IMAGINING CHANGE BEFORE AND AFTER *CITIZENS UNITED*

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ABSTRACT

The Supreme Court held in *Citizens United v. Federal Election Commission* that nearly all impediments to corporate-sponsored political advertising are facially unconstitutional. In doing so, the Court made disastrous policy and disregarded ordinary norms of judicial restraint. Yet *Citizens United* does not obviously advance an unfaithful understanding of the First Amendment. It more accurately gives expression to a dark potential in the First Amendment that past Justices have preferred to hide: namely, that the law of free speech might frustrate the ideal of popular democracy as often as it fosters it.

After *Citizens United*, one would therefore expect the advocates of clean and fair elections to approach the new First Amendment somewhat more critically, much as moderate gun-control advocates approach the Second. Yet most campaign finance reformers, who should be championing *censorship* of big-money electioneers, remain committed to rhetorical and intellectual norms of free speech libertarianism that heavily favor the argument for further deregulation.

I argue that if campaign finance reformers wish to turn the tide, they should learn from Justice Thomas, the Supreme Court Justice who has argued consistently for a decade and a half that *all* campaign finance law should be struck down. Justice Thomas writes from the fringe, which often earns him ridicule. But by doing so, he provides political cover for other Justices to write previously unthinkable opinions such as *Citizens United* without appearing to take up the fringe themselves. Campaign finance reformers should adopt similar tactics. That means throwing off the yoke of free speech libertarianism and arguing openly for corporate censorship laws that appear obviously unconstitutional—today, at least—so that a more authentic democracy can appear possible tomorrow.

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I. INTRODUCTION

> "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."
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> -*Buckley v. Valeo* [1]

The Supreme Court held in *Citizens United v. Federal Election Commission*[2] that there is a general First Amendment right to direct and distribute electoral propaganda without government interference. There are only two qualifiers. First, the right is limited if the speech is coordinated with a campaign organization. Second, the speaker may be required to sign off on its ads.[3] Other than that, these speakers, whether individual or corporate, may saturate the airwaves with as much propaganda as they please.

The ruling put all eyes on the Court.[4] Lay people talked about the case. It was a *Bush v. Gore* moment, a tectonic five-to-four,[5] complete with an angry, bridge-burning dissent by the outgoing Justice Stevens.[6]

And amid this spectacle, it was easy to overlook the fact that Justice Thomas had written a partial dissent of his own.[7] Of course, Justice Thomas *had* signed on to almost everything in the holding.[8] But by 2010, there was very little that Justice Thomas might have said to make news. For years he had written the strangest and most provocative dissents and concur-

1. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam).
2. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).
3. *Id.* at 913-14.
4. Including those of the President himself, who confronted the case specifically in a State of the Union address with six Justices present, saying it would "open the floodgates for special interests—including foreign companies—to spend without limit in our elections." Linda Greenhouse, *Justice Alito's Reaction,* N.Y. TIMES (Jan. 27, 2010), *available at* http:// opinionator.blogs.nytimes.com/ 2010/ 01/ 27/ justice-alitos-reaction/.
5. *See, e.g.*, Adam Liptak, *Supreme Court Memo—Justices Turn Minor Movie Case Into a Blockbuster*, N.Y. TIMES (Jan. 22, 2010), *available at* http:// www.nytimes.com/ 2010/ 01/ 23/ us/ politics/ 23scotus.html.
6. *Citizens United*, 130 S. Ct. at 929 (Stevens, J., dissenting).
7. *Id.* at 980 (Thomas, J., dissenting).
8. *See id.* at 980 ("I dissent from Part IV of the Court's opinion . . . because the Court's constitutional analysis does not go far enough.").

rences on the Court.[9] Yet because he has never been a "swing-vote," or a "consensus-builder," they tend to read as minor works. One senses that Justice Thomas has purchased a great degree of intellectual freedom by withdrawing from Court politics—his legendary silence during oral argument[10] may speak to this—and by forfeiting a lot of opportunities to shape positive law.

Justice Thomas's First Amendment jurisprudence generally seems to affirm this sense. He wants strict scrutiny for false advertising laws.[11] He does not do balancing tests.[12] He scorns stare decisis. Little surprise, then, when contrarian Justice Thomas contended that the *Citizens United* demolition crew had left too much campaign finance regulation *intact*: why, Justice Thomas asked, had the majority upheld the requirement that the underwriters sign off publicly on the ads? Surely they had undersold the right to speak anonymously.[13] So long as political donors are not guaranteed anonymity, he argued, rival political actors will resort to intimidation tactics "specifically calculated to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights."[14] "[T]he simple interest in providing voters with additional relevant information"[15] could not possibly justify abridging such a right. The majority believed as-applied challenges could protect the right adequately;[16] Justice Thomas thought not.[17]

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9. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 412 (2007) (Thomas, J., concurring) (urging, from a study of nineteenth-century classrooms in which "[t]eachers commanded, and students obeyed," that the First Amendment does not extend free-speech rights to students in public schools).

10. Thomas discussed his reticence at a speaking engagement at Hillsdale College in Michigan:

> We are there to decide cases, not to engage in seminar discussions. Now, each of us has a different way of thinking about things. Some people like to talk it out. Some people enjoy the questioning and the back and forth. Some people think that if they listen deeply and hear the people who are presenting their arguments, they might hear something that's not already in several hundred pages of records.

Paul Bedard, *This Is Not Perry Mason*, U.S. NEWS & WORLD REP. (Nov. 29, 2007), *available at* http://politics.usnews.com/ news/ blogs/ washington-whispers/ 2007/ 11/ 29/ this-is-not-perry-mason.html.

11. *See, e.g.*, Thompson v. Western States Medical Center, 535 U.S. 357, 377 (2002) (Thomas, J., concurring) (criticizing balancing test of Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980), for determining commercial speech regulation cases); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (Thomas, J., concurring in part and concurring in the judgment) ("I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'"); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 264 (2003) (Thomas, J., dissenting) (urging "'the strictest scrutiny'" for campaign finance restrictions (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 412 (2000))).

12. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410 (2000) (Thomas, J., dissenting) (arguing that *Buckley* and its progeny improperly "balance away First Amendment freedoms").

13. "I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in 'core political speech, the 'primary object of First Amendment protection.'" *Citizens United*, 130 S. Ct. at 982 (Thomas, J., dissenting) (quoting *McConnell*, 540 U.S. at 264 (Thomas, J., concurring in part, concurring in judgment in part, and dissenting in part)).

