

2015

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## Recommended Citation

Tribe, Laurence H., "Dividing Citizens United: The Case V. the Controversy" (2015). *Constitutional Commentary*. 622.  
<https://scholarship.law.umn.edu/concomm/622>

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## DIVIDING *CITIZENS UNITED*: THE CASE V. THE CONTROVERSY

*Laurence H. Tribe\**

In the five years since *Citizens United*,<sup>1</sup> that notorious and much-misunderstood<sup>2</sup> Supreme Court decision has become more than just a case: it has become a symbol, a rallying cry. For some, it is an emblem of free speech values at their best. For others, it is a symptom of a deep sickness in our body politic. But we should not forget that it was a case first, with a plaintiff who wanted to distribute a political movie and was told “no.”

As a *case* dealing with a particular controversy over a proposed publication, I believe *Citizens United* was rightly decided, for the reasons I discuss in Part I, even if it was resolved in a way that was symptomatic of judicial overreach all too common on the current Court. But as a symbol and a symptom, *Citizens United* has broader significance reflected in the Court’s eventual opinion. It represents a bizarrely cramped and naïve vision of political corruption and improper influence in the electoral process—one that has become characteristic of Roberts Court campaign finance law. And, more broadly, it is part of a trend in First Amendment law that is transforming that body of doctrine into a charter of largely untrammelled libertarianism, in which the regulation of virtually all forms of speech and all kinds of speakers is treated with the same heavy dose of judicial skepticism, with exceptions perversely calculated to expose particularly vulnerable and valuable sorts of expression to

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\* Carl M. Loeb University Professor, Harvard University, and Professor of Constitutional Law, Harvard Law School. This essay’s origin lies in a symposium on the intersection of First Amendment law and corporate law held at Harvard Law School on November 7, 2014, and I am grateful to my friend and colleague John Coates for including me in that symposium. Thanks also to my students Sam Barr, Elizabeth Bewley, Jonathan Gould, Chris Havasy, Robert Niles, and Max Rosen for their excellent research assistance.

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

2. Blaming *Citizens United* alone for our campaign finance system is particularly mistaken. As Joshua Matz and I recently wrote, *Buckley v. Valeo* “caused a deluge long before *Citizens United*.” LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE 97 (2014). And Super PACs trace their origin, at least most immediately, to the D.C. Circuit’s post-*Citizens United* decision in *SpeechNow.org v. FEC*. *See id.* at 106.

unconvincingly justified suppression.<sup>3</sup> It is those trends, rather than the outcome of *Citizens United* as applied to the facts before the Court, that need to be revisited.

Part II provides a first cut at rethinking campaign finance law. This effort is informed by the recognition that there are few if any easy answers in this field. The First Amendment requires hard choices about seriously conflicting yet equally foundational constitutional values: democracy, liberty, equality. Each one of these values is contested; no single value or theory can or should reign supreme. But, as I strive to show, the Supreme Court has started to privilege—throughout First Amendment law—an overly skeptical and distrustful understanding of democracy and an excessively rigid and mechanical approach to liberty, leaving equality increasingly out of the picture.<sup>4</sup> I believe the Court would do well to rethink that approach.

### I. *CITIZENS UNITED* AS A CASE

The popular uproar over the outcome and aftermath of *Citizens United* has disguised the complexity of the issues presented in the case itself. *Citizens United* forced the Court to determine whether and how Congress can exclude disfavored speakers from the political marketplace altogether or severely restrict their participation in the name of political equality and electoral fairness. The strong language in Justice Kennedy's opinion about the necessity of categorical First Amendment protections for political discourse and the danger to our democracy of letting government officials decide who may and may not participate in that discourse expresses legitimate

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3. For examples of such exceptions, see *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (speech implicating national security concerns); *Morse v. Frederick*, 551 U.S. 393 (2007) (speech by public school students); *Beard v. Banks*, 548 U.S. 521 (2006) (speech involving prisoners); *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (government employee speech). See generally *TRIBE & MATZ*, *supra* note 2, at 127–39.

4. In an earlier era, the Court took more seriously how various ways of reading the First Amendment would differentially affect the wealthy and the economically disadvantaged. Writing for a majority of the Court in 1943, for example, Justice Black expressly took into account egalitarian concerns in writing that “[d]oor to door distribution of circulars is essential to the poorly financed causes of little people.” *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943); see also Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 599–606 (1985) (discussing Burger Court cases demonstrating “[t]he Court’s use of an approach that increasingly allows it to ignore the distributional dimension of legal rights,” *id.* at 603). For an account sympathetic to the idea that egalitarian norms should inform First Amendment analysis, see, for example, OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996).

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constitutional concerns that too often get minimized in the adverse reactions to *Citizens United*.

The basic facts of *Citizens United* are worth revisiting because they are so often bypassed in the race to reach the more momentous issues. The case arose as a challenge to a federal law prohibiting “electioneering communications” backed by corporate funds in the thirty days before a primary election. The Bipartisan Campaign Reform Act of 2002 prohibited corporations and unions from funding such “electioneering communications,” defined to include “‘any broadcast, cable, or satellite communication’ that ‘refers to a clearly identified candidate for Federal office’ and is made within 30 days of a primary . . . election.”<sup>5</sup>

The putative “electioneering communication” at issue in the case was a film, *Hillary: The Movie*, a highly critical 90-minute documentary about Hillary Clinton, who was then a candidate in the 2008 Democratic presidential primary. Citizens United, a nonprofit corporation partially funded by for-profit corporations, sought to promote *Hillary: The Movie* on TV and distribute it through video-on-demand. Citizens United, fearing possible civil and criminal penalties under the campaign finance law for promoting the film, sought declaratory and injunctive relief against the Federal Election Commission, arguing that the restriction on “electioneering communications” was unconstitutional as applied to its case.

These facts alone should give campaign finance reformers pause. A nonprofit corporation motivated by its openly proclaimed conservative ideology wanted to distribute a political documentary to willing, paying viewers—and it was being told it could not do so because some of its money came from for-profit corporations. Had the political shoe been on the other foot, many of those crying “foul” might have had second thoughts. Yet the constitutional rule obviously cannot depend on whether the relevant litmus turns red or blue. In my view, the Court was correct in holding that the government could not bar such a film from airing—particularly at the very time when it would likely have the greatest impact, just before an election.<sup>6</sup> But the Court did more than decide this as-applied challenge, instead reaching

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5. *Citizens United*, 558 U.S. at 321 (quoting 2 U.S.C. § 434(f)(3)(A) (2012)).

6. See *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating a state law making it a crime for a newspaper editor to publish an editorial on election day urging voters to vote a certain way).

out to invalidate the statute on its face. As detailed below, such Court-invited broadening of the issues initially presented by the parties has become a trait characteristic of the Roberts Court.

A. THE JUDGMENT OF THE COURT AND SOME INADEQUATE RESPONSES

When the Court first heard argument in *Citizens United*, it became clear that in order to uphold the law's application to prevent Citizens United from distributing its film criticizing Hillary Clinton, the Court would also have to conclude that the very same organization could equally have been prevented from distributing a magazine or book with precisely the same content, at the same time, and with exactly the same financial backing. To be sure, efforts have been made to distinguish the print media from television on various (problematic) theories, focusing on spectrum scarcity or the ostensibly public ownership of the airwaves. But nobody supposes that *books* and *films* could plausibly be put into different First Amendment silos.<sup>7</sup> Yet the nightmare image of bookburning—think *Fahrenheit 451*<sup>8</sup>—made the book hypothetical lethal to the attempt by the government's attorney, Malcolm Stewart, to defend the Obama Administration's effort to prevent what Citizens United sought to distribute. Justice Alito engineered a particularly devastating exchange in which the government lawyer seemingly had no choice but to concede that, under the Government's theory, Congress could even ban books about candidates for political office if they were funded with corporate money.<sup>9</sup> Chief Justice Roberts followed up: "It's a 500-page book, and at the end it says, and so vote for X, the government could ban that?" The lawyer replied that it could.<sup>10</sup> Though it took an additional round of oral argument and nearly a year for the Court to decide the case,<sup>11</sup>

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7. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988) (noting "the tension between the Supreme Court's radically divergent approaches to the print and electronic media," *id.* at 1005, and suggesting "a more candid equation between the new media and the old," *id.* at 1010).

8. See generally RAY BRADBURY, *FAHRENHEIT 451* (1953).

9. Transcript of Oral Argument at 26–28, *Citizens United*, 558 U.S. 310 (2010) (No. 08-205), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-205.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf).

10. *Id.* at 29.

