Topical Seminars
Friday, November 2 at 1:30 pm in the Lewes Library
Speaker & Discussion Leader: Ron Collins

Before you read the materials, please view the following:
https://www.youtube.com/watch?v=4J5Zx5YotBU

There are three readings for this seminar. The first is coauthored by Ron Collins, the seminar leader "When Money Speaks." The second is "Illuminating Citizens United: What the Decision Really Did" published by the Federalist Society. The third article by David Frum, senior editor of the Atlantic, "The Republican Party Needs to Embrace Liberalism."

As you are reading the materials, consider the following:

1. In the early 1970s, the Nixon Administration used the Federal Election Campaign Act to go after liberals who raised money to take out newspaper ads critical of Richard Nixon. Liberal groups such as the ACLU challenged such laws on First Amendment grounds as did the New York Times.

2. One of the plaintiffs in the Court's famous Buckley v. Valeo (1976) ruling, striking down expenditures provision of the Federal Election Campaign Act, was Senator Eugene McCarthy, a progressive Democrat.

3. In Buckley, the Court made a distinction between campaign contributions given directly to a candidate, and campaign expenditures made on behalf of a candidate (e.g. money spent for TV ads or billboard ads).

4. As in Citizens United, unions representing federal and state employees sided with conservative groups in challenging campaign finance laws, as has the progressive groups Emily's List.

5. Assume that Citizens United went the other way and that the First Amendment challenged lost. Now assume that shortly before the 2020 presidential election the ACLU made a documentary titled Trump, one highly critical of Donald Trump. Assume as well that a book was released just before the same election and that it, too, was highly critical of Mr. Trump. Assume finally, that both the movie and book were funded heavily by a Soros foundation (The Open Society Institute) grant. Do you think such activities should be treated the same as Hillary the movie was in Citizens United?

6. In the 1958 case of NAACP, Inc. v. Alabama, the Supreme Court ruled that the state of Alabama was barred under the First Amendment from demanding the public disclosure of the members of the civil rights group. Lawyers for Alabama argued that since the NAACP was a corporation, it should be treated the same as all other corporations, which had to comply with disclosure requirements. Note

also that Alabama argued that the NAACP was not covered by the First Amendment since it was a corporation and not a person

_____Readings_____

Excerpts from

When Money Speaks

By\
Ronald K.L. Collins
Harold S. Shefelman Scholar
University of Washington School of Law
&
David M. Skover
Fredric C. Tausend Professor of Law
Seattle University School of Law

IT STARTED WITH A MOVIE: HILLARY

David Bossie, the president of a Washington-based conservative advocacy group called Citizens United, has long been involved in scrutinizing alleged electoral improprieties committed by Democrats; among other things, he worked for Senator Fred Thompson in investigating the Whitewater scandal. When Michael Moore's award-winning documentary film, Farenheit 9/11, captured public attention, it gave him an idea. He was stirred by the movie's economic successes (as of 2012, it was the highest-grossing documentary of all time, coming in at over $200 million worldwide). And though he disagreed with the movie's political positions, he was also taken by its impact as a searing cannonade against George W. Bush's 2004 reelection.

The prospect of responding in kind by producing documentary diatribes to further Republican causes intrigued Bossie. So he converted his organization into a movie studio, and looked for suitable liberal targets. One of the most irresistible was a politician whom Citizens United had attacked ever since she was America's First Lady – Hillary Rodham Clinton. Once Senator Clinton launched her campaign for the 2008 presidential election, Bossie determined to make her the incorrigible punching bag of his next film.

Hillary: The Movie featured 90 minutes of news clips, foreboding music, and slashing critique by a marquee list of conservative commentators – all to highlight the Clintons' political scandals (including the Whitewater and the White House FBI files controversies, among others), to savage Hillary's character, and to slice into her electoral chances. Typical of the film's hard-core harangues was that of Dick Morris, a disaffected advisor to the Clinton Administration: "She's deceitful, she'll make up any story, lie about anything, as long as it serves her purposes of the moment." Agreeing that Hillary was a liar, the right-wing firebrand Ann Coulter delivered the movie's only compliment: Hillary "looks good in a pantsuit." Amidst all of this bashing, there was one declaration that Hillary carefully avoided: at no point did the film expressly advocate for the candidate's electoral defeat.

David Bossie intended that the documentary run as an on-demand cable movie, free to viewers at Citizen United's expense, during the entire 2008 primary election period. The only catch? As a nonprofit corporate PAC funded in part by donations from for-profit corporate treasuries, Citizens United could not finance the cablecast (or television advertisements for it) during the pre-election black-out periods – that is, as long as Hillary were classified as an "electioneering communication" within the meaning of federal campaign finance law. To prevent such entanglements, the organization sought a Federal Election Commission (FEC) ruling that the movie was not subject to the strictures of 2 U.S.C. §441(b), the provision which codified the ban on corporate-funded independent expenditures in Title II of the Bipartisan Campaign Reform Act (BCRA).

James Bopp, Jr. – the counsel for Citizens United – was the man who prevailed on the FEC for its approval. A graduate of Indiana University (where he led a chapter of the conservative Young Americans for Freedom) and of the University of Florida Law School, Bopp had previously represented the anti-abortion group, Wisconsin Right to Life, in its victorious suit against the FEC. Now, once again, the Commission looked unfavorably on another of Bopp's clients: it found that Hillary's denunciations of Hillary amounted to an electioneering communication. "The marketplace for my movie was completely and totally shut down by the Federal Election Commission," Bossie told Philip Rucker, a Washington Post reporter. Although the film passed quickly through movie theaters and was available on DVD, Hillary never became a cablecast blockbuster.

Bopp immediately filed suit in a federal district court alleging that §441(b) was unconstitutional as applied[1]to issue advocacy pieces such as Hillary and its advertisements. (In addition, Citizens United challenged BCRA's disclaimer and disclosure requirements on an "as applied" basis.) Based on its reading of earlier Supreme Court cases, the three-judge court recognized §441(b) as facially constitutional, and ruled unanimously that the statute was constitutional as applied to Hillary, as well.

As the federal judges perceived it, the movie was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." In other words, it was tantamount to impermissible candidate advocacy.

As for Citizens United's disclaimer and disclosure claims, the jurists observed that "the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment." Given this analysis, the FEC's characterization of the film was determined

[1] In constitutional law, there are *applied challenges* to laws and *facial challenges.* The latter involve cases where the law is said to be unconstitutional on its face, however applied. The former involve cases where a law may be facially constitutional but applied in an unconstitutional way. For example, assume that there is a state law that says that all voting must be on a certain day and at a certain time and by people of a certain age. Though the law is constitutional on its face, it would be unconstitutional if applied differently to people of color.

to be an "electioneering communication." Hence, the defendant's summary judgment motion was granted.

