ON POLITICAL CORRUPTION

Samuel Issacharoff*

Lurking beneath the surface of all debates on campaign finance is a visceral revulsion over future leaders of state groveling for money. The process of fundraising is demeaning to any claim of a higher calling in public service and taints candidates, policies, donors, and anyone in proximity to this bleakest side of the electoral process. The intuition is that at some level money must be corrupting of the political process and that something must be done to limit the role of money in that process. In turn, and almost inescapably, the same logic appears to lead to the belief that less money is better than more money, and that successful reform must bring down the cost of modern electoral campaigning.

It is the logic of constricting the effects of money that has defined the modern era of campaign finance reform, an era that began after the Watergate scandals and is now completing its fourth decade.1 Time and again, the impetus behind the reform effort has been to depress the amount of money spent in campaigns and thereby limit the associated moral stain. So long as a stench attaches to money and by extension to those who seek to direct political outcomes with money, the cause of campaign finance reform takes the high road. If money be the root of all evil, reducing the amount of money in the system is the natural conclusion.

With these efforts at limitation comes the inevitable result that some speakers will be handicapped in expressing their views and that the total quantity of speech will be curtailed. This point is not really disputed by the reform camp, nor by the dissident wing of the Supreme Court. The oft-invoked claim that money is not speech,2 and the corollary claim of the rights of listeners not to be bombarded with excesses from one side of the debate, both assume a right to limit the propagation of certain views, presumably those that are overfunded or overexposed, or both. For Justice Stevens and a persistent minority on

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* Reiss Professor of Constitutional Law, New York University School of Law. I am grateful for the comments of Richard Briffault, Cynthia Estlund, Lucas Issacharoff, Burt Neuborne, and Richard Pildes. Ari Glogower and Jeremy Peterman provided indispensable research assistance. Research funding was provided by the Filomen D’Agostino and Max E. Greenberg Research Fund.


2 E.g., Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (“Money is property; it is not speech.”).
the Court, the claim that money is not speech lends constitutional cover to the search for a way to squeeze money out of politics. In turn, this attempt to restrain the amount of money in the system runs headlong not only into the teeth of the constitutional concern of the majority of the Court but also into the brute fact of the increased scale and complexity of campaigning for contested office.

The restrictive aspect of the reform agenda is ultimately both its strength and its constitutional liability. Constitutionally, the effort to limit the spending of political campaigns — which, if not directly speech, is certainly “speechy enough” — has occasioned a long line of losses for reform, with *Citizens United v. FEC* but the latest in an almost unbroken streak. *Citizens United* continues the troubled tradition of *Buckley v. Valeo* in drawing the divide between political contributions and expenditures. The former category gives rise to potential regulation in order to combat a poorly specified corruption of the political process — a concept to which I return below — while the latter is seen as within the domain of expressive liberties that the state may not seek to restrict.

Academic commentary has long had a field day with the core expenditures-versus-contributions rationale of *Buckley*. The system of limited contributions but unchecked expenditures runs afoul of the animating logic of the 1974 campaign finance amendments, and is in fact a regulatory structure created by the Court. No rational regulatory system would seek to limit the manner by which money is supplied to political campaigns, then leave unchecked the demand for that same

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3 This phrase was coined by Professor Richard Briffault during a panel discussion on *Citizens United*. Richard Briffault, Joseph P. Chamberlain Professor of Legislation, Columbia Law Sch., Panel Discussion at the Brennan Center for Justice Symposium on Money, Politics & the Constitution: Should We Look Beyond the First Amendment to Other Constitutional Principles? (Mar. 27, 2010).

4 See, e.g., *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2671 (2007) (finding no compelling reason to regulate advertisement that was neither express advocacy nor its equivalent); *Randall v. Sorrell*, 548 U.S. 230, 261–62 (2006) (plurality opinion) (finding Vermont’s campaign law limiting expenditures and contributions unconstitutional); *Buckley*, 424 U.S. at 57 (stating that “[t]he First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise”).

5 130 S. Ct. 876 (2010).

6 424 U.S. 1.

7 See FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE 238 (1992) (arguing for the interrelation between contribution and expenditure limits in the statutory Federal Election Campaign Act scheme).

money by leaving spending uncapped.9 In the meantime, majorities drawn from varying voting blocs on the Court have persistently rejected the Buckley divide between contributions and expenditures, with only a division among the Justices on how to overturn Buckley serving to shore up a frayed body of law.10 Whether framed as doctrinal incoherence11 or simply as a doctrinal approach that proved unworkable over time,12 the Court’s attempt to muddle through the difficult issue of money and politics has been subject to easy hits by critics. I confess to being a participant in looking at the failures of Court doctrine, all the while conceding in articles and the classroom just how intractable the problem seemed. Indeed, writing with Professor Pamela Karlan a decade ago, I concluded that not much could be done about the pull of finance in elections, such that the perverse “hydraulic” of money finding its outlet13 led many campaign finance reform efforts to backfire and empower the unaccountable tertiary actors (the political action committees (PACs), the 527s, and all the rest) at the expense of the candidates and parties who actually had to stand for election before We the People.14

This Comment takes Citizens United as a launching point to revisit the central Buckley paradigm and examine what possibilities for reform remain to redress the vulnerabilities of democracy before the

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10 See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY 373 (3d ed. 2007) (providing the stable division on the Court over Buckley); J. Robert Abraham, Note, Saving Buckley: Creating a Stable Campaign Finance Framework, 110 COLUM. L. REV. 1078, 1091–92 (2010) (stating and citing support for the claim that nearly half the Justices who have served since 1976 have opposed the Buckley framework).


12 Samuel Issacharoff & Pamela S. Karlan, The Hydraulics of Campaign Finance Reform, 77 TEX. L. REV. 1705, 1736 (1999) (“A generation has shown us that the expenditure/contribution distinction of Buckley not only is conceptually flawed, but has not worked.”). There are many recent doctrinal examples that demonstrate the fragility of the contributions/expenditures divide. See, e.g., Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257, 2263–65 (2009) (combining contributions and independent expenditures to reach the conclusion that the total amount of support provided by an individual to a judicial candidate was enough to create an intolerably high probability of actual bias); McConnell v. FEC, 540 U.S. 93, 139 (2003) (upholding limitations on expenditures of soft money on the ground that they “limit the source and individual amount of donations” and that “prohibiting the spending of soft money does not render them expenditure limitations”); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 464 (2001) (“There is no significant functional difference between a party’s coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party’s right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending.”).

13 See Issacharoff & Karlan, supra note 12, at 1708.

14 See id. at 1715–17.
powers of the purse. Beginning with *Buckley*, the Court recognized that contributions had the unique potential to corrupt the political process.\(^\text{15}\) Revisiting the contribution process and the concept of corruption may yield a better handle on what should be the sources of concern in the financing of electoral campaigns. The approach taken here is to start by examining the competing concerns that tend to get glossed over by underspecified references to political corruption, then to see if the processes of financing campaigns can be addressed both to those concerns and to increasing the level of democratic engagement in politics. Specifically, this approach focuses on the mechanisms used to empower democratic participation in two ways: one by inducement, one by prohibition. Counterintuitively, the inducement looks to increase the amount of contributions to campaigns to alleviate some of the concerns over political corruption, while the prohibition seeks to bar those in a position to distort public policy — such as government contractors — from providing support to candidates’ campaigns. The argument rests heavily on the idea that the threat to democratic governance may come from the emergence of a “clientelist” relation between elected officials and those who seek to profit from relations to the state.

The inquiry begins in Part I with the contested terrain over the nature of political corruption. Once the Supreme Court announced in *Buckley* that the concern over corruption or even its appearance could justify limitations on money in politics, the race was on to fill the porous concept of corruption with every conceivable meaning advocates could muster. As with the elusive term “diversity” after *Buckley’s* contemporary, *Regents of the University of California v. Bakke*,\(^\text{16}\) a thin constitutional reed transformed the lexicon of political debate. Part II advances the argument that the corruption concern is really a concern with ensuring public — rather than private — outputs from the policymaking process. This reorientation toward corruption in the outputs of policymaking suggests effective solutions to address the financial vulnerabilities of democracy compatible with the Court’s strong constitutional stance in *Citizens United*, which are discussed in Part III.

I. What Is Corruption?

Prior to *Citizens United*, the Court had struggled between two competing views of the sources of potential corruption as a result of campaign finance. A fairly consistent majority position, beginning in *Buckley v. Valeo* itself, had focused on the potential for the corruption of the candidates who aimed to ingratiate themselves to their wealthy

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inequities born of wealth are compounded by the unnatural ability of arrangements, while allowing more expansively for the potential dispiriting influence of the appearance of such arrangements. The al-
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corporations to amass wealth more readily than can individuals. This view defines corruption poorly, and makes corruption appear as a "derivative" problem from broader societal inequalities. As formulated in Austin v. Michigan State Chamber of Commerce, the only case to adopt squarely the distortion of electoral outcomes view of corruption, the inequities born of wealth are compounded by the unnatural ability of corporations to amass wealth more readily than can individuals. This argument logically extends to all disparities in electoral influence occasioned by differences in wealth. In doctrinal terms, the prevailing majorities across the broad run of the Court's campaign finance


18 See FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2672 (2007) (plurality opinion); McConnell, 540 U.S. at 143–45 (discussing the importance of prohibiting the appearance of "undue influence," id. at 144); FEC v. Beaumont, 539 U.S. 146, 155 (2003) (noting that the state has an interest in preventing "war-chest corruption"); Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659–60 (1990) (expressing concern about the corrupting effect of "immense aggregations of wealth that are accumulated with the help of the corporate form," id. at 660); see also Bellotti, 435 U.S. at 809 (White, J., dissenting) (arguing that states have an interest in preventing institutions from "using . . . wealth to acquire an unfair advantage in the political process"); United States v. UAW, 352 U.S. 567, 570 (1957) ("No less lively, although slower to evoke federal action, was popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption.").

19 Austin, 494 U.S. at 659.


21 494 U.S. 652.

22 See id. at 660 ("[T]he unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures."); see also FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 447 (2001) (focusing on expenditures by political parties providing a path to circumvent contribution limits).

23 See OWEN M. FISS, THE IRONY OF FREE SPEECH 4 (1996) (advocating state restriction of speech by some and subsidies of others to equalize access to political discourse); David Cole, First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance, 9 YALE L. & POL'Y REV. 236, 237 (1991) (framing Austin as premised on the idea that "[f]ree market capitalism threatens the free marketplace of ideas by giving certain voices inordinate influence"); Ronald Dworkin, The Curse of American Politics, N.Y. REV. BOOKS, Oct. 17, 1996, at 19, 23 ("[W]hen wealth is unfairly distributed and money dominates politics . . . [voters] are not equal in their own ability to command the attention of others for their own candidates, interests, and convictions."). These arguments run into the teeth of Buckley: "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," 424 U.S. at 48–49.
decisions invoked the liberty protections of the First Amendment to resist limitations on expression.\textsuperscript{24} For the dissenters in these cases, by contrast, the animating logic was the equality protections of democracy on the political process.\textsuperscript{25}

In the view of a fairly consistent majority of the Court, the key to corruption became the surreptitious deal that bypasses the mechanisms of political accountability. The fear of such silent arrangements further allowed the Court to posit that “[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse.”\textsuperscript{26} But all such arrangements require a conspiratorial agreement willfully to undermine electoral accountability. Thus, the Court fastened on the distinction between coordinated and uncoordinated activity in the electoral context as the defining line for what \textit{Buckley} deemed could be regulated: “the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”\textsuperscript{27} Most clearly, in \textit{First National Bank of Boston v. Bellotti},\textsuperscript{28} the Court held that a banking corporation could not be prohibited from spending money in opposition to a ballot initiative because such initiatives do not involve candidates and there could accordingly be no risk of any quid pro quo corruption.\textsuperscript{29} Over Justice White’s dissent on the undue influence wielded by corporations, Justice Powell cham-

\textsuperscript{24} The strongest exponent of this view has been Justice Thomas, whose opinions on campaign finance return consistently to the core prohibitory structure of the First Amendment. \textit{See}, e.g., \textit{Nixon v. Shrink Mo. Gov’t PAC}, 528 U.S. 377, 410–11 (2000) (Thomas, J., dissenting) (“I begin with a proposition that ought to be unassailable: Political speech is the primary object of First Amendment protection.”).

\textsuperscript{25} The Court’s commitment in \textit{Reynolds v. Sims} that all citizens have an “equally effective voice” in the political process expressed the core of the equality argument. 377 U.S. 533, 565 (1964). The equality rationale appears in campaign finance cases through efforts to dampen the impact of money in general and the arms-race effects of needing to raise money. \textit{See}, e.g., \textit{Buckley}, 424 U.S. at 260 (White, J., concurring in part and dissenting in part) (justifying expenditure limitations as a legitimate means to “counter the corrosive effects of money in federal election campaigns”); \textit{see also Richard L. Hasen, The Supreme Court and Election Law: Judging Equality from \textit{Baker v. Carr} to \textit{Bush v. Gore} 114 (2003) (“Austin represents the first and only case in which a majority of the Court accepted, in deed if not in word, the equality rationale as a permissible state interest.”). To this quotation from Hasen’s book, Chief Justice Roberts added \textit{McConnell} as also being premised on the equality rationale. \textit{Citizens United}, 130 S. Ct. at 922 n.2 (Roberts, C.J., concurring), \textit{see also id. at 922 (“Austin ‘has been understood by most commentators to be an opinion driven by equality considerations, albeit disguised in the language of ‘political corruption’ . . . .”) (quoting Elizabeth Garrett, \textit{New Voices in Politics: Justice Marshall’s Jurisprudence on Law and Politics}, 52 HOW. L.J. 655, 669 (2009)).


\textsuperscript{27} Id. at 788 n.26.
pioned the liberty arguments of the First Amendment: “[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution ‘protects expression which is eloquent no less than that which is unconvincing.”  

The dissenting positions, most strongly associated with Justice Stevens, argued that quid pro quo arrangements were difficult to police and, more centrally, that not regulating money in politics compounded the advantages held by the wealthy in our society. At the doctrinal level, the dissenters relied upon an equality rationale as a justification for restricting expenditures. The claim that money was not speech was absolutely critical to distance the proposed governmental restrictions from traditional First Amendment concerns, particularly as the proposed restrictions were often justified on the basis of the content of the speech, or even the viewpoint of the speaker. On this view, wealth, particularly corporate wealth, allowed those with “‘resources amassed in the economic marketplace’ to obtain ‘an unfair advantage in the political marketplace.”

Although generally disregarded through dozens of Supreme Court opinions on campaign financing, Austin held precariously to life, especially in the hearts of reform advocates. Justice Souter, in Nixon v. Shrink Missouri Government PAC, sought to retool Austin’s approach by tying the undue influence argument to the potential for the appearance of corruption: “Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.” Most notably, in McConnell v. FEC, the case that upheld most of the Bipartisan Campaign Reform Act (BCRA) against constitutional challenge, the Court adopted a highly deferential view of congressional authority and allowed disproportionate influence on officeholders’ judgment to stand in for corruption as a justification

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32 See, e.g., Ronald Dworkin, The Decision that Threatens Democracy, N.Y. REV. BOOKS, May 13, 2010, at 63 (treating Austin as the controlling precedent on limitations on campaign expenditures).
34 Id. at 390.
for upholding campaign limitations.\textsuperscript{37} Ultimately, however, \textit{Austin} could not be reconciled with the core analytic structure of \textit{Buckley}. If the prohibition of wealth-based distortions of politics were the ultimate aim, then drawing a constitutional line between contributions and expenditures would make no sense. To have wealth compromise political outcomes requires distortionary appeals to the voters, something that of necessity occurs on the expenditure side of the ledger.