11. In the second round of argument, then-Solicitor General Elena Kagan was tasked with defending the law's application to the anti-Hillary film as well as its facial validity. See Transcript of Oral Reargument at 29, *Citizens United*, 558 U.S. 310 (2010) (No. 08-205), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-205%5BReargued%5D.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf). On reargument, Kagan noted that the FEC had never applied the relevant legal provision to books, *id.* at 65, and tried to distinguish books from pamphlets

Justice Kennedy in his opinion for the Court made clear that the problem identified in the initial argument was very much on the mind of the majority, presenting a parade of horrors that could be permitted if the Court rejected Citizens United's facial challenge:

The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.<sup>12</sup>

In each of these examples, an ideologically motivated nonprofit would be banned from participating in political advocacy, the very kind of speech that the First Amendment is meant to protect most vigorously. The risk of censoring print advocacy—canonical communication in the marketplace of political ideas—was too great, and the distinction between film and print too ephemeral, to uphold the bar on “electioneering communications” as applied to Citizens United's publication.

Justice Stevens' vision of a “reasonableness” standard does little to provide a workable solution to this particularly nettlesome First Amendment quagmire. Since his retirement, Justice Stevens, who dissented vehemently in *Citizens United*<sup>13</sup> and has called the Court's decision “a giant step in the wrong direction,” has continued to advocate his position in a book, in the media, and even before Congress.<sup>14</sup> He has proposed what he views as a simple solution to the campaign finance problem given the Court's evident unwillingness to revisit its precedent. His solution would take the form of a constitutional amendment: “Neither the First Amendment nor any provision of this

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on the grounds that only the latter is “pretty classic electioneering,” *id.* at 66. Whether the Solicitor General's office would have done better to concede the invalidity of the law as applied to Citizens United might warrant consideration, though not in this space.

12. *Citizens United v. FEC*, 558 U.S. 310, 337 (2010).

13. *See id.* at 393 (Stevens, J., concurring in part and dissenting in part).

14. *See* Adam Liptak, *Justice Stevens Suggests Solution for ‘Giant Step in the Wrong Direction,’* N.Y. TIMES (Apr. 21, 2014), <http://www.nytimes.com/2014/04/22/us/politics/justice-stevens-prescription-for-giant-step-in-wrong-direction.html>; *see also* JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014).

Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters, may spend in election campaigns.”<sup>15</sup>

While Justice Stevens’s solution has the appearance of simplicity—bracketing the political impossibility of its endorsement by the supermajorities demanded in Article V<sup>16</sup>—its standard of “reasonableness” is bound to prove far too indeterminate in application for a First Amendment standard, where the notorious chilling effect of vague and nebulous criteria has long led judges to steer clear of the mushy standards that suffice for government work in such areas as the law of search and seizure. Even Justice Stevens found his own proposed amendment difficult to apply in a recent interview. The interviewer “asked whether the amendment would allow the government to prohibit newspapers from spending money to publish editorials endorsing candidates. He stared at the text of

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15. Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond: Hearing Before the S. Comm. on Rules and Administration, 113th Cong. (2014) (testimony of Justice John Paul Stevens), *available at* [http://www.rules.senate.gov/public/index.cfm?p=CommitteeHearings&ContentRecord\\_id=3fb0fbe5-f5f6-4366-80fa-ab84c40746ff&ContentType\\_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group\\_id=1983a2a8-4fc3-4062-a50e-7997351c154b](http://www.rules.senate.gov/public/index.cfm?p=CommitteeHearings&ContentRecord_id=3fb0fbe5-f5f6-4366-80fa-ab84c40746ff&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=1983a2a8-4fc3-4062-a50e-7997351c154b).

16. Full disclosure: The amendment proposed by Justice Stevens resembles one I drafted for Congressman Adam Schiff (D. Cal.), which he introduced in the 112th Congress, before I had concluded that such an amendment had no chance of passage. That amendment read: “Nothing in this Constitution shall be construed to forbid Congress or the States from imposing content-neutral limitations on private campaign contributions or independent political campaign expenditures, or from enacting systems of public campaign financing, including those designed to restrict the influence of private wealth by offsetting campaign spending or independent expenditures with increased public funding.” H.R.J. Res. 111, 112th Cong. (2012). This amendment, as the text makes clear, was aimed not just at overturning *Citizens United*, but also the following year’s decision in *Arizona Free Enterprise Club’s Freedom PAC v. Bennett*, 131 S. Ct. 2806 (2011), which struck down a state’s provision of “matching” funds for publicly funded candidates when their privately funded opponents (and their opponents’ independent supporters) spent above a certain amount. Even if an amendment—either Stevens’s or Schiff’s version—were politically plausible, it would still raise difficult questions. An amendment would have to distinguish between money spent producing ordinary films or books, on the one hand, presumably including ordinary films or books with a distinct political tilt or even a discernible message favorable to one or another candidate, and “independent political campaign expenditures,” on the other. This line, as the initial *Citizens United* oral argument demonstrated, is a dangerously thin and slippery one. Moreover, any amendment would have to thread the difficult needle of simultaneously inviting closer judicial scrutiny of incumbent-protective and otherwise self-serving limitations, while still giving Congress and state legislatures broader latitude to enact limitations consistent with democratic values. These difficulties should not foreclose the quest for a workable change to constitutional doctrine, through an amendment or otherwise, but should underscore the difficulty of revising the Court’s *Citizens United* holding and the wisdom of proceeding incrementally in this field.

his proposed amendment for a little while. ‘The “reasonable” would apply there,’ he said, ‘or might well be construed to apply there.’”<sup>17</sup> This reasonableness standard requires the sort of “I know it when I see it” ad-hockery that plagued the Court’s mid-century attempts to define obscenity.<sup>18</sup> And such an approach lacks even the relatively more structured character of the kind of proportionality analysis that the former Chief Justice of Israel, Aharon Barak, has famously championed in his influential writings, writings that have apparently had an impact on the approach toward which Justice Breyer has gravitated in recent years.<sup>19</sup>

Various rhetorical strategies employed by *Citizens United* opponents of late also fail to provide a doctrinally sustainable way forward. If we take seriously (and share) the Court’s aversion to anything that would permit book-banning—as we should—then both the rallying cry of “money isn’t speech” and “corporations aren’t people” are analytical non-starters. The argument that money doesn’t amount to speech and thus may be regulated without implicating the First Amendment carries little legal weight. As Joshua Matz and I recently wrote, “[A]llowing government to control who can spend enough to get heard on a grander scale would render freedom of speech illusory.”<sup>20</sup> For, as Justice Kennedy made clear in his opinion in *Citizens United*, “All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker’s ideas.”<sup>21</sup> The right to deliver a speech or perform a song obviously includes the right to speak or sing for a fee as well as the right to hire research assistants and pay for an accompanying guitarist, and the right to publish a newspaper or book certainly includes the right to spend money doing so and to earn a profit in the bargain. Even Justice Stevens acknowledged

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17. Liptak, *supra* note 14.

18. TRIBE & MATZ, *supra* note 2, at 121.

19. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2551–52 (2012) (Breyer, J., concurring); see also TRIBE & MATZ, *supra* note 2, at 150 (noting that “Breyer’s *Alvarez* opinion was classic Breyer,” and that consequently it was “surprising (and intriguing) that Kagan joined it—and did so just one year after going along with Scalia’s entirely incompatible opinion in *Brown*”).

20. TRIBE & MATZ, *supra* note 2, at 112.

21. *Citizens United v. FEC*, 558 U.S. 310, 351 (2010) (citing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 707 (1990) (Kennedy, J., dissenting) (“Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary.”)).

in dissent that we live in “an age in which money and television ads are the coin of the campaign realm.”<sup>22</sup> And, more generally, it seems pointless to argue that people have a right to engage in a particular activity but not to spend money doing so or to do so in return for monetary compensation.

Undoubtedly, the right to engage in a particular type of conduct needn’t invariably entail the right to do so as part of an economic transaction: the right to have consensual sex or to become pregnant, for example, doesn’t inescapably imply the right to sell one’s sexual services to others or to become a surrogate mother for a price. It may well be, as Deborah Hellman has forcefully argued,<sup>23</sup> that substantive liberties protected by the Constitution might usefully be divided into those that are accompanied by a right to expend one’s own resources optimizing the realization of the liberties at issue and those that are not: the right to the assistance of counsel pretty obviously includes a right to spend all one has available or can amass from supporters to prove one’s innocence, while the right to vote, when constitutionally protected, does not entail a right to purchase votes.<sup>24</sup> But recognizing that commodification changes the constitutional equation hardly implies that the introduction of money into the picture automatically obliterates the application of otherwise governing constitutional principles.<sup>25</sup>

The “corporations aren’t people” argument likewise fails to overcome the First Amendment concerns raised by *Citizens United*, and fails as well to address many of the concerns of those who oppose the decision. Corporations, including those organized for strictly business reasons, have long enjoyed at least some constitutional protections; under the constitutional system we currently enjoy, few would suggest that a State or the Federal Government could censor speech expenditures by an entity whose views it found anathema. This logic applies to for-profit corporations, non-profit corporations, and unions. Laissez-faire capitalism, happily, no longer dictates our constitutional destiny.