ORAL ARGUMENTS IN THE SUPREME COURT – JUDGING BY THE BOOK

Bossie insisted on appealing to the nation's high court, but he decided to do so with another attorney, one with an even more impressive record of Supreme Court adjudication who could command respect from the Justices. That man was Theodore Olson – the lawyer from the distinguished D.C. firm of Gibson, Dunn, & Crutcher who had argued and won Bush v. Gore (2000) and who thereafter served as Solicitor General under President Bush. Notably, as the government's lawyer, Olson had successfully defended BCRA's restrictions on corporate electioneering communications in McConnell v. FEC six years before, but now he was positioned to attack that law in the service of a corporation's political advocacy. Interesting, as well, was Olson's personal link to Hillary: The Movie. The documentary was dedicated to his deceased wife, Barbara Olson, who had died as a passenger on American Airlines Flight 77 when it crashed into the Pentagon on September 11, 2001. An inveterate critic of Hillary Clinton, Barbara had worked with Bossie to investigate the Clinton Administration scandals in the 1990s, and had authored the book Hell to Pay: The Unfolding Story of Hillary Rodham Clinton. In this light, as Philip Rucker reported it, Bossie claimed that Ted Olson "had an emotional connection" to fighting for Citizens United.

An eminent legal tactician who understood the jurisprudential inclinations of the Justices, Olson decided to play his hand more conservatively in order to appeal to the stealth-overruling preferences of Justices Roberts and Alito as revealed in their 2006-2007 campaign finance rulings. Accordingly, when oral arguments in Citizens United v. FEC were heard in March of 2009, Olson asked the Court to construe §441(b) narrowly to apply only to electioneering commercials, and not to an issue advocacy documentary such as Hillary, produced by a small nonprofit corporation and broadcast as video-on-demand.

Legalese aside, there is an important point here: That is, at the outset Mr. Olson argued that there was no need to reach the constitutional question since what the FEC had done exceeded its statutory authority. Hence, if the statute were violated, that would be the end of the matter and the federal First Amendment question would not have to be reached. (In constitutional law this is called the doctrine of constitutional avoidance, a doctrine long championed by conservatives though, as in Citizens United, sometimes ignored.)

When Malcolm Stewart, the Deputy Solicitor General defending the FEC, offered his rebuttal, it became apparent that a majority of the Court was not inclined to take the statutory route and rely on the doctrine of constitutional avoidance. The conservative majority, however, did not want to rely on statutory grounds; it wanted to go straight to the larger First Amendment issues. The question that sent Stewart tumbling down the proverbial rabbit hole was asked by Justice Alito.

"Do you think the Constitution required Congress to draw the line where it did, limiting this to broadcast and cable and so forth?," he inquired. What about "providing the same thing in a book? Would the Constitution permit the restriction of all those as well?"

To all appearances, the Princeton University-Yale Law School graduate who clerked for Justice Harry Blackman in 1989 and had been given the highest rank for a career lawyer in the Solicitor General's office shortly before the Citizens United oral argument either did not detect the slippery slope ahead of him in this line of reasoning or did not fathom how to stop the fall. Rather than stressing that §441(b)'s restriction on electioneering communications did not facially apply to full-length books, or that the FEC's interpretation of §441(b)'s independent expenditure limitation to include such books could give rise to a strong case of "as applied" unconstitutionality, the Deputy Solicitor General conceded the point. "Those [prohibitions] could have been applied to additional media as well," Stewart curtly answered.

"That's pretty incredible," Alito exclaimed. "You think that if a book was published, a campaign biography that was the functional equivalent of express advocacy, that could be banned?" Stewart strove to recover ground. "I'm not saying it could be banned," he rejoined. "I'm saying that Congress could prohibit the use of corporate treasury funds and could require a corporation to publish it using its . . . ."

At that point, Justice Kennedy interrupted and, sensing the weakness in Stewart's argument, decided to pile on. "Well, suppose it were an advocacy organization that had a book," the Justice inquired. "Your position is that, under the Constitution, the advertising for this book or the sale for the book itself could be prohibited within the sixty- and thirty-day periods?" Unenthusiastically, Stewart agreed.

Now the Chief Justice came in for the kill. "If it has one name, one use of the candidate's name, it would be covered, correct?," Roberts probed. "If it's a five-hundred page book, and at the end it says, 'And so vote for X,' the government could ban that?" Struggling to cover his hindquarters, Stewart continued to expose the ungainliness of his position. "Well," he explained, "if it says 'vote for X,' it would be express advocacy and it would be covered by the preexisting Federal Election Campaign provisions."

Assessing the overall impact of the oral arguments, Jeffrey Toobin incisively observed: "Through artful questioning, Alito, Kennedy, and Roberts had turned a fairly obscure case about campaign-finance reform into a battle over government censorship. The trio made Stewart – and thus the government – take an absurd position: that the government might have the right to criminalize the publication of a five-hundred-page book because of one line at the end."

As fortune would have it, that absurdity enabled the conservative Justices to rally to a much more expansive understanding of the Citizens United case. Originally, the Chief Justice purportedly wrote a draft opinion for the Court that gave a victory to the appellant along the narrow lines proposed by Theodore Olson. But the draft of a concurring opinion authored by Justice Kennedy – representing the typical deregulatory posture of

Justices Scalia, Thomas, and himself – argued that BCRA's restrictions on electioneering communications were facially unconstitutional, that contrary precedents must be overturned, and that §441(b)'s prohibition on corporate independent expenditures expressly advocating the election or defeat of federal candidates (a restriction first put in place by the Taft-Hartley Act of 1947) must be gutted. This dramatic and extensive critique ultimately won favor with both Roberts and Alito, and the Chief then assigned to Kennedy the task of writing the opinion for a five-member majority of the Court.

As Toobin characterized it, Roberts "came up with a strategically ingenious maneuver." Unwilling to threaten the integrity of the Court by "violating [its] own procedures to engineer the result he wanted," the Chief Justice secured the approval of his colleagues to withdraw Kennedy's opinion and set the case for re-argument in the fall. "On June 29, 2009, the last day of the term," Toobin described, "the Court shocked the litigants – and the political world – by announcing, 'The case is restored to the calendar for reargument.'" And the new Questions Presented "told the parties that the Justices were considering overruling two major decisions in modern campaign-finance law," namely the Austin and McConnell precedents that gave congress greater leeway in regulating campaign expenditures. "As every sophisticated observer of the Court knew," Toobin explained, "the Court did not ask whether cases should be overruled unless a majority of the Justices were already prepared to do so."

CORPORATIONS ARE PERSONS, AREN'T THEY?

In 1886 – the same year in which the Statue of Liberty was dedicated in New York Harbor – American liberty was given a new face. The liberty that was once accorded only to individuals was handed over to corporations as well. In Santa Clara County v. Southern Pacific Railroad, a unanimous Supreme Court declared that corporations were "persons" under the Fourteenth Amendment and were entitled to the blessings of liberty. Thus, the Court converted an amendment primarily designed to protect the rights of African-Americans into an amendment whose major effect, for the next seventy years, was to protect the rights of corporations.

Remarkably, as historian Howard Zinn reported, "Of the Fourteenth Amendment cases brought before the Supreme Court between 1890 and 1920, nineteen dealt with the Negro, 288 dealt with corporations." Once personhood had thus been transformed, it was entirely predictable that corporations would eventually seize First Amendment liberties for their own expression, as well. And they did so in celebrated First Amendment cases protecting corporate press freedoms, as in New York Times, Inc. v. Sullivan (1964), corporate associational freedoms, as in NAACP, Inc. v. Alabama (1964), and corporate political speech freedoms, as in First National Bank of Boston v. Bellotti (1978), among others.

These famous First Amendment decisions were much in the air during the second set of oral arguments in Citizens United on the morning of Wednesday, September 9, 2009. Once again, Theodore Olson was the spokesman for the appellant. The veteran

First Amendment attorney, Floyd Abrams (a liberal), appeared on behalf of Senator Mitch McConnell, as amicus curiae in support of Citizens United.

Facing off against them on behalf of the Federal Election Commission was Solicitor General Elena Kagan, who had been confirmed as President Obama's nominee earlier in 2009, only a few days before the first oral arguments in the case. Prior to her appointment, the renowned Dean of the Harvard Law School had never argued an appellate case. Thus, not only was Citizens United her debut performance before the Supreme Court, but it was her first appellant oral argument. Accompanying her was Seth Waxman, a distinguished Supreme Court litigator from the D.C. firm of WilmerHale and the former Solicitor General during the Clinton Administration, who represented Senator John McCain and others as amici curiae in support of the FEC.

Shortly after Citizen United's counsel took the podium, Justice Ruth Bader Ginsburg seized upon the First Amendment implications of corporate personhood. "Mr. Olson, are you taking the position that there is no difference in the First Amendment rights of an individual?," she asked. "A corporation, after all, is not endowed by its creator with inalienable rights. So is there any distinction that Congress could draw between corporations and natural human beings for purposes of campaign finance?" Olson invoked the force of precedent in his sweeping response. "What the Court has said in the First Amendment context, New York Times v. Sullivan," he argued, "and over and over again, is that corporations are persons entitled to protection under the First Amendment."

Lighting upon a distinction that had politically portentous overtones, Justice Ginsburg pressed her point: "Would that include today's mega-corporations, where many of the investors may be foreign individuals or entities?" In essence, she aimed to provide a compelling government purpose for regulating corporate behemoths to prevent foreign influence in the nation's elections. "Nowadays," the Justice continued, "there are foreign interests, even foreign governments, that own not one share but a goodly number of shares." But Olson was prepared for this query: "I submit that the Court's decisions in connection with the First Amendment and corporations have in the past made no such distinction. . . . I'm saying that the First Amendment applies. Then the next step is to determine whether Congress and the government has established a compelling governmental interest and a narrowly tailored remedy to that interest." Putting a fine point on the matter, Olson concluded: "Certainly, the government has not advanced it in its briefs: that there is some compelling government interest because of foreign investment in corporations."

Justice Alito offered a helping hand in this debate by asking, point-blank: "Mr. Olson, do you think that media corporations that are owned or principally owned by foreign shareholders have less First Amendment rights than other media corporations in the United States?" To this, Olson predictably responded: "I don't think so, Justice Alito, and certainly there is no record to suggest that there is any kind of problem based upon that. . . . We are talking about a prohibition that covers every corporation in the United States,

including nonprofit corporations, limited liability corporations, Subchapter S corporations, and every union in the United States."

Not willing to let the former Solicitor General off her hook, Justice Ginsburg pounced again. "You have used the word 'prohibition,' Mr. Olson. One answer to that is that no entity is being prohibited; it is a question not of whether corporations can contribute, but how." She then clarified her general point: "The corporation can give, but it has to use a PAC."

"I respectfully disagree," Olson countered. "The corporation may not expend money. It might find people, stockholders or officers, who want to contribute to a separate fund, who could then speak." But that option, he concluded, "is more like surrogate speech."

Shortly before Olson's time was up, Justice Sonia Sottomayor asked her first question of the day – in fact, her first question in her first Supreme Court hearing. Sottomayor, the Court's third female and first Latina Justice, was a Princeton University-Yale Law School graduate, like her colleague Samuel Alito. She had served as a New York federal district court judge for six years and as a Second Circuit appellate court judge for 11 years before being nominated by President Obama as the replacement for retiring Justice David Souter. Her confirmation hearings and the Senate's ratifying vote were held in August of 2009, one month before the second set of oral arguments in Citizens United. Because the Chief Justice scheduled the hearing for September 9th, a month before the typical opening of the Court's term on the first Monday in October, Citizens United was the first case on which Justice Sottomayor sat.

The most junior Justice chose to focus on the narrower challenge to BCRA that the appellant had launched only five months before. Sottomayor questioned Citizen United's counsel as to his client's current position on that legal posture. "Mr. Olson," she asked, "are you giving up on your earlier arguments that there are statutory interpretations that would avoid the constitutional question?"

"No, Justice Sottomayor," Olson replied. "[T]here are all kinds of lines that the Court could draw which would provide a victory to my client. There are so many reasons why the federal government did not have the right to criminalize this 90-minute documentary that had to do with elections."

Floyd Abrams, the First Amendment maven, began his oral argument by reflecting on an important lesson from New York Times v. Sullivan that ought be applied to Citizens United. That lesson? Where vital First Amendment interests are severely burdened, it may be wiser for the Court boldly to resolve the constitutional issue rather than cautiously walking the narrow path of statutory interpretation.

This suggestion sparked a sharp reaction from Justice Ginsburg: "Mr. Abrams, New York Times v. Sullivan did not involve overruling precedents of this Court that had been followed by this Court and others. So, I think the situation is quite different." Abrams was willing to concede the point, but only technically. "That's true, Your Honor," he

responded. “But it did involve overruling 150 years of American jurisprudence. I mean, there was no law at that point that said that actual malice –”

Ginsburg would not be deterred from driving her point home, and interrupted Abrams in mid-sentence: “We do tend to adhere to our precedents. . . . The question that was posed here is, is it a proper way to resolve this case, to overrule one precedent in full and another in part?”

Despite the Justice’s apparent disfavor for a constitutional vindication of corporate political speech rights, Abrams stuck to his guns. “And what I’m urging on you, Your Honor, is that [where] there is an ongoing threat to freedom of expression . . . it is worth our moving away in this case from looking for the narrowest way out, and determining [the constitutional issue] now.”

When the questioning turned to Solicitor General Kagan, Justice Antonin Scalia hit a note of political pragmatism. “Congress has a self-interest,” he asserted. “[W]e are suspicious of congressional action in the First Amendment area because . . . I doubt that one can expect a body of incumbents to draw election restrictions that do not favor incumbents. Now is that excessively cynical of me? I don’t think so.”

“I think, Justice Scalia, it’s wrong,” Kagan responded pragmatically. “In fact, corporate and union money go overwhelmingly to incumbents. This may be the single most self-denying thing that Congress has ever done.” Calling on statistics for corporate PAC spending over the last two election cycles, she argued, “when corporations play in the political process, they want winners . . . and the way to get those winners is to invest in incumbents . . . in double digits times more than they invest in challengers.”

Justice Anthony Kennedy would have none of it. For him, the problem was, purely and simply, censorship of corporate critics of governmental officials. “Corporations have lots of knowledge about environment, transportation issues,” he asserted, “and you are silencing them during the election.” For Kagan, however, there was a crucial difference between corporate lobbying of governmental officials and corporate buying-up of electoral candidates: “[C]orporations can lobby members of Congress in the same way that they could before this legislation. What this legislation is designed to do, because of its anticorruption interest, is to make sure that that lobbying is just persuasion and it’s not coercion.”

As Kagan’s argument proceeded, Justice John Paul Stevens offered her a helping hand, inviting her to recommend a basis narrower than the facial unconstitutionality of §441(b) to resolve the case. For example, couldn’t the Justices create an exception for non-profit ideological corporations like Citizens United, or for “ads that are financed exclusively by individuals even though they are sponsored by a corporation”?

Seizing the opportunity handed her, Kagan responded immediately: “Yes, that’s exactly right. . . . [N]onprofit organizations of the kind here [could] fund these ads out of separate bank accounts – not PACS, just separate bank accounts – which include only individual

expenditures." Then leading her to his desired conclusion, Stevens inquired, "Then why is that not the wisest narrow solution of the problem before us?" Kagan had finally arrived where Stevens wished her to go: "Well, it is – it is certainly a narrower and I think better solution than a facial invalidation of the whole statute."

In her waning time before the Justices, Kagan was forced to address the fateful flaw in the government's first oral argument in March. Thankfully, the question came from an unequivocal ally. "May I ask you one question that was highlighted in the prior argument," Justice Ginsburg queried, "and that was if Congress could say no TV and radio ads, could it also say no newspaper ads, no campaign biographies? Last time the answer was yes, Congress could . . . . Is that still the government's answer?"

Ripples of laughter filled the chamber when Kagan forthrightly declared: "The government's answer has changed, Justice Ginsburg." After silence resumed, the government's counsel explained the modification: "It is still true" that BCRA's electioneering communication restriction, "which is the only statute involved in this case, does not apply to books or anything other than broadcasts; §441(b) does, on its face, apply to other media." Given that distinction, Kagan needed to mitigate the potential for First Amendment dangers: "I should say that the FEC has never applied §441(b) in that context. So for 60 years a book has never been at issue. . . . I don't think that it would be substantially overbroad . . . if I tell you that the FEC has never applied this statute to a book."

"But we don't put our First Amendment rights in the hands of FEC bureaucrats," Chief Justice John Roberts protested.

Realizing that she needed to address the issue of the statute's theoretical extension, Kagan put a different spin on the matter: "What we're saying is that there has never been an enforcement action for books. Nobody in Congress, nobody in the administrative apparatus has ever suggested that books pose any kind of corruption problem, so I think that there would be a good as-applied challenge with respect to that."

When it was all said and done, the Justices knew that the second round of oral arguments were for naught. That morning, all nine had entered the courtroom fully aware of the impending resolution of the case. A majority of five already had the votes for the opinion they wanted – an expansive ruling that went far beyond any more moderate "as applied" interpretation of the governing statute. Notwithstanding the arguments of Solicitor General Elena Kagan, the five conservative Justices were determined to deep-six the campaign finance prohibitions on corporate speech.

WRANGLING OVER FIRST AMENDMENT REASONING

On the morning of Thursday, January 21, 2010, Justice Anthony Kennedy announced the decision of a narrowly divided Court in Citizens United v. FEC. His tempered description of the ruling and reasoning of the five majority Justices was

followed by some 20 minutes of an impassioned dissenting statement by Justice John Paul Stevens.

Although eight of the nine jurists had upheld BCRA's disclosure, disclaimer, and reporting requirements (with Justice Thomas writing strongly against Congress's abridgement of anonymous political expression), the Court's facial invalidation of §441(b)'s restrictions on corporate independent expenditures and electioneering communications – and its overruling of Austin v. FEC and the part of McConnell that had validated those restrictions – were the targets of a vitriolic debate among the Justices.

Running 54 reported pages, Justice Kennedy's opinion (joined in pertinent part by Chief Justice Roberts and Justices Scalia, Thomas, and Alito) fervently embraced lofty and abstract First Amendment principles that tolerated no distinctions disfavoring corporate speakers. Striving to fend off the dissenters' searing counterarguments, Kennedy (assisted by Robert's and Scalia's concurring opinions) endeavored to justify the Court's broad-based decision as fully consistent with the dictates of stare decisis and of judicial preference for narrower "as-applied" rulings.

More notable still were the scalding – and oftentimes scornful – attacks launched by Stevens' dissent (joined by Justices Ginsburg, Breyer, and Sottomayor). Almost twice as long as the majority opinion, the 90-page rejoinder – the lengthiest authored by Stevens during the entirety of his judicial career – appeared to be his full-throated swan-song, delivered only five months before he retired from the Court. Trenchantly and methodically, he addressed the majority's rationales, point by point, to undermine them and to embarrass their proponents. Whether in substance or tone, the Citizens United decision was the exposed site of a pitched jurisprudential battle over the First Amendment's meaning and the future of campaign finance reform.

The structure of the majority's analysis rested on four conceptual columns:

Broad Ruling Required: The case could not be resolved on narrower grounds than a full-fledged reconsideration of Austin and McConnell. The exception to §441(b) recognized in Wisconsin Right to Life for pure issue advocacy could not apply, he argued, because Hillary: The Movie constituted express advocacy of her electoral defeat. After all, the movie called Senator Clinton "Machiavellian" and questioned whether she was "the most qualified to hit the ground running if elected President," and such commentaries were no more than veiled attacks on her candidacy. "It is not judicial restraint to accept an unsound, narrower argument just so the Court can avoid another argument with broader implications," Kennedy concluded.

This invocation of judicial duty galled Justice Stevens and the dissenters, who viewed the Court's decision to reexamine the facial constitutionality of §441(b) as judicial overreaching, pure and simple.

Core Political Speech at Stake: The law in question [§441(b)] was a "ban" on core political expression based on the corporate identity of the speaker. Such an identity-

discriminatory ban is presumptively invalid under the First Amendment, since free speech protections have long been extended to corporations even though they are not natural persons. Thus, the principle that the government cannot "distinguish among different speakers, allowing speech by some but not others" applies to corporate speakers, as well.

Both the Court's depiction of corporate speech as "banned" and its characterization of the First Amendment as tolerating no corporate identity-based distinctions severely rankled the dissenters. "Neither Citizens United's nor any other corporation's speech has been 'banned,'" Justice Stevens stressed. "The real issue in this case concerns how, not if, the appellant may finance its electioneering." Taking on the basic premise underlying the Court's ruling – that is, the First Amendment's bar on identity-based distinctions – Justice Stevens caustically declared: "While that glittering generality has rhetorical appeal, it is not a correct statement of the law. . . . The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case."

Strict Standard of Review Required: The law's independent expenditure limitations on corporations must fail strict scrutiny review for the very same reason that similar independent expenditure restrictions on individuals and groups failed in Buckley v. Valeo, a 1976 ruling striking down federal campaign expenditure law (liberal Justices in the persons of Justices William Brennan and Thurgood Marshall signed onto the Court's judgment in the case.)

They could not be justified as necessary to serve the only governmental interest for campaign finance regulation that Buckley and its progeny recognized as truly compelling – namely, prevention of the actuality and appearance of quid-pro-quo candidate corruption. "When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear," Justice Kennedy concluded, "it uses censorship to control thought. This is unlawful."

Precedent Need Not Be Followed: The Court was justified in overriding stare decision and overruling Austin and the part of McConnell that rested on Austin's authority. "This Court has not hesitated to overrule decisions offensive to the First Amendment," Justice Kennedy maintained.

The dissenters' response as to stare decisis was more voluminous in length and voluble in tone. "[T]he majority blazes through our precedents," they instructed, "overruling or disavowing a body of case law." Justice Steven's last words scorched the Court's decision as "backwards in many senses." He listed them, one by one: "It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality."

Undoubtedly, it was the dissenters' scorching accusations of judicial imperialism and non-judicious activism that moved Chief Justice John Roberts to write a concurring opinion (joined by Justice Alito) to address principles of judicial restraint and stare decisis implicated in Citizens United. "It should go without saying," Roberts asserted, "that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right. . . . There is a difference between judicial restraint and judicial abdication." Moreover, in balancing between respecting precedent and rectifying constitutional law, "we must keep in mind that stare decisis is not an end in itself. . . . Its greatest purpose is to serve a constitutional ideal – the rule of law." It followed, then, that Austin ought not be retained if it "does more damage to this constitutional ideal" than overruling it would damage the value of fidelity to precedent. And because Austin "departed from the robust protections we had granted political speech in our earlier cases," the Court "must be willing to depart from that precedent."

The high Court battle in Citizens United was pitched, and the intellectual and emotional heat was intense. One academic commentator, Georgetown University law professor Mark Tushnet, held a more measured view of the decision. "Restrictions on political spending – and on contributions to organizations that spend money on campaigns – have always hung by a thread from the First Amendment," he wrote. "Citizens United cut the thread." However tempered his perspective, it was overwhelmed by the firestorm of penetrating and passionate reactions released by the Supreme Court's ruling in America's political precincts.

Feuding over the Future of Campaign Finance and the First Amendment

Within hours after the Court announced its landmark ruling, Citizens United was tossed about like a football in a championship tournament skirmish. Politicians seized the bully pulpits in turn to declare their approval or dismay.

The Politicos Weigh In

Senate Minority Leader Mitch McConnell (R-Ky):
"For too long, some in this country have been deprived of full participation in the political process. With today's monumental decision, the Supreme Court took an important step in the direction of restoring the First Amendment rights of these groups by ruling that the Constitution protects their right to express themselves about political candidates and issues up until Election Day. By previously denying this right, the government was picking winners and losers. Our democracy depends upon free speech, not just for some but for all."

Senator Patrick Leahy (D-Vt.), Judiciary Committee Chair:
"The Supreme Court's divided opinion is likely to change the course of our democracy and could threaten the public's confidence in the Court's impartiality. . . . There is clear reason for ordinary citizens to be concerned that this divisive ruling will, in reality, allow powerful corporations to drown out the voices of everyday Americans in future campaigns. This ruling is, no doubt, yet another victory for Wall Street, at the expense of

Main Street America. Our founding document begins "We the People," and . . . enshrines the power of our government in the people, not in corporations and powerful special interests."

President Barak Obama:
"With its ruling today, the Supreme Court has given a green light to a new stampede of special interest money in our politics. It is a major victory for big oil, Wall Street banks, health insurance companies, and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans. This ruling gives the special interests and their lobbyists even more power in Washington, while undermining the influence of average Americans who make small contributions to support their preferred candidates. That's why I am instructing my Administration to get to work immediately with Congress on this issue. We are going to talk with bipartisan Congressional leaders to develop a forceful response to this decision. The public interest requires nothing less."

Corporate-interest lobbyists vied against public-interest advocates in timely press reports on the decision. Robin Conrad, the executive vice-president of the U.S. Chamber of Commerce's litigation center, reflected the views of the nation's largest business association, which had spent $136 million on political lobbying in 2009 alone. "Today's ruling protects the First Amendment rights of organizations across the political spectrum," Conrad gushed, "and is a positive for the political process and free enterprise." His ideological opponent, Common Cause President Bob Edgar, saw the death of democracy without future public funding for federal elections. "The Roberts Court today made a bad situation worse," he argued, "The path from here is clear: Congress must free itself from Wall Street's grip so Main Street can finally get a fair shake."

But what really caught the country's attention was the additional rebuke that President Obama reserved for his State of the Union address on Wednesday night, January 27th. Speaking generally to the nation and specifically to six of the Supreme Court Justices sitting directly in front of him, Obama aimed his rhetorical fire at their ruling in Citizens United. "With all due deference to separation of powers," the former University of Chicago constitutional law professor declared, "last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections."

This rare reprimand – a reproach delivered in the Justices' faces and over national television – drew a rare response. Justice Samuel Alito, one of the five-member majority in the case, shook his head at Obama's description of their decision, and appeared to utter the words "not true." This sharp and stark exchange electrified the press, which avidly reported the continuing tussle between the major players. After Chief Justice John Roberts complained several months later to a group of University of Alabama law students that the annual address had "degenerated to a political pep rally" – a breach of decorum that he found "very troubling" – the President issued a press statement smacking

him back. “What is troubling,” Obama replied, is that this decision “drown[s] out the voices of average Americans” in the election process.

Illuminating Citizens United: What the Decision Really Did

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William R. Maurer

In January 2010, the U.S. Supreme Court issued one of its most controversial decisions in decades, Citizens United v. FEC.[1] The response among politicians supporting restrictions on campaign finances was immediate and fierce. President Obama said he could not “think of anything more devastating to the public interest” and criticized it during the State of the Union address with members of the Court present.[2] Senator Al Franken called it “an incredible act of judicial activism,”[3] while Rep. Chris Van Hollen called it “a very, very sad day for American democracy,” and a “radical, radical decision.”[4]

Politicians were not the only ones to denounce Citizens United. One law professor compared it to Plessy v. Ferguson[5] and Dred Scott.[6] A Huffington Post writer compared the five Justices in the majority to concentration camp prisoners who cooperated with the Nazis and called the beneficiaries of the decision “vampires” who treat humans “as sources of profit, with zero consideration for their humanity.”[7]

The decision remains a sore spot for many. A cable-TV-talk-show-host for the cable channel MSNBC, Dylan Ratigan, is attempting to lead an effort to amend the U.S. Constitution to reverse Citizens United,[8] while a recent “Occupy DC” event concentrated on undoing the decision.[9]

Many of the assumptions underlying this opposition are simply incorrect, however. If the arguments employed against Citizens United are any indication, the opponents’ positions are based on an erroneous understanding of the American constitutional system and a fundamental misreading of the First Amendment itself. Indeed, the most common critiques of Citizens Unitedare based on beliefs about what the decision did—recognizing corporate personhood and ignoring that the Founders never meant to “give” free speech rights to corporations—that are either entirely false or, at the least, reflect a serious misunderstanding of American government. Read correctly, with an accurate understanding of history and Supreme Court precedent, Citizens United is a decision consistent with both the words and intent of the First Amendment.

What Did Citizens United Actually Say?

Citizens United concerned a provision in the U.S. Code, Section 441b of Title 2, that made it a crime for corporations and unions to use general treasury money to make “independent expenditures” (that is, spending that is not coordinated with candidates) that expressly advocated the election or defeat of a federal candidate.[10] Prior to Citizens United, corporations and unions could only participate

in the political process by creating separate political action committees (PACs). PACs operate under complex and expensive administrative requirements, however, and these associations could not use general treasury funds for political purposes, so this was an "alternative" of which very few corporations availed themselves.[11]
Citizens United is a nonprofit corporation that wished to use its general treasury funds to distribute a film about Hillary Clinton—then a candidate for the Democratic Party's nomination for President in 2008—via video-on-demand. Citizens United sued the Federal Election Commission to enjoin Section 441b's application to their distribution of the film. Citizens United lost at the trial court and then sought review at the U.S. Supreme Court, which took up the case in 2009.
In an unusual move, the U.S. Supreme Court held oral argument twice in the case. In the first argument, the U.S. Solicitor General's office admitted that "a corporation could be barred from using its general treasury fund to publish [a] book . . . ."[12] In other words, the position of the government was that, if a group of citizens pooled their money in a corporate form, the government could fine or imprison them if they published a book, or made a film, about politics. During the second oral argument, then-Solicitor General Elena Kagan attempted to back away from this statement, saying that the FEC had never applied the provision to a book, to which Chief Justice Roberts responded, "But . . . we don't put our First Amendment rights in the hands of FEC bureaucrats . . . ."[13]
In January 2010, a five-Justice majority struck down Section 441b. The Court stated unequivocally that the First Amendment restricts the ability of the government to abridge the freedom of speech of corporations. The Court found that Section 441b was an outright ban on speech and that the PAC alternative was not a real alternative for corporations because PACs are separate associations and expensive and difficult to establish and administer.
The Court also noted that the government's reasoning would also allow it to ban media publications, but that it had so far exempted media corporations from the law's broad reach. The Court rejected the government's proffered justifications for the law. It overturned two relatively-recent decisions, Austin v. Michigan Chamber of Commerce[14] and portions of McConnell v. FEC,[15] which held that the government may ban the independent expenditures of corporate and union entities.
Justice Stevens, joined by three other Justices, filed a lengthy dissent, arguing that Congress could constitutionally make it a felony for corporations and unions to pay for political advertisements using money from their general treasury.

What Citizens United Did Not Say

Many critics of the decision argue that Citizens United hinge on the assumption that the decision granted corporations the same constitutional rights as individuals and that this grant of rights was incorrect because the First Amendment only applies to individuals. For instance, in one of its criticisms of Citizens United, The New York Times (ironically, a for-profit corporation that routinely uses its general treasury funds to expressly advocate for the election or defeat of federal candidates) said the following: "Most wrongheaded of all is its insistence that corporations are just like people and entitled to the same First Amendment rights."[16] Similarly, Rep. Van Hollen stated that Citizens United "is a decision that equates, for the purposes of expending monies in elections, says [sic] that corporations equal individuals. I think

it is an un-American decision . . . ."[17] Justice Stevens also accepted this argument, arguing that the "speech" referred to in the First Amendment only applies to "oral communications by individuals," and that because corporations are "artificial entities," they "do not have the technical capacity to speak."[18]

These criticisms misunderstand the American constitutional order and the purpose of the First Amendment itself. The critics are correct, of course, that the First Amendment does not say anything about corporations having free speech rights. This is because it does not say anything about which individuals and groups have free speech rights. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." It does not say, "Only persons have the right to free speech." It does not say, "Corporations do not have free speech rights," nor does it say, "Congress shall make no law abridging the freedom of speech of individuals." It does not say, "Congress shall make no law abridging freedom of speech, except for two or more people." It does not say, "Congress shall make no law abridging freedom of speech, except when the speaker is capable of amassing immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[19]

The critics of Citizens United thus forget an important fact about the First Amendment: it is not a grant of rights. Instead, the First Amendment is a restriction on government power.[20] The First Amendment restricts the ability of government to restrict the rights listed in the amendment—it certainly does not create a limitation on those rights so that they apply only to individuals acting by themselves. It does not lay out who does and does not have the right of free speech because it assumes every American, acting collectively or individually, does.

Instead, the First Amendment defines what legislation Congress can pass that affects this right, which is none. The Founders believed the rights guaranteed by the Bill of Rights are inherent in the American people and that these rights prevail whether they act independently or in concert with one another. The Bill of Rights is an explicit recognition that Congress cannot interfere with these inherent rights. It was not a positive grant of privileges, but a restriction on government.

It is difficult to believe that the critics of Citizens United really believe that only individuals may exercise constitutional rights. Taken to its logical conclusion, the belief that "only individuals have constitutional rights" would have serious consequences for American liberty and would reduce the U.S. to little more than a legislative dictatorship. If only individuals are protected by the Bill of Rights, can the government seize Apple's intellectual property without paying for it, regardless of the Fifth Amendment? Can the government quarter troops at the AFL-CIO's headquarters, despite the Third Amendment? Can it search the ACLU's offices without a warrant because the Fourth Amendment does not apply? Why would any corporation continue to operate in the United States if the fundamental protections that have made America a free and prosperous nation can be ignored by the government? Could the government destroy organized labor by means commonly viewed as forbidden by the Bill of Rights?

In his majority opinion, Justice Kennedy also recognized the implications of a holding that Congress could ban speech by groups of individuals acting in concert: it

would allow the government to ban speech by newspapers, magazines, television news organizations, and other members of the press.[21] If the government may ban speech because it is produced by corporations, unduly influential, and drowns out other speakers, why should media corporations—which are sometimes owned by some of the largest multi-national corporations in the world—be immune? Dylan Ratigan, who works for a cable network owned by General Electric, seems to assume that his speech and that of his employer would be immune from a constitutional amendment banning corporate political speech, but it is not clear why this would be so.

Corporations and unions are not individuals, but they are comprised of individuals that have banded together for common purposes. Marriages, partnerships, neighborhood organizations, and rock groups are all also not individuals, but are rather associations of individuals that have decided that acting cooperatively is more effective than acting alone. To hold that the First Amendment rights (or any other constitutional rights) dissipate the minute one person begins to act in concert with another would neuter the Bill of Rights as an effective check on unrestrained government power. As Chief Justice Roberts put it in his concurrence in Citizens United, "The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer."[22]

Conclusion

Many critics of Citizens United do not realize that this decision was the third time the Supreme Court considered the constitutionality of this law. The first two times the Supreme Court considered the ban, however, it went out of its way to avoid reaching the issue of its constitutionality. Justice Douglas, joined by Chief Justice Warren and Justice Black, filed a dissent that argued that not only should the Court hear the case, it should strike down the ban as an obvious violation of the First Amendment:

Some may think that one group or another should not express its views because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate. First Amendment rights are part of the heritage of all persons and groups in this country. They are not to be dispensed with or withheld because we or Congress thinks the person or group is unworthy.

Justice Douglas concluded by calling the ban "a broadside assault on the freedom of political expression guaranteed by the First Amendment."[23]

The critics of Citizens United too often ignore what the case actually said and disregard the meaning and intent of the First Amendment. Justice Kennedy and Justice Douglas recognized that the right of free speech is not a privilege dispensed by the Court or the government, but an inherent right that the First Amendment protects from government action. When viewed correctly, Citizens United was perfectly consistent with the wording, spirit, and intent of the First Amendment.

* Institute for Justice. A previous version of this article was published in The Weekly Standard, Vol. 16, No. 11. The article is republished here with permission.

Endnotes

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20 See Barron v. Baltimore, 32 U.S. 243, 250 (1833) (The amendments "demanded security against the apprehended encroachments of the general government . . . .").

21 Citizens United, 130 S. Ct. at 905-07.

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23 United States v. UAW-CIO, 352 U.S. 567, 597 (1957) (Douglas, J., dissenting). In an earlier case, Justice Rutledge, joined by Justices Black, Douglas, and Murphy, also dissented from the Court's refusal to consider the ban. Justice Rutledge argued, "A statute which, in the claimed interest of free and honest elections, curtails the very freedoms that make possible exercise of the franchise by an informed and thinking electorate, and does this by indiscriminate blanketing of every expenditure made in connection with an election, serving as a prior restraint upon expression not in fact forbidden as well as upon what is, cannot be squared with the First Amendment." United States v. CIO, 335 U.S. 106, 155 (1948) (Rutledge, J., dissenting).

The Republican Party Needs to Embrace Liberalism

DAVID FRUM https://www.theatlantic.com/magazine/archive/2016/04/how-to-reverse-citizens-united/471504/

Recent history suggests a more reliable means of constitutional change. A quarter century ago, the idea that gay and lesbian couples had a constitutional right to marry was at least as far-fetched as campaign-finance reform has seemed in recent years. And in 1991, former Chief Justice Warren Burger dismissed as fraudulent the notion that the Second Amendment protects an individual right to bear arms. But in 2008, in District of Columbia v. Heller, the Supreme Court recognized an individual right to bear arms, overturning almost 70 years of settled law. And in 2015, the Court declared in Obergefell v. Hodgesthat gay and lesbian couples have a right to marry. Both changes came about gradually, through decades of work by citizens' groups—such as Freedom to Marry and the National Rifle Association—committed to an alternative constitutional vision.

If campaign-finance reform similarly succeeds, it will not be through dramatic measures like the current proposals to pass a constitutional amendment overturning Citizens United. Nor will it be through a quixotic presidential campaign, like Lawrence Lessig's short-lived run on a platform devoted almost exclusively to electoral reform. Constitutional law is more typically changed through a long process of smaller, incremental steps. If the various groups now seeking to fix the problem of money in politics are to prevail, they would do well to take a page from the gun-rights and marriage-equality playbooks.

THE PLACE TO START the fight against Citizens United is not the Supreme Court, or even Washington, D.C., but the hinterlands. When federal constitutional law is against you, you must look for alternative forums in which to press your case. And as with guns and family relations, most of the laws regarding elections are made by the states.

Both gun-rights and marriage-equality advocates began their campaigns in the states most sympathetic to their cause—Florida for the NRA, Vermont and Massachusetts for marriage-equality activists—and then sought to export favorable precedents across state lines. The NRA sought to expand gun-rights provisions in state constitutions, while pressing for legislation that protected the right to carry concealed weapons and insulated gun manufacturers from liability for injuries caused by their products. Gay-rights groups championed parental rights, nondiscrimination ordinances, and modest domestic-partnership benefits

for gays and lesbians. By the time the Supreme Court recognized a right to bear arms, most state constitutions had already done so, and by the time the Court declared that gay and lesbian couples had a federal right to marry, 37 states and the District of Columbia had recognized same-sex marriage.

Some promising campaign-finance initiatives are already appearing at the state and local levels. Maine, Connecticut, Arizona, Seattle, and New York City have each adopted generous public-financing schemes to reduce the influence of private wealth. New York City, for example, matches small donations six-to-one for those candidates who agree to contribution and spending limits. Maine offers a public grant to candidates who raise a qualifying number of $5 donations and then agree to abstain from further private fund-raising. In November, Seattle voters approved a first-of-its-kind ballot initiative that will provide every voter with four $25 "democracy vouchers," to be distributed as they wish among candidates who agree to abide by spending limits. By amplifying the contributions of ordinary citizens, reducing candidates' reliance on Big Money, and enticing candidates to accept voluntary limits on their spending, these laws are meant to encourage politicians to pay attention to all their constituents, not just the wealthy ones. And by making realistic amounts of public financing available, the reforms have made it possible for a wider range of candidates—including, so far, waitresses, teachers, and a convenience-store clerk—to run for office and win.

As the gun-rights and marriage-equality campaigns demonstrate, movements begun in the states can, if they develop sufficient momentum, jump the track and influence federal constitutional law. The normative arguments for a right to same-sex marriage, for example, are largely the same whether one is arguing in a Massachusetts state court, on behalf of a ballot initiative in Maine, or before the U.S. Supreme Court. In this way, state-law developments can ease the way for a Supreme Court decision. The Court did not recognize the right of indigent criminal defendants to free legal representation until 35 states had provided such representation. And the Court did not strike down anti-miscegenation laws until interracial marriage had been legalized in 34 states.

The NRA also eased the way for constitutional change by patiently cultivating a shift in the views of the legal academy. In the last decades of the 20th century, the group began providing grants and awards to legal scholars writing about the Second Amendment. These scholars—including, most prominently, Stephen Halbrook and Don Kates—unearthed historical evidence supporting the notion that the Second Amendment was intended to protect not only the prerogative of states to field militias, as conventional wisdom and constitutional case law then held, but also an individual right to bear arms. By the time the Supreme Court took up the question, this revisionist account had become the predominant view in legal scholarship, and had been lent credence by a number of highly respected liberal scholars, including Akhil Reed Amar, Sanford Levinson, and Laurence Tribe. When, in 2008, the Court made this view the law of the land, the majority's opinion closely tracked the revisionist history. As Walter Dellinger, who unsuccessfully defended the District of Columbia's gun law in the Supreme Court, told a gun-rights scholar the day the decision came down, "You know, it was the scholarship that won the case."

Scholarship could similarly lay the groundwork for a new approach to campaign finance. One promising critique of the Court's recent rulings concedes that spending restrictions limit First Amendment rights, but maintains that the constitutional interest in protecting speech is outweighed by other compelling considerations. Although the Court's most recent rulings assert that the only legitimate basis for restricting campaign spending is curtailing bribery—what the Court calls "quid pro quo corruption"—a number of scholars are persuasively pressing a broader understanding of the state's interests. For example, Zephyr Teachout, a law professor at Fordham, has shown that the Constitution's framers expressed an active desire to fight corruption, a category they understood to include, beyond mere bribery, the undue influence of wealth on politics. Robert Post, the dean of Yale's law school, argues that ensuring "electoral integrity" is essential to a functioning democracy, and justifies limits on the free flow of campaign cash. And in an important new book, Plutocrats United, Richard Hasen, a law professor at UC Irvine, maintains that the state's interest in equality can justify rules aimed at countering money's distortion of politics. Each of these arguments could provide a path toward a constitutional jurisprudence that allows states and Congress more leeway in regulating campaign spending.

In addition, the Brennan Center for Justice's Democracy Program is encouraging social-science research that will test some of the questionable empirical assumptions underlying current campaign-finance jurisprudence—such as the Court's notion that only direct contributions to a candidate's campaign have the potential to corrupt, while massive contributions to and expenditures by so-called independent super PACs do not.

IN A POWERFUL DISSENT in 2014, Justice Stephen Breyer demonstrated how the Court's recent 5–4 decisions striking down campaign-finance laws are out of step with the Court's own precedents, thus laying out the logic for a reversal. In theory, he just needs one more vote.

And yet, even if Scalia's replacement shifts the ideological balance of the Court, the effort to undo Citizens United will still face daunting hurdles. The Court hesitates to overturn any past decision, but it is especially reluctant when a reversal means cutting back on a constitutional right, rather than establishing a new one (as pro-life opponents of Roe v. Wade have learned).

In at least one regard, campaign-finance reformers do have a head start as compared with gun-rights and gay-rights advocates in the 1980s: Public opinion is already on their side. A September 2015 Bloomberg poll found that about 80 percent of Republicans and Democrats alike oppose Citizens United. But even so, reformers must combat what may be their biggest obstacle to meaningful change: public skepticism that anything can be done to fix the problem.

Some argue that reformers' focus on the corrupting influence of wealth has only made voters more likely to dismiss reform efforts as futile. As David Donnelly, the president and CEO of Every Voice, a group that supported the electoral-reform campaign in Maine, told me, "If all voters hear about are the super-rich and their super PACs, they are likely to become demoralized, to feel that nothing can be done." A recent Gallup poll found that 75 percent of Americans think government corruption is "widespread." Meanwhile, the 2014 elections saw the lowest voter turnout in more than 70 years.

In this sense, the significance of the campaign-finance measures now springing up around the country could extend far beyond the states and cities that adopt them. If campaign-finance-reform advocates can learn from the gun-rights and marriage-equality struggles, and focus on incremental progress at the state and local levels and in legal scholarship, they have a chance of not only altering constitutional law, but also restoring faith in the democratic process. “These victories help change the story about money in politics,” Donnelly said. “Maine, Connecticut, and New York City show that this state of affairs is not inevitable or inescapable.”

Even the boldest of gamblers might still hesitate to bet on campaign-finance reform. But not so long ago, they wouldn’t have bet on a constitutional right to marriage equality or gun ownership, either.