14. *Citizens United*, 130 S. Ct. at 981-82 (Thomas, J., concurring in part and dissenting in part).

15. *Id.* at 980 (Thomas, J., concurring in part and dissenting in part) (citations omitted).

16. *See generally id.* at 913-14.

17. He went on to write that narrow as-applied challenges to disclosure requirements were inappropriate in the electoral context, since they would depend on protracted litigation and uncertain line-

Yet none of this means Justice Thomas came away as the loser. Quite the contrary. *Citizens United* marks a giant step toward the alternate-universe First Amendment jurisprudence Justice Thomas has articulated for most of his tenure on the Court. Justice Thomas's dissent therefore reads less as a protest than as a sign marking the way forward, into an America where all campaign finance regulation ceases to exist and where the wealthy electioneer whenever they want, however they want, in as big a way as they want.

Justice Thomas's vision of campaign finance law is distasteful because it exposes an antidemocratic potential[18] in the First Amendment that other Justices have preferred to restrain. Yet it fares better under Occam's razor[19] than present case law and far better than what came before *Citizens United*. Other Justices have subdued the First Amendment's antidemocratic aspect by allowing numerous epicyclic safeguards to proliferate around the background rule that campaigning is constitutionally protected. And though Justice Thomas would make bad policy by clearing those safeguards away, and though he would offend stare decisis, he would not obviously be "wrong" in any positive sense to do so.

Indeed, it is at least arguable that the First Amendment's antidemocratic side is a feature rather than a glitch. The Constitution mandates a multitude of antidemocratic practices that are far more explicitly antidemocratic and troubling.[20] The Framers fretted famously about democracy's inherent instability.[21] There is little reason to expect the First Amendment to deviate from that pattern.

So if you find your country insufficiently democratic, I suggest that advancing the First Amendment's deep truths more faithfully should not be your priority. For if those truths exist at all, whether in the Framers' minds or in some historical dialectic of American politics, they will not advance the democratic project reliably. They will backfire frequently. Instead, you should ask how we might make our elections more democratic *in spite of*

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drawing. *Id.* at 982 (Thomas, J., concurring in part and dissenting in part); *see generally* NAACP v. Alabama, 357 U.S. 449 (1957).

18. *See infra* text accompanying notes 73-78.

19. *E.g.*, the preference for simple theories over complex ones.

20. Recall that the original Constitution did not guarantee universal suffrage, even among white males, and that in the federal government, only the House of Representatives was elected by "the people." Even today, the design of the Senate gives a Wyomingite seventy times the representation of a Californian—a gross inequity that under Article V cannot be corrected without the specific consent of the Wyomingites. The President is still appointed by proxy, and though modern custom makes the Electoral College a far better proxy for the popular will than it was originally, four presidents have won the office while losing the popular vote.

21. *See* THE FEDERALIST NO. 10 (James Madison).

> A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.

the law of free speech. You should try, like Justice Thomas, to take the long view, to think big, even if it takes you to a fanciful place.

This Article attempts to do just that. I open in Part II with a thought experiment: How would well-meaning policymakers regulate campaign finance in an altered but parallel America whose Constitution left government free to censor at will? The point of this fantasy is to chart the campaign finance policies we might implement if all of the constitutional red tape was removed. Then, in Part III, I return to reality to survey the relatively anemic policy options that manage to survive contemporary First Amendment scrutiny. Finally, in Part IV, I ask how policymakers could work around the obstacle of the First Amendment to approximate the democratically-optimal solutions offered in Part II.

Lest I be misread, I wish to clarify that I do believe free speech matters. The freedom of thought comes first in the Bill of Rights for a reason. But there is a *Zeroth* Amendment, too, which dictates that the nation belongs to its people. It is unwritten and subject to varying interpretations—some claim it does not exist at all. But it underlies all constitutions throughout the world and it precedes every other provision. Any attempt to overrule it is morally void. And when the First Amendment comes into obvious, open conflict with the Zeroth, the Zeroth commands us to push back at the First however we can. At the very least, we must *envision* a world in which the Zeroth asserts its priority, and the First complies. See Part II, immediately below.

II. AN EXCERPT FROM A LAW REVIEW ARTICLE THAT WAS WRITTEN IN A PARALLEL UNIVERSE

> Amendment 1—Freedom of Religion, Assembly.
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> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof~~; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble~~.

There are many proposals to fix our ailing democracy. The majority of them concentrate on the problem of campaign finance. This makes sense, as Americans' historically low estimation of their elected government appears rooted in the perception that money buys audience in Washington.

The traditional logic holds that corruption boils down to vote-purchasing, which boils down to bribery. Yet not even the most energetic prosecution of the bribery laws could eliminate enough bribery to dispel the air of corruption that surrounds our elected institutions. For bribery convictions require proof of corrupt intent, which rarely presents itself to the prosecutor.

But *preventative* measures, unlike prosecutions, require no such proof. They just identify a category of transactions that corruption is known to infest—the direct corporate campaign contribution, for instance—and impose strict liability on everyone caught engaging in it, whether corrupt or not. Such schemes are more easily enforced than the bribery laws, since monetary transactions, unlike bad intentions, generate tangible documentary evidence.

The Federal Campaigns Act (FCA), first enacted in 1908 and amended thrice since then, reflects one such preventative strategy. The FCA's earliest iteration simply banned direct campaign donations by business corporations and labor unions to federal electoral campaigns. This was in response to prosecutors' failure to indict former President Hanna for bribery, though the evidence clearly implicated him in the lowest forms of corporate graft. After the bribery laws' failure, the FCA's proponents hoped that the blunter tactic of banning the transactions altogether would prove more effective.

But the money still leaked through. One early circumvention strategy would launder the corporate donation through individual employees and reimburse them in the form of a "bonus." Corporations also milked the FCA's exemption for contributions to the parties' general treasuries. Though this "soft money" was nominally marked for get-out-the-vote drives and the like, parties would discreetly route it toward "issue" propaganda in the targeted candidates' districts.

Even more insidiously, the corporations that used to send a check directly to the candidate learned, around the 1910 midterms, to design "unofficial" campaign fliers, newspaper advertisements, and newsreels outside the candidate's shop. This "unofficial" propaganda worked better than the official type anyway, as the company could defame the opposition savagely while leaving the candidate himself "above the fray." In a related tactic, companies would sometimes pay newspapers to endorse the company's man or to withhold negative coverage about him.

Congress ultimately moved on various occasions to close these various "loopholes." Later reforms include general bans on soft money expenditures exceeding $1,000, broad bans on corporately-penned print or broadcast "campaign propaganda" within sixty days of an election, and a battery of corporate disclosure requirements. But whenever a loophole closed, another immediately opened elsewhere, almost as if by logical necessity. The limit on soft money contributions, for instance, simply led donors to pay independent propaganda firms such as Americans for Progress rather than the parties themselves.

Moreover, the independent propaganda firms' nearly total dominance of the message machine brought to light a number of political ills besides out-and-out bribery. For one thing, the corporations and trusts that used to buy specific votes now seemed to use the influence they retained to buy "audience" with elected officials. For another, the voice of the independent propaganda firms and their corporate benefactors simply exercised an outsize influence on the national "debate." Even in the unlikely event that the

FCA had completely wiped out the particularized quidproquoism of the Hanna era, it was clear that the trusts and the wealthy continued to set the national agenda in a general sense. This was the simplest way to explain, for instance, Congress's grossly retrogressive tax policies, or its nearly obsessive hostility toward labor unions, or its unconscionable refusal to jettison the gold standard during Great War I, which enlarged private debts even as the creditors were allowed to buy their sons exemptions from the national draft.

The Great Panic of the 1930s, of course, caused national policy to veer sharply left. For the first time, fair advertising laws required that all paid broadcast advertising be preapproved by the newly-minted National Fair Advertising Council (NFAC). President Sinclair "sold" the NFAC to the public as a safeguard against junk consumer products, and, more importantly, against unfair financial practices. But the NFAC also nixed nearly all corporate speech that carried any sort of political message—and in Sinclair's case, a president whom much of the business community shunned, we can assume that this was largely designed as an incumbent protection device. Sinclair's NFAC nonetheless applied the ban against corporate political speech evenly, shutting down the occasional Progressive propaganda firms (such as Americans for Progress) as well as the generally wealthier Republican ones. By the time Sinclair left office in 1948, this ban had become fairly well-institutionalized.

That ban eventually found formal reflection in the 1975 amendments to the FCA, along with partial public funding and some other fresh reforms. Most famously, the 1975 amendments ended the phenomenon of short-form televised political advertising—a prohibition that many voters favored simply because they found the ads annoying, but that was also grounded in the common experience that the format tended to favor manipulative arguments over fair ones.

Yet, even after all this, wealth still buys audience. Individual contributors to campaigns remain free to give up to $2,000. A room of five hundred such donors could theoretically raise $1,000,000. Nearly every one of those donors would occupy the highest tax bracket. There is no one without money who has the connections to organize such an event.

Many recent commentators urge that a "deregulation" of American campaign finance law would improve the position of insurgent candidates versus incumbents and allow voters a more meaningful choice. These commentators frequently propose lifting the ban on corporate political speech, the ban on televised political advertising, or both.

But as I argue here, we cannot hope to enhance the voice of ordinary people by allowing our political candidates to advertise as if they were business corporations, and business corporations to politick as if they were citizens. Any argument for such a policy assumes one of two false premises: first, that the corporate voice is as valuable to the political process as the expressed thoughts of potential voters, or second, that it is simply impossible to censor anything intelligently.

The falsity of the second premise—that judicious censorship is somehow impossible—should be immediately transparent. Champions of deregulation will quickly point to the disastrous Sedition Acts of the First and Second Great Wars as examples of censorial overzeal. But it makes no sense to tar all acts of censorship with the same brush as the very worst among them. For there is good censorship, and there is bad censorship. What harm comes from the fair advertising laws, the occasional obscenity statute, or the law against celebrating the traitorous and bigoted Southern Confederacy? Perhaps some, but majorities of adult voters have judged the harm to be marginal and the benefits to outweigh them. That is the best approach in other areas of public policy. Why not here?

As for the first premise—that business corporations have something constructive to add to our political conversation—I say that as a rule, they do not. Unlike human beings, business corporations are bred for perpetual strife. They survive by undercutting the competition, by guarding secrets, by exacting the highest price the market will permit. And properly limited, this selfish behavior can generate vast wealth for society as a whole. But I say that our politics suffer when parochial and selfish interests crowd out the shared interests of the nation as a whole. Human beings are at least arguably capable of thinking selflessly, but shareholder protections ensure that corporations are not.

In objection it will be said that I dislike the notion of corporate political advertising because I favor policies that generate public wealth over policies that generate private wealth. Perhaps when we lay the ground rules for our elections, we should do so without regard to the policies those elections will produce. I disagree with that premise subtly, but I lack the space or the need to contest it meaningfully here.

Even if we *were* agnostic to the policy outcomes of our elections, there is a strong policy-neutral basis to oppose corporate participation. Consider that in 1930, the average automobile advertisement contained 250 words. Today, the average automobile advertisement contains fewer than ten words. In 1960, the average television advertisement was roughly sixty seconds long. Today, it is thirty seconds long. The message is ever-more oblique; it is unheard of today to read a straightforward description of the product and why the reader should buy it. The profit motive has taught marketers to short-circuit the critical faculties altogether and target the consumer's baser instincts. There is room for reasonable debate on the pros and cons in the context of consumer products advertising. But I shudder to think of the results should corporations bring the same expertise to bear against the voting public.

III. AMERICAN ELECTIONS WITH FREE SPEECH

> Amendment 1. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Greivances

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . .[22]
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> "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."
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> -*Buckley v. Valeo* [23]

A. Background, via Citizens United

As in the "other" America I have described, the true history of campaign finance law begins long before 1976. Nineteen seventy-six is nonetheless the year that the modern conflict between free speech and campaign finance regulation began, and in some sense serves as a point of divergence between the "other" America—the one where speech is not protected—and our own, which curiously emerges as the dystopian alternative.

When *Buckley v. Valeo*[24] had come to the Supreme Court in 1975, Congress had recently amended the Federal Election Campaign Act (FECA)[25] to include a $1,000 limit on individual political contributions to any single candidate per election,[26] an overall annual limitation of $25,000 by any contributor,[27] and a $1,000 ceiling on independent expenditures by individuals and groups "relative to a clearly identified candidate."[28] It also capped expenditures by the candidates themselves at $70,000, plus an additional $14,000 to offset additional fundraising expenses brought on by the $70,000 limit.[29] A presidential candidate, a senator, and various political parties and advocacy groups all brought suit to enjoin enforcement on a First Amendment theory.[30]

The Court saw that FECA's new restrictions hampered core political speech. For "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[31] Limiting this expenditure, the

22. U.S. CONST. amend. I.
23. *Buckley*, 424 U.S. at 48-49.
24. *Id.* at 1.
25. 2 U.S.C. §§ 301-406 (1976) *as amended by* 2 U.S.C. §§ 431-455 (2000).
26. *Id.* at § 441a(a)(1)(A).
27. *Id.* at § 441a(a)(3).
28. 18 U.S.C. § 608(e) (1976).
29. Federal Election Campaign Act of 1971, Pub. L. No. 93-443 § 101(b)(1), 88 Stat. 1263 (1974) *repealed by* Pub. L. No. 94-283, 90 Stat. 475 (1976). Chief plaintiffs' counsel has argued that the law's $70,000 limit "was set in the face of the fact that no challenger to a House incumbent in 1972 had succeeded in defeating that incumbent without spending more than $70,000." Ralph K. Winter, *The History and Theory of* Buckley v. Valeo, 6 J.L. & POL'Y 93, 103 (1997).
30. *See Buckley*, 424 U.S. at 7-8.
31. *See id.* at 19.

Court wrote, would "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[32] This impoverishment of the nation's political discourse would in turn lead citizens to cast uninformed votes for unfit candidates who would place the nation on an unsound course.[33] Given these perceived stakes, the fact that FECA referred to the funding of core political speech rather than the speech itself did nothing "to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."[34]

Nonetheless, the government argued "that what the Act regulates is conduct, and that its effect on speech and association is incidental at most."[35] The Court used similar reasoning in *United States v. O'Brien*[36] to approve the law against burning draft cards.[37] But it took no sweat for the Court to distinguish that case. "Even if the categorization of the expenditure of money as conduct were accepted," it wrote, "the limitations challenged here would not meet the *O'Brien* test because the governmental interests advanced in support of the Act involve 'suppressing communication.'"[38]

Still, there was this problem of Watergate. The Court understood that some "deeply disturbing examples [of corruption] surfacing after the 1972 election"[39] had provided the impetus for FECA in the first place, and it could not dispute the urgency of combating further quid pro quo corruption.[40] Indeed, the Court recognized that the very *appearance* of quid pro

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32. *Id.* Specifically, the Court expressed concern that the $1,000 ceiling on expenditures "would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication." *Id.* at 19-20.

33. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Id.* at 14-15. *Cf.* Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).

34. *See Buckley*, 424 U.S. at 16.

35. *Id.* at 15.

36. *See* United States v. O'Brien, 391 U.S. 367 (1968) (sustaining the conviction of an anti-war demonstrator for burning his draft card).

37. *See id.*

38. *Buckley*, 424 U.S. at 17 (emphasis added). "[I]t is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups." *Id.*

39. *Id.* at 27. Congressional investigations uncovered wide scale corruption in GOP fundraising and campaign spending activities, known as the Watergate Scandal, during the 1972 presidential elections.

> In seeking reelection as president in 1972, Richard Nixon and his fundraising organization, the Committee for the Reelection of the President (CREEP), had raised well in excess of $50,000,000, often in illegal fashion or in ways otherwise meant to bypass . . . disclosure requirements. . . . Public revulsion towards the Watergate fundraising, spending, and other illegal activity . . . prompted Congress to . . . place restrictions upon both political contributions and expenditures.

David Schultz, *Revisiting* Buckley v. Valeo*: Eviscerating the Line between Candidate Contributions and Independent Expenditures*, 14 J.L. & POL. 33, 39 (1998) (citations omitted).

40. *Buckley*, 424 U.S. at 27.

quo corruption had already dealt serious damage.[41] If the Court struck the FECA amendments *in toto*, the nation would pay a steep price.

The Court therefore split the baby, holding that contribution limits—limits on donations—were constitutional[42] while expenditure limits—limits on advertising—were not.[43] For while contribution limits presented "only a marginal restriction upon . . . free communication,"[44] expenditure restrictions placed "direct and substantial restraints on the quantity of political speech."[45]

In the Court's view, the very worst that contribution limits could do was force big contributors to speak for themselves through direct expenditures and candidates to solicit small contributions from a wider range of people.[46] Whatever minimal encumbrance these limits placed on free speech, the Court thought them outweighed by the government's interest in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."[47] "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders," the Court wrote, "the integrity of our system of representative democracy is undermined."[48] Review passed.[49]

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41. *Id.* at 29. "Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 27. *See* CSC v. Letter Carriers, 413 U.S. 548 (1973) (upholding federal prohibition against federal employees taking active part in political campaigns).

42. *Buckley*, 424 U.S. at 20-21. "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* at 21.

43. *Id.* at 39. The limits on candidate expenditures were struck down as well. *Id.* at 51-59. *Buckley* also examined and upheld the Act's system of public disclosure and recordkeeping requirements for contributions and expenditures as well as a procedure for the public funding of presidential candidates. *Id.* at 60-84, 85-109.

44. *Id.* at 20-21.

45. *Buckley*, 424 U.S. at 39.

46. *Id.* at 21.

> The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

Id. at 21-22. The Court also noted that services that individuals volunteered to candidates or political committees were exempted from the contribution limitations. *Id.* at 23-24.

47. *Id.* at 25.

48. *Id.* at 26-27. "The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy." *Buckley*, 424 U.S. at 26.

49. *Id.* at 29. Respondents argued that bribery laws and disclosure requirements would handle bribery less restrictively than the contribution limitations. The majority rejected this argument. Instead, the Court: (1) questioned the efficacy of bribery laws and (2) deferred to Congress's conclusion that disclosure would fail in the absence of contribution limits. *Id.* at 27-28. Further, Congress answered the argument that the $1,000 restriction was "unrealistically low" by observing that "Congress' failure to engage in such fine tuning does not invalidate the legislation. . . . Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* at 30.

The Court found FECA's expenditure limits more problematic. The relevant language ambiguously limited expenditures "*relative to* a clearly identified candidate."[50] Any wide reading of "relative to" would chill issue advocacy, as it requires a lot of contrivance to discuss political ideas without referring to the candidates who oppose or support them.[51] The Court therefore interpreted the language narrowly to apply "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[52] This would boil down to a "magic words" rule: expenditure limits applied only to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[53]

Thus, there was only one interpretation of the expenditure limits that avoided unconstitutional overbreadth. But that same interpretation left a rule that was trivially easy to circumvent[54] and therefore useless against corruption. It would serve no corruption-related interest sufficient to counter the limitations it placed on speech.[55] Nor could it promote any legitimate countervailing interest in political equality,[56] or in tamping down the cost of federal campaigns.[57] Those interests were not cognizable. There-

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50. *Id.* at 41 (emphasis added).

51. *Id.* "[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley*, 424 U.S. at 42. "Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Id.*

52. *Id.* at 44.

53. *Id.* at 44 n.52.

54. *See id.* at 45. "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign." *Id.*

55. *Buckley*, 424 U.S. at 45. "[N]o substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office." *Id.*

56. *Id.* "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." *Id.* at 48-49. "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 49. "Moreover, the 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." *Id.* at 56-57.

57. Second, it also discounted arguments that expenditure limitations were vital for "reducing the allegedly skyrocketing costs of political campaigns . . . [because] the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns." *Buckley*, 424 U.S. at 57.

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.

Id. But see DICK MORRIS, BEHIND THE OVAL OFFICE: WINNING THE PRESIDENCY IN THE NINETIES 100-01 (1997) (reporting Clinton to have complained, "I can't think. I can't act. I can't do anything but go

fore, Congress shall make no law abridging the freedom to buy political advertising. That includes the freedom of corporations.[58]

Some critics may object that I have given a crude account of *Buckley*. But the account I give is *Buckley* via *Citizens United*,[59] and that is the only reading that matters. The nuances in *Buckley* that let you force a corporation to fund its politics through a segregated account, [60] or to force corporations to pipe down during the final sixty days of the race,[61] no longer exist. The entire point of *Citizens United* was to efface them: independent expenditures may not be limited in any way.[62]

B. Money Restrictions: Contributions and Expenditures

In economic terms, it may be said that *Buckley v. Valeo* created the worst[63] of all possible worlds.[64] Its contribution/expenditure dichotomy reduces to supply/demand. It is this asymmetry that inspires candidates and their patrons to invent the gray-market circumvention devices the Supreme Court upheld in *Citizens United.* [65]

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to fund-raisers and shake hands. You want me to issue executive orders; I can't focus on a thing but the next fund-raiser. Hillary can't, Al can't, we're all getting sick and crazy because of it.").

58. *See generally* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (upholding the First Amendment right of corporations to spend corporate funds on electioneering communications).

59. *Citizens United*, 130 S. Ct. 876.

60. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010); Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197 (1982).

61. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

62. "The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." *Citizens United*, 130 S. Ct. at 886.

63. "[T]he blame rests with the Supreme Court and its aggressive use of the First Amendment . . . to frustrate Congressional efforts to deal with the distorting role of wealth in the democratic process." Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 795 (1998). "By deploying a vision of the First Amendment that prevents government from leveling the electoral playing field, the *Buckley* Court inadvertently gave us the worst of all possible democratic worlds." *Id.* (emphasis added). Professor Neuborne credited three factors for what he regarded as a democratic malaise: (1) low voter turnout; (2) limited choice among candidates and ideas; and (3) the lack of substance in political discourse. *Id.* at 794.

64. "If . . . Buckley were reconsidered, the status of independent expenditures would also have to be reconsidered." C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 47 (1998). "Analytically, there is no real difference between the First Amendment value of a contribution and an expenditure. A contribution is a quintessential act of political association, just as an expenditure is an act of expression. Nor is there much difference between the real-world potential for corruption posed by each." Neuborne, *supra* note 63, at 796-97.

65. Professor Neuborne explains that

> [i]n effect, the Buckley Court authorized government to regulate the size and source of campaign contributions, thus permitting significant regulation of the supply of funds to candidates, but forbade the government to place ceilings on expenditures, thus preventing any regulation of the demand for campaign funds. Any economist will tell you that an effort to regulate supply in the teeth of unlimited demand is a prescription for a black market. And that is exactly what has happened to American politics. . . . Until the Court permits the demand side of the campaign financing equation to be regulated, campaign finance reform will risk being frustrated by legally questionable end-runs around restrictions on supply.

Neuborne, *supra* note 63, at 797.

If the *Buckley* framework creates the worst of all possible worlds, then we could expect the inverse of *Buckley*—restrictions on demand but not supply—to create the best. FECA's expenditure limits on candidates who accept public funding[66] provide one example of a fully constitutional restriction on demand. But candidates' freedom to opt out of matching funds hobbles the system by forcing Congress to set the expenditure ceiling so high that candidates still hunger too much for corporate cash. For if the ceiling were set too low, candidates would have no incentive to opt in. And even with the ceiling set as high as it is, certain candidates still find it efficient to opt out of matching funds altogether.

Moreover, even if the First Amendment's future evolution allowed unconditional expenditure limits on candidates with no room to wriggle out, we could expect candidates to use some new exotic proxy to subvert the rule—super-PAC, pseudo-PAC, crypto-PAC. Congress would continue to install security updates so finely-tuned that not even Congress could see how to hack them. And the Koch brothers[67] would hack them within months.

The cycle of rulemaking and circumvention will self-perpetuate in this manner as long as the limits are defined with respect to spending rather than speech. This is not merely a projection from historical experience; it is a logical necessity drawn from two simple facts. First, all spending restrictions of any kind have a qualified scope rather than a universal one. That is to say that Congress cannot outlaw "spending" universally without outlawing the economy. All speech-neutral spending limitations must therefore be circumscribed either by the identity of the spender (e.g., the political party) or by the budget item (e.g., the segregated fund). Second, money is liquid. The fact that it can be transferred outside the regulated area to an unregulated one, and that an unregulated haven must always exist as the residue of the regulation, renders spending restrictions inherently exploitable. The rich will always game them.[68]

C. Restrictions Against Speech

Yet laws against the speech itself, as opposed to the funding of the speech, do not suffer the same flaw. Imagine, hypothetically, a blanket prohibition against all paid political advertising on television—a policy that would be glaringly unconstitutional here, but *de rigueur* abroad[69] and per-

66. *See* 26 U.S.C. §§ 9001-9013 (2006).

67. *See* Jane Mayer, *Covert Operations—The Billionaire Brothers Who Are Waging a War Against Obama*, NEW YORKER (Aug. 30, 2010), http:// www.newyorker.com/ reporting/ 2010/ 08/ 30/ 100830fa_fact_mayer?currentPage=all.