\textit{Citizens United} closed the circle on the \textit{Buckley} scenario. In expressly overruling \textit{Austin}, the Court has now struck down anything categorized as an expenditure limitation\textsuperscript{38} (unless found to be coordinated with a candidate and thereby a way of circumventing contribution limitations\textsuperscript{39}), while at the same time upholding virtually all contribution limits, except in the rare case where contribution limits are set at such a restrictively low level that they threaten the viability of the ensuing political debates.\textsuperscript{40} In the Justice Kennedy majority opinion, only the risk of explicit quid pro quo corruption appears to survive as a basis for regulating campaign finance.\textsuperscript{41} The critical holding comes with regard to independent expenditures: “The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a \textit{quid pro quo} . . . .”\textsuperscript{42} Nor will independent expenditures create the appearance of quid pro quo corruption because “[t]he fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.”\textsuperscript{43}

Ultimately, \textit{Citizens United} rejected a claimed governmental interest “in equalizing the relative ability of individuals and groups to in-
fluence the outcome of elections,” and rejected the concern over the “undue influence” of money serving as a form of corruption that justifies regulation. Corruption proved not as malleable as Austin might have indicated.

II. THE CORRUPTION OF POLITICS

Any system of privately financed campaigns invites strategic use of money to influence public officials. The case law has now been engaged in a multidecade search for a workable definition of just what is corrupt as opposed to benign when aspiring public officials solicit money to further their ambitions. So far, the debates at the Supreme Court have asked only whether the candidates are corrupted through illicit quid pro quo arrangements, or per the dissents, whether electoral outcomes are distorted as a result of concentrated corporate and private wealth.

An alternative take on the problem of corruption of the political process would suggest that both of these definitions miss the mark. Each is concerned with the improper influences on the selection of candidates for office. While the influence of the well-heeled may be a concern, and while the prospect of out-and-out corruption is a serious issue, there is an alternative concern — perhaps the more serious problem — that looks not to inputs into who holds office, but to the outputs in terms of the policies that result from an elected class looking to future support in order to retain the perquisites of office. On this view, the underlying problem is not so much what happens in the electoral arena but what incentives are offered to elected officials while in office. Although the question of holding office remains key to this incentive structure, the focus shifts to how the electoral process drives the discharge of public duties. Specifically, the inquiry on officeholding asks whether the electoral system leads the political class to offer private gain from public action to distinct, tightly organized constituencies, which in turn may be mobilized to keep compliant public officials in office.

Any constitutional test resting on corruption as the evil to be avoided begs for a definition of the good, or, in this case, the uncorrupted. As in many areas of law in which the good state resists simple definition, the first insight may come from process questions — which campaign finance procedures are likely to promote desirable forms of democratic governance and which are likely to promote infirmities in

44 Id. at 904 (quoting Buckley, 424 U.S. at 48) (internal quotation marks omitted).
45 See id. at 962 (Stevens, J., concurring in part and dissenting in part).
democracy?46 A tractable definition of corruption may emerge not by reference to an idealized state of candidate election, but instead by looking to how the process of election incentivizes certain behaviors in elected officials seeking to retain office. Here the concept of corruption hinges not on a quid pro quo by which the candidate for office is impermissibly enriched, nor on a distortion of the concept of democratic equality among the electorate. Without denigrating either concept as a concern, an outputs focus on the effects on public policy looks to alterations in the use of public office resulting from the incentive structures of the electoral process.

The outputs account of corruption is concerned with the subversion of the role of government, conceived of in terms of the need to provide public goods. The classic examples of public goods are the protections of security, of the environment, of foreign relations, of the matters from which private initiative cannot realize gains and that in turn require public coordination. It is precisely this benevolent use of public authority to overcome the collective action barriers to the production of public goods that is increasingly subject to challenge. The public choice accounts of recent political economy claim that the existence of public power is an occasion for motivated special interests to seek to realize private gains through subversion of state authority.

This strategy — identified in the political science literature as clientelism — defies easy categorization as corruption under current campaign finance law precisely because it concerns what happens in office, rather than what happens during the election campaign.47 At its simplest, clientelism is a patron-client relationship in which political support (votes, attendance at rallies, money) is exchanged for privileged access to public goods.48 The concept differs in emphasis from quid pro quo corruption. The traditional account of corruption assumes that the harm is the private benefit obtained by the politician. While

46 Attempts to fashion a “proceduralist” view of the aim of campaign finance regulation anticipated this approach. See generally Bruce E. Cain, Moralism and Realism in Campaign Finance Reform, 1995 U. CHI. LEGAL F. 111, 122–39.

47 The Court started to grapple with this problem in McConnell:

Just as troubling . . . is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder . . . . And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation. McConnell v. FEC, 540 U.S. 93, 153 (2003).

the concept of quid pro quo corruption is ample enough to include almost any benefit obtained, the focus of clientelism is not the enrichment of an individual politician but continued officeholding on the condition that “party politicians distribute public jobs or special favors in exchange for electoral support.”

For all democracies, there are aspects of clientelism whenever politicians respond to constituent interests. Indeed, Justice Kennedy took pains in Citizens United to insist that “[i]ngratiation and access . . . are not corruption.” A pathology ensues only when political decisions are made to allow important sectional supporters “to gain privileged access to public resources” for profit. Weak political parties and candidates with difficulty holding a programmatic electoral base begin to rely on patron-client networks to retain their positions.

This trend becomes more problematic in large and expensive elections: “as it becomes increasingly costly to connect with groups of voters, candidates prefer to organize a smaller electorate and target them with larger transfers.”

The pathology of clientelism then rewards incumbent politicians for an expansion of the public sector in a way that facilitates sectional rewards to constituent groups. This phenomenon was described by Mancur Olson in his classic work on the pressures toward the growth of both the size and complexity of government:

The limited incentive the typical citizen has to monitor public policy . . . implies that lobbies for special interests can sometimes succeed where matters are detailed or complex but not when they are general and simple, and this increases complexity . . . . [In turn, someone has to administer the increasingly complex regulations that result from the lobbying and the related processes . . . . This increases the scale of bureaucracy and government.

Olson identified one of the mechanisms by which public power can be harnessed for private aims. Private gain may abound in large-scale government enterprise, which is nontransparent to the public and which resists both monitoring and accountability. The extreme form is

49 Alex Weingrod, Patrons, Patronage, and Political Parties, 10 COMP. STUD. SOC’Y & HIST. 377, 379 (1968) (describing related concept of patronage).
50 Roniger, supra note 48, at 357 (describing clientelism as endemic in democracy).
51 130 S. Ct. at 910.
52 Roniger, supra note 48, at 358.
53 Cf. Philip Keefer & Razvan Vlaicu, Democracy, Credibility, and Clientelism, 24 J.L. ECON. & ORG. 371, 372–73 (2008) (arguing that politicians may avoid the costs of establishing credibility with the general electorate by instead forming relationships with patrons who are interested only in outcomes that benefit their interest group).
54 Id. at 381; see also id. at 381–82, 387.

Unfortunately, any attempt to act on the danger of clientelism runs into the inescapable problem that government is a blur of the high-minded and the petty, where it is often difficult to distinguish between rewards to constituents and matters of policy and principle. The American recognition of the risk of legislation in the private interest dates at least to \textit{The Federalist No. 10}, in which Madison identified as a central problem of republican governance the ability to resist “a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”\footnote{\textit{The Federalist} No. 10, at 72 (James Madison) (Clinton Rossiter ed., 2003).} The Framers appear to have conceptualized corruption as a derogation of the public trust more than as the narrow opportunity for surreptitious gain.\footnote{The most ambitious effort to read this definition of corruption cross-textually into the Constitution is found in Zephyr Teachout, \textit{The Anti-Corruption Principle}, 94 \textit{CORNELL L. REV.} 341, 373–81 (2009).} But the distinction between public- and private-regarding legislation is difficult to make, and efforts to review legislation on the basis of its public-regarding character have largely failed\footnote{The leading effort was signaled in Cass R. Sunstein, \textit{Public Values, Private Interests, and the Equal Protection Clause}, 1982 \textit{SUP. CT. REV.} 127, 133–35, which argued for applying different tiers of scrutiny to public- and private-regarding legislation.} — the debate over whether a political initiative is dominated by public or private purposes proves to be too great an invitation to reargue the politics of legislation that any particular group finds objectionable.\footnote{See Richard B. Stewart, \textit{Regulation in a Liberal State: The Role of Non-Commodity Values}, 92 \textit{YALE L.J.} 1537, 1542–43 (1983) (noting that “[t]he regulation is viewed as a self-serving tool, manipulated either by well-organized economic interest groups to increase their wealth, or by ideological factions to impose their partisan values on society,” id. at 1543 (footnote omitted)).}

Despite the difficulty in drawing precise substantive lines, it is clear that our political process does introduce pathways for private motivations to capture the use of governmental processes — and that these may not be pathways but rather avenues, boulevards, perhaps even express lanes. Clientelist pressures erode public institutions with incentives to increase the size, complexity, and nontransparency of governmental decisionmaking, with the corresponding impetus simply to increase the relative size of the public sector, often beyond the limits of what the national economy can tolerate. In the first instance, political accountability through a robust and competitive political system may check some pressures toward the excessive rewarding of private consti-
But, if unchecked, clientelism breeds the perception of “systemic corruption, which cripples institutional trust and public confidence in the political system” — a parallel to the Court’s concern in *Buckley* over the detrimental effects of the appearance of quid pro quo corruption.

No doubt money is at the root of the problem, but the problem is not limited to the wealthy or the corporations or even the institutional actors such as labor unions or Indian tribes. Like the overbroad prohibition on corporate independent expenditures that proved problematic in *Citizens United*, simply trying to root out money in undifferentiated fashion miscasts the problem of the compromise of public authority. More closely hewn, the issue is not money as such but the potential private capture of the powers of the state. The Supreme Court acknowledged this concern a year prior in *Caperton v. A.T. Massey Coal Co.*, in which the Court ruled unconstitutional a state judge’s sitting in judgment on a case involving a major campaign supporter. *Caperton* suggests a concern with the ability to use privileged positions in the democratic process to gain control over the exercise of governmental authority. Under this view, the problem is not the ability to deploy exceptional resources in election campaigns, but the incentives operating on governmental officials to bend their official functions to accommodate discrete constituencies.

III. DOES MONEY NECESSARILY CORRUPT?

The most striking and perhaps the oddest feature of *Citizens United* is the extravagant endowment of rights upon corporate actors, a result that appeared to reach beyond what was necessary to strike down an overbroad restriction on contributions. Also, curiously, the Court did not act at the behest of corporations eager to exploit the vagaries of campaign finance law. No corporation filed an amicus brief in the case, with only the Chamber of Commerce making the expansive case for the First Amendment. In states where corporate campaign con-

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63 130 S. Ct. at 911 (finding the prohibition of corporate independent expenditures both under- and overinclusive if the object is to protect shareholder interests).

64 129 S. Ct. 2252 (2009).

65 Id. at 2256–57.

tributions are legal (about half the states\textsuperscript{67}), the evidence of an urge to overwhelm elections with corporate spending is scant, at least thus far. For example, one study from California for 2001–2006 revealed that among the top ten contributors to state independent expenditure committees, there was not a single corporate interest.\textsuperscript{68} There were two wealthy individuals among the top ten,\textsuperscript{69} banking a friend who was running for governor,\textsuperscript{70} but the top ten were dominated by either Indian tribes or public employee unions.\textsuperscript{71} Even the trial lawyers — another widely disparaged group — barely eked onto the list at number ten.\textsuperscript{72} When all contributions among the top ten were added together for that period, the amount expended by public employee unions was about double that attributed to corporate sources. In some individual races, there were expenditures by associations of small businesses, such as real estate interests, but even they were secondary players overall.\textsuperscript{73}

At bottom, corporations are business rivals and there are serious collective action problems preventing them from coordinating in the political arena, except through trade associations such as the Chamber of Commerce. That conflict is why corporations have difficulty overcoming the concentrated pull of public employee unions, even on matters of concern to the business community.\textsuperscript{74} More centrally, for most corporations, elections are noisy events that may prove a poor forum for advancing their interests. Most publicly traded corporations do not want to be associated with controversial positions on hot-button social issues that dominate elections, notably abortion, capital punishment, foreign military engagements, and school prayer.\textsuperscript{75} PACs funded from

\textsuperscript{67} Twenty-eight states permit some — usually limited — form of corporate campaign contributions. Within this group, five states allow unlimited contributions, with one scheduled to introduce limitations effective January 2011. \textit{See Nat’l Conference of State Legislatures, State Limits on Contributions to Candidates (2010), available at http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf.}


\textsuperscript{69} Id.


\textsuperscript{71} \textit{Cal. Fair Political Practices Comm’n}, supra note 68, at 22.

\textsuperscript{72} Id.

\textsuperscript{73} \textit{See id.} at 24–36.

\textsuperscript{74} For example, a recent Oregon referendum proposed using increased payroll taxes to finance public employment. Public employee unions raised almost fifty percent more than employer groups to push the measure through. \textit{See Brent Walh & Jeff Mapes, Public Workers Flex Muscles in Tax Battle, OREGONIAN}, Jan. 21, 2010, at A1; \textit{see also T.W. Farnam, Unions Spending Big on Campaign Ads, Wash. Post}, July 7, 2010, at A4.

\textsuperscript{75} The difficulties encountered by the Target corporation in the recent Minnesota gubernatorial election provide an object lesson in the perils of political engagement. Target made a $150,000 contribution to a business group supporting the Republican candidate, Tom Emmer, based upon
individually pooled funds provide a way to signal support for candidates without opening the corporate treasury to ever-ravenous politicians.76 But for pursuing direct interests, lobbying is a more effective means of securing desired ends, and the amounts spent on lobbying rather than on campaign activities (even in states that permit contributions) reflect corporate understanding that the work of securing a compliant government is best carried out in the legislative rather than electoral arena.77 Moreover, within the legislative arena, corporations are likeliest to focus on gaining a competitive advantage over rivals or other sources of economic challenge, and thus are apt to be further dissuaded from concerted efforts to influence politics generally.78 The corporations that do wish to engage regularly in speech turn out to be either the ideological organizations that have plagued the campaign finance case law (for example, Massachusetts Citizens for Life79 and

Emmer’s endorsement of positions generally helpful to business interests. See Jennifer Martinez & Tom Hamburger, Target Faces Investor Backlash, L.A. TIMES, Aug. 20, 2010, at A1. Target did not factor into its electoral calculus Emmer’s strong opposition to gay marriage. See Protecting Life and Marriage, EMMER FOR GOVERNOR, http://www.emmerforgovernor.com/issues/socialvalues (last visited Oct. 2, 2010). The issue of gay marriage proved to have greater electoral salience than Emmer’s other positions, and in turn provoked a significant public backlash against Target. Boycotts were organized, anti-Target advertisements were run, and shareholders called for an investigation. See Martinez & Hamburger, supra.

76 Australia provides an example of a country where corporate contributions to campaigns are legal yet prove to be limited. The leading study of company contributions indicated that in the 1995–1998 period, all but one of the top ten campaign contributors donated money to both major political parties. Ian Ramsay, Geof Stapledon & Joel Vernon, Political Donations by Australian Companies, 29 Fed. L. Rev. 179, 203–04 (2001). Indeed, Professor Ian Ramsay, the author of the most comprehensive study to date on political contributions in Australia, indicated that most corporations that do give tend to continue to give to the major parties, with some bump up for whichever party is in power. The firms that publicly disclose their contributions report the items on their websites or in their annual reports as “supporting the democratic process” or “strengthening democracy.” Interview with Ian Ramsay, Professor of Law and Dir. of the Ctr. for Corporate Law and Sec. Regulation, Melbourne Law Sch., in Melbourne, Austl. (Apr. 22, 2010). There appears to be no evidence of any party in Australia having reader access to large contributions. See Anne Twomey, The Reform of Political Donations, Expenditure and Funding 21 (Sydney Law Sch., Legal Studies Research Paper No. 08/136, 2008), available at http://papers.ssrn.com/abstract_id=1299331.


Wisconsin Right to Life80) or closely held companies, including publicly traded corporations still dominated by a founding family (for example, Wal-Mart). There are exceptions, of course, in local elections, especially judicial elections,81 but for most corporations, elections are a precarious and indirect means for advancing their interests.

While Citizens United’s grant of rights to corporations is not particularly significant in terms of clientelist corruption, the facts of Citizens United are significant in terms of potential subsequent reforms. At issue before the Court were the BCRA prohibitions on corporate and union contributions to independent expenditure groups during the run-up to federal elections; this issue was the context for the Court’s critical finding that there was no risk of quid pro quo corruption.82 The Court left untouched not only limitations on contributions,83 but also the broad disclosure requirements currently in force.84 The Court did not address the longstanding prohibition on direct contributions by corporations85 and unions,86 something that dates back over a century for corporations and more than half a century for unions. In endowing corporations with all the prerogatives of natural persons in terms of independent expenditures, the logic of the Court’s holding could even signal a willingness to open the door to allowing corporations to donate directly to candidates and parties. As shocking as such a step would be to century-old settled practice, it is unclear how big a difference it would make. Would the world look all that much different if corporations could contribute $2,400 (the current federal contribution limit on individual donations87) to a candidate? Perhaps, but likely not all that much.

The logic of Justice Kennedy’s majority opinion in Citizens United was ultimately that any undue pressures on the body politic will be cleansed by the competitive wash of the electoral process in which

82 Citizens United, 130 S. Ct. at 910.
83 Id. at 909 (noting that Citizens United did not suggest “that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny”).
84 In John Doe No. 1 v. Reed, 130 S. Ct. 2811 (2010), the Court further rejected a First Amendment facial challenge to disclosure of names on a state petition drive. Id. at 2815.
more information is a salutary force. The dissenting response was either that corporations are not entitled to such protections, that their expenditures are not speech, or that Justice Kennedy’s emphasis on First Amendment liberty of expression must yield before a countervailing claim to equality in the political arena. The resulting engagement is stark, and given the majority’s commitment to the primacy of liberty of expression and the dissent’s concern with the appearance of untoward pressures from concentrations of wealth, there is little common ground for engaging whether there are particular pathologies that reforms might address.

A. Funding Politics

For all the attention devoted to campaign finance reform, the challenge remains straightforward: for our political system to work properly, there is “the need for funding sufficient to enable candidates to mount competitive races without rendering them unduly dependent on large donors.” It is here that the reform impulse to constrict money is most problematic. For example, the first effort to offer public funding to candidates for office — the post-Watergate presidential election subsidies — set the amount of the public contribution at two-thirds of what George McGovern had spent on his disastrous presidential run of 1972. Once the cap on expenditures was removed in Buckley, the race was on to collect money to satisfy the mounting costs of campaigns, despite the constraints imposed by low contribution limits.  

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88 See Saul Zipkin, The Election Period and Regulation of the Democratic Process, 18 WM. & MARY BILL RTS. J. 533, 591 (2010) (suggesting the majority view implies that “because Americans can think for themselves, more information cannot hurt them, but can only help in the voting process” (footnote omitted)).
89 Citizens United, 130 S. Ct. at 930, 971–72 (Stevens, J., concurring in part and dissenting in part).
90 Id. at 972.
91 Id. at 977.
94 See Issacharoff & Karlan, supra note 12, at 1711 (drawing analogy between the remaining unlimited candidate expenditure limits and “giving a starving man unlimited trips to the buffet table but only a thimble-sized spoon with which to eat”).
Whatever the failings as a matter of regulatory policy, the Court has weighed in most readily on the side of protecting expenditures. Thus, the first significant prohibition of BCRA to fail scrutiny was the so-called “Millionaire’s Amendment.” Struck down by *Davis v. FEC,* the amendment permitted increased hard money fundraising for incumbents challenged by self-financed campaigns. This particular provision appeared to carry none of the anticorruption logic of the *Buckley* exception and instead carried the redolent whiff of self-dealing by politicians. In striking down what it perceived to be a penalty on speech, the Court held that BCRA “imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right [to expend lawfully obtained funds. The Act] requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.”

*Davis* then carried over into the Court’s order upholding an injunction against a longstanding Arizona policy of matching small contributions with state financial support of grassroots-based candidacies, a practice known as “clean money” financing because of the small-donor constituency. At issue, however, was Arizona’s policy of giving an additional clean money subsidy to gubernatorial candidates under challenge from self-funded candidates. Presumably, the same concern would apply to the burdening of expenditures by individuals who, in effect, be putting one dollar in their opponents’ coffers for every dollar they themselves spent. The result would be a “drag on First Amendment rights,” as Justice Alito described the concern in *Davis.*

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96 *Id.* at 2771.
99 *McComish,* 130 S. Ct. 3408; *see also* *McComish v. Bennett,* 605 F.3d 720 (9th Cir. 2010). This ruling prompted hyperventilated outrages over the Court seeming to put public finance schemes at risk. *See* Editorial, *Keeping Politics Safe for the Rich,* N.Y. Times, June 9, 2010, at A24 (describing the *McComish* decision as “reckless” and “a burst of judicial activism”). The Arizona law included a “matching funds” provision that increased public funds available to a participating candidate to match the financing levels of self-funded candidates, which arguably has the effect of depressing expenditures. *Ariz. Rev. Stat. Ann.* §§ 16-940 to 16-961 (2006). Invariably there is the paradox that the mainstream media, despite being composed of for-profit corporations, has systematically touted restrictions on any independent expenditures by corporations, other than those deemed to be the media. As Justice Kennedy noted in *Citizens United,* the claim “exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news.” 130 S. Ct. at 906.
100 *Davis,* 128 S. Ct. at 2777.
A careful reading of *Davis*, however, reveals that the Court’s concern was not contribution limits or even clean money matching systems, but the implicit efforts to rein in expenditures of individuals who self-finance, and whose expenditures do not readily fall into any theory of corruption — save the now-rejected equality concerns from *Austin*. The logic of *Davis* poses a dilemma for the reform impulse as the Court’s handling of the seed money approach of clean money is in tension with the reformers’ lurking desire to use the public money carrot as a stick to limit expenditures.

There is no constitutional issue raised by the use of matching funds to reward candidates for mobilizing many small donors. For example, there are a number of clean money programs that offer the quid pro quo recognized in *Buckley* by which candidates accept public money and contractually agree to a limit on their own expenditures,101 as with presidential matching funds. These programs are all premised on the idea that candidates should be rewarded for engaging the voting public and should get public monies to the extent that they expand the network of citizens who participate through small donations. Indeed, such programs have generally survived constitutional challenge when they release publicly funded candidates from the expenditure limitation if their opponents threaten to spend in excess of the public limitations.102

*Davis* would call the constitutionality of these programs into question to the extent that they couple the inducement to expand the base of popular participation with a heavy-handed effort to dampen expenditures by the opponent. Almost invariably, these clean money programs seek to limit contributions to participating candidates, even below the generally established contribution limits for the office in question. In other words, rather than simply match a low figure (for example, five-to-one public matching for the first $100 contributed by any donor), these programs seek to limit the size of contributions can-

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101 Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976) (per curiam) (affirming that a government may “condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations”).

102 See, e.g., Daggett v. Comm’n on Governmental Ethics & Election Practices, 205 F.3d 445, 450 (1st Cir. 2000) (holding that constraints on participating candidates in Maine outweighed effects of releasing them from contribution limits if facing privately funded challengers); Gable v. Patton, 142 F.3d 940, 943 (6th Cir. 1998) (upholding a Kentucky statute that simply released participating candidates from expenditure and contribution limits if facing heavily financed challenger); Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 29 (1st Cir. 1993) (upholding a Rhode Island law that released publicly funded candidates from expenditure and contribution limits if facing overly funded candidate). The portion of the Maine statute that provides for additional funds to a candidate challenged by a privately funded opponent, ME. REV. STAT. tit. 21-A, §§ 1121, 1125(9) (2009), may now fail under *Davis*. The same logic would apply to another bill before Congress, the Clean Money, Clean Elections Act of 2009, H.R. 2056, 111th Cong. (2009), which would provide “fair fight” funds to candidates who are being outspent, see id. § 510.
candidates may receive, even below the threshold deemed not to risk candidate corruption. Moreover, most of these programs have been tried in local elections and in states that are without a history of heavy media expenditures. If public financing is to succeed, it has to provide candidates with enough money to control the agenda of the election campaign, lest candidates be at the mercy of tertiary organizations, such as PACs and political committees operating under section 527 of the tax code, including the panoply of denizens of the Swift Boat or MoveOn.org side of politics.

Paradoxically, the history of BCRA reforms suggests that the influence of money on policy is diminished when candidates and parties have ample access to fundraising. If anything, the 2008 presidential election should invite a revisiting of the reform premises that money is unrelated to participation and that less money is inherently a good thing. Contrary to what may be expected, creating an incentive for candidates to raise more money from more people may actually reduce the clientelist pressures to capture political outputs. One of the keys to fundraising in 2008 was an unheralded but important aspect of BCRA: the significant increase in the amount of hard money available to candidates and parties. The greater opportunity to raise money from individuals combined with the eased ability to reach small donors through the internet. As a result, the 2008 Obama campaign was able not only to raise money prodigiously, but also to engage millions of citizens at the same time. In the process, President Obama raised $745 million and spent $730 million — figures that surpassed the fundraising and expenditure marks of all prior candidates. Those contributions came from nearly four million donors, again more than any prior candidate in American history. While President Obama also re-

103 For example, under one bill currently before Congress, the Fair Elections Now Act, H.R. 1826, 111th Cong. (2009), S. 752, 111th Cong. (2009), participating candidates in a federal clean money program would have to agree to accept no contribution greater than $100 per election cycle, even though the current federal limitation on contributions is $2,400 per election cycle.

104 The argument that excessive restrictions on candidate fundraising promote politics dominated by single-issue special interests is central to the argument in Issacharoff & Karlan, supra note 12.

105 BCRA doubled the amount an individual could contribute to a candidate in each campaign cycle from $1000 to $2000 and raised the amount that could be given to a political party to $25,000. BCRA § 307(a)(1)-(2) (codified at 2 U.S.C. § 441a(1) (2006)). Under BCRA, these limits were also indexed to inflation, id. § 441a(c), and as of January 2010 stood at $2,400 to a candidate and $30,400 to a national party committee. FEC, supra note 87.


ceived a record number of contributions of less than $200 — making up nearly one-quarter of all his fundraising — the vast majority of money raised was from donors outside of the small donor category. Yet the breadth of the fundraising base and the sheer quantity of the amounts raised defy any easy story of corruption of democratic politics. Problems arise when there are only a few large donors, not when there are many donors who may be substantial but not critical. Thus, reforms that create incentives for campaigns to solicit money from more sources may actually be more effective at diminishing the distortive effects of money on public policy than those that seek to limit the amount of money in the system.

B. Clientelist Concerns

An alternative view of corruption, one centered on the ability to command private rewards from public office, yields another prospect both for concern and potentially for reform. The risk of private-regarding legislation is heightened when groups with special holds on government are able to bypass the normal process of interest group bargaining to secure benefits for themselves. Ordinary democratic politics may be a messy and imprecise construct, but the contrast is to the sectional advantage exercised by special groups that have claims both within and without the political process.

Several decades ago, Professors Harry Wellington and Ralph Winter tried to develop this intuition with regard to strikes by public sector unions. In defining what it means to have “a disproportionate share

108 Obama received a greater percentage of donations from small contributors than did previous major party candidates for President. For a comparison of percentages of contributions from small donors, see Press Release, Campaign Fin. Inst., All CFI Funding Statistics Revised and Updated for the 2008 Presidential Primary and General Election Candidates (Jan. 8, 2010), http://www.cfinst.org/Press/PRelases/10-01-08/Revised_and_Updated_2008_Presidential_Statistics.aspx. While the percentage difference was marginal, given the significantly greater amount of total money raised by Obama, see supra note 106 and accompanying text, the raw number of contributions Obama received from small donors was also significantly greater than the number of such contributions past major-party nominees had received.


110 See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 145 (1956) (identifying the “‘normal’ American political process” in terms of “a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision”); JOHN HART ELY, DEMOCRACY AND DISTRUST 135 (1980) (similarly describing the assurances of the democratic process as allowing “any group whose members were not denied the franchise [to] protect itself by entering into the give and take of the political marketplace”).

of effective power in the process of decision.” Wellington and Winter identified the particular danger of actors with dual mechanisms of influence over political outcomes: “[b]oth the political power exerted by the beneficiaries of the services, who are also voters, and the power of the public employee union as a labor organization, then, combine to create great pressure on political leaders either to seek new funds or to reduce municipal services of another kind.”

If we look beyond campaign finance as such, there are other bodies of law, including some current statutes, that partially recognize the similar problem of clientelist-style double claims on the political process, some of which are reflected in current law. Beginning with a 1940 amendment to the Hatch Act, all federal government contractors were prohibited from “mak[ing] any . . . contribution, to any political party, committee, or candidate for public office or to any person for any political purpose or use,” during the period of contract negotiation or performance. That prohibition turns not on the form of organization as a corporation, a partnership, or an individual contractor — indeed, the Tillman Act has prohibited corporate contributions to candidates for federal office since 1907 — but rather on the idea that contractors engage the decisionmaking processes of elected officials in dual fashion, both as voters in the political arena and as entities having special relationships to the same government officials outside the electoral process — the same idea that animated the concern over public employees having a double hold on public policy. While this provision has never come before the Supreme Court, the Court has twice upheld parallel provisions of the Hatch Act against constitutional challenges.

The prohibition on contractor contributions in federal elections continues in force and was largely integrated into the 1974 election re-
forms of the Federal Election Campaign Act of 1971, though somewhat weakened by expressly allowing contractors to make contributions to political activities through PACs. In its current form, federal election law not only prohibits federal contractors from making contributions for any purpose related to a federal election, but the same statute also makes it illegal for anyone “knowingly to solicit” such contributions. Whatever the limitations of current law, the core objective remains to try to insulate politics from the demands of those who would use public power for nonpublic-regarding aims. As with the arguments advanced by Wellington and Winter in the context of public employee strikes, the basic intuition is that claims on the decisions of political officeholders should be played out in the political process and that legal means must be sought to shut down the mechanisms by which politicians are induced to contort the outputs of the political process for the gain of the few at the expense of the many.

In light of Citizens United, the question arises whether the Constitution allows the government to prohibit parties in contractual relations with public bodies not only from contributing to the campaigns of elected officials, but also from directing independent expenditures to elections for the same officials. There is significant constitutional risk in crossing the divide from contributions to expenditures, and the overwhelming body of doctrine reveals a high barrier to any congressional efforts along this line, with only the aging Hatch Act cases offering a safe harbor.

Nonetheless, a prohibition on contractor expenditures in connection with the election of public officials with whom they contract would be premised on the risk of improper conduct rather than on the disfavored status of corporations as such. In Citizens United, the Solicitor General could offer no substantial argument for the use of corporations as the regulated entities, once she abandoned the distortion rationale of Austin. The proffered justification of protecting management misuse of shareholder wealth not only had no foundation in the legislative record, but also prompted the Court to recount that the majority

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122 Id. § 441c(a)(2).
123 On the record presented, Citizens United sweepingly condemned any attempt to limit independent expenditures, at least so long as premised on the theory of quid pro quo corruption: “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” 130 S. Ct. at 909.
124 See id. at 904; id. at 923–24 (Roberts, C.J., concurring).
of business entities that fell under the prohibition were sole proprietorships that by definition could not be subject to agency costs imposed by management.\textsuperscript{125} The Court did not address the longstanding view of Justice Rehnquist that a state that charters a corporation might have free rein to condition the grant of corporate benefits on specified conditions,\textsuperscript{126} including an inability to direct corporate funds to politics; that issue had no application so long as the prohibition was one of federal law, rather than of the law of incorporation.