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22. *Citizens United*, 558 U.S. at 455 (Stevens, J., concurring in part and dissenting in part).

23. See Deborah Hellman, *Money Talks but It Isn’t Speech*, 95 MINN. L. REV. 953 (2011); Deborah Hellman, Presentation at Symposium on Advancing Democracy at Harvard Law School (Nov. 7, 2014).

24. Even the right to vote itself “was mentioned in the Constitution only in a backhanded way and was limited essentially to property-owning, taxpaying white males over the age of twenty-one.” Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1345 (2003).

25. See generally TRIBE & MATZ, *supra* note 2, at 253–81.

Yet it would take a full-fledged constitutional revolution to strip all First Amendment protections from entities organized in a corporate form just because they exist only by virtue of a legal structure.<sup>26</sup>

Justice Thurgood Marshall has articulated an alternative approach that may have more normative appeal, despite its recent rejection by the Court. In *Austin v. Michigan Chamber of Commerce*, the Court upheld the Michigan Campaign Finance Act, which prohibited corporations from using treasury money to make independent election-related expenditures. Justice Marshall argued that “[c]orporate wealth can *unfairly influence* elections when it is deployed in the form of independent expenditures.”<sup>27</sup> Implicit in this statement is not only a vigorously egalitarian approach to First Amendment law in the electoral context—one that in principle I would tend to favor—but also an approach that accompanies its egalitarian vision with a vision that assumes the legitimacy of permitting those whom we elect to govern our affairs to decide without judicial supervision which distributions of political influence depart from properly egalitarian criteria of power and which adhere to those criteria: the theory of *Austin* was that unsupervised legislative majorities should be entrusted to decide when allowing one person to speak (or spend money) has “unfairly” influenced complex political processes, whether by diluting or overwhelming the voices of others or in some other way.<sup>28</sup> Although this theory appears to

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26. On the applicability of the First Amendment to corporations, see *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 780–86 (1978). Of course the mere applicability of the First Amendment does not suggest that the Constitution forbids imposing conditions on government-issued corporate charters to limit the ability of corporate managers to divert to political or religious causes the money entrusted to them by those who purchase shares not for the purpose of advocacy but strictly for the purpose of maximizing their income or wealth. See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-out Rights After Citizens United*, 112 COLUM. L. REV. 800 (2012). To be sure, the unconstitutional conditions doctrine stands for the proposition that government may not impose its will, without limit, on individuals or associations in exchange for government benefits. See *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); see also TRIBE & MATZ, *supra* note 2, at 253–81. Still, nothing in *Buckley*, *Citizens United*, or standard First Amendment theory suggests that the state may not trade the benefits of the corporate form for limits on the freedom of corporate managers to spend other people's money—including that of investors and shareholders—however they wish.

27. 494 U.S. 652, 660 (emphasis added).

28. For a normative theory of “complex equality,” arguing that inequalities in one sphere (such as economic wellbeing) should not affect citizens' standings in others (such as political discourse), see MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

provide a powerful justification for restricting corporate participation in the political process—or indeed for restricting how much amassed wealth individuals may expend to affect the workings of that process—it proved unable to overwhelm a stronger recent strain in First Amendment jurisprudence. That strain sets its face unalterably against permitting the state to determine, as if it were the conductor of our democratic choir, who may be permitted to speak, how much, and how loudly.<sup>29</sup>

In any case, successfully challenging corporate personhood could not address many of the concerns raised by *Citizens United*, for at least two reasons. The first is that speech by non-natural persons like corporations and unions is not entirely (or even mostly) to blame for the recent spike in campaign spending by sources other than the candidates themselves or the political parties to which they belong: rather, superrich individuals are.<sup>30</sup> Indeed, large businesses—and for-profit corporations generally—have a strong interest in not alienating large swaths of their customers or clients with controversial forms of political influence, such as donating directly to social and political causes that some of those constituent groups may not support and might indeed actively oppose (consider Target’s controversial 2010 donation to a group opposing same-sex marriage).<sup>31</sup>

The second reason is that, even if corporations were not regarded as “persons” within the meaning of various constitutional provisions, and even if restrictions on monetary outlays were not viewed as restrictions on the speech facilitated by those outlays, that would imply relatively little about the constitutional validity of particular restrictions on corporate spending on, or contribution to, various political causes. For individual citizens—persons, all—would still have a First Amendment right to *receive* the information and ideas (whether in the form of books, films, video displays, or digital distributions) that corporate expenditures can bring into the marketplace of information and ideas. Regardless of whether a particular *source*

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29. See TRIBE & MATZ, *supra* note 2, at 98–99. Indeed, the fear of allowing the government to function as conductor seems to have animated Justice Kennedy’s decision in *Town of Greece v. Galloway*, in which he cautioned against “forc[ing] . . . legislatures . . . to act as supervisors and censors of religious speech.” 134 S. Ct. 1811, 1814 (2014).

30. See Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. TIMES, July 22, 2012, <http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html>; see also Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 14–21 (2012) (describing corporate spending after *Citizens United*).

31. See TRIBE & MATZ, *supra* note 2, at 111–12.

of speech may claim federal constitutional protection for itself under the First Amendment, censoring that speech may abridge the “freedom of speech” that the First Amendment undoubtedly protects vis-à-vis would-be recipients of the ideas and information conveyed.<sup>32</sup> Perhaps one of the strongest moves in Justice Kennedy’s opinion for the Court in *Citizens United* was his pivot from the rights of speakers to the rights of listeners—their rights to hear and see whatever messages anyone or anything might choose to spend money to send their way and to make up their own minds about what to believe or to reject. “When Government seeks to use its full power . . . to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought.”<sup>33</sup> At an abstract level, it’s difficult to disagree.

#### B. OPPORTUNISTIC OVERREACH

Thus, the Court’s decision was correct at least as applied to *Citizens United* and the movie it wished to spend corporate funds to disseminate. But five Justices used the case to create an opportunity to go much further. From the initial briefing to the final argument, the Court greatly expanded the scope of the issues presented. And in its decision, the Court dodged a multitude of paths to a narrower ruling.<sup>34</sup>

The Court heard argument twice in *Citizens United*, and the scope of the case widened dramatically between its two appearances in the Marble Palace. The brief for *Citizens United* the first time its case reached the Court presented a suitably narrow question for review: “Whether the prohibition on corporate electioneering communications in the Bipartisan

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32. For example, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the first Supreme Court decision striking down an Act of Congress on the basis of the Free Speech Clause, did so on the basis of listeners’ rights, at the behest, indirectly, of foreign speakers not themselves entitled to First Amendment protection. In addition, the First Amendment’s Petition Clause embodies not only the rights of citizens to express their views and address their grievances to government officials but also the structural principles that those who govern should not be cut off from any source of critique or complaint. The implications of that set of rights and principles for legislative lobbying in particular cannot be ignored in assessing what it would mean to overturn *Citizens United*.

33. *Citizens United v. FEC*, 558 U.S. 310, 356 (2010).

34. I do not go as far as some, in the academy and on the federal bench, in propounding the general superiority of narrower holdings or judicial deference over broader decisions. See, e.g., J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY* (2012); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996). I do, however, fault the *Citizens United* Court for its overreach in that case, for the reasons set out in this section.