68. Obviously, my language of "logical necessity" overstates things somewhat, as it is impossible to prove laws of economics or politics through techniques such as mathematical induction. But the overstatement is trivial, given that the counterexample to my rule requires the rich either to become politically unsavvy or to forswear the profit motive, and to do so unanimously.

69. *See* EPRA Secretariat, *Political Advertising: Case Studies and Monitoring*, EUROPEAN PLATFORM OF REGULATORY AUTHORITIES (May 17-19, 2006), *available at* http:// www.rtdh.eu/ pdf/

fectly legal in the alternate universe contemplated *supra*. Such a law would immediately slash most large-scale campaign budgets by half or more. It would cut them largely free from the need for corporate patronage. By the same stroke, it would reduce the leverage of outside organizations. The Club for Growth would no doubt run internet ads, print posters, and so on, and of course, the prominence of those media in campaigns would naturally increase. But it is doubtful that the Club could soon recover the prestige that television allows it today. For speech is not liquid like money. You cannot just invent new media or new audiences from thin air as if they were financial instruments and move your message from account to account. Street protesters know well that it is hard to find much of an audience if you have to shout from a "free speech zone" located a mile away from the event you are protesting.[70]

Of course, it is this finality that makes censorship frightening. There is the theoretical danger that urgent messages will be cut off, that key information will be lost, and that for the censor's own narrow, perhaps perverse interests, the nation will be diverted irrevocably from its proper course. But to some extent, are we not living out that scenario already? It is easy to see once you admit the possibility that the censor may be a private rather than public actor, and that drowning out another person's speech with your own can have the same effect as silencing them outright. I find it difficult to believe that Orwell's dystopia is around the corner if our elected government, like those of other stable democracies, shuts off the manipulative thirty-second political spots that every reasonable adult identifies correctly as sheer garbage;[71] or if it holds that the Hilton heirs should not be born with a louder political bullhorn than Ralph Nader;[72] or, generally, if its policies acknowledge that the parochial interests of corporations should matter less in a democracy than those of the ordinary people who make up the overwhelming majority.[73]

20060517_epra_meeting.pdf.

> Paid political advertising is statutorily forbidden in the vast majority of Western European countries such as Belgium, Denmark, France, Germany, Ireland, Malta, Norway, Portugal, Sweden, Switzerland, and the UK. Several countries from central and Eastern Europe such as the Czech Republic and Romania, also have a prohibition of paid political advertising.
>
> The most traditional justification for this prohibition is that rich or well-established parties would be able to afford significantly more advertising time than new or minority parties—thus amounting to a discriminatory practice. Another rationale invoked for the restriction or the ban is that it may lead to divisiveness in society and give rise to public concern. It has also been suggested, albeit less frequently, that a prohibition would preserve the quality of political debate.

Id. at 3. Note, though, that the European Court of Human Rights struck down Norway's ban in *TV Vest AS & Rogaland Pensjonistparti v. Norway*. TV Vest AS & Rogaland Pensjonistparti v. Norway, 2008-Eur. Ct. H.R. 21132/05 (2008).

70. *See* Ronald Bailey, *Speakers Cornered*, REASON (Feb. 5, 2004), *available at* http:// reason.com/ archives/ 2004/ 02/ 05/ speakers-cornered.

71. *See generally supra* note 78.

72. As in England, where individual independent expenditures (in local elections, at least) are limited to £500.

73. *See generally* Harper v. Canada, [2004] S.C.R. 827 (Can.).

In short, speech-based restrictions offer blunter, more effective solutions than what we have, and at little genuine risk. Yet they are available only in the "other" America; in ours, there is a constitutional problem. Perhaps more importantly in the long term, and I address this further at the end of the Article, censorship seems anathema to the "real" America's civic religion (at least selectively so). This makes it difficult for policymakers to break out of *Buckley*'s paradigm.

They therefore survey their options: Money laws are either illegal or fishy after *Citizens United*, and at any rate they never worked that well anyway. Speech laws would be effective but they are completely off-limits. Is there a third way, one that avoids censorship and its accompanying constitutional issues? Yes, but it is not promising.

D. The False Hope of Full Disclosure

Many legislators and commentators have proposed that the cure for *Citizens United* is disclosure, disclosure, disclosure: Let them advertise all they want, but let's see their names on it.

Recall that *Citizens United* left some room for this. McCain-Feingold required the Citizens United organization to identify itself as the underwriter for *Hillary: The Movie*, and the Court, excluding Justice Thomas, said that that was fine.[74] That leaves us with little real transparency today, for while we are told that *Citizens United* funded *Hillary*, we do not know who funded *Citizens United*. Still, unless the Court tacks further into Justice Thomas country, it seems constitutionally possible to force *Citizens United* to make its donor rolls publicly available.[75] In theory, then, voters should be able to follow the money trail from candidate to donor.

There are a number of problems with this solution. First, most voters will not take the time to investigate the funding of political advertisements. Second, they should not be expected to.[76] Third, any focus on independent finance issues distracts from the merits of the candidates' actual policy positions. Fourth, inequality concerns would linger even if every single voter knew every money trail in the campaign.

Consider a famous example. During the 2004 presidential campaign of Senator John Kerry, a 527 organization called Swift Boat Veterans for Truth (SBVT) alleged that Kerry had misrepresented his military service in the Vietnam conflict.[77] Most mainstream media sources agreed that SBVT's charges were inaccurate and politically motivated. Moreover, it became fairly clear by Election Day that there was at least some degree of coordina-

74. *Citizens United*, 130 S. Ct. at 913-14.

75. *See generally id.*

76. Robert Dahl is "inclined to think that compared with the political systems of the other advanced democratic countries, ours is among the most opaque, complex, confusing, and difficult to understand." ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 115 (2002).

77. *See Swift Boats and the Texas Nexus*, N.Y. TIMES (Aug. 25, 2004), *available at* http:// query.nytimes.com/ gst/ fullpage.html?res=9D02EFD6153EF936A1575BC0A9629C8B63.

tion between SBVT and the Bush campaign.[78] SBVT's startup cash had come from "big-money Texas donors long supportive of Bush political causes."[79] The same lawyer had represented both organizations simultaneously.[80] This information was publicly available. So what? Few people would dispute that SBVT nonetheless damaged Kerry severely. And to the standard reply that Kerry should have worked harder to unmask SBVT for who they were, I say that voters deserve campaigns that are about governance rather than the scandals of campaigning.

Disclosure and transparency are good things, and they should be defended. We are better off for knowing where SBVT came from. But while it is good to know how a scandal occurred, it is much better to have prevented it. And to prevent these scandals from defining our politics, we have little choice but to take on the First Amendment as we now know it.

IV. AMERICAN DEMOCRACY IN SPITE OF FREE SPEECH.

"We also have to work, though, sort of the dark side, if you will."

-U.S. Vice President Richard Cheney[81]

Many frightened lay observers misread the holding of *Citizens United*[82] as follows: "Let the word go forth that Corporations are today, for the first time in history, converted to human beings, and granted the full array of rights that come with that title." This is wrong, of course. Any lawyer will tell you that corporate personhood is nothing new.[83] Yet it would be a mistake to dismiss the lay reading of *Citizens United* as just another harmless popular misconception about legal practice. For what it tells us is that prior to *Citizens United*, but after *Buckley*[84] and *Bellotti*[85] and *Wisconsin Right to Life*,[86] the average non-lawyer believed our electoral processes were far more democratic than they actually were. That profound misunderstanding, in its own right, measures how little genuine popular control can possibly be taking place in our country.

Awakened to the crisis, any number of op-eds, blog posts, and proposed constitutional amendments have converged on the slogan that "[m]oney is

78. *See* Jake Tapper, *Independent Groups' Big Role in Politics*, ABC NEWS (Aug. 25, 2004), http:// abcnews.go.com/ WNT/ story?id=131858&page=1.
79. N.Y. TIMES, *supra* note 77.
80. Jim Rutenberg & Kate Zernike, *Bush Campaign's Top Outside Lawyer Resigns*, N.Y. TIMES (Aug. 25, 2004), *available at* http:// liveweb.archive.org/ http:// www.nytimes.com/ 2004/ 08/ 25/ politics/ campaign/ 25CND-SWIF.html?.r=3&oref=slogan&ref=slogin.
81. Interview by Tim Russert with Richard Cheney, U.S. Vice President, NBC (Sept. 16, 2001), *available at* http:// emperors-clothes.com/ 9-11backups/ nbcmp.htm.
82. *Citizens United*, 130 S. Ct. at 876.
83. *See, e.g.*, *Bellotti*, 435 U.S. 765.
84. *See Buckley*, 424 U.S. 1.
85. *See Bellotti*, 435 U.S. 765.
86. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

not speech!"[87] This critique of *Citizens United* (really, a critique of the entire *Buckley* line) seems to imply that restrictions on money do not affect the freedom to speak. Anyone familiar with the phrase "big-budget feature film" can point out that argument's embarrassing deficiency. Nonetheless, and despite the fact that regulations of "money" rather than the "speech" it finances have not performed well in the past, intelligent people continue to rally behind the "[m]oney is not speech!" tagline.

The only reason for so many intelligent people to fall back on such a weak position is that they are unwilling or perhaps unable to acknowledge the profane truth: namely, that it will take some degree of censorship to repair our democracy. Instead, "[m]oney is not speech!" implies that while "money" can be problematic, "speech" is inherently good, the more the better in fact, for an efficient marketplace of ideas will sort everything out in the end. Of course, this libertarian subtext only ratifies the intellectual foundations that underlie the whole line of antidemocratic campaign finance opinions that begin in *Buckley* and culminate in *Citizens United*,[88] which raises a confusing discrepancy. People who genuinely care about the poor rarely defer to the napkin sketches of libertarians who would equate economic "liberty"—deregulation—with economic sufficiency. Why, then, do those who would empower common people to run their nation's government defer to similarly a priori notions regarding some hypothetical "free marketplace of ideas?"[89]

If democracy's advocates ever hope to get their way, they will have to stop ceding the intellectual and moral high ground to free speech libertarians. Instead they must openly assert democracy's priority over the First Amendment with the full knowledge that they may be advancing a fringe position. They must learn from the daring of Justice Thomas, the "big thinker"[90] who called for the overturn of *Buckley* as early as 1996,[91] in spite

87. David Morris, *8 Words That Could Save Our Country*, ALTERNET (May 1, 2010), http://www.alternet.org/ story/ 146664/. The other four words, "[c]orporations are not persons," hold up better. *Id.*

88. *See* Winter, *supra* note 29. Chief counsel for plaintiffs in *Buckley* writes,

> [l]imiting campaign spending . . . simply limits the amount of communication in which candidates can engage. In short, it reduces political speech and communication. This seems a rather odd consequence under a legal rule that generally says the more speech the better in the case of the arts, newspapers, and even commercial speech.

Id. at 96 (citing Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976) (commercial speech), Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (arts), N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (newspapers)).

89. Perhaps because "[m]oney is not speech!" Or perhaps it is a religious thing. Americans' habit of reading their Constitution as a holy text rather than a mutable political charter can promote a worshipful logic rather than a pragmatic one. *See* MICHAEL SCHUDSON, THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE 202 (1998). Even people who would alter the Constitution typically shape their amendments as fortifications of the ancient temple against contemporary meddlers. Indeed, it is not uncommon to hear the amendments that abolished slavery and granted the vote to women described as refinements of the Framers' divine vision. This in spite of the obvious fact that a majority of the founders wanted nothing to do with those reforms. It comes as no surprise, then, that reformers would rather narrow the category of "speech" to its allegedly more fundamental dimensions rather than target the holy substance itself through open censorship.

90. Thomas C. Goldstein, *Justice Thomas: Constitutional 'Stare Indecisis,'* FIRST AMENDMENT

of the fact that he was alone and that *Buckley* was settled law; who would submit commercial speech to strict scrutiny,[92] though he is alone and his position conflicts with settled law; who would hold that the Establishment Clause should not be incorporated against the states,[93] though he is alone; and his position would horrify most law school graduates.

As a first step, they should permit themselves to imagine the policies they would enact, if they did not feel bound by stare decisis to live under Justice Thomas's First Amendment. A couple of them are implemented in the "other America" I describe above. These policies may include but need not be limited to:

A ban on all political advertising on commercial television networks;

An outright ban on *all* political expenditures by corporations;

Universal and exclusive public funding of all political campaigns.