While \textit{Citizens United} gave new vitality to the fundamental \textit{Buckley} divide between contributions and expenditures, it did not exhaust the possible range of concerns occasioned by the use of private money in politics. When abstracted from the broader rhetoric on the role of corporations, the majority opinion in \textit{Citizens United} is actually less sweeping than it might appear. The Court is concerned only with the inputs to the electoral process, not the outputs of the ensuing legislative process. Thus, in overturning \textit{Austin}, Justice Kennedy concluded that \textit{Buckley} categorically prohibited regulations aimed at “equalizing the relative ability of individuals and groups to influence the outcome of elections.”\textsuperscript{127} Similarly, Justice Kennedy distinguished \textit{Caperton} as distinctly about post-election conduct, not campaign speech: “\textit{Caperton}’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.”\textsuperscript{128}

A tightly drawn prohibition premised on the effects of “pay-to-play” on public policy could potentially survive scrutiny under \textit{Citizens United} as a constitutional first step toward effective campaign finance reform. Moreover, the regulated bodies may welcome such a law as a protection against public officials intent on using their position to solicit funds for campaign expenditures. Such a measure would be only a partial inroad into the accompanying world of lobbying and into the sector of the economy that does not face incumbent state officials as contracting parties but as subjects of regulation.\textsuperscript{129} Likewise, lawmakers may broaden the protections offered by the Hatch Act by prohibit-

\begin{footnotes}
\item[125] Id. at 911 (majority opinion); \textit{cf.} id. at 924 (Roberts, C.J., concurring).
\item[126] First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 823–24 (1978) (Rehnquist, J., dissenting) (“[C]orporations are created] only for the limited purposes described in their charters and regulated by state law. . . . [T]he mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons . . . .” (footnote omitted) (citation omitted)). Though the Court does not address it on its terms, Justice Rehnquist’s position contrasts with the Court’s more categorical assertion that “First Amendment protection extends to corporations.” \textit{Citizens United}, 130 S. Ct. at 899 (citations omitted).
\item[127] \textit{Citizens United}, 130 S. Ct. at 904 (emphasis added) (quoting \textit{Buckley v. Valeo}, 424 U.S. 1, 48 (1976) (per curiam)) (internal quotation mark omitted).
\item[128] Id. at 910.
\item[129] For a new effort by the SEC to combat similar pay-to-play concerns in the regulation of the financial services industry, see \textit{Political Contributions by Certain Investment Advisers}, 75 Fed. Reg. 41,069 (July 14, 2010) (to be codified at 17 C.F.R. \textsection 275.206(4)–(5)).
\end{footnotes}
ing contractors from expenditures through PACs, 527 groups, or bundling efforts without running afoul of the underlying rationale in *Citizens United*. Admittedly, these are partial steps. Nonetheless, such approaches do offer alternative insights into the problem of money, not so much in terms of election outcomes but in terms of public policy. Whether an incumbent Congress would welcome such legislation is another matter.

IV. CONCLUSION

The aim of using campaign finance law to limit the amount and influence of money on elections has run into two barriers, one constitutional and the other practical. Viewed in retrospect, the Supreme Court’s unsatisfying jurisprudence in this area has actually settled on an organizing logic that grants constitutional protection to the ability to spend money in furtherance of electoral speech. That logic may not appeal to reformers, but its failure is not one of incoherence, no matter how difficult the *Buckley* divide proves to be on the implementation side. Modern technology has, if anything, reinforced this constitutional stand because the diffusion of information outlets places a premium on organization and control over content, lest candidates and parties be swamped by well-heeled tertiary organizations and the hysterical poles of the media.

Paradoxically, the most significant reform in *lessening* the role of special interest money in elections may be the one recent reform that actually facilitated the ability of candidates to raise money. The combination of BCRA’s raising of contribution levels and the emergence of internet fundraising did two things: it allowed candidates to raise unprecedented amounts of money in the 2008 election cycle and it incentivized them to raise funds from an unprecedented number of citizens. The combination allowed both greater engagement in the election of 2008 and a strengthened ability of the candidate-driven political message to dominate the electoral debate.

On this view of the aims of the electoral process, *Citizens United* is a distraction of limited consequence. Putting aside the elusive leveling aspiration of equality of all individuals in privately funded campaigns, the question is how to use campaign finance regulation to enhance a competitive electoral system and to guard against the corrosive distortion of political decisionmaking as a means toward incumbent entrenchment. This in turn requires rethinking the incentives toward candidate engagement of the electorate as they compete for office, including in the process of fundraising, and a more nuanced understanding of the corrupting influence of incumbent reelection on the outputs of the political process.
TWO CONCEPTS OF FREEDOM OF SPEECH

Kathleen M. Sullivan*

By holding that corporations may make independent expenditures from their general treasuries advocating the election or defeat of political candidates, 

Citizens United v. FEC

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unleashed a torrent of popular criticism, a pointed attack by the President in the State of the Union address,2 a flurry of proposed corrective legislation in Congress,3 and various calls to overturn the decision by constitutional amendment.4 Political uproar over a 5–4 Supreme Court decision upholding a controversial free speech right is not new; the Court’s two 5–4 decisions upholding a right to engage in symbolic flag burning,5 for example, elicited widespread public condemnation and efforts in Congress to overturn the Court by statute and by constitutional amendment.6

But 

Citizens United

surely marks the first time a controversial victory for

* Former Dean and Stanley Morrison Professor of Law, Stanford Law School; Partner, Quinn Emanuel Urquhart & Sullivan.

1 130 S. Ct. 876 (2010).

2 President Barack Obama, State of the Union Address (Jan. 27, 2010), in 156 CONG. REC. H418 (daily ed. Jan. 27, 2010) (“With all due deference to the separation of powers, last week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests — including foreign corporations — to spend without limit in our elections.”).


4 Professor Lawrence Lessig, for example, has advocated the adoption of a constitutional amendment that would provide: “[n]othing in this Constitution shall be construed to restrict the power to limit, though not to ban, campaign expenditures of non-citizens of the United States during the last 60 days before an election.” Lawrence Lessig, 

Citizens Unite


6 In response to 

Texas v. Johnson

, which invalidated the application to symbolic flag burning of a state criminal statute protecting venerated objects, Congress enacted the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (2006)), which the Court then invalidated as applied in United States v. Eichman. For an account of the origins of the federal statute including a pre-Eichman defense of its constitutionality, see Geoffrey R. Stone, 

Flag Burning and the Constitution

, 75 IOWA L. REV. 111 (1989). Miscellaneous proposals to amend the Constitution to permit prohibition of flag burning failed in Congress, although one commentator thought such an amendment would be less damaging to other First Amendment values than a flag-protective statute. See Frank Michelman, 

Saving Old Glory: On Constitutional Iconography

free speech rights emanated from a majority of Justices conventionally viewed as conservative, over the dissent of four Justices conventionally viewed as liberal, with virtually all political criticism arising from the political left.\(^7\)

Does *Citizens United* mark a reversal in the political valence of free speech? Have liberals grown weary of First Amendment values they once celebrated? Have conservatives flip-flopped and now become free speech devotees? This Comment argues that support for First Amendment values in fact cuts across conventional political allegiances, and that both sides in *Citizens United* are committed to free speech, but to two very different visions of free speech. Where the two visions align, lopsided victories for free speech claims are still possible. For example, last Term in *United States v. Stevens*,\(^8\) the Court voted 8–1 to invalidate the criminal conviction of a purveyor of dogfight videos, reasoning that a federal criminal ban on depictions of animal cruelty was overbroad.\(^9\) But where the two visions diverge, divisions like that in *Citizens United* become sharp.

In the first vision, discussed in Part I, free speech rights serve an overarching interest in political equality. Free speech as equality embraces first an antidiscrimination principle: in upholding the speech rights of anarchists, syndicalists, communists, civil rights marchers, Maoist flag burners, and other marginal, dissident, or unorthodox speakers, the Court protects members of ideological minorities who are likely to be the target of the majority’s animus or selective indifference. A vision of free speech as serving an interest in political equality

\(^7\) While the labels “liberal” and “conservative” are reductive and sometimes incoherent as descriptions of the Justices’ approaches to constitutional decisionmaking, they have become pervasive in popular accounts of the Court and in attempts to quantify its outcomes. See, e.g., Adam Liptak, *The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1 (reviewing political science studies analyzing the positions of Justices across an ideological spectrum, and situating the majority of the current Court at the rightward edge of that spectrum). But see id. at A19 (acknowledging that “[s]cholars quarrel about some of the methodological choices made by political scientists who assign a conservative or liberal label to Supreme Court decisions and the votes of individual justices”).

\(^8\) 130 S. Ct. 1577 (2010).

\(^9\) Id. at 1592. Liberal and conservative Justices similarly align in support of free speech rights in other contexts as well. For example, in the flag-burning cases, see supra notes 5–6 and accompanying text, the majority opinions were joined by “liberal” Justices Brennan, Marshall, and Blackmun as well as by “conservative” Justices Scalia and Kennedy. Such decisions show that the free-speech-as-equality and free-speech-as-liberty theories discussed below sometimes overlap, at least when dissenting groups seek protection against government restraints. The dissents in these cases by Chief Justice Rehnquist and Justice Stevens do not undermine the internal structure of either theory, but simply would have upheld flag-burning bans on the ground that unique interests in preserving a symbol of national unity trumped free speech interests on any theory. See *Eichman*, 496 U.S. at 321–22 (Stevens, J., dissenting); *Johnson*, 491 U.S. at 429–34 (Rehnquist, C.J., dissenting); id. at 436 (Stevens, J., dissenting). While the flag-burning cases united free-speech-as-liberty Justices and free-speech-as-equality Justices in alliance against a nationalist view, *Citizens United* set free speech as liberty and free speech as equality in opposition.
also endorses a kind of affirmative action for marginal speech in the form of access to government subsidies without speech-restrictive strings attached. By invalidating conditions on speakers’ use of public land, facilities, and funds, a long line of speech cases in the free-speech-as-equality tradition ensures public subvention of speech expressing “the poorly financed causes of little people.”

On the equality-based view of free speech, it follows that the well-financed causes of big people (or big corporations) do not merit special judicial protection from political regulation. And because, in this view, the value of equality is prior to the value of speech, politically disadvantaged speech prevails over regulation but regulation promoting political equality prevails over speech.

The second vision of free speech, by contrast, sees free speech as serving the interest of political liberty. On this view, discussed in Part II, the First Amendment is a negative check on government tyranny, and treats with skepticism all government efforts at speech suppression that might skew the private ordering of ideas. And on this view, members of the public are trusted to make their own individual evaluations of speech, and government is forbidden to intervene for paternalistic or redistributive reasons. Government intervention might be warranted to correct certain allocative inefficiencies in the way that speech transactions take place, but otherwise, ideas are best left to a freely competitive ideological market.

The outcome of Citizens United is best explained as representing a triumph of the libertarian over the egalitarian vision of free speech. Justice Kennedy’s opinion for the Court, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, articulates a robust vision of free speech as serving political liberty; the dissenting opinion by Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, sets forth in depth the countervailing egalitarian view. Neither vision, however, entirely eclipses the other in Citizens United; each of the principal opinions pays lip service to the other by invoking the other’s theory in its own cause. And, as Part III illustrates, neither side appears to have fully thought through how its position in Citizens United fits with the broader views its members have expressed about First Amendment rights in other contexts, causing seeming inconsistencies with positions taken in other First Amendment cases last Term. The upshot is that each vision retains vitality for use in other First Amendment contexts.

10 Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

11 See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . . That at any rate is the theory of our Constitution.”).
The tension between these two competing visions — of free speech as serving equality and of free speech as serving liberty — is illuminated by analysis of four possible political reforms that might be considered in the aftermath of the *Citizens United* decision: first, invalidating limits on political contributions directly to candidates; second, allowing independent electoral expenditures by nonprofit but not for-profit corporations; third, increasing disclosure and disclaimer requirements for corporations making expenditures in connection with political campaigns; and fourth, conditioning receipt of various government benefits to corporations on their limiting political campaign expenditures. The first seems initially attractive to libertarians but not egalitarians; the second to egalitarians but not libertarians; the third to both libertarians and egalitarians; and the fourth to libertarians but not egalitarians. As addressed in Part IV, however, a closer look at each alternative reveals significant complexities.

The best view of freedom of speech would combine the free-speech-as-liberty perspective with the egalitarian view’s skepticism toward speech-restrictive conditions on government benefits. Under such a capacious approach, the first and third reforms are preferable to the second and fourth, and any new regulation of political money in the wake of *Citizens United* should abandon source and amount limits or increase disclosure requirements, not distinguish among political speakers or make speech restrictions a price of government largesse.

I. FREEDOM OF SPEECH AS EQUALITY

Because the free-speech-as-equality vision has an older pedigree in the Court’s First Amendment jurisprudence than does the free-speech-as-liberty view, the opinions in *Citizens United* are best discussed in reverse order. Writing for the four dissenters in *Citizens United*, Justice Stevens articulates a view of First Amendment freedom of speech that maps onto an analytic structure familiar from equal protection law. Government classifies all the time, but equal protection jurisprudence treats only certain grounds of differentiation (for example, race, ancestry, national origin, alienage, and qualifiedly gender) as suspect or “invidious,” while treating all others (for example, age, disability, and economic status) as presumptively permissible. Justice Stevens too assumes that differentiation is suspect only if drawn along suspect lines: that is to say, in the free speech context, on the basis of viewpoint or ideas.

The dissent thus relies centrally on the point that limitations on the use of general corporate treasuries for independent expenditures in

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12 *See Kathleen M. Sullivan & Gerald Gunther, Constitutional Law* 500–01 (17th ed. 2010).
support of or in opposition to political candidates are “viewpoint-neutral regulations based on content and identity,” not embodiments of “invidious discrimination or preferential treatment of a politically powerful group.”13 So long as government does not pick and choose among speakers on the basis of viewpoint, Justice Stevens suggests, there is little cause for First Amendment concern: “speech can be regulated differentially on account of the speaker’s identity, when identity is understood in categorical or institutional terms.”14 Accordingly, the dissent would have reviewed source limitations on corporate electoral expenditures deferentially.

The dissent explains that, in its view, the “categorical or institutional” features of corporations that justify Congress’s different treatment of corporations and “natural persons” include their limited liability, perpetual life, separate ownership and control, and ability to accumulate “resources . . . [that] ‘are not an indication of popular support for the corporation’s political ideas.’”15 These features compel corporations to “engage the political process in instrumental terms” in order “to maximize shareholder value,”16 the dissent argues, rather than in terms that advance “any broader notion of the public good.”17

Having described the free speech interests at stake as thus attenuated in light of the “special concerns raised by corporations,”18 the dissent finds the source limitations on corporate independent expenditures easily justified by a government interest in preventing “corruption” of the political process, with “corruption” broadly defined to cover not mere quid pro quo exchanges but something much broader called “undue influence.”19 The Citizens United dissenters would have followed the approach of the majority of the Court in Austin v. Michigan State Chamber of Commerce,20 which allowed the government to prevent “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”21 While Justice Stevens disputes the majority’s characterization of this interest as impermissibly advancing the

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13 *Citizens United*, 130 S. Ct. at 946 (Stevens, J., concurring in part and dissenting in part).
14 Id. at 945.
15 Id. at 971 (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659 (1990)).
16 Id. at 965.
17 Id. at 974 (citing *Austin*, 494 U.S. at 660).
18 Id. at 970.
19 Id. at 962–63. Justice Stevens suggests that the limitations would serve as a backstop to prevent corruption even if defined narrowly, as per the majority opinion, as quid pro quo corruption or the currying of favoritism with candidates through the deployment of independent ads. But he devotes greater energy to arguing that such a narrow definition of “corruption” is too crabbed. See id. at 964–68.
20 494 U.S. 652.
21 Id. at 660 (citation omitted).
“equalization” of speaking power, his own description suggests that it is necessarily redistributive: he argues that source limitations on corporate political expenditures will limit the deployment of resources “on a scale few natural persons can match,” and avert the “drowning out of noncorporate voices” through “corporate domination of the airwaves prior to an election.” Such concerns about the disproportionate influence of corporate speech can be addressed only by reducing the influence that corporate speakers would have if speech were left to private ordering.

Justice Stevens’s dissent thus embodies one deep strand of free speech jurisprudence that might be called free speech as equality. This vision of free speech has both an antidiscrimination component and an affirmative action component. The former bars government from discriminating against marginal, dissident, or unpopular viewpoints that are likely to suffer political subordination or hostility. The latter enforces a kind of preference or forced subsidy for marginal, dissident, or unpopular viewpoints by barring the attachment of speech-restrictive conditions to the receipt of public benefits. On this view, political equality is prior to speech: when freedom of speech enhances political equality, speech prevails; when speech is regulated to enhance political equality, however, regulation prevails. Government may redistribute speaking power so long as it does so along viewpoint-neutral dimensions such as speakers’ structural or institutional features.

Such concerns about the disproportionate influence of corporate speech can be addressed only by reducing the influence that corporate speakers would have if speech were left to private ordering.

The antidiscrimination aspect of this view rests on an understanding that speech is embodied in a kind of ideological hierarchy in which mainstream ideas held widely at any given time by majorities or the socially powerful predominate over the systematically subordinated voices of dissent. Protecting dissent from political suppression offsets

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22 Citizens United, 130 S. Ct. at 957–58 (Stevens, J., concurring in part and dissenting in part); see also id. at 971 n.69.
23 Id. at 974.
24 Id.
25 Id. at 975.
26 Professor Ronald Dworkin, for one, has given a theoretical account of the underpinnings of this free-speech-as-equality view. See RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 121 (2000) (defining liberty as “an aspect of equality rather than, as it is often thought to be, an independent political ideal potentially in conflict with it”); id. at 134 (“We must try to reconcile liberty and equality, if we care for liberty, because any genuine conflict between the two is a contest liberty must lose.”); id. at 371 (allowing “regulation of free speech that improves citizen equality”); see also RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE 69–70 (2006) (“I propose this initial formulation: liberty is the right to do what you want with the resources that are rightfully yours . . . . If we accept this account of liberty, then we must also accept that liberty is not damaged when government restricts freedom if it has a plausible distributive reason for doing so.” (footnote omitted)).
the effects of this hierarchy. The more mainstream, traditional, orthodox, and popular the speech is, the more it will be unrestricted by the government. The more challenging, unusual, or unorthodox speech is, the more government will tend to restrict it. Thus, protecting speech by dissidents and dissenters from regulation serves to equalize the relative opportunities various viewpoints have to influence political and cultural outcomes.

On this view, the World War I espionage cases and the Red Scare cases of the 1910s and 1920s27 erred in allowing the criminalization of speech and association by socialists, anarchists, and communists, but later decisions like Brandenburg v. Ohio28 properly vindicated the principle that government may not prohibit subversive speech unless the speech intentionally incites people to cause imminent and likely serious harm.29 On this view, New York Times Co. v. Sullivan30 correctly constitutionalized state defamation law, requiring a public figure or public official to show actual malice (that the speaker intentionally lied or recklessly disregarded the truth),31 in order to ensure freedom to criticize governing officials and the prevailing orthodoxies they represent.32 And on this view, decisions invalidating criminal bans on flag burning as symbolic protest properly allowed dissidents at the fringes of political debate to vivify their contempt for reflexive and uncritical patterns of patriotism.33

A second line of free-speech-as-equality cases likewise uses the First Amendment to redistribute speaking power, this time by preventing government from conditioning grants of resources on speakers’ curtailment of their speech. By in effect requiring public subsidies for speech in the form of unconditioned access by speakers to government property, jobs, facilities, or funds, such decisions operate as a kind of affirmative action for the speech of politically subordinated speakers. By holding that the mere conferral of public benefits does not entitle the government to condition access on conformity with the government’s preferred views, such decisions require the majority to pay for the expression of minority or dissident views.

The classic paradigm of such an implicit public subsidy for unpopular speech is the protection of speech in the public forum — the
streets, parks, and other public settings that the Court has held must be available for expression of “the poorly financed causes of little people.” \footnote{34} Whether the speaker hands out leaflets or engages in public demonstration, the public is obliged to pick up the costs of cleaning litter from leaflets thrown on the ground\footnote{35} or providing a police cordon to protect the speaker from a violent response by onlookers.\footnote{36} The government may impose a flat user fee to help cover these costs, but may not keep a speaker out of the public square to prevent litter, violence, or the need for a police presence, and may not impose discriminatory fees scaled to the likely unpopularity of the speech.\footnote{37}

The Court has held similarly that unpopular views must be tolerated and, in effect, publicly subsidized in settings involving public jobs, education, or funds. In a line of cases beginning with \textit{Pickering v. Board of Education},\footnote{38} the Court held that a public employee may not be disciplined for expressing views on matters of public concern, as opposed to workplace grievances.\footnote{39} In a line of cases beginning with \textit{Tinker v. Des Moines Independent Community School District},\footnote{40} the Court held that public school students may not be disciplined for expressing dissenting ideas, even in a publicly operated and subsidized setting, as long as they did not cause disruption in class or a cafeteria brawl.\footnote{41} And in a line of so-called unconstitutional conditions cases,\footnote{42} the Court has held that governmental funding may not be made contingent on surrender of otherwise protected entitlements to speak: vet-

\footnote{34} Martin \textit{v. City of Struthers}, 319 U.S. 141, 146 (1943) (finding door-to-door distribution of leaflets “essential” to such causes; see also \textit{Saia v. New York}, 334 U.S. 558, 559–60 (1948) (invalidating an ordinance prohibiting the use of amplification devices without the permission of the police chief after the ordinance was applied to a Jehovah’s Witness); \textit{Hague v. CIO}, 307 U.S. 496, 516 (1939) (opinion of Roberts, J.) (upholding a challenge by a labor union to an ordinance that imposed a permit requirement to hold assemblies in streets and parks).


\footnote{37} See \textit{Forsyth Cnty. v. Nationalist Movement}, 505 U.S. 123, 126, 134–36 (1992) (invalidating a county ordinance requiring demonstrators to pay a fee to obtain a permit for parades and assemblies, on the basis that the costs of such events would “exceed[ ] the usual and normal cost of law enforcement,” \textit{id.} at 126).

\footnote{38} \textit{Id.} at 563 (1968).

\footnote{39} \textit{Id.} at 573–75.

\footnote{40} \textit{Id.} at 503 (1969).

\footnote{41} \textit{Id.} at 512–14.

ers may not be made to swear loyalty oaths in order to receive property tax exemptions, public broadcasting stations may not be made to forswear all editorializing in order to receive public grants, and legal aid providers may not be made to refrain from challenging legislation in the course of representing their clients as the price of receiving federal subsidies. In these cases, more expressly than in the political dissident cases, free speech rulings serve to equalize relative speaking power, forcing the public to subsidize what would otherwise be an unpopular set of views and thus creating a kind of affirmative action for marginal speech.

Against this backdrop, it is possible to return to Justice Stevens’s dissent in *Citizens United* and to situate it in the free-speech-as-equality mode. The dissent finds no equality basis for invalidating the source limitation on corporate political ads — and therefore no basis at all for such a decision. Emphasizing that the source limitation is “viewpoint-neutral” and dismissing as “airy speculation” the majority’s assertion that the limitation is biased in systematic favor of the viewpoint of incumbents, Justice Stevens finds no violation of the anti-discrimination principle. By painting corporations as archetypically large, for-profit corporations with “immense aggregations of wealth” and “vastly more money with which to try to buy access and votes” than individual citizens — and by ignoring the majority’s reminders that many of the nation’s nearly six million corporations are too small to fit this archetype — he finds no basis for any use of the First Amendment to promote affirmative action for their speech. Justice Stevens suggests, therefore, that any interest in political equality is served by the regulation, not the deregulation, of political advertising funded directly from corporate treasuries.

In keeping with speech egalitarians’ general opposition to speech-restrictive conditions on government benefits, Justice Stevens avoids defending source restrictions on corporate electoral expenditures on the ground that corporations exist merely as creatures of the state, and are thus subject to whatever speech-restrictive conditions government

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46 *Citizens United*, 130 S. Ct. at 975 (Stevens, J., concurring in part and dissenting in part).
47 *Id.* at 969.
48 *Id.* at 957 (quoting McConnell v. FEC, 540 U.S. 93, 205 (2003)).
49 *Id.* at 965 (citing Supplemental Brief for the Appellee at 17, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 22193000 at *17 (noting $1.1 trillion combined revenues of Fortune 100 companies during previous election cycle)).
50 *Id.* at 907 (majority opinion). Justice Stevens also would have found media corporations protected by the Free Press Clause and nonprofit advocacy groups protected by the exception from *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). *Citizens United*, 130 S. Ct. at 951–52, 955 (Stevens, J., concurring in part and dissenting in part).
might wish to impose. Justice Stevens might appear in some passages to embrace conditionality: for example, by criticizing the majority for not addressing “whether Citizens United may be required to finance some of its messages with the money in its PAC,”\textsuperscript{51} he may seem to suggest that corporations, unlike individuals, may be required, as a condition of their legally conferred institutional advantages, to incorporate separate entities for the purpose of engaging in electoral speech. But elsewhere, Justice Stevens pointedly insists that “[n]othing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession.”\textsuperscript{52}

Justice Stevens thus distances the dissenters from the strong conditionality that, for example, the late Justice Rehnquist advocated in dissent from First National Bank of Boston v. Bellotti,\textsuperscript{53} which held that Massachusetts could not bar corporations from spending to advance their business interests in a referendum election.\textsuperscript{54} Justice Rehnquist’s dissent argued that the decision erred because a corporation “possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence,” and these properties in his view could not reasonably be read to include any right of political expression.\textsuperscript{55} Justice Rehnquist’s views in Bellotti were part of a consistent statist position that led him to view all recipients of government benefits, whether corporations or recipients of government jobs or grants, as legitimately bound by the strings the government chooses to attach to those benefits.\textsuperscript{56} But in other First

\textsuperscript{51} Citizens United, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part).

\textsuperscript{52} Id. at 971 n.72 (citation omitted); see also id. (noting that Austin’s references to the “state-conferring” advantages of corporations did not determine its holding (internal quotation marks omitted)).

\textsuperscript{53} 435 U.S. 765 (1978).

\textsuperscript{54} Id. at 767.

\textsuperscript{55} Id. at 823 (Rehnquist, J., dissenting) (quoting Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819)). Whether the state-confferred nature of the corporate form establishes grounds for limiting the constitutional rights of corporations is an ancient controversy. See Adam Winkler, Corporate Personhood and the Rights of Corporate Speech, 30 Seattle U. L. Rev. 863, 863–64 (2007) (noting that Dartmouth College reflected not only the view that state chartering of corporations made them “unlikely holders of so-called rights against the government” but also the view that corporations existed as a result of contracts entered into by “real individuals” who have “constitutional rights against the state”). For the view that, today, “[t]he state-creation or state-privilege theory is deeply flawed as a justification for denying First Amendment protection to corporate speech” because “[c]orporate features are adopted by private contract rather than as a result of legislative favor as they were at the time of Dartmouth College,” see Larry E. Ribstein, Corporate Political Speech, 49 Wash. & Lee L. Rev. 109, 121 (1992).

\textsuperscript{56} See, e.g., Rust v. Sullivan, 500 U.S. 173, 194 (1991) (Rehnquist, C.J.) (upholding family planning subsidies conditioned on forgoing advocacy or counseling of abortion on the ground that, “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program”); FCC v. League of Women Voters, 468 U.S. 364, 402–03 (1984) (Rehnquist, J., dissenting) (objecting to the majority’s holding that the government may not condition public broadcasting subsidies on refraining from editorializing, suggesting that the majority
Amendment contexts, Justice Stevens and other members of the *Citizens United* dissent have been equally consistent in rejecting the position that government may impose speech-restrictive conditions on any “privileges” it accords — whether public space, education, jobs, funds, or corporate charters.\(^{57}\) The dissent’s careful avoidance of a corporate privilege theory of why source restrictions are constitutional therefore is plausibly read as a conscious refusal to undermine unconstitutional conditions precedents in other contexts.\(^{58}\)

Justice Stevens underscores the dissent’s reliance on political equality norms in opining that “corporations have no consciences, no beliefs, no feelings, no thoughts, no desires.”\(^{59}\) At first glance, this seems to be an allusion to an alternative theory of free speech as liberty (quite different from the one followed by the majority) — one holding that the First Amendment protects “self-expression”\(^{60}\) or “self-realization,”\(^{61}\) values that inhere only in natural persons. Such concerns may seem alien to a free-speech-as-equality theory, where a speaker’s ontological makeup should not matter because the focus is on relative differentials among speakers in their resources and capacity for public influence. But Justice Stevens clarifies that his focus on corporate personhood is ultimately relevant less to a theory of self-expression than to whether an entity possesses the preconditions for raising an equality claim. He writes that corporations are “not themselves members of ‘We the People’” who constitute the voting public,\(^{62}\) and concludes that, if corporate treasury spending on political ads is inhibited, “no one’s

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\(^{57}\) See supra notes 34–45 and accompanying text.

\(^{58}\) Further support for this reading is found in Justice Stevens’s disagreement with the majority that previous speaker-based limits on the speech of public school students and public employees can be upheld simply as a condition of the government’s engagement in a “governmental function” — that is, as conditions on the “privilege” of attending public schools or holding public jobs. *Compare Citizens United*, 130 S. Ct. at 899–900, and *id.* at 946 n.46 (Stevens, J., concurring in part and dissenting in part), with *id.* at 971 n.72.

\(^{59}\) *Id.* at 972 (Stevens, J., concurring in part and dissenting in part).

\(^{60}\) *Id.*


\(^{62}\) *Id.*
autonomy, dignity, or political equality has been impinged upon in the least.\textsuperscript{63}

Finally, the dissent’s grounding in an equality-based view of speech is evident from its discussion of desirable end states in the distribution of political ideas. Justice Stevens distinguishes the “instrumental”\textsuperscript{64} speech of corporations from speech, presumably of other factions of citizens, that is oriented toward “the public good.”\textsuperscript{65} He suggests that “corporate domination” of the airwaves before elections will “drown[]” out noncorporate voices.\textsuperscript{66} He thus seems to assume that some baseline of minimally necessary diversity in political viewpoints is an essential precondition to democratic self-government.\textsuperscript{67} If corporations speak univocally in favor of positions that advance the interests of their shareholders, the dissent intimates, this baseline will be unachievable. This position partially echoes the decision in \textit{Red Lion Broadcasting Co. v. FCC},\textsuperscript{68} in which the Court rejected a First Amendment challenge to the FCC’s then-extant “fairness doctrine” requiring broadcasters to furnish free air time for replies to on-air political attacks.\textsuperscript{69} Starting from the assumption that the now–technologically obsolete fact of broadcast spectrum scarcity conferred monopoly power upon broadcast licensees, \textit{Red Lion} suggested that, absent compelled access for reply, such licensees could “drown[]” out the voices of those who could not afford access to the airwaves without governmental assistance\textsuperscript{70} and thus prevent an environment in which “representative community views on controversial issues” could be voiced and heard.\textsuperscript{71} Similarly, on the \textit{Citizens United} dissent’s view, political

\textsuperscript{63} Id. (emphasis added).
\textsuperscript{64} Id. at 965. For elaboration of the view that corporate speech is necessarily instrumental because corporate managers are legally obligated to pursue profit maximization on behalf of shareholders, see Daniel J.H. Greenwood, \textit{Essential Speech: Why Corporate Speech Is Not Free}, 83 IOWA L. REV. 995, 1001–04 (1998), which argues that such a limited perspective undermines any corporate claim to speech rights.
\textsuperscript{65} \textit{Citizens United}, 130 S. Ct. at 974 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{66} Id.
\textsuperscript{67} See id. at 977 (“[The ruling] will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process. Americans may be forgiven if they do not feel the Court has advanced the cause of self-government today.”).
\textsuperscript{68} 395 U.S. 367 (1969).
\textsuperscript{69} Id. at 370–71.
\textsuperscript{70} Id. at 387 (analogizing to sound trucks).
\textsuperscript{71} Id. at 394. Writing for the Court, Justice White grounded the decision in one very specific market failure — the monopolies that resulted from the technological fact of spectrum scarcity — and expressly declined to reach the broader theory propounded in the case: [Q]uite apart from scarcity of frequencies, . . . Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public.
equality is advanced by governmental regulation limiting corporate incentives to decrease the diversification of electoral debate.

In short, the dissent conceives of speech rights as protected to the extent that they serve the end of political equality, and regulable to the extent that political equality cuts the other way. Implicitly invoking the paradigms of equal protection law, the dissenters would strike down laws that discriminate against, or that use government benefits to exact orthodoxy from, speech interests that are subordinated or disadvantaged in the private order. But they do not see free speech norms as protecting speakers who occupy positions of relative wealth, prestige, or power in the private speech order, and see redistributive regulation of such speakers as readily defensible from First Amendment attack.

II. FREEDOM OF SPEECH AS LIBERTY

Now contrast the very different concept of free speech expressed in Justice Kennedy’s opinion for the majority of the Court in Citizens United as well as in Chief Justice Roberts’s and Justice Scalia’s concurrences. In this view, the Free Speech Clause serves the end of liberty, checking government overreaching into the private order. Government regulation is suspect not only when it discriminates among viewpoints, as in the free-speech-as-equality view, but also when it discriminates among speakers or seeks to equalize their speaking power. On this view, the audience of citizen listeners is best situated to evaluate political speech without government intervention aimed at reshaping the dialogue or achieving some preferred distributional end state in which the government deems speaking power sufficiently diversified.

This view of free speech as liberty starts from a textual interpretation of the Free Speech Clause as “written in terms of ‘speech,’ not speakers.” But unlike clauses that aim to protect “persons” from government deprivations or coercion, the Free Speech Clause states that “Congress shall make no law . . . abridging the freedom of speech,” without mentioning “persons” or denominating any ontological prerequisites for who or what may invoke its protection. The clause thus

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_id. at 401 n.28 (citation omitted). This theory has some resonance with the dissenters’ view in Citizens United. In supporting government intervention to improve any given distribution of speaking power, the free-speech-as-equality view assumes that “there is no ‘natural’ version of public dialogue that the First Amendment could prohibit the government from distorting.” C. Edwin Baker, Turner Broadcasting: Content-Based Regulation of Persons and Presses, 1994 SUP. CT. REV. 57, 85.

72 Citizens United, 130 S. Ct. at 929 (Scalia, J., concurring).

73 See, e.g., U.S. CONST. amend. V (Due Process and Self-Incrimination Clauses).

74 Id. amend. I.
suggests that its core concern is negative rather than affirmative — to restrain government from “abridging . . . speech” rather than to protect “rights” that require the antecedent step of identifying appropriate rights holders.

On this reading, the clause is indifferent to a speaker’s identity or qualities — whether animate or inanimate, corporate or nonprofit, collective or individual. To the extent the clause suggests who or what it protects, it suggests that it protects a system or process of “free speech,” not the rights of any determinate set of speakers. If this interpretation requires an ultimate foundation in the rights of individuals, corporations enable individuals to “speak in association with other individual persons,” banding together in a “common cause.”

In this understanding of freedom of speech, both governmental redistribution of speaking power and paternalistic protection of listeners from the force of speech are illegitimate ends that, as a categorical matter, cannot justify political speech regulation. On this view, government may not attempt to shift relative influence among private speakers any more than it may give relative preference to some ideas. True to this perspective, the Citizens United majority rejects redistribution of speaking power as a permissible justification for limiting corporate treasury expenditures on political ads. After quoting the canonical sentence from Buckley v. Valeo stating that “[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,” Justice Kennedy’s opinion for the Court

76 Id. at 928 (Scalia, J., concurring) (emphasis omitted). While Chief Justice John Marshall famously wrote in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), that “[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law,” he also wrote that “[i]t is chiefly for the purpose of clothing bodies of men, in succession, with . . . qualities and capacities, that corporations were invented, and are in use.” Id. at 636.
77 If the dissent’s analysis maps onto the structure of equal protection law, the majority’s maps onto the structure of substantive due process analysis — albeit pre–New Deal. Just as Lochner v. New York, 198 U.S. 45 (1905), invalidated maximum-hours laws for bakers (holding that neither the redistributive end of leveling inequalities of bargaining power between employers and employees nor the paternalistic end of protecting employees from accepting bad bargains may justify such a law, see id. at 64), the Citizens United majority reiterates that the First Amendment itself forecloses government redistribution of speaking power and expresses skepticism toward any view that government may regulate corporate speech to protect listeners from their possible responses to political ads. For the insight that the commercial speech cases similarly track the antidistribution and antipaternalist rationale of Lochnerian substantive due process, see Thomas H. Jackson & John Calvin Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 VA. L. REV. 1, 30–33 (1979), which criticizes this approach.
78 424 U.S. 1 (1976) (per curiam).
79 Citizens United, 130 S. Ct. at 904 (quoting Buckley, 424 U.S. at 48–49) (internal quotation marks omitted).
takes the crucial step of equating Austin's purportedly distinct "anti-distortion" rationale with just such a forbidden form of redistribution,\textsuperscript{80} concluding that "Austin interferes with the 'open marketplace' of ideas protected by the First Amendment."\textsuperscript{81}

Justice Kennedy likewise rejects as impermissibly paternalistic any alternative reading of the "antidistortion" interest as protecting voters from corporate advice "on which persons or entities are hostile to their interests," stating that "the people" should be trusted "to judge what is true and what is false."\textsuperscript{82} And he finds the government’s asserted interest in "protecting dissenting shareholders from being compelled to fund corporate political speech" — also a paternalistic justification — insufficient to save the source limitations because such an end is readily served by other means, which could include changing state corporate governance laws to increase the opportunities for shareholders to control whether and in what amounts and to what ends corporate political expenditures will be made.\textsuperscript{83} On this antipaternalistic view, government must leave speakers and listeners in the private order to their own devices in sorting out the relative influence of speech.\textsuperscript{84}

The only interest the majority opinion concedes might be a legitimate (nonredistributive, nonpaternalistic) ground for limiting corporate treasury-funded political ads is the prevention of the narrow quid pro quo corruption of candidates that the Court recognized in Buckley and its progeny as justifying limits on contributions to candidate campaigns.\textsuperscript{85} Even on the free-speech-as-liberty view, specific exchanges of ads for legislative action might permissibly be regulated to ensure allocative efficiency in the political marketplace.\textsuperscript{86} The funder of an ad known to a legislator who benefits from that ad might enter a virtual transaction that enhances efficiency between the two of them, but that lowers social welfare by contributing to private-regarding legislative priorities. The Citizens United majority, while assuming that preventing such transactions is permissible, views source regulations on corporate independent expenditures as insufficiently tailored to any such end: "Here Congress has created categorical bans on speech that are asymmetrical to preventing quid pro quo corruption."\textsuperscript{87} To dispel

\textsuperscript{80} See id. at 905.
\textsuperscript{81} Id. at 906 (citations omitted).
\textsuperscript{82} Id. at 907.
\textsuperscript{83} Id. at 911.
\textsuperscript{84} See id. at 899 ("The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.").
\textsuperscript{85} See id. at 908–11.
\textsuperscript{86} Lochner accepted that protecting public health from unsafe bread or diseased workers was a permissible end, unlike redistributive or paternalistic ends, but found the law too poorly tailored to fit it. See Lochner v. New York, 198 U.S. 45, 57, 62 (1905).
\textsuperscript{87} Citizens United, 130 S. Ct. at 911.
any doubt left by open-ended phrases in prior opinions, Justice Kennedy states that “we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption” as a categorical matter.88

Like Justice Stevens’s dissent, Justice Kennedy’s majority opinion in Citizens United reflects a vision of free speech already embedded in a well-developed strand of the Court’s First Amendment jurisprudence. This libertarian strand, unlike the egalitarian strand from which Justice Stevens draws support, views free speech as a system involving the free flow of information rather than as a set of rights possessed by individual speakers. And it rejects governmental efforts to alter the relative balance of speaking power in the private order, treating redistributive limits on speech and paternalistic protection of listeners as cardinal First Amendment sins.

The commercial speech cases — beginning with Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,89 which invalidated a law regulating pharmacists that effectively barred the truthful advertisement of drug prices90 — illustrate this approach. Under Virginia State Board, the First Amendment precludes the government from keeping consumers in ignorance of truthful information because it thinks it knows better than they do what is good for them.91 While the case was litigated by consumer protection advocates and others seeking to lower drug prices by lowering information costs,92 corporate speakers soon became the principal beneficiaries of subsequent rulings that, for example, struck down restrictions on including alcohol content on beer can labels,93 limitations on outdoor tobacco advertising near schools,94 and rules governing how compounded drugs may be advertised.95

If the commercial speech cases reject paternalistic justifications for limiting speech, a second line of cases in the free-speech-as-liberty strand rejects government efforts to equalize speaking power by regulating expressions of racism and other practices that reinforce social hierarchy. For instance, in R.A.V. v. City of St. Paul,96 the Court

88 Id. at 909.
90 See id. at 770.
91 See id. (“It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.”).
92 See Virginia State Board, 425 U.S. at 748–49.
unanimously struck down a city ordinance that prohibited the display of symbols tending to arouse anger, hatred, or alarm on the basis of race, reasoning in the principal opinion that, even if antidiscrimination laws may alter racially discriminatory conduct, a similar leveling approach is not permissible with respect to expression of racist views or ideas. On the free-speech-as-liberty view, government may not assume authority to denominate some hateful expression false, and racist speech or symbols may not be suppressed on the paternalistic assumption that they silence their victims; members of subordinated groups and their allies should be counted on to talk back.

A third line of cases in this strand further supports the idea that free speech protects a system of private ordering — and only a system of private ordering — by increasingly rejecting the unconstitutional conditions claims that the free-speech-as-equality view generally accepts to ensure affirmative action for disadvantaged speech. In recent Terms, speakers frequently have lost challenges to speech-restrictive conditions applicable to using public property, holding a public job, attending public school, or receiving public funds.

In public forum cases, for example, the Court has held that the free speech rights that proselytizers and leafleters enjoy in public streets and parks do not extend to public facilities deemed nonpublic forums — including airports, post office sidewalks, teacher mailboxes, and government workplace charitable campaigns — in all of which government may define permissible modes or topics of speech.

98 See R.A.V., 505 U.S. at 391–92.
100 See id. at 249–50.
101 See Charles R. Calleros, Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun, 27 ARIZ. ST. L.J. 1249, 1257–63 (1995). The result in R.A.V. was unanimous, and the decision can be explained on free-speech-as-equality as well as free-speech-as-liberty grounds; the R.A.V. regulation can be viewed as impermissible on political equality grounds because it was drawn on the basis of viewpoint and thus violated First Amendment equal protection for ideas. See supra pp. 146–47.
104 See Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007).
105 See Rumsfeld v. Forum for Academic & Inst’l Rights, Inc., 547 U.S. 47, 70 (2006). But see id. at 60 (“As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do — afford equal access to military recruiters — not what they may or may not say.”).
and may discriminate on the basis of speaker identity. In public employee cases, the Court has held that the speech rights of government employees do not extend to expression of internal workplace dissent or speech critical of government within the scope of official duties. In the public education context, the Court has rejected a free speech claim by a student who unfurled a banner proclaiming “BONG HiTS 4 JESUS” at a school-organized outdoor event as inconsistent with the school system’s antidrug policy even though the student’s actions caused no material disruption. And in public funding cases, the Court has held that, within broad limits, government may dictate the contours of the programs it funds, thus rejecting free speech claims by doctors seeking to accept federal family planning funds without having to forgo providing abortion counseling, by artists seeking to be free of restrictions on national arts grants exhorting them to decency, and by law school faculties seeking to exclude military recruiters under their nondiscrimination policies without costing their universities a campus-wide loss of federal funds under the so-called Solomon Amendment.

These decisions, like the commercial speech and anti–hate speech cases, distinguish free speech as liberty from free speech as equality. Unlike decisions invalidating, as unconstitutional conditions, speech restrictions on public benefits, these decisions embody a view that the First Amendment may invalidate government regulation of speech by those who have their own resources, but does not compel government support enabling a speaker who depends upon government resources to defy the government’s own preferred approach. As Justice Holmes famously quipped when upholding the dismissal of a loquacious Boston police officer, “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” Or as Justice Scalia wrote, concurring in the judgment in the arts funding case, “Avant-garde artistes such as respondents remain entirely free to épater les bourgeois; they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it.” Such quips reflect a rejection of the view that government has any affirmative obligation under the Free Speech Clause to underwrite the speech

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112 See Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).
118 Finley, 524 U.S. at 595–96 (footnote omitted).
of those who defy the majority’s resource-backed expression of ideological preferences.

With this backdrop in place, it is possible to return to the majority opinion in *Citizens United* and to situate it in the free-speech-as-liberty approach. To begin with, Justice Kennedy’s opinion expresses a deep antipaternalism. Echoing earlier dissents in campaign finance decisions, he stresses that whether corporate political ads are unduly toxic or enlightening is a judgment to be left to the evaluation of citizens: “The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”

In keeping with the premises of the libertarian view, Justice Kennedy assumes that corporate political advocacy arises in a highly competitive private order, painting the corporate sector as containing a large number and a wide range of speakers of diverse interests and viewpoints, rather than an entrenched hierarchy supposedly dominated by immense aggregations of concentrated wealth, as the dissent depicts. In the majority’s view, these background conditions foreclose any justification that the government’s structural intervention to redistribute speaking power is warranted on grounds of market failure.

Thus, in contrast to Justice Stevens’s focus on the archetype of large for-profit corporations, Justice Kennedy emphasizes that a very large percentage of the nation’s 5.8 million for-profit corporations “are small corporations without large amounts of wealth” and with relatively few employees and modest revenues. Conscripting the free-speech-as-equality view rhetorically in its own cause, the majority goes so far as to suggest that eliminating expenditure restrictions on corporations will itself have an equalizing effect, enabling independent expenditures by small corporations to gain some competitive purchase against the influence that large corporations wield through lobbying and that wealthy individuals levy through independent campaign expenditures.

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119 See, e.g., McConnell v. FEC, 540 U.S. 93, 286 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part) (“The First Amendment guarantees our citizens the right to judge for themselves the most effective means for the expression of political views and to decide for themselves which entities to trust as reliable speakers.”).

120 *Citizens United*, 130 S. Ct. at 899.

121 See id. at 904–08, 910.

122 Id. at 907.

123 Id. at 908 (“Even if § 441b’s expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although smaller corporations may not have the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. Yet certain disfavored associations of citizens — those that have taken on the corporate form — are penalized for engaging in the same political speech.” (citation omitted)).
Justice Kennedy also emphasizes that the universe of corporations includes “television networks and major newspapers owned by media corporations,” which operate as “salient” sources of political speech and which might be undermined as checks on government tyranny if equalization rationales were found to be a permissible basis under the First Amendment for limiting corporate expenditures in general.\(^{125}\)

While the dissent downplays such concerns in light of the statutory exception media corporations enjoyed under the invalidated federal election law provisions,\(^{126}\) Chief Justice Roberts interjects in his concurrence that freedom of speech for media corporations is too important to “public discourse” to be “simply a matter of legislative grace.”\(^{127}\)

Consistent with the free-speech-as-liberty view’s central distinction between the use of public and private resources, the majority also appears to accept that government may impose speaker-based distinctions upon speakers who are dependent on government resources, even as it invalidates speaker-based distinctions aimed at corporations’ political expenditures from their own general treasuries. Justice Kennedy distinguishes a series of cases involving public school students, prisoners, military personnel, and civil servants on which the dissent relies to argue that speaker-based restrictions based on institutional characteristics of the speakers have been found to arouse no serious First Amendment concern.\(^{128}\) In Justice Kennedy’s words, these cases do not apply because they “stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech.”\(^{129}\) Free speech as liberty condemns only distinctions among speakers operating with private resources as a form of improper government interference in the private order.\(^{130}\)

In short, the majority opinion and concurrences in *Citizens United* see freedom of speech as forbidding the reordering of private political speech for redistributive or paternalistic reasons, reflecting a fear that government intervention is a more pernicious threat to the distribution...
of speech than is any supposed vast accumulation of private capital. The government remains free, however, to place conditions on those dependent on public resources for their ability to speak.

III. ALIGNMENTS AND TENSIONS BETWEEN THE COMPETING VISIONS OF FREE SPEECH

It is now possible to discuss several complexities in this account of the clash between the visions of free speech as equality and free speech as liberty. The two accounts sometimes converge, and adherents of each view sometimes seem to take contrary positions.

First, in some categories of cases, such as those in which dissenting groups seek protection against government restraints, free-speech-as-equality and free-speech-as-liberty theories point in the same direction. To return to the example of flag burning, free speech egalitarians reject bans on flag burning because flag burning is a powerful condemnation of prevailing orthodoxy, and free speech libertarians do so because government is not entitled to pass judgment on the value of dissenting ideas. The same can be said of the Court’s unanimous decision protecting subversive advocacy by fringe groups from punishment as incitement absent intentional risk of imminent serious harm. And in R.A.V. v. City of St. Paul, free-speech-as-equality Justices likewise joined free-speech-as-liberty Justices in invalidating a regulation of racist symbols.

In such cases, the egalitarian and libertarian positions converge in support of a strong prohibition on viewpoint discrimination. Acceptance of this canonical principle places a significant limitation on the free-speech-as-equality approach of members of the current Court compared with other, more aggressive equality-based approaches to the First Amendment that might be imagined. For example, free-speech-as-equality proponents might argue that regulations promoting equality should trump speech even where they draw viewpoint-based distinctions — such as where government discriminates against a

131 See supra note 9.
133 Compare R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (invalidating the ordinance because it was drawn along impermissible lines of viewpoint and subject matter), with id. at 413–14 (White, J., concurring in the judgment) (arguing that the ordinance should have been invalidated on the basis of overbreadth because it swept in protected speech causing anger or resentment in addition to symbols akin to unprotected fighting words), id. at 416 (Blackmun, J., concurring in the judgment) (same), and id. at 417 (Stevens, J., concurring in the judgment) (same).
134 For explication and defense of the strong prohibition on viewpoint discrimination even in cases where viewpoints are sought to be suppressed for egalitarian ends, see Elena Kagan, Regulation of Hate Speech and Pornography After R.A.V., 60 U. CHI. L. REV. 873, 874–83 (1993); Geoffrey R. Stone, Comment, Anti-Pornography Legislation as Viewpoint-Discrimination, 9 HARV. J.L. & PUB. POL’Y 461 (1986).
viewpoint held by powerful rather than marginalized or dissident
groups.\textsuperscript{135}

On such a super-egalitarian view of free speech, obscenity laws
aimed at limiting speech appealing to the “prurient interest” might
be invalidated while antipornography ordinances aimed at curtailing
the subordination of women might be upheld.\textsuperscript{136} These two kinds
of regulation alike view sexually graphic speech as shaping and re-
forcing social structures and attitudes — not as mere individual
transactions whose effects are confined to each consumer in iso-
lation.\textsuperscript{137} But obscenity statutes treat obscene speech as a minority
perspective that deviates from and undermines socially predominant
norms channeling sexuality into monogamous heterosexual mar-
riage,\textsuperscript{138} while feminist antipornography ordinances view pornography
as itself embodying predominant social practices of sexism.\textsuperscript{139} Free
speech as liberty condemns both types of law as involving impermis-

\textsuperscript{135} Under such an approach, \textit{R.A.V.} would have come out the other way, upholding a regulation
that was explicitly drawn to limit the power of prevailing patterns of social hierarchy. Such an
approach would resemble the premise that the Equal Protection Clause should not prevent politi-
cal majorities from discriminating against themselves by providing race-based preferences to
traditionally disadvantaged minorities. \textit{See} \textit{John Hart Ely, Democracy and Distrust} 170–
72 (1980). For a rare illustration of such a super-egalitarian approach to freedom of speech, see
\textit{Beauharnais v. Illinois}, 343 U.S. 250 (1952), which upheld a criminal group libel law prohibiting
racial vilification, a practice of predominant social groups toward subordinated minorities. \textit{Id. at}
266. \textit{Even Beauharnais}, however, expressed its justification for such a law in terms of injury to
reputation rather than suppression of dominant ideology. \textit{See id. at} 253, 255 n.5.

\textsuperscript{136} \textit{Compare} \textit{Miller v. California}, 413 U.S. 15, 24 (1973) (holding that obscenity statutes may be
consistent with the First Amendment in some cases, and setting out guidelines for this determina-
tion), and \textit{Paris Adult Theatre I v. Slaton}, 413 U.S. 49 (1973) (upholding obscenity statutes under-
stood to protect the “total community environment,” \textit{id. at} 58, and predominant notions of sexual-
ity as “central to family life[ and] community welfare,” \textit{id. at} 63), \textit{with Am. Booksellers Ass’n v.
Hudnut}, 771 F.2d 319, 324 (7th Cir. 1985), \textit{aff’d mem.}, 475 U.S. 1001 (1986) (invalidating an Indi-
anapolis ordinance penalizing the production and sale of pornography defined as “the graphic
sexually explicit subordination of women” (quoting \textit{Indianapolis, Ind., Code} § 16-3(6) (1984)
(internal quotation mark omitted)).

\textsuperscript{137} \textit{See Paris Adult Theatre I}, 413 U.S. at 59 (“W]hat is commonly read and seen and heard
and done intrudes upon us all, want it or not.” (quoting Alexander Bickel, \textit{On Pornography II:
mark omitted)); \textit{Hudnut}, 771 F.2d at 329 (“W]e accept the premises of this legislation. Depictions
of subordination tend to perpetuate subordination [and] . . . harm[] women’s opportunities for
equality and rights . . . . “ (quoting \textit{Indianapolis, Ind., Code} §§ 16-1(a)(2)) (internal quotation
mark omitted)); Catharine A. MacKinnon, \textit{Pornography, Civil Rights, and Speech}, 26 \textit{Harv. C.R.-
C.L. L. Rev.} 1, 7–8 (1985) (“P]ornography constructs the social reality of gender . . . . Refusing to
look at what has been substantively done will institutionalize inequality in law . . . .“).

\textsuperscript{138} \textit{See Miller}, 413 U.S. at 45 n.9 (Douglas, J., dissenting) (“[E]nglish obscenity law was some-
times] simply a roundabout modern method to make heterodoxy in sex matters and even in reli-
gion a crime.” (quoting \textit{Zehariah Chafee, Jr., Free Speech in the United States} 151 (1969)) (internal quotation
mark omitted)).

\textsuperscript{139} \textit{See Hudnut}, 771 F.2d at 329 (“P]ornography is central in creating and maintaining sex as a
basis of discrimination.” (quoting \textit{Indianapolis, Ind., Code} § 16-1(a)(2)) (internal quotation
mark omitted)).
ble government control over private responses to sexual speech. But free speech as equality might be invoked to uphold regulation aimed at reducing the power of a highly profitable commercial pornography industry to reinforce prevailing discriminatory economic and social patterns by eroticizing the subordination of women. Because even free-speech-as-equality Justices generally accept the prohibition on viewpoint discrimination, however, this possible divergence from the liberty view remains largely theoretical.

A second complexity in the clash between the liberty and equality approaches arises with respect to conditioning government benefits on forfeiture of speech rights. Typically, free-speech-as-equality Justices reject conditionality while free-speech-as-liberty Justices permit it, the latter seeing the First Amendment as protecting private resources, but not public resources, from government constraint. But in an important subspecies of cases involving religious groups’ access to government programs, including last Term’s decision in Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez (CLS), the roles appear reversed. Liberal Justices who usually favor free speech as equality defended denials of access to government subsidies, while conservative Justices who usually favor free speech as liberty argued that if the government funds some viewpoints, it must also fund religious viewpoints and must not impose conditions that interfere with expression of such viewpoints. Such a topsy-turvy lineup also characterized the decision in Rosenberger v. Rector and Visitors of University of Virginia, in which a conservative majority invalidated the exclusion of a Christian evangelical magazine from a student activities program at a public university, over the dissent of liberal Justices objecting that the university should be free to exclude the subject matter of religion from its subsidies.

In CLS, all members of the Citizens United dissent plus Justice Kennedy joined a majority decision by Justice Ginsburg that rejects a First Amendment challenge to a public university law school’s refusal to recognize and fund a Christian student organization that excludes

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140 This perspective assumes that obscenity statutes might be understood as regulating viewpoints for their offensiveness to predominant norms, rather than, as under current obscenity law, a category of speech presumptively subject to regulation because it has little value. See Miller, 413 U.S. at 26.

141 The super-egalitarian approach to the First Amendment on display in Beauharnais was rejected in R.A.V. and Hudnut, which invalidated statutes that aimed at serving principles of equality but did so in an impermissibly viewpoint-discriminatory way. See R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992); Hudnut, 771 F.2d at 325.

142 130 S. Ct. 2971 (2010).


144 See id. at 845–46.

145 See id. at 895–97 (Souter, J., dissenting).
gay students from membership and leadership positions. The majority opinion takes the classic conditionality view typically associated with free speech as liberty: “[O]ur decisions have distinguished between policies that require action and those that withhold benefits,” and here, by declining to recognize CLS as an official student organization because it did not welcome all comers, Hastings was merely “dangling the carrot of subsidy, not wielding the stick of prohibition.”146 In such statements, Justice Ginsburg might well have been channeling the late Chief Justice Rehnquist.147 By contrast, the dissenting Justices — all members of the free-speech-as-liberty majority in Citizens United — would have invalidated the conditioning of official inclusion in the Hastings program upon CLS’s renunciation of its own faith-based opposition to homosexuality, reasoning that, given the breadth of the university forum, using the leverage of the university program was indistinguishable from imposing an all-comers policy on “private groups . . . off campus.”148

It is possible that such contrarian lineups on free speech subsidies as applied to religious organizations reflect the peculiar features of religious speech: to conservatives, religious minorities may appear particularly vulnerable to persecution and marginalization by mainstream secular forces, and thus in need of affirmative action for their speech through compelled subsidies; to liberals, the Establishment Clause may give the government special reason to exclude religious speakers from public programs lest it impermissibly appear to give them its imprimatur.149 It is also possible that in such cases, the respective Justices’ substantive commitments (to the importance of equality for gay people or to the importance of robust religious organizations) trump their transsubstantive commitments to the free-speech-as-equality or free-speech-as-liberty paradigms. But at a minimum, this line of cases is a reminder that, in other settings like campaign finance, arguments for and against conditionality of government benefits may arise from unexpected quarters.

146 CLS, 130 S. Ct. at 2986; see id. at 2984–86 (situating the Hastings program in the line of “limited-public-forum” cases allowing viewpoint-neutral delimitations of content permissible in public programs and facilities); see also id. at 2997 (Stevens, J., concurring) (emphasizing that the Hastings program is a “limited forum — the boundaries of which may be delimited by the proprietor” (emphases omitted)).
147 See supra note 56 and accompanying text.
148 CLS, 130 S. Ct. at 3014 (Alito, J., dissenting).
149 Rosenberger, for example, rejected an alternative argument that exclusion of the evangelical magazine was required by the Establishment Clause. See 515 U.S. at 837–46.
IV. THE AFTERMATH OF CITIZENS UNITED THROUGH LIBERTARIAN AND Egalitarian Lenses

In view of the clash in the Citizens United opinions over the competing equality and liberty visions of freedom of speech, what possibilities for legislative reform of the campaign finance system exist in the wake of the decision? And how would Justices in each camp respond if they were adopted and subjected to First Amendment challenge?

Four main possibilities warrant discussion: first, invalidating limits on political contributions directly to candidates; second, invalidating restrictions on independent electoral expenditures by nonprofit but not for-profit corporations; third, increasing disclosure and disclaimer requirements for corporations making expenditures in connection with political campaigns; and fourth, conditioning various government benefits to corporations on their limiting political campaign expenditures. Each is a useful lens through which to analyze the competing libertarian and egalitarian visions. And each helps to reveal and illuminate important complexities within each camp.

A. Invalidating Contribution Limits

To begin with a proposition that has garnered virtually no public discussion in the wake of Citizens United, and that is very likely a political nonstarter, Congress remains free to unwind the path that has led to this point in the nation’s campaign finance history by simply eliminating contribution restrictions on hard money contributed directly to candidates. This change would disregard the various distinctions Buckley v. Valeo drew between political campaign contributions and independent expenditures in the course of upholding amount limits on the former but not the latter.150 Citizens United carefully reserved the question whether to revisit the constitutionality of contribution limits.151 And many donors, including corporations, might prefer to keep the limits in place for self-protection — to keep the tide of requests for political contributions at bay. But that does not mean such a reform is not at least theoretically possible.

First, Congress could repeal the features of the federal campaign laws going back to the Tillman Act of 1907152 that prohibit corporations from giving directly to political candidates from their own treasuries.153 It is difficult to see how source limitations on contributions

151 Citizens United, 130 S. Ct. at 909 (“Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.”).
153 For an account of the origins and history of these provisions, see Citizens United, 130 S. Ct. at 952–57 (Stevens, J., concurring in part and dissenting in part). See generally Adam Winkler,
(as opposed to amount limitations) serve an interest in avoiding quid pro quo corruption, the only corruption interest the majority assumed (without deciding) might justify campaign finance restrictions.\textsuperscript{154} After \textit{Citizens United}, there would seem to be no basis for the Court to confine to the context of independent expenditures its skepticism toward any blanket legislative distinction between corporations and other political speakers.\textsuperscript{155} And the majority opinion in \textit{Citizens United} clearly views the requirement that corporations form separate, segregated PACs for the purpose of engaging in campaign-related speech as a grave burden on their First Amendment liberties.\textsuperscript{156} Thus, there is a strong argument that the holding of \textit{Citizens United} might be extended to support invalidation or repeal of source limitations on corporate contributions.

Second, Congress could eliminate the amount limitations on contributions to candidate campaigns from any source, corporate or otherwise. Several members of the current Court have suggested that \textit{Buckley}’s holding on contribution limits was wrongly decided, and thus that the First Amendment requires the elimination of contribution limits.\textsuperscript{157} At first glance, the option of invalidating contribution limits altogether would seem attractive to the libertarian view of the First Amendment and anathema to free speech egalitarians. To libertarians, unfettered contributions to candidates (coupled with full disclosure, which is newly meaningful in an age of instantaneous internet communication) serve a market conception of speech. To egalitarians, contribution limits represent a mechanism for literally limiting the spread of financial inequalities in political influence.

\textsuperscript{154} See \textit{Citizens United}, 130 S. Ct. at 909–10; id. at 961 (Stevens, J., concurring in part and dissenting in part).


\textsuperscript{156} \textit{Citizens United}, 130 S. Ct. at 897 (“Even if a PAC could somehow allow a corporation to speak — and it does not — the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.”).

But this lineup is not inevitable; there is good reason to believe that unfettered contributions to candidates (subject to the disclosure caveat) might serve the goal of political equality better than the existing regulatory scheme. It is worth recalling that the situation that political critics of Citizens United now regard as a nightmare — the prospect of a flood of independent political ads funded by corporate treasuries that will “drown out” noncorporate voices at election time — exists only as the unintended consequence of federal election campaign finance laws combined with judicial decisions that altered their original contours. 

_Buckley v. Valeo_ split the baby by holding that the First Amendment protects expenditures, but not contributions, from federally imposed ceilings. This split result ensured that demand for political money has remained unlimited while government nonetheless has limited its supply. Wherever there is unlimited demand and limited supply, substitution effects set in and black markets and gray markets emerge. As Justice Kennedy observed in an earlier case, contribution limits had the effect of shifting political money away from the candidates’ own campaigns to secondary and tertiary organizations. The Bipartisan Campaign Finance Reform Act of 2002 (BCRA) sought to shut down the flow of “soft money” to secondary organizations like political parties and to tertiary organizations like trade associations and other advocacy groups that could fund and produce independent broadcast ads — with Congress deeming such substitution effects “loophole[s]” in the regulatory scheme.

In short, the federal election system is now, from the political equality perspective, a dystopian universe in which political money has been driven further and further from the candidates who are themselves uniquely accountable to the voters through elections, where every citizen enjoys an equal vote. A voter has no means to express dissent from an independent issue ad funded by a small number of donors, but can take corrective action at the ballot box against a candi-

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158 424 U.S. 1, 143 (1976) (per curiam).
160 _See Nixon_, 528 U.S. at 406–07 (Kennedy, J., dissenting) (arguing that _Buckley’s_ split result had “adverse, unintended consequences,” forcing “a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits” and giving rise to “covert speech,” _id_. at 406 — in all, a “misshapen system” that “mocks the First Amendment,” _id_. at 407).
162 _See McConnell_, 540 U.S. at 122–33 (describing the rise of “soft money” after _Buckley_ and Congress’s reaction).
163 _Id_. at 133.
date who acts partially toward a contributor and against that voter’s interests. And because Citizens United has removed one more component from a comprehensive regulatory scheme, election financing may now be more unequal than it would have been if fewer campaign finance regulations existed in the first place. For example, as Justice Stevens notes in dissent, Citizens United alters the balance between corporations and political parties.164

Allowing unfettered contributions directly to candidates, who are accountable to the voters, might also decrease the concern of free-speech-as-equality proponents that corporate-funded ads will be particularly toxic, debasing public dialogue and undermining a desirable end state of diverse political ideas.165 If the dirty work of negative advertising is left to corporate sponsors running independent ads because candidates do not want to be muddied by the backsplash from running such ads themselves, then redirecting political money to candidates will also tend to elevate the tenor of political campaigns.

B. Distinguishing For-Profit from Nonprofit Corporations

A second possible response to the problem critics of Citizens United are concerned about — the domination of electoral politics by wealthy for-profit corporations — would have been to draw a for-profit/nonprofit distinction, permitting bans on independent expenditures from the corporate treasuries of for-profit, but not nonprofit, corporations. Such an approach should be attractive to free speech egalitarians, who are most concerned about “immense aggregations of wealth”166 being deployed in the political process, but disturbing to free speech libertarians, who do not believe in distinctions based on speaker identity.

Free-speech-as-equality advocates, however, let this possible solution slip away in Citizens United. In a series of amicus briefs filed in Citizens United and its precursors, various advocacy organizations urged such an approach, relying upon fallback provisions Congress itself had enacted in BCRA.167 And at oral argument, Justice Stevens

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164 Citizens United, 130 S. Ct. at 940 (Stevens, J., concurring in part and dissenting in part).
165 See id. at 962; McConnell, 540 U.S. at 260 (Scalia, J., concurring in part and dissenting in part) (noting congressional members’ concern about “attack ads” in enacting BCRA and suggesting that “[t]here is good reason to believe that the ending of negative campaign ads was the principal attraction of the legislation”).
asked the government, seemingly with some incredulity, why it was not pushing harder for the approach these amici urged.168

The specific vehicle for taking this approach in Citizens United would have been to trigger a statutory mechanism known as the Snowe-Jeffords amendment.169 Congress included the amendment within Title II of BCRA as a less restrictive alternative to an all-encompassing ban on “electioneering communications” by all corporations. Under this provision, nonprofit organizations incorporated under Internal Revenue Code § 501(c)(4) and § 527(e)(1) — unlike for-profit corporations — would have been permitted to use their general treasury funds for “electioneering communications” so long as the communications were paid for exclusively with funds from individuals who are U.S. citizens, nationals, or lawfully admitted for permanent residence.170 The addition of the so-called Wellstone amendment, however, negated this exception.171 The late Senator Wellstone explained that his amendment was meant to close the Snowe-Jeffords “loophole” by which nonprofit advocacy groups could otherwise continue to engage in independent expenditures for ads foreclosed to for-profit corporations by BCRA’s electioneering-communications provisions.172 Congress made the provisions of BCRA severable so that, if a court found the Wellstone amendment unconstitutional, the original Snowe-Jeffords provision could be restored.173

The Court, however, declined to take this path in Citizens United. Justice Kennedy’s majority opinion suggested that the reason was that Citizens United had funded its critical movie about then-candidate Hillary Clinton in part with donations from for-profit corporations,
rendering it ineligible for Snowe-Jeffords treatment, and that the Court was reluctant to read into the statute an exception where, as here, such corporate contributions were de minimis in amount.174 He expressly noted that the Government had been at best lukewarm about the possibility of a Snowe-Jeffords solution with a de minimis exception.175

These tactical litigation issues aside, it is no surprise that the majority did not embrace Snowe-Jeffords. Under the free-speech-as-liberty position expressed in the Citizens United majority opinion, distinctions among corporate speakers using their private resources for speech trigger skeptical First Amendment scrutiny,176 and there is no reason to suppose that a for-profit/nonprofit distinction would fare better under this analysis than would one between all corporations and other entities, and individuals.177 It is more surprising that the government and free-speech-as-equality Justices did not make greater effort to use Snowe-Jeffords as a firewall against the majority’s decision. But the for-profit/nonprofit distinction may be challenged even on free-speech-as-equality premises: for example, “[t]he combined effect of encouraging corporate PACs while prohibiting direct activity by corporations may be to cause corporate speech to reflect managers’ interests” rather than the broader interests of shareholders or customers.178

For now, however, the debate is moot, as Citizens United would appear to foreclose the constitutionality of drawing such a distinction.

C. Increasing Disclosure and Disclaimer Requirements

The third possible reform, making disclosure and disclaimer rules for corporate electoral expenditures more robust, as embodied in portions of legislative proposals like the eponymous DISCLOSE Act,179

175 See id. at 892.
176 See id. at 905–06.
177 For a counterargument articulating possible grounds for a for-profit/nonprofit distinction, see Family Research Council Amicus Brief, supra note 167, at 16–21, 2007 WL 894820 at *16–21.
178 Ribstein, supra note 55, at 141.
would appear to align the libertarian and egalitarian visions of free speech. By a vote of 8–1, with only Justice Thomas in dissent, Justices from both camps in *Citizens United* joined the Court’s second holding, which upheld against First Amendment challenge existing federal disclosure and disclaimer rules for corporate expenditures in support of or opposition to political candidates.\(^{180}\) *Citizens United* held that disclosure requirements, long upheld in the contribution context as substantially related to an important governmental interest in an informed electorate,\(^{181}\) serve similar purposes when applied to independent political expenditures.

To free-speech-as-equality advocates, disclosure is obviously attractive because it facilitates voter and interest group monitoring of the speech of those with concentrated resources, lowering the costs of detection and counterspeech. To equality advocates, disclosure is a less restrictive alternative to source and amount limitations; it might not level the speech of the powerful and wealthy, but it makes it easier to call it out and to expose unseemly responses to it by candidates and incumbents. And if disclosure threatens marginal speakers with self-censorship from fear of retaliation and reprisal, the free-speech-as-equality view can be satisfied by as-applied exceptions.\(^{182}\)

Explaining why disclosure should be attractive to free-speech-as-liberty advocates is a bit trickier. After all, the Court has upheld the right of members of expressive organizations to maintain anonymity\(^{183}\) and the right to anonymity in distributing leaflets in connection with direct ballot measures.\(^{184}\) Understood as an aspect of personal autonomy, the right to speak would seem to entail a right not to speak, akin to the right against self-incrimination.\(^{185}\) And Justice Thomas’s dissenting opinion on the disclosure issue, treating forced speech in this context as an undue burden on First Amendment liberty,\(^{186}\) suggests that disclosure rules in fact divide free-speech-as-liberty adherents.

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\(^{180}\) *Citizens United*, 130 S. Ct. at 913–16.

\(^{181}\) Id. at 914 (citing Buckley v. Valeo, 424 U.S. 1, 66 (1976) (per curiam)).

\(^{182}\) See *Brown v. Socialist Workers’ 74 Campaign Comm.* (Ohio), 459 U.S. 87 (1982). While the Court last Term upheld against a facial First Amendment challenge the mandated public disclosure of the identity of those who signed petitions to place a referendum measure on the ballot, at least eight Justices agreed that as-applied exceptions might be permissible upon demonstration of particularized threats of retaliation and reprisal. Doe v. Reed, 130 S. Ct. 2811, 2821 (2010); see id. at 2822 (Alito, J., concurring); id. at 2831 (Stevens, J., concurring in part and concurring in the judgment); id. at 2845–47 (Thomas, J., dissenting).


\(^{185}\) See *U.S. CONST.* amend. V.

\(^{186}\) See *Citizens United*, 130 S. Ct. at 979–82 (Thomas, J., dissenting). Justice Thomas expressed similar views when he concurred in *McIntyre*, 514 U.S. at 358 (Thomas, J., concurring in the judgment), and filed the lone dissent in *Doe*, 130 S. Ct. at 2837 (Thomas, J., dissenting).
The free-speech-as-liberty approach that prevails in *Citizens United*, however, is not a theory of free speech as autonomy, nor a theory focused on the dignitary interests of speakers. It is rather a negative theory that focuses on the interests of listeners, in a system of freedom of speech, to assess speech and speakers without paternalistic government intervention. This view traces back to the listener-focused reasoning in the commercial speech cases, which similarly noted that compelled disclosures have a beneficial information-forcing function that is not inconsistent with First Amendment values. Thus, free-speech-as-liberty advocates may favor forced disclosure as a vehicle for enhancing the capacity of listeners to assess political speech without paternalistic government intervention to adjust or redistribute the mix of voices that will be heard.

Technological change reinforces this understanding by making disclosure more robust. When the 1974 campaign finance laws were enacted, disclosure meant that an overburdened civil servant might retrieve an index card from a musty file cabinet; today, disclosure of the source and amount of expenditures can be instantaneously disseminated over the internet. As Justice Kennedy observed in the majority opinion, “With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”

**D. Conditions on Government Benefits to Corporations**

A fourth possible response to *Citizens United* is to make restrictions on corporate electoral speech a condition of the receipt of government benefits. Some conditions might be imposed on the use of the corporate form itself, while others might be attached to “goods” that the government provides to particular corporations, including government contracts, subsidies, or bailout money. Such conditions, like disclosure rules, are prominently featured in proposed legislation like the DISCLOSE Act.

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188 See id. at 771 n.24.

189 *Citizens United*, 130 S. Ct. at 916.

190 Section 101 of the DISCLOSE Act, H.R. 5175, 111th Cong. (2010), for example, would have required “a person who enters into a contract” with the government worth more than ten million dollars, id. § 101(a)(2)(B), as well as certain “recipients of assistance under [the] Troubled Asset Program,” id. § 101(b), to refrain from “making any independent expenditure or discharging funds for an electioneering communication,” id. § 101(a)(2)(B).
Such conditionality is normally anathema to liberals who, on free-speech-as-equality grounds, dislike government’s use of its leverage to exact conformity as the price of reliance upon government resources. Conditions on government benefits, by contrast, are normally acceptable to conservatives, who see the First Amendment, on free-speech-as-liberty grounds, as protecting private resources from government encroachment but not as tying government’s hands to define the limits of its own programs. The fact that advocacy for speech-limiting conditions on corporate benefits now emanates from the political left, over conservative opposition, places both sides in uncomfortable positions vis-à-vis their stances in other unconstitutional conditions cases.

It is difficult to extract clear views from the *Citizens United* opinions predicting whether the Justices in either camp would likely uphold conditions on government benefits to corporations. In some places, Justice Stevens’s dissent can be understood as defending conditionality in the corporate context despite the dissenters’ overarching commitment to the free-speech-as-equality perspective: for example, Justice Stevens criticizes the majority for not addressing “whether Citizens United may be required to finance some of its messages with the money in its PAC,” suggesting that the dissenters believe government may condition the adoption of the corporate form on the requirement that political contributions flow through PACs. The free-speech-as-liberty majority, by contrast, rejects such conditionality, portraying segregated-fund conditions as so burdensome as to amount to a “ban” on political speech. Such a reverse lineup is not unlike the one the Justices evinced last Term in *CLS*. Conditioning government benefits to corporations on surrender of the right to make independent political expenditures would have implications for other aspects of First Amendment jurisprudence. *Citizens United* forecloses future attempts to distinguish such conditions on the ground that corporations are categorically different from other speakers. Thus, liberal critics of *Citizens United* should be careful what they wish for; endorsing speech-restrictive conditions in this context may lower the barrier to conditions in other contexts as well.

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191 *Citizens United*, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part).
192 See supra note 156 and accompanying text. Elsewhere in the opinions, to be sure, the majority appears to approve some forms of conditioned government benefits, see supra p. 162, while the dissenters dispute the breadth of government’s freedom to limit speech because the government is engaged in governmental functions, see supra note 58 and accompanying text.
193 130 S. Ct. 2971 (2010); see pp. 165–66.
V. CONCLUSION

Citizens United has been unjustly maligned as radically departing from settled free speech tradition. In fact, the clashing opinions in the case simply illustrate that free speech tradition has different strands. The libertarian strand from which the majority draws support emphasizes that freedom of speech is a negative command that protects a system of speech, not individual speakers, and thus invalidates government interference with the background system of expression no matter whether a speaker is individual or collective, for-profit or nonprofit, powerful or marginal. The egalitarian strand on which the dissent relies, in contrast, views speech rights as belonging to individual speakers and speech restrictions as subject to a one-way ratchet: impermissible when they create or entrench the subordination of political or cultural minorities, but permissible when aimed at redistributing speaking power to reduce some speakers’ disproportionate influence. In many First Amendment challenges, the two traditions converge upon the same outcome. For example, Justices favoring either tradition will typically vote to protect marginal or dissident speakers from regulation at the hands of expressive majorities. The traditions diverge, however, where government seeks to limit speech to reduce the influence of speakers deemed too dominant in public discourse, as in the segregated-fund requirements struck down in Citizens United.

Finding convergence between the two free speech traditions is key to enacting new legislation that might counteract Citizens United’s perceived effects while surviving constitutional challenge. Of the four leading possibilities for reform — invalidating contribution limits, limiting segregated-fund requirements to for-profit corporations, increasing disclosure and disclaimer requirements for corporate political expenditures, and making segregated political funding a condition of the corporate form or the receipt of government benefits — only the disclosure alternative would appear readily capable of uniting both strands. Egalitarian speech advocates will generally disfavor a right to unlimited contributions and should, if consistent, disfavor conditions on government benefits; libertarian speech advocates will generally disfavor distinctions based on speaker identity.

The Court’s deference to compelled disclosure requirements in the electoral context is illustrated both by the 8–1 portion of Citizens United upholding existing corporate disclosure and disclaimer requirements and by the Court’s similarly lopsided decision in Doe v. Reed104 rejecting a facial challenge to compelled disclosure of the identities of those who sign petitions to place initiative and referendum measures on the ballot. To free speech libertarians, such measures

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104 130 S. Ct. 2811 (2010).
might at first glance seem dubious as they decrease the autonomy of speakers, but on balance they increase the autonomy of listeners by increasing the availability of politically relevant information. To free speech egalitarians, such measures might at first glance appear to invite retaliation and reprisal against vulnerable minority causes, but those possibilities may be averted through as-applied challenges, and on balance, forced disclosure may assist political equality by enabling listeners to expose and criticize disproportionately powerful voices.

The Court’s pronounced willingness to uphold compelled disclosure requirements provides the best guide to future policymaking in the area of campaign finance. Coupled with the libertarian approach embraced by the majority, it also suggests an emerging coherent vision of free speech that may characterize future Roberts Court decisions. In this vision, the more speech the better, with its distribution and assessment nearly always best left to the citizenry rather than the government. For a generation raised on YouTube and other channels of instantaneous access to information made possible by the internet, this may prove to be a congenial vision.