Campaign Reform Act of 2002 (“BCRA”) can constitutionally be applied to a feature-length documentary film about a political candidate funded almost exclusively through noncorporate donations and made available to digital cable subscribers through Video On Demand.”<sup>35</sup> Indeed, fully cognizant of the thick body of precedent disfavoring sweeping facial challenges in cases where holding a law unconstitutional as applied to the case at hand would suffice to give the challenger full relief, Citizens United had expressly abandoned the facial challenge it had originally launched in the district court. Despite the narrowness of the question thus presented, Justices Scalia, Kennedy, Thomas, and Alito were eager to decide the broad constitutional issues potentially raised by the application of the federal statute at issue to cases not before the Court. Justice Souter, meanwhile, stood ready with a scathing dissent lambasting the majority for its unwarranted activism.<sup>36</sup> Chief Justice Roberts, worried as ever about the potential damage to the Court’s credibility, engineered a compromise and ordered reargument, without any opinions being issued.<sup>37</sup>

By the time the case was argued the second time, the Court on its own motion had immensely expanded the question presented for review: “For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce* and the part of *McConnell v. Federal Election Comm’n*, which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002?”<sup>38</sup> Justice Stevens described this scope-creep scathingly in his dissent: “Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”<sup>39</sup> For a Court that had so often explained the narrowness of its rulings by appealing to the essentially *passive* nature of its jurisdiction, this was, for Justice Stevens, a departure that begged for justification. Indeed, the Court has often taken great pains to emphasize its perceived role

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35. Brief for Appellant at i, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205).

36. See *TRIBE & MATZ*, *supra* note 2, at 92. For a discussion of the deliberations between the Justices regarding *Citizens United*, see JEFFREY TOOBIN, *THE OATH* 165–69 (2012).

37. See *TRIBE & MATZ*, *supra* note 2, at 92.

38. Supplemental Brief for Appellant at i, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205) (citations omitted).

39. *Citizens United v. FEC*, 558 U.S. 310, 398 (2010) (Stevens, J., concurring in part and dissenting in part).

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as a resolver of ordinary cases and controversies brought to it by litigants. On this view, the Court opines on the constitutional validity of contested exercises of power only to the degree required to resolve those cases, rather than serving as a roving constitutional tribunal rendering advisory opinions on the validity of laws.<sup>40</sup> In *Citizens United*, the Court stepped enthusiastically but without a word of explanation into a broader role.

Despite the Court-driven widening of the issues in the case, there remained several more limited rulings that the Court declined to adopt in its manifest rush to overrule *Austin* and to make sweeping declarations about the role of money in politics and about the sort of “corruption” whose avoidance might justify restricting supposedly independent expenditures of money in political campaigns.

In dissent, Justice Stevens offered three potentially narrower grounds for decision: “First, the Court could have ruled, on statutory grounds, that a feature-length film distributed through video-on-demand does not qualify as an ‘electioneering communication’ under §203 of BCRA.”<sup>41</sup> Although that kind of ruling might have served the objective of separating the application of the statute to the case at hand from the swath of applications implicated by the facial challenge the Court had deputized itself to address, it remains unclear just how that narrowing of the statute’s scope could have been reconciled either with the statute’s language or with its legislative history. Nor is it clear just how the Court would have explained distinguishing feature-length films from brief docudramas or, for that matter, from 90-second (or even shorter) television ads. Perhaps a strong dose of the maxim of constitutional avoidance would have done the trick for the time being.<sup>42</sup>

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40. The prohibition on advisory opinions is foundational. See Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1006 (1924) (“[A]dvisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intensities of immediacy are wanting.”). This more modest vision of the judicial role was famously identified with the “passive virtues.” See Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (setting out his theory). But see Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (critiquing Bickel).

41. *Citizens United*, 558 U.S. at 406 (Stevens, J., concurring in part and dissenting in part).

42. For a discussion of the canon of constitutional avoidance and its many different forms, see, for example, Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71; Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000). For a discussion of the Roberts Court’s uneasy relationship with the constitutional avoidance canon, see generally Richard L.

Second, the Court could have read the statute to exempt “nonprofits that accept only a *de minimis* amount of money from for-profit corporations.”<sup>43</sup> That, too, would have required the art of statutory interpretation to execute some heroic acrobatics, but the Roberts Court has not shrunk from such contortions in other contexts—as in its 2012 reading of the Affordable Care Act’s individual purchase “mandate” as not a mandate at all but a mere tax incentive;<sup>44</sup> or in its suggestion, in the *Hobby Lobby* case, that the Religious Freedom Restoration Act’s definition of the “persons” entitled to religious accommodation might somehow be confined to closely held Subchapter S corporations;<sup>45</sup> or in its decision in the *Bond* case to avoid opining on the scope of the treaty power by simply refusing to apply the Chemical Weapons Convention Implementation Act to an “unremarkable local offense.”<sup>46</sup> Finally, the Court might have ruled, after all, only on Citizens United’s as-applied challenge, despite having *sua sponte* broadened the question presented so as to encompass the facial validity of the law at issue.<sup>47</sup>

The Court’s decision instead to issue a sweeping facial ruling in *Citizens United*—a ruling vastly broader than the question posed by the case itself as the parties had chosen to litigate it—is but one example in a growing trend of opportunistic overreach by the Roberts Court. Chief Justice Roberts publicly claims a restrained role for the institution, having famously declared that the job of the Court is only to “call balls and strikes” rather than to “pitch or bat.”<sup>48</sup> The past decade tells a different story,

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Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181.

43. *Citizens United*, 558 U.S. at 406 (Stevens, J., concurring in part and dissenting in part).

44. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594–95 (2012); *TRIBE & MATZ*, *supra* note 2, at 63–64. In *NFIB*, Chief Justice Roberts first made clear that the mandate did not pass constitutional muster under the Commerce Clause and/or the Necessary and Proper Clause before ultimately upholding it as a valid exercise of the taxing power. *TRIBE & MATZ*, *supra* note 2, at 62–63. These initial constitutional proclamations might be understood as gratuitous, but they might also be framed as the Chief’s sole justification for the statutory stretch the latter holding entailed.

45. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767–75 (2014) (discussing whether closely held corporations are “persons” under RFRA).

46. *Bond v. United States*, 134 S. Ct. 2077, 2083 (2014). As many of my colleagues have noted, the statute in *Bond* was hardly ambiguous, and thus stands as one of the more notable recent instances of statute-stretching. *See, e.g.*, Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 89 (2014).

47. *Citizens United*, 558 U.S. at 407 (Stevens, J., concurring in part and dissenting in part).

48. *See* Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong.

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however—one of active vice rather than passive virtue.<sup>49</sup> The overreach of *Citizens United* is but one example of the Court resolving issues that are neither logically nor procedurally necessary to a full disposition of the case at hand. In *Citizens United*, the Court was presented with a narrow question about the constitutionality of campaign finance rules as applied to a nonprofit’s on-demand video, but it transformed the case into an opportunity to rule with a broad brush, putting essentially all future regulation of campaign finance in conspicuous jeopardy.<sup>50</sup> The Court followed a nearly identical pattern in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>51</sup> a case about the meaning of the Alien Tort Statute, among our nation’s earliest and most cryptic statutes. In *Kiobel*, the Court initially heard oral arguments on a relatively narrow question, ordered reargument on a considerably broader question, and then decided the case on the broader grounds. The parallel between this procedural history and that of *Citizens United* is striking. And in a wide range of other cases, on issues as diverse as the constitutionality of Obamacare, labor law, and class action law, the majority (usually consisting of the Chief Justice and Justices Scalia, Kennedy, Thomas, and Alito) has been criticized—often by other Justices—for issuing broader-than-necessary opinions.<sup>52</sup>

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56 (2005) (statement of Judge John G. Roberts, Jr.), available at <http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf>.

49. See *supra* note 40 and accompanying text.

50. A possible defense of this move might be that there is no coherent way, consistent with the Court’s judicial rather than legislative role, for it essentially to redraft the statute at issue by drawing lines that would—as neatly as would be required in the First Amendment arena—sever the universe of applications that the Court could invalidate from the residue of applications that the Court could leave intact. Absent the formal ability to remand the case to Congress for modification of the statute, the Court may have viewed its hands as being tied.

51. 133 S. Ct. 1659 (2013).

52. See, e.g., *Nat’l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2629 n.12 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting that she “see[s] no reason to undertake a Commerce Clause analysis that is not outcome determinative,” given that five Justices would uphold the individual mandate on Taxing Power grounds); *Knox v. SEIU*, 132 S. Ct. 2277, 2296 (2012) (Sotomayor, J., concurring in the judgment) (“I concur only in the judgment, however, because I cannot agree with the majority’s decision to address unnecessarily significant constitutional issues well outside the scope of the questions presented and briefing. By doing so, the majority breaks our own rules and, more importantly, disregards principles of judicial restraint that define the Court’s proper role in our system of separated powers.”); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561–62 (2011) (Ginsburg, J., concurring in part and dissenting in part) (arguing, in a class action case, that the Court should have remanded the case for further proceedings under a provision of the Federal Rules of Civil Procedure, rather than “disqualif[y]ng the class at the starting gate,” *id.* at 2562).