They should promote these policies on talk shows, blogs, in law reviews, wherever. They should speak of them as actual, rather than theoretical, possibilities. Perhaps if they are lucky a bold congressional representative will flout the constitutional orthodoxy by putting one of the proposals to the floor. If this irreverence causes a scandal, if the law somehow passes and the Court strikes it down per curiam, if Justice Alito shakes his head,[94] all the better. The increased coverage will help publicize the fact that *someone* considers strong, speech-regulative electoral policy to be a worthy option.

One might object that none of this matters, so long as the *someone* constitutes a fringe. But the example of Justice Thomas, the consummate fringe Justice,[95] rebuts that objection. From the fringe, "[Justice] Thomas' steadfastness and clarity on this issue appears to have opened up space for additional [J]ustices to move toward his position."[96] These "additional Justices," namely Scalia, Kennedy, Roberts, and Alito, all joined the deregulatory majority in *Citizens United*,[97] but moved there only slowly, and under cover of what Justice Scalia, once he had crossed over, would criticize as "faux judicial restraint."[98] In other words, there is good reason to believe that a majority of this Court's Justices privately wanted *Citizens United*

CENTER (Oct. 8, 2007), http:// www.firstamendmentcenter.org/ justice-thomas-constitutional-'stare-indecisis'.

91. Colo. Repub. Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 635-40 (1996) (Thomas, J., concurring in the judgment and dissenting in part).

92. *See supra* note 11.

93. Elk Grove School Dist. v. Newdow, 542 U.S. 1, 48 (2004) (Thomas, J., concurring).

94. *See Alito Reaction Touches Ideological Nerve*, UPI (Jan. 28, 2010), http:// www.upi.com/ Top_News/ US/ 2010/ 01/ 28/ Alito-reaction-touches-ideological-nerve/ UPI-45411264659175/.

95. *See Buckley*, 424 U.S. 1.

96. Richard L. Hasen, *Justice Thomas: Leading the Way to Campaign-Finance Deregulation* (Oct. 8, 2007), http:// www.firstamendmentcenter.org/ justice-thomas-leading-the-way-to-campaign-finance-deregulation.

97. *See Citizens United*, 130 S. Ct. at 876.

98. *Wis. Right to Life*, 551 U.S. at 498 n.7 (Scalia, J., concurring in part and concurring in judgment).

years ago, but that they feared that they lacked the political or institutional clearance to make it happen. Justice Thomas changed that.

There is a model for this kind of transformation. Joseph Overton, the late vice president of a conservative think-tank called the Mackinac Center for Public Policy, proposed the following. Take a public issue, and list every possible policy response, no matter how ridiculous.[99] Now arrange them in some sort of useful spectrum. [100] In the campaign-finance realm, the spectrum might be conceived as "more intervention/less intervention," "more egalitarian/more *laissez-faire*," etc. I would place, at one end of the spectrum Justice Thomas's America, where all campaign-finance regulation of any kind is unlawful. At the other end of the spectrum, I might place a regime in which elections were entirely publicly-funded and independent expenditures were limited to a few dollars per head.[101] At any given time, all of the policies that the public understands as "mainstream" or "acceptable" are confined to a narrow band on the spectrum called the "Overton Window."[102] Policies outside the Overton Window cannot become law.[103]

In Overton's view, the function of a right-wing think-tank was not to take up the rightmost position in the Window.[104] Instead, it should move the whole window rightward by taking up hail-Mary positions so extreme that previously unthinkable ideas will begin to appear moderate by comparison.[105] This is, to some extent, what Justice Thomas has accomplished since he held in 1996 that strict scrutiny should apply to all campaign-finance legislation.[106]

I hope that democrats can eventually reverse this maneuver, though I think that it is unlikely. The clearest obstacle, of course, is the Supreme Court's veto power over any new legislation that a democratically-minded Congress might manage to pass. Justice Thomas is the only Justice on the Court who operates regularly outside the Overton Window. He has no counterpart on the left, and I cannot imagine that Justice Kagan will willingly take up an outspoken position on campaign finance that earns her the ridicule of legal mainstreamers.

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99. *See* Lehman, *infra* note 100.

100. Mackinac's website claims Overton "observed" that any set of policies can be arranged in order from "more freedom" to "less freedom." Joseph G. Lehman, *An Introduction to the Overton Window of Political Possibility*, MACKINAC CENTER FOR PUBLIC POLICY (Apr. 8, 2010), http:// www.mackinac.org/ 12481. Taken at face value, this "observation" seems extremely naïve for a number of reasons that are not worth addressing here. Overton's window still provides a powerful illustration in its broad strokes.

101. I recognize that the whole concept of a one-dimensional "spectrum" of policy positions cannot withstand much intellectual scrutiny. It nonetheless provides a useful conceptual shorthand in this instance.

102. Ironically, the commentator Glenn Beck, whose push against a kind of Overton Window of infotainment has made Bill O'Reilly appear as a centrist, published a political thriller by the same name last year. *See* GLENN BECK, THE OVERTON WINDOW (2010).

103. *See* Lehman, *supra* note 100.

104. *Id.*

105. *Id.*

106. *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 635-40 (Thomas, J., concurring in the judgment and dissenting in part).

Still, democrats[107] are free to work the Overton Window in Congress and the media. It would be satisfying to hear commentators and political candidates anguish over "the balance between democratic governance and liberty" in the same way that they have anguished in the past decade over "the balance between security and liberty." If an adequate sense of urgency exists, policymakers may begin to place institutional pressure on the Court in various ways: by asserting unreviewable authority in the electoral field, for instance, or by threatening to pack the court with litmus-tested democrats.[108] At the very least, committed lawmakers could scuff up the Court's popular reputation and hope that some justices might feel pressure to trade in principle for public legitimacy. There is reason to believe that the Court's holdings track popular opinion within some wide margin; the Court, more than the Congress or the President, stands uniquely to lose its trump card if the coordinate branches decide they have had enough.[109]

Whatever happens, we can be sure that modern democratic standards are a long way off in our country. Justice Thomas's deregulatory First Amendment is ascendant; it will not soon ebb. In the meantime, we must get used to the fact that we have little to lose. We should not aim to work within *Citizens United*, or to overrule it; we should aim, like Justice Thomas, at overruling *Buckley* and rebuilding campaign finance law from scratch.

107. Meaning advocates for democratic reform, not the Democratic Party.

108. *See supra* note 107. Again, they needn't be from the Democratic Party, though the democrats may find better pickings in that party than in the other one.

109. For Article III does not specify that the Courts have powers of judicial review over Acts of Congress. U.S. CONST. art. III.