

SO HOW DID WE GET INTO THIS MESS? OBSERVATIONS ON THE LEGITIMACY OF *CITIZENS UNITED*

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How did the American body politic allow business corporations to threaten members of Congress by saying, credibly, “Do what we want or we’ll bury you!”?

On January 21, 2010, the Supreme Court’s 5-4 decision in *Citizens United v. Federal Election Commission* interpreted the U.S. Constitution’s First Amendment to permit corporations to spend unlimited amounts of money to support or oppose their chosen candidates.¹ “[A] lobbyist,” said the front page of the next day’s *New York Times*, “can now tell any elected official that [if you vote wrong,] my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election.”² The headline read, “Lobbies’ New Power: Cross Us, And Our Cash Will Bury You.”³

“Bury” was metaphoric but not hyperbolic. In 2008, profits of the top 100 Fortune 500 companies amounted to \$600 billion.⁴ Were a mere one percent of those profits allocated to electioneering, the resulting \$6 billion fund would double what the Obama or McCain campaigns spent, or what every candidate for a House or Senate seat spent, during the 2008 election cycle.⁵ In the recent rancorous health care debate, over 3,300 persons—more than six for every member of Congress—were registered just as health care lobbyists.⁶

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¹ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010) (link).

² David D. Kirkpatrick, *Lobbies’ New Power: Cross Us, And Our Cash Will Bury You*, N.Y. TIMES, Jan. 22, 2010, at A1.

³ *Id.*

⁴ See Matthew Rothschild, *Corporations Aren’t Persons*, PROGRESSIVE (Apr. 2010), <http://www.progressive.org/mrapril10.html> (citing Maryland State Senator and American University Law Professor Jamie Raskin) (link).

⁵ See *id.*

⁶ Michael Tomasky, *The Money Fighting Health Care Reform*, N.Y. REV. BOOKS (Apr. 8, 2010), <http://www.nybooks.com/articles/archives/2010/apr/08/the-money-fighting-health-care-reform/> (link).

To channel my distress in a useful way, I decided to try to understand how it could have happened. Not politically, but “doctrinally.” How could such a result have been reached under the law? The answer, as it turned out, was that it couldn’t be. More on that later.

I. THREE STAGES

The journey to *Citizens United* had several stages. One was the development of the First Amendment to include under its protective umbrella attempts to influence elections either by donations to candidates or by spending money to influence voters about candidates—for example, by making a television movie opposing Hillary Clinton’s run for the Presidency, which is what *Citizens United* was about. Spending money to influence elections is considered speech because it is a way to express or influence opinions; I will call it “election speech.”

This stage of the journey is pretty easy to trace. Although adopted in 1791, the First Amendment’s speech clause—“Congress shall make no law . . . abridging the freedom of speech”⁷—did not achieve its initial explicit victory in the Supreme Court until 1931 (over a California law making it illegal to display a red flag symbolizing opposition to organized government).⁸ Forty years and many decisions later, University of Chicago law professor Harry Kalven, Jr., then the country’s preeminent First Amendment scholar, observed that speech problems were “difficult to conceptualize and to relate to each other.”⁹ He suggested that it might be a mistake to search for a unitary theory of freedom of speech under the Constitution, that perhaps one should seek “not so much an organizing principle” as an “organizing map” on which to place the problems.¹⁰

Several hundred First Amendment decisions by the Supreme Court have followed that initial red flag case but—as Harry Kalven had predicted—no unitary theory applying to all of them has emerged. Even without an overarching theory, however, once the First Amendment began to appear on the judicial landscape, its “coverage” of election speech was never in serious doubt.¹¹ John Doe had a First Amendment right to contribute to Jane Doe’s (or Hillary Clinton’s) campaign and to spend money to support or oppose her.

Another stage of the journey was to decide whether everyone’s protected speech was covered, or whether there were exceptions. That is, were

⁷ U.S. CONST. amend. I (link).

⁸ *Stromberg v. California*, 283 U.S. 359, 360–61, 368–69 (1931) (link).

⁹ Jamie Kalven, *Introduction* to HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA*, xi, xvii–xviii (1988) (quoting a statement Harry Kalven made to his students).

¹⁰ *Id.* at xviii.

¹¹ The culminating analysis came in *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam) (link), in which the Court said that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”

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some speakers unable to fit under the First Amendment umbrella, not because of what they were saying but because of who they were? The answer was yes, there were exceptions—several, in fact. Prisoners were one. So were members of the Armed Forces. So were students. In each of these cases, in spite of the First Amendment’s absolute language, the Supreme Court ruled that in certain contexts the government could impose restrictions on the speech rights of prisoners,¹² soldiers,¹³ and students.¹⁴

When prisoners tried to organize a “union,” the Court held that a prisoner does not have First Amendment rights “inconsistent with . . . the legitimate penological objectives of the corrections system.”¹⁵ Ruling that an Army Captain did not have a First Amendment right to advise black soldiers not to go to Vietnam, the Court said that “the different character of the military community and of the military mission requires a different application” of the First Amendment.¹⁶ Similar rulings applied to students who, because of the legitimate interests of their educational institutions, were held not to have the same First Amendment rights as non-students.¹⁷

The Court also upheld laws barring federal employees not only from contributing to members of Congress but also from taking part in political campaigns.¹⁸ Among the reasons were that the government and its employees should “avoid practicing political justice,” and that they should “appear to the public to be avoiding it, if confidence in the system of representative Government [was] not to be eroded.”¹⁹

After two stages of the journey, then, the First Amendment clearly protected election speech, but speech by certain groups of speakers could in certain contexts be restricted because of who they were. In most of the cases referred to so far, the speaker was a human being; the third stage in the journey to *Citizens United* involved corporations as speakers. Corporations are artificial beings, created by law. Does that make a difference in whether they fit under the First Amendment umbrella?

For a long time before the *Citizens United* decision, the answer was yes; it did make a difference. In the country’s infancy, the few corporations that existed did so by grant of special charters from state legislatures able to

¹² See, e.g., *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 130 (1977) (link).

¹³ See *Parker v. Levy*, 417 U.S. 733, 758–59 (1974) (link).

¹⁴ See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682–83 (1986) (link).

¹⁵ *N.C. Prisoners’ Labor Union*, 433 U.S. at 129 (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

¹⁶ *Parker*, 417 U.S. at 758.

¹⁷ See, e.g., *Fraser*, 478 U.S. at 682–83 (holding that the “constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings”).

¹⁸ See *United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548 (1973) (link).

¹⁹ *Id.* at 565.

tie whatever strings they wished to the charters they issued.²⁰ Soon, general “incorporation” statutes replaced charters, but these too could (and still do) contain all manner of regulatory strings.²¹ In the early years of our country, the Bill of Rights was not thought to apply to corporations.²² And the evils of permitting corporations to engage in electioneering were thought to be self-evident.

In 1907, when at the request of President Theodore Roosevelt²³ Congress banned corporate contributions to candidates,²⁴ a Senate Report on the proposed new law observed,

The evils of the use of money in connection with political elections are so generally recognized that the committee deem it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials.²⁵

In the years following 1907, the initial ban on corporate contributions, which came to be called the Corrupt Practices Act,²⁶ was tinkered with in a number of ways, both by Congