash against some of that spending. Target's experience in Minnesota is exhibit A. Indeed, there are built-in powerful restraints on the ability of corporations to use their *Citizens United* rights extensively, namely, the fact that their customers or clients are Republicans *and* Democrats *and* Independents. Active political involvement is likely to anger significant business constituencies, as has been the case.

VI. THE FUTURE OF CAMPAIGN FINANCE JURISPRUDENCE

The *Citizen United* dissenters, the academic critics of the decision, and the political figures who attacked it immediately and furiously leveled various charges against the Court's ruling, both in terms of the reasoning of it and the implications flowing from it. Academic criticism has included the prominent charge of incoherence: the contention that the Court's seeming absolutist rhetoric and reasoning will either have to be carried to logically and politically unacceptable extremes or cabined in unprincipled ways that will continue to make the law incoherent.[70] But I think much of this criticism has an incoherence and a cognitive dissonance of its own, and is often inconsistent with views of the critics on other issues.

One charge of potential incoherence is that the decision is in tension with the settled rule that contributions can be limited in amount and source. Either the Court will have to back off some of its broad statements in *Citizens United* to avoid eroding these other settled campaign finance limitations, thus feeding the tension and incoherence, or the Court will follow the logic of its deregulatory approach and dismantle those remaining restrictions, with a resulting

69. *See* CFI, *supra* note 64; Isenstadt, *supra* note 64.
70. *See* Hasen, *supra* note 42.

political firestorm of protest against the Court. Of course, the original incoherence was *Buckley*'s artificial division between contributions and expenditures, rejecting the perfectly sensible argument that they are "two sides of the same First Amendment coin," as Chief Justice Burger put it in his partial dissent.[71]The *Buckley* majority rejected the argument that effective disclosure and laws against bribery and conflict of interest would be sufficient antidotes to the corruption potential of large contributions. And the Court has clung to the expenditure free/contributions limited distinction ever since.[72]

But the campaign finance system has suffered a great deal from this regime, which favored incumbents and special interests and encouraged circumventions such as soft money. If *Citizens United* helps a future Court, or perhaps a future Congress, see the folly of the continued distinction, and realize that a regime of unlimited independent speech—as powerfully protected and vital as that is—creates disparities with limited candidate- and party-funded speech, then a pro-free speech coherence will indeed be achieved. Indeed, speaking of incoherence, the campaign finance regime we have been living under for the last forty years, with its byzantine rules and regulations and IRS-like complexity, its stratification of speech rights in tax-code-like categories, and its provisions and exceptions and exceptions to the exceptions and safe harbors—all regulating political speech at the core of the First Amendment—should be on any Top Ten list of incoherent systems. As the Court pointedly noted in *Citizens United*, you should not need a campaign finance lawyer to

71. Buckley v. Valeo, 424 U.S. 1, 241 (1976) (Burger, C.J., dissenting). The case brought together James L. Buckley, a conservative Republican, and Eugene McCarthy, a liberal Democrat. Both had achieved stunning political upsets by being able to raise and spend the funds necessary to get their insurgent messages out. But Congress thereafter imposed limits on political contributions and spending (through amendments to the Federal Election Campaign Act of 1971) that would have made it impossible for them to run similar outsider campaigns in the future. The Court upheld limits on contributions, because of a concern with the potential for corruption. But it ruled that limits on what individuals and groups could spend to get their own political messages out violated the First Amendment. Today, on the Court, only Justice Thomas, joined by Justice Scalia, has squarely called for overruling *Buckley*'s artificial distinction and called for an end to limitations on contributions. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410–29 (2000) (Thomas, J., dissenting).

72. The Court has ruled, however, that contribution limits set so low that they make it impractical to raise enough money to mount an effective campaign violate the First Amendment. *See* Randall v. Sorrell, 548 U.S. 230 (2006).

exercise your right of free speech.[73] The regulatory regime required speakers to run a maze of questions: Who or what are you? What are you planning to say? When are you planning to say it? What medium are you planning to say it in? Oh, and why are you planning to say it? While the Court did not sweep away all of those distinctions and achieve a perfectly unitary system of free speech where every person or group gets to say whatever they want about any politician or issue at any time of the year and in any medium and using whatever amount of resources they see fit, the decision got us significantly closer to that First Amendment nirvana than we were before.

The second charge of incoherence is that the Court's logic will either lead to opening the door to foreign financial intervention in our election campaigns, or keep that door shut by ignoring, in an incoherent and unprincipled way, some of the implications of the *Citizens United* ruling to the effect that the protection of speech cannot be made to turn on its source. In the views of dissenting Justices and thoughtful academics, this contention is worth considering. But in the hands of political figures, it has become almost a demagogic campaign with tones of nativism and isolationism that rarely emanate from the liberal end of the political spectrum. Of course, President Obama set the tone for that demagoguery by calling out the Justices at the State of the Union days after the decision and attacking them for "open[ing] the floodgates for special interests—including foreign corporations—to spend without limit in our elections." He further stated, "I don't think our elections should be bankrolled by America's most powerful interests, or worse, by foreign entities." This in the face of the Court's having explicitly noted that issues of foreign individual or corporate funding in American elections—prohibited by statute—were not before the Court or being resolved. This set the tone for the demagoguery of so many political figures for the duration of the 2010 campaign.[74] And again what is so telling about the use of the "foreign

73. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 889 (2010).

74. Perhaps the low point was the effort to paint the Chamber of Commerce with a "foreign" brush with wildly inflated charges of secret foreign money just because many of its dues-paying members are corporations from other countries, as is true for hundreds of organizations and labor unions. It

influence" card is that it was being done by politicians who are normally the strongest supporters of foreign immigration and who label as nativists or isolationists or worse those politically opposed to such immigration. It was almost as if someone were going to propose a Smoot-Hawley Tariff against foreign funding of free speech, or erect a Free Speech Iron Curtain to keep that alien or foreign speech from invading our shores.

On the Court, a similar cognitive dissonance was apparent on this issue. It seems surprising that the liberal members of the Court also wanted to put up a First Amendment Iron Curtain to keep foreign ideas and their funding from darkening our shores. Normally, one would expect conservatives to strike such an isolationist, nativist stance. The liberal Justices want to extend the Constitution around the world, and certainly to Guantanamo, and would presumably reject restrictions on the import of foreign ideas, and indeed, would even let Americans help support terrorist organizations—or at least the non-violent work of such organizations[75]—yet do not want to allow foreign organizations to fund political ideas in America. Liberal Justices of an earlier era, like Black, Douglas and Brennan, opposed the xenophobic rejection of ideas coming from abroad, and, indeed, struck down a statute which simply required notifying the government that you wanted to receive foreign communist government propaganda.[76] They said that we should not put up a First Amendment Iron Curtain against foreign ideas, and that Americans who wanted to hear those ideas had a constitutional right to do so. Liberal organizations have long opposed "ideological exclusion" of foreign speakers and visitors from America[77] and prominent leaders

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culminated in an exchange between CBS News' Bob Schieffer and President Obama's campaign strategist, David Axelrod. When Schieffer pressed Axelrod on whether he had any proof that the Chamber was guilty of funneling foreign money into the 2010 elections, his response was "Do you have any evidence that it's not, Bob?" Schieffer's response was telling: "Is that the best you can do?" *See Schieffer Smacks Down Axelrod's Foreign Money Accusation*, FACE THE NATION, CBS, Oct. 10, 2010, http://www.cbsnews.com/video/watch/?id=6944932n.

75. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

76. Lamont v. Postmaster Gen. of the United States, 381 U.S. 301 (1965).

77. *See, e.g.*, Am. Acad. of Religion v. Napolitano, 573 F.3d 115 (2d Cir. 2009); Attorney Gen. of the United States v. Irish People, Inc., 796 F.2d 520 (D.C. Cir. 1986); *see also* Meese v. Keene, 481 U.S. 465 (1987).

of such groups have written eloquently in opposition to a "nylon curtain" to keep out foreign ideas and influences from the American debate.[78] What has changed? The fact that the ideas may be conservative, not liberal? Pro-business and not pro-union?

The Justices waving the red flag of foreign influence were the members of the Court's liberal wing, which normally supports immigration, cosmopolitanism, interaction with the world, and even the controversial issue of looking to and considering foreign law as part of their judicial deliberations.[79] Yet these internationalists were quick to condemn the majority for the fact that the decision might lead to foreign groups or individuals funding speech regarding American political campaigns, and academic critics of the decision have followed suit.

Does the Court's decision open the door to foreign funding of our political campaigns, and is that something to be avoided at all costs and which the Court will avoid even if it has to act in an unprincipled and incoherent way?

Current law prohibits any foreign national from making any contributions or expenditures with respect to a federal election, but permits a wide range of other First Amendment political activity.[80] Critics of *Citizens United* ask whether its principles can or should allow a Saudi oil company to spend a billion dollars advocating in an American political campaign. Let me start from the other end of the hypothetical spectrum. Would we ban a visitor from Saudi Arabia, here on a tourist visa, from buying a loudspeaker and giving a speech on a street corner praising President Obama's quest for peace in the Middle East? From paying to print up and then hand out leaflets on the same street corner containing the same message? Would it matter if the tourist's speech were funded by a foreign labor union or non-profit organization or even business corporation? If we are not

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78. *See* Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM & MARY L. REV. 719 (1985).

79. *See* Roper v. Simmons, 543 U.S. 551 (2005); Lawrence v. Texas, 539 U.S. 558 (2003).

80. 2 U.S.C. § 441e(a) (2006) (prohibiting "foreign nationals" from making contributions or expenditures). *See generally*, Toni M. Massaro, *Foreign Nationals, Election Speech and the First Amendment*, 34 HARV. J.L. & PUB. POL'Y (forthcoming 2011), *available at* http://ssrn.com/abstract=1682202.

willing to prohibit that foreign speech or those foreign leaflets about American politics and elections, then why are we not willing to allow foreign entities to uses resources to speak out on American political issues and candidates on the same terms as any American person or entity?[81]

Speaking of soap box orators, it is the liberal dissenters, not the conservative majority, that seem to take almost a primitive, atomistic, eighteenth-century view of the purpose and beneficiaries of the First Amendment's protections. Their model for First Amendment poster person is the lonely pamphleteer, the soapbox orator, the individual railing against the system. That is certainly an important image of First Amendment iconography, but it is an image that needs to be updated for the twenty-first century when, despite the great boon to individual speech provided by the Internet, most of us need to associate ourselves with entities to amplify our individual voices and have them heard. Political parties, advocacy groups, organizations, labor unions, corporations—they are the vehicles through which the individuals who are associated with them can press their common cause more effectively. Mrs. McIntyre and her self-printed leaflets;[82] Mr. Gilleo and his hand-made lawn sign;[83] the pajama-clad blogger;[84] all are vital cogs in the First Amendment system and certainly favorites of Justice Stevens. But individuals like David Koch and George Soros, and the organizations they fund, give voice to hundreds and thousands of individual supporters as well, as do business corporations and labor unions, whose free speech rights

81. At least one scholar has said that the First Amendment case for permitting foreign contributions and expenditures in American campaigns is a very strong one, though she doubts whether the Court will be willing to take the political heat to rule to that effect. *See* Massaro, *supra* note 81. We may learn the answer to some of these questions sooner rather than later since a three-judge court in Washington is considering a constitutional challenge to the ban on foreign contributions to American candidates on behalf of two people lawfully, but temporarily, in the United States on visas, who want to participate in the debate on political issues by making modest contributions to favored federal candidates. *See* Bluman v. Fed. Election Comm'n, No. 10-1766 (RMU), 2011 WL 52561 (D.D.C. Jan. 7, 2011) (granting in part plaintiff's application for a three-judge court).

82. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

83. City of Ladue v. Gilleo, 512 U.S. 43 (1994).

84. Reno v. ACLU, 521 U.S. 844 (1997).

were enhanced by the Court's decision.[85] The First Amendment should apply with equal vigor in all of these settings to keep government from setting the terms and conditions of public debate about the wisdom of what government is doing.

That was the teaching that animated the *Buckley* decision—where the Court said: "In the free society ordained by our Constitution, it is not the government but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign."[86] That was the teaching that animated the *Citizens United* decision as well. The dissenters usually are associated with notions of "a living constitution" yet here they seem to want the protections of free speech frozen in time in the eighteenth century and only available to those people who are its twenty-first century counterparts.[87]

There is one other example of incoherence and cognitive dissonance, which was manifest by all but one Justice on the Court, namely, the question of deference to Congress when interference with First Amendment rights is concerned.

In *Holder v. Humanitarian Law Project*,[88] decided the same Term as *Citizens United*, the Court rejected a First Amendment challenge to a federal statute barring "material support" to designated foreign terrorist groups, including "coordinated" speech and advocacy on

85. The ACLU recently announced that it had raised over $400 million as part of its ninetieth anniversary campaign, much of which one has to assume came from rich individuals, foundations, perhaps some business and corporations, and $100 of which came from this author. All that funding helped amplify my voice considerably beyond what it would have been had I spent the money on leaflets and handed them out on my street corner.

86. Buckley v. Valeo, 424 U.S. 1, 57 (1976).

87. Here too there was an interesting switch of positions, with the liberal dissenters emphasizing their claim that the Framers would not have intended including corporations or other organizations within the protections of the First Amendment, *see* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 948–52 (2010), although in many other controversial constitutional law areas they are not usually associated with originalism, but with more open-ended notions of a living constitution. In any event, the originalist response was that the Framers were aware of corporations, especially educational and religious ones, used to advocate different positions, and, more broadly, that the Framers certainly did not intend a system where government would paternalistically intervene in political speech and control its contours. *Id.* at 925–29 (Scalia, J., concurring).

88. Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

behalf of such groups, even though the advocacy would otherwise be entirely peaceful and lawful.

There is a real tension between the *Holder* case, which upheld a statute restricting "material support" for protected speech, and *Citizens United* which struck down a statute restricting "material support," so to speak, for political speech by corporations and unions. I tell my students, only half jokingly, that the moral of the story is (1) that the conservatives will protect speech for corporations, but not for terrorists, (2) the liberals will protect speech for terrorists, but not for corporations, and (3) Justice Stevens will protect speech for nobody, since he was the only Justice to reject the First Amendment claims in *both* cases. I then tell my students that maybe Al Qaeda should incorporate and gain protection in the Supreme Court by a vote of 8–1. Of course, the cases are more nuanced than that, but I am a bit appalled by the self-contradictory inconsistencies in approaches, especially, inter alia, on the question of deference to Congress and the President. The liberals give Congress the benefit of the doubt on regulating campaign speech, but not regulating terrorists, and the conservatives do vice versa. Were I the tenth Justice, I would say that deference is no more appropriate—and just as pernicious—in the *Pentagon Papers*[89] case as in *Buckley v. Valeo*, in *Holder* as in *Citizens United*. The one constant is the government's self-interest in protecting itself or its secrets, and the courts should be willing to call the government on it. I have not the slightest doubt that Justices Black and Douglas would have easily invalidated both statutes. Instead, you have the specter of Justice Breyer dissenting in *Holder* saying the activities at issue "involve the communication and advocacy of political ideas and means of achieving political ends" and continuing, that "this speech and association for political purposes is the kind of activity to which the First Amendment ordinarily offers its strongest protection." If that does not also describe *Citizens United*, in which he rejected the First Amendment claim, then what does.

89. N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

My hope is, however, that *Holder* will be distinguished in the future as a national security case, without a spillover effect on First Amendment claims and issues more generally. But there is definitely an underlying tension between the two cases that may erupt in the future.

CONCLUSION: THE MORAL OF THE STORY

Of course, only time will tell what the real impact of the *Citizens United* decision will be, either doctrinally, practically or politically. But, whatever results, to me the case is a landmark of political freedom. It has already changed the campaign finance conversation away from limits and toward issues like disclosure, public subsidies, plus further deregulation of the limits on political funding. The decision will lead to increased political speech, a more informed electorate, and a more robust democracy. A win, win, win situation

The ultimate essence of the Court's ruling is that under the First Amendment there are no privileged speakers and no pariah speakers. The First Amendment protects all those individuals and groups that would exercise their right to speak and communicate by disabling government from abridging the freedom of speech. That is a true form of leveling the playing field, putting all people and groups on the same plane and footing where freedom of speech is concerned. Most of the press does not like the decision because they do not want the competition; most of the politicians do not like the decision because they do not want the criticism and the pushback. But the competition and the criticism will inevitably work to the benefit of the public and the political process, and ultimately, to the strength of our democracy.