This analysis tells a very different story about *Citizens United* than the one the public typically hears. I believe that McCain-Feingold was indeed unconstitutional as applied to the facts of *Citizens United*. But the decision nonetheless represents a worrisome trend by the Court: reaching out to decide issues not squarely before it. In *Citizens United*, that move led the Court first to formally broaden the questions presented, then to issue a facial rather than as-applied ruling. Both were mistakes. Yet judicial overreach is far from the only thing wrong with *Citizens United*. The case also represents the Roberts Court's overly narrow view of the *values* that should animate First Amendment jurisprudence. In the next section, I take up that issue.

## II. RECONSTRUCTING CAMPAIGN FINANCE THEORY AND DOCTRINE

The public discourse surrounding *Citizens United* makes clear that the case is about far more than its precise holding and the analysis underlying that holding: it is about the kind of democracy our Constitution should be understood to create and the types of governing arrangements it should be understood to put in place. This section looks beyond *Citizens United* itself to First Amendment jurisprudence more generally and reframes the normative questions at stake in that area of law, rather than proffering particular doctrinal reforms.

*Citizens United* highlights a fundamental tension between two conceptions of democracy—a tension with which neither the majority nor the dissent, nor the partisans on either side, fully reckons. At one pole lies the egalitarianism that has long been a central strand of our democratic tradition. The social contract tradition of Hobbes and Locke, from which the founders drew many of their ideas, incorporates an ideal of equality: the social contract (be it real, tacit, or hypothetical) is one between *all* individuals, each of whom is on equal footing in entering into society.<sup>53</sup> The framers repeatedly affirmed a commitment to civic

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53. THOMAS HOBBS, *LEVIATHAN* 120–21 (Richard Tuck ed., Cambridge University Press 1991) (1651); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 330–33 (Peter Laslett ed., Cambridge University Press 1967) (1690). Although both Hobbes and Locke considered women to be persons for the purposes of the creation of the social contract, their views on women in the private sphere did not, of course, approach the modern idea of equality between the sexes. For in-depth discussions regarding the role of women in the political and social philosophy of Hobbes and Locke, see *FEMINIST INTERPRETATIONS OF THOMAS HOBBS* (Nancy J. Hirschmann & Joanne H. Wright eds., 2012); *FEMINIST INTERPRETATIONS OF JOHN LOCKE* (Nancy J. Hirschmann & Kirstie M. McClure eds., 2007).

equality in the construction of a representative system, a commitment exemplified by James Madison's Federalist 57:

Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.<sup>54</sup>

In the same era, the Constitution and Bill of Rights incorporated principles of civic equality. We need recall but two examples long predating Reconstruction and the Fourteenth Amendment's Equal Protection Clause: the Constitution bars the United States from granting titles of nobility,<sup>55</sup> and the First Amendment prevents government from privileging any religion or its members over other religions or over nonbelievers.<sup>56</sup> (Although notions of "civic equality" long excluded some groups, most notably women and racial minorities, those notions are conceptually compatible with—and perhaps even demand—the more inclusive polity that we have only belatedly begun to achieve.)

In the modern era, these ideals of civic equality were clearly and powerfully embodied in the Supreme Court's reapportionment cases. Several decisions in the early 1960s, most notably *Baker v. Carr*<sup>57</sup> and *Reynolds v. Sims*,<sup>58</sup> required that legislative districts (both state and federal) be equal in population. Embedded in these cases was a theory of equal representation,

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54. THE FEDERALIST NO. 57 (James Madison) (Clinton Rossiter ed., 1961). This being said, the framers had a notoriously limited and inherently unequal conception of political equality. See Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) ("When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America's citizens. 'We the People' included, in the words of the framers, 'the whole Number of free Persons.' On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes—at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years." (internal citations omitted)). For my reflections on this issue, see Laurence Tribe, *Bicentennial Blues: To Praise the Constitution or to Bury It?*, 37 AM. U. L. REV. 1, 3 (1987) (arguing that "the Constitution of Thurgood Marshall is . . . incomplete" and that "[t]o disparage the work of 1787 is to overlook those institutional structures that made it possible for the Supreme Court of the United States, from the 1950's to the 1970's, after a century of national blindness, both to see, and to make the country face, what had to be done to redeem the [F]ourteenth [A]mendment's promise").

55. U.S. CONST. art. I, § 9, cl. 8.

56. *Id.* amend. I.

57. 369 U.S. 186 (1962).

58. 377 U.S. 533 (1964).

now famously expressed by the slogan “one person, one vote”: the Constitution, with the conspicuous exception of the composition of the United States Senate, requires that all citizens have an equal voice—at least when it comes to voting in legislative elections. This reapportionment revolution mattered not only in theory, but in practice: political scientists have documented the many ways in which it affected concrete policy outcomes, noting the “singular conclusion” that “[t]he equalization of representation led directly to an equalization of the distribution of public expenditures—who got what.”<sup>59</sup> Civic equality, in other words, is directly related to policy results.

Despite the strength of this egalitarian tradition, it is threatened by a competing, non-egalitarian tradition that results from the intersection between our political and economic systems. Capitalism has resulted in different interest groups having differing quantities of resources,<sup>60</sup> which those groups deploy in the public sphere in pursuit of their preferred policy outcomes—with some citizens being far more able to influence policy than others. It was, of course, this inequality that George Orwell famously parodied in *Animal Farm*, with its unforgettable proclamation that “all animals are equal, but some are more equal than others.”<sup>61</sup>

This unequal distribution of potential influence operates through a variety of mechanisms: the increasing cost of campaigns, compelling candidates to spend more time fundraising and leading them to avoid embracing policy positions that would antagonize their potential sources of campaign funding; the maturation of the lobbying industry as a major force in Washington and nearly every state capital; and, most recently, the rise of supposedly “independent” campaign expenditures as a new means for powerful interests to affect electoral outcomes and, whatever the outcomes, to win preferential access and wield disproportionate influence. While some scholars, often called “pluralists,”<sup>62</sup> have lauded these changes as simply expanded

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59. STEPHEN ANSOLABEHRE & JAMES M. SNYDER, JR., *THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS* 15 (2008).

60. See, e.g., THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 336–76 (Arthur Goldhammer trans., Harvard Univ. Press 2014) (2013); David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 632–44 (2014) (reviewing THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., Harvard Univ. Press 2014) (2013)).

61. GEORGE ORWELL, *ANIMAL FARM* 112 (1946).

62. See, e.g., ROBERT A. DAHL, *WHO GOVERNS?* (1961).

means of civic participation, it was over a half century ago that E.E. Schattschneider first noted that “[t]he flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.”<sup>63</sup> More recently, political scientists have made a powerful empirical case that American government is systematically far more responsive to the interests of the wealthy and well-organized than to the interests of ordinary citizens.<sup>64</sup>

The fact that government is more responsive to the preferences, priorities and interests of some citizens than others is perhaps endemic to any attempt to run an egalitarian polity alongside a non-egalitarian economy. But the phenomenon is particularly worrisome in the era of what many have called a “great divergence.” In what is now a well-known story, over the past four decades America has witnessed ever-growing (and too often racially skewed) gaps between rich and poor: in income, wealth, health, educational outcomes, and even in family stability.<sup>65</sup> As the lived experiences of the wealthy and the poor diverge, it becomes increasingly significant that the political system is more responsive—and is widely understood to be more responsive—to the preferences of one group than to those of the other. The *Citizens United* dissenters rightly highlight these inequalities in political access and power, while the majority largely overlooks them and incants bromides about how a key precept of our First Amendment tradition is that government may not address such inequalities through seeking to “level the playing field” of political speech.

To be sure, those bromides reflect important truths about the dangers of governmental efforts to decide what a “level playing field” in the world of ideas and information would look like. But those are not the only important truths to be considered. The fundamental dynamic—a dynamic in which the non-egalitarian character of America’s economic system undermines the egalitarianism of our core political ideals—is complicated by three dichotomies that run through campaign finance law.

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63. E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE* 35 (1960).

64. See, e.g., MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012); JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010); KAY LEHMAN SCHLOZMAN, SIDNEY VERBA, & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012).

65. See, e.g., TIMOTHY NOAH, *THE GREAT DIVERGENCE: AMERICA’S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT* (2012).

The first is the divide between what might be called “trusting” and “skeptical” views of democracy.<sup>66</sup> Recognizing that this is a huge oversimplification, one can sum up the contrast this way: on the more trusting view, the greatest threat to democracy comes from outside influences (especially moneyed influences), and courts should by and large trust the political branches to protect the political system against those harms. The more skeptical view, by contrast, focuses on the threat from within and is wary of letting the political branches regulate without significant judicial supervision the processes by which they are elected, with a particular fear that legislatures will enact incumbent-protection provisions at the expense of a robust, self-correcting democracy. On this more skeptical view, a primary role of the independent judiciary is to regulate the political process when the elected branches cannot be trusted to do so disinterestedly. It is a view that fits firmly into the political process tradition. It can plausibly claim to be a descendant of the Warren Court reapportionment cases.<sup>67</sup> The Roberts Court’s campaign finance jurisprudence, building on decisions going back to the mid-1970s,<sup>68</sup> has at times adopted this distinctly skeptical approach, perhaps summed up best by the Chief Justice’s blunt statement in 2014 that “those who govern should be the *last* people to help decide who *should* govern.”<sup>69</sup>

While concerns about such self-serving distortions in the electoral process certainly have merit in some contexts,<sup>70</sup> those

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66. Frederick Schauer, *Constitutions of Hope and Fear*, 124 *YALE L.J.* 528 (2014) (reviewing ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014)) (comparing Robert Post’s trusting view of democracy with Winston Churchill’s skeptical view of democracy).

67. The canonical sources on political process theory are *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

68. See, e.g., *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976).

69. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441–42 (2014). This view is not new, however; as early as *Buckley v. Valeo*, the Court’s first modern campaign finance decision, the Court noted that “equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.” 424 U.S. at 56–57. This, however, does little to explain the Court’s divergent approaches to incumbent protection in the campaign finance context and the redistricting context. See Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 *HARV. L. REV.* 29 (2004).

70. Notably, they do not have merit in every context: where regulations are passed by popular initiative, it is far from clear how any presumption of self-serving distortion is warranted. See *infra* note 78 (discussing *Arizona Free Enterprise Club’s Freedom PAC v. Bennett*, 131 S. Ct. 2806 (2011)).

concerns should not be permitted to eclipse other, equally serious if not more pervasive, sources of worry. I have in mind particularly the worry about what some label “corruption,” not in the narrow, quid-pro-quo sense of outright bribery—“I give you my money, I get your vote in favor of this or that measure that helps me and my friends”—but in a general, more diffuse sense. In particular, corruption can be understood in the broader sense of systemic corrosion, exemplified by purchasing the gratitude, if not the ongoing dependence, of the political officials whom one assists financially in their quest for office and power.

The *Citizens United* Court took the narrowest possible view of corruption, maintaining that the only legitimate government interest in this field is the prevention of quid pro quo corruption. But, as many have argued in response, quid pro quo corruption is far too narrow a governmental interest to identify as constitutionally relevant.<sup>71</sup> It is an interest that does not begin to reflect the full stakes at issue in the campaign finance realm: the health of American democracy itself. Unless the notion of interests sufficiently compelling to count in the First Amendment calculus is strangely truncated to exclude interests this fundamental simply because they appear imprecise or diffuse, courts must recognize a compelling interest in combating corruption broadly defined as a distortion in the political process, understood to include a deviation from the ideal of equal representation embodied in Federalist 57 and the reapportionment cases.<sup>72</sup> In a republican system of government—a system that Article IV commands the United States to guarantee—it is a legitimate and indeed compelling goal of legislation, both state and federal, to ensure that officeholders and their staff have no greater incentive to meet with, to respond favorably to the approaches of, or to be susceptible to influence by, those who either have supported their candidacies financially or can be expected to do so in the future. This foundational ideal may be unattainable in practice, so long as we have private

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71. See generally LAWRENCE LESSIG, *REPUBLIC, LOST* (2011); ROBERT C. POST, *CITIZENS DIVIDED* (2014); Zephyr Teachout, *The Anti-Corruption Principle*, 94 *CORNELL L. REV.* 341 (2009). For an argument that the Supreme Court should be reluctant to even define corruption, see Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 *MICH. L. REV.* 1385 (2013).

72. Cf. LESSIG, *supra* note 71 (advocating reforms to combat “dependence corruption,” which leads to policy distortion); Teachout, *supra* note 71, at 410–11 (arguing “not . . . that corruption is a compelling state interest that might, in some cases, justify restrictions on speech, but that there are two competing, equally important constitutional interests at stake: free speech and the anti-corruption principle”).

financing of political campaigns, but various policy decisions can move us either closer to or further away from it.<sup>73</sup> Moreover, judicial supervision can help ensure that legislatures do not enact incumbent-protection measures to entrench themselves at the expense of the openness of the system. The Court's master rule in this area should fall under the overarching rubric of judicial supervision to prevent *all* failures of representation, whether they are brought about by actors inside or outside the political branches.<sup>74</sup>

The Court in *Citizens United* at places seems to acknowledge both the empirical reality and the public belief that those who provide the most financial assistance gain the most access and thus the most influence<sup>75</sup>—but, in what amounts to the most paradoxical about-face in the decision, the Court elsewhere flatly denies both that truth and the widespread perception of that truth.<sup>76</sup> It is unclear whether the Court is simply contradicting itself or is saying that, genuine as this worry might be and however much it might erode the foundations of the ideal of one-person/one-vote, it simply cannot justify government-imposed restrictions on speech. Insofar as the Justices in the *Citizens United* majority are concerned with inequality and with this broader sort of corruption—and I do not purport to know their views on this matter beyond the words on the page—it is certainly true that they are *less concerned* with those issues than with preserving the laissez-faire ideal that individuals or groups may spend their own money (and, evidently, the money entrusted to them by investors) to help some people get elected and others get defeated, and, in turn, to help some policies get chosen and others get rejected.

Yet *why* the free speech ideal would have to be fatally corrupted by suitable attention to this broader worry about corruption remains for the reader to imagine; the Court largely

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73. For a more detailed discussion of the issue, see TRIBE & MATZ, *supra* note 2, at 104. To the degree that First Amendment jurisprudence does require that content-focused restrictions on speech be reasonably effective, the doctrine would of course need to be revisited if anything short of an across-the-board restriction on private spending in the political arena were to survive efficacy review.

74. See *supra* note 69 and accompanying text.

75. See *Citizens United v. FEC*, 558 U.S. 310, 361 (2010) (“If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern.”).

76. See *id.* at 360 (“The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”).

assumes its conclusion, in a worrisome substitution of *ipse dixit* for legal reasoning. It fails to make a coherent argument to show that it would be infeasible to carve a more sensitive middle path between the seemingly naïve willingness of the *Citizens United* dissenters (and of leading critics of *Citizens United* like Robert Post<sup>77</sup>) to trust those in positions of political power to enact campaign finance reforms that protect democracy more than they preserve incumbency, and the seemingly boundless skepticism of the Roberts Court majority in its campaign finance cases.<sup>78</sup> I favor such a middle path, which calls on judges to be skeptical of campaign finance reforms that seem calculated to entrench or empower incumbents, but more trusting when reforms prevent corruption and there is little or no evidence that they have undue pro-incumbent purposes or effects. This path is admittedly a treacherous one to blaze, as it requires deep judicial engagement with hard empirical questions: most notably, the tasks of measuring the incumbency advantage, levels of corruption, and incentives created by various funding schemes, and of assessing the degree to which those schemes were in fact designed with those effects in mind. But the difficulty of pursuing this course should not foreclose judicial attempts to distinguish among different types of campaign finance regulations: even if the Court were to misjudge some regulations and consequently proved

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77. For a recent statement of Dean Post's views, see POST, *supra* note 71.

78. For examples of the Roberts Court striking down state or federal campaign finance regulations, see *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (striking down federal aggregate limits on individual donations); *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012) (striking down Montana's ban on corporate independent political expenditures in state elections); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (striking down Arizona's matching funds provision); *Davis v. FEC*, 554 U.S. 724 (2008) (striking the federal "Millionaire's Amendment"); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (striking down a federal restriction on so-called "issue advertising" by third parties); and *Randall v. Sorrell*, 548 U.S. 230 (2006) (striking down Vermont's contribution limit as unconstitutionally low). The Roberts Court's skeptical presumption of corrupt self-dealing in the passage of campaign finance reforms is particularly difficult to defend in the context of regulations, like that at issue in *Bennett*, enacted by popular initiative. 131 S. Ct. at 2813. In any case, this heightened sensitivity to the corruption of self-dealing incumbents is difficult to reconcile with the Court's near-total insensitivity to non-quid pro quo corruption. See *supra* note 71 and accompanying text. The Court may have been particularly skeptical of the *Bennett* matching funds scheme because it provided publicly financed candidates with compensatory funding taking into account not only the opposing *privately financed candidate's own spending*, but also the spending of the opponent's *independent supporters*. 131 S. Ct. at 2813. Acting on its (doubtful) assumptions that independent groups are truly independent and that their expenditures are unlikely to be helpful to the candidates they support, the majority highlighted the "disparity in control" that the scheme involved: the publicly financed candidate would have full control over the public matching funds, while the privately financed candidate would be, in a sense, penalized for the expenditures of groups outside his or her control. *Id.* at 2819.

either too skeptical or too trusting in some cases, it would almost certainly do better than it has done under its current approach of essentially blanket skepticism.

The second dichotomy is between doctrinaire libertarianism and less purely libertarian approaches to campaign finance—and to speech generally. A purely libertarian approach to campaign finance, much like a libertarian approach to economic regulation, essentially assumes that there exists such a thing as a neutral baseline, an “unregulated” marketplace of speech, of free and fair elections, and of human interactions generally. The huge shortcoming of this view, familiar to nearly everyone since the early twentieth century if not before, is that the political system (and the system of laws constructed by politics) does not preexist the state and is not a product of “nature” but, rather, is *constituted* by an elaborate system of man-made rules.<sup>79</sup> The realist critique of economic libertarianism dating to the early 1900s sheds light on a fundamental weakness of an essentially laissez-faire approach in the campaign finance realm. Economic libertarianism was undermined by the growing recognition (or, for those who still view the issue as contestable, the growing belief) that not only the rules of corporate formation and limited corporate liability but also the even more basic rules of property, contract, and tort were all products not of a “brooding omnipresence in the sky”<sup>80</sup> but of positive law.<sup>81</sup> Needless to say, the entire edifice of elections and campaigns is itself the product of rules established by law, both federal and state. Not to make too fine a point of it, most of the means through which election-related speech is transmitted to the public (including, obviously, the postal service and the airwaves, both radio and television) are creations of the state as well. Given that the legal rules construct the campaign and electoral system in the first instance, it should not come as a surprise that the search for something to hang onto as a “neutral, regulation-free” baseline departs from which are deemed constitutionally suspect is a search for something that just isn’t there. The question in constructing a system of campaign finance, therefore, should not be: What business has government interfering in the unregulated operations of a supposedly “natural” and politically

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79. For a small sampling of the vast literature on these issues, see, for example, TRIBE, *supra* note 7, at 567–86; J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Tribe, *supra* note 4.

80. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

81. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 238–45 (1985).

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unmediated marketplace of information and ideas? Rather, the question should be: Given that the whole edifice is constructed by political choices, which set of choices will best accommodate the conflicting values that our constitutional framework, prominently including the First Amendment, should be understood to embody?

The Roberts Court seems to have answered this question by excising not just egalitarianism but realism from the First Amendment, at least in the campaign finance realm. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,<sup>82</sup> for example, the Court took to a new extreme the long-established principle that “equalizing” or “leveling” citizens’ ability to influence politics is categorically forbidden.<sup>83</sup> *Bennett* involved a state program in which publicly financed candidates were offered “matching” public funds if their privately financed opponents (and the opponents’ independent supporters) spent more than a certain amount. The Court saw this offset provision as unconstitutionally penalizing the privately financed candidate’s right to spend his own money without limit. Thus, the Court now forbids not just straightforward restrictions on politicians’ ability to raise and spend money, but also public financing schemes that, on the margins, *might discourage* the raising and spending of additional amounts of money by providing public funds to one’s opponents to partially offset such financial exertions.

Of course, the logic of *Bennett* could be somewhat arbitrarily limited to schemes that involve matching-fund triggers of the sort that Arizona had enacted. And yet, its logic could just as easily be extended. *Bennett* suggests the Court is wary not just of “leveling down” but also of “leveling up.” The fact that the privately financed candidates remained free to spend to their hearts’ content did not save the law. The Court was concerned not simply with their liberty to spend, but with their liberty to spend *more* than their publicly funded opponents are permitted to spend with the aid of the public fisc. Thus, *Bennett* implied a sharp distinction between private funds earned in the private economy (sacrosanct, democratic) and public funds delivered by the state (suspect, distortive). The Court not only rejected the notion that egalitarian values might be latent in the First Amendment or in the structure of our Constitution, but also adopted the libertarian notion of a

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82. 131 S. Ct. 2806 (2011).

83. *Id.* at 2825–26; *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976). *But see supra* note 78 for a possible narrower understanding of the concerns underlying *Bennett*.

pre-regulatory “natural” distribution of political speech that can *only* be warped by governmental interference.

The third and final distinction is that between fully theorized views and what could be described as “incompletely theorized” approaches.<sup>84</sup> A purely libertarian approach to campaign finance is an example of a “fully theorized” approach—with a normative foundation and clear implications for policy that stem from that normative foundation. As an alternative to this fully theorized approach, there are two options. First, it could be replaced by a *different* but no less fully theorized approach. Possible examples from democratic theory include deliberative democracy and communitarianism. Deliberative democracy, as the name suggests, focuses on creating processes through which members of the polity reason together about the public good.<sup>85</sup> Communitarian views often define liberty less in negative than in positive terms—less in terms of the absence of government-imposed restraints than in terms of active participation in self-government, with particular focus on situating the individual in the context of the larger polity.<sup>86</sup> Both kinds of theory contrast starkly with purely “aggregative” or “pluralist” views of democracy, in which the only legitimate purpose of the political process is to aggregate citizens’ pre-existing preferences. Although they differ in substantial ways, both deliberative and civic republican theories treat democracy as more than mere aggregation, but rather as a forum for developing a shared conception of the common good and then approximating it in reality.

Rather than choosing one of these fully theorized approaches, however—something that a multimember Court, not to mention a vast and diverse society, cannot be expected to do—one might simply aim to achieve what have been called “incompletely theorized” agreements on particular important

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84. For a detailed discussion and support of “incompletely theorized agreements,” see generally Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

85. See, e.g., AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996). For an application of deliberative-democratic theory to the problem of for-profit corporations participating in politics, see Samuel J. Barr, *Deliberative Democracy and Corporate Political Advertising* (Mar. 2011) (unpublished A.B. honors thesis, Harvard College) (on file with Harvard University Library).

86. See, e.g., MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); cf. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); Laurence H. Tribe, *Federalism as the Architecture of Liberty: A Comment on Justice Kennedy’s Jurisprudence* (Mar. 5, 2014) (unpublished manuscript) (on file with author).

issues.<sup>87</sup> On the view this relatively modest aspiration suggests, we need not agree upon any one fully theorized view of democracy in order to draw on a range of theories and identify their areas of intersection and points of tangency to demonstrate the shortcomings of the purely libertarian view. Despite the appeal of choosing one theory of democracy and building a system of legal rules accordingly, we might as well recognize the truth that judges are not, and should not aspire to become, philosopher-kings. They need not—and, for both theoretical and institutional reasons, should not—endorse and implement a single theory of democracy. Instead, they should draw from all the legitimate intellectual traditions available to them, to form what John Rawls described as an “overlapping consensus,” in which different normative conceptions of justice, even if not wholly consistent, can together form a common if not necessarily permanent foundation for political institutions.<sup>88</sup>

These seemingly theoretical considerations should not be regarded as beside the point for purposes of workaday jurisprudence. They make a huge practical difference. In particular, the theoretical framework that we adopt in the campaign finance context directly implicates First Amendment doctrinal analysis. To give but one example, traditional First Amendment analysis typically requires that courts answer the question of which proffered government interests are “legitimate” or “compelling.” But that question cannot be answered in a theoretical vacuum: doing so requires at least a provisional theory of democracy. A minimally theorized agreement on basic principles may be sufficient, but at least some conceptual work needs to be done. The Justices simply cannot avoid acting as democratic theorists in adjudicating campaign finance cases under the First Amendment. For the First Amendment, like much of the constitutional text, is a broadly worded statement without a clear and uncontested meaning. It is the Supreme Court’s job, in conversation with its predecessors and with its contemporaries throughout society, to develop the constitutional common law that gives the First Amendment’s text a more determinate meaning.<sup>89</sup> The quest for a mode of

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87. See Sunstein, *supra* note 84.

88. See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987); see also Justice David H. Souter, *Harvard University’s 359th Commencement Address*, 124 HARV. L. REV. 429, 433 (2010) (“The explicit terms of the Constitution, in other words, can create a conflict of approved values, and the explicit terms of the Constitution do not resolve that conflict when it arises.”).

89. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 51 (2010).

interpretation that provides perfect clarity to the First Amendment is chimerical. Courts *must* act as democratic theorists, whether they wish to or not. Even if this is a second-best reality that is not ideal in a democratic society, it is nonetheless our reality, and it is almost certainly preferable to the imaginable alternatives. And, given the inevitability of democratic theory, the Court should favor minimally theorized agreements, ones that seek to synthesize competing conceptions of democracy, rather than the single-minded libertarianism that we have seen in campaign finance cases in recent years.

The Court's recent decision in *Williams-Yulee v. Florida Bar*<sup>90</sup> may represent a promising exception to this single-minded trend. There the Court, with Chief Justice Roberts writing for the bare majority, upheld Florida's ban on personal solicitation of campaign funds by judicial candidates. While this decision may simply reflect an ad hoc judiciary-only exception to the Court's libertarian streak,<sup>91</sup> its premises seem hard to square with *Citizens United's* unwillingness to treat public concern about the dependence of officeholders on those who fund their elections as a compelling reason to restrict campaign-related speech. Though Chief Justice Roberts may believe that it's more important for the constitutional system that people trust judges to be apolitical umpires<sup>92</sup> than that they have confidence in the fairness and openness of the political process, such a distinction seems untenable and will hopefully, in time, be corrected.

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Given this theoretical backdrop, how should the Court ideally go about adjudicating campaign finance cases? As a matter of prediction, only a substantially reconstituted Court would pursue a path different from the one the Roberts Court appears determined to follow—a path toward essentially invalidating all substantial constraints on campaign spending and campaign contribution. I have elsewhere argued that pursuing a constitutional amendment to reform this area of the law is almost certainly a lost cause.<sup>93</sup> I do not intend to examine here the

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90. 135 S. Ct. 1656 (2015).

91. See *id.* at 1682 (Scalia, J., dissenting) (“The First Amendment is not abridged for the benefit of the Brotherhood of the Robe.”); *cf.* *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (treating public perceptions of the legal profession as important enough to warrant content-based and even lopsided restrictions on speech by attorneys to accident victims).

92. See *supra* note 48 and accompanying text.

93. See *supra* note 16.

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prospects for reform in terms of beating the rich at their own game the way my colleague Larry Lessig hopes to do with his Mayday Pac<sup>94</sup>—other than to say that, even if such efforts were, implausibly, to result in the election of people committed to “doing the right thing” once in office, that would beg the question of what “the right thing” would be: asking officeholders to pledge that they will listen only to those whom they are constitutionally elected to represent would leave unanswered huge questions about whether the “right” theory of democracy requires elected officials to disregard the views of those outside their immediate constituency, and to disregard as well the intensity of various groups’ convictions about what policies those officials should pursue, as measured by the willingness of those groups to put their money where their mouths are. So let me confine my discussion to the more modest question: What should the Court have done in *Citizens United*, once it made the dubious choice of answering a question that the parties had not asked, the (hard) question of McCain-Feingold’s facial validity as opposed to the (easy) question of its validity as applied to the *Hillary* film?

Reconstructing McCain-Feingold, saving its valid applications while striking down its invalid ones, would have been tempting but extremely difficult in *Citizens United*. It would have at the very least required judicially drawing lines that Congress had chosen not to draw in drafting the law, lines presumably distinguishing ordinary, for-profit business corporations from overtly ideological, nonprofits like Citizens United itself. And, in the course of that architectural and essentially legislative undertaking, that reconstruction would have required revisiting doctrines about just how constitutionally suspect speaker-based lines are and what it would take to make such lines survive the appropriate level or form of First Amendment scrutiny.

However the Court proceeded, it should probably have been less preoccupied with pure listener-protection and with the protection of “speech” without regard to speaker structure or identity. Yes, listeners do and should matter greatly in First Amendment analysis. But the speaker is relevant as well—and is particularly relevant given concerns about failures of representation. There is some indication that the Roberts Court may be receptive to this sort of approach in at least some contexts. In 2012, in an unexplained order, the Court departed from its

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94. See Evan Osnos, *Embrace the Irony*, THE NEW YORKER (Oct. 13, 2014), available at <http://www.newyorker.com/magazine/2014/10/13/embrace-irony>.

preoccupation with listeners in the campaign finance context and upheld a flat ban on campaign-related spending by foreign persons.<sup>95</sup> Given that foreign spending in American elections dramatically implicates the rights of listeners, and given that speakers from particular areas of the world may have things to say that are of unique value and importance to American citizens who hail from those areas or may have close relatives still living there, the Court must have been concerned principally with the speaker's side of the First Amendment ledger in upholding the ban on foreign contributions. While the lack of a written opinion means that we can only speculate on what various justices may have had in mind, it's hard not to suppose that at least some of those in the *Citizens United* majority might have been concerned with distortions of representation: allowing foreign donors to influence American elections could cause elected officials to be responsive to those donors rather than to their voting constituents. Reasoning of this sort could easily be applied to donations by entities that, like foreign citizens, are not permitted to vote in American elections—like unions and, of course, corporations, including transparently ideological nonprofits. It's difficult not to recall the moment during the State of the Union speech in which President Obama, shortly after *Citizens United* had been decided, speculated that the decision would mean possible foreign influence over our elections, only to find Justice Alito visibly but silently mouthing the words “Not true.”<sup>96</sup> Moreover, the foreign-donors case demonstrates the power of a minimally theorized approach to campaign finance—we need not agree on a single, comprehensive theory of representation to agree that some actions (buying of American elections by foreign donors) falls outside *any* plausibly defensible theory.

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The Supreme Court's sin in *Citizens United* is not that it has been wrong to recognize and embrace the libertarian values that inhere in the First Amendment. But the libertarian campaign finance law the Court has developed fails in the broader project vital to First Amendment jurisprudence: the sensitive accommodation of competing constitutional values. The Court has not only underemphasized the egalitarian strain in First Amendment law—it has rejected that strain outright. And it has

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95. See *Bluman v. FEC*, 132 S. Ct. 1087 (mem.) (2012).

96. See Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES, Jan. 29, 2010, at A12.

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failed to recognize the range of plainly legitimate conceptions of democracy that Americans hold, instead privileging one view, democracy-by-financial-contributions, above all others.

How to understand the First Amendment, and deciding how it should blend libertarian, egalitarian, and democratic values, is among our most difficult constitutional questions. Yet the Court's majority, in its campaign finance jurisprudence, has treated it as an easy (indeed, almost as a self-answering) question, with one set of values trumping all others. In so doing, it has reached out to decide issues not squarely before it while implausibly downplaying, and at times all but denying, the baleful corruption of American politics by means short of criminal bribery—by means that are lamentable precisely because they are lawful. Faced with weighty normative choices, the wiser path would be for the Court to answer only the narrow questions it must resolve to decide the specific controversies presented to it; to be particularly attentive to empirical realities; and—most of all—to avoid going “all in” on a single, highly contestable theory of democracy and on a single, uncompromisingly skeptical, orientation toward the motives and workings of the political branches.

There may be satisfaction in such intellectual absolutism, in painting in bright colors and with a broad brush. But a wiser path recognizes the difficulty of the normative issues at the heart of campaign finance law and the irreconcilable values that recent cases implicate.

This is not a plea for deciding any particular case one way or another. Indeed, as I stated at the outset, I believe that the Court rendered the correct judgment in favor of the right claimed by the corporation that sought to distribute a video critical of Hillary Clinton in *Citizens United*. This is instead a plea for greater judicial open-mindedness, sensitivity to nuance, and a measure of old-fashioned humility. Just as these issues cannot be intelligently settled by slogans like “money isn't speech” and “corporations aren't people,” so too they cannot be satisfactorily settled by proclamations that independent expenditures don't corrupt or by sweeping assumptions that government regulation of spending on political speech always equals censorship. The political branches should be left with some tools to regulate the alchemy through which economic inequality perpetuates itself by transmutation into political and civic inequality. The form that these regulations

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may take is properly policed by the federal judiciary,<sup>97</sup> but *Citizens United* appears to represent a much broader and more perilous assertion of judicial power in campaign finance law and in First Amendment law more generally: unrelenting skepticism of legislators' motives, a pathologically rigid doctrinal absolutism, and a naïve, unrealistic economic libertarianism and blindness to political corruption.

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97. See TRIBE & MATZ, *supra* note 2, at 101 (“[I]t would be a mistake to leave judgments about the ‘proper’ distribution of speech to politicians. Arming them with a roving license to level the playing field by silencing or adjusting the volume of disfavored speakers is an invitation to self-serving behavior and, ultimately, tyranny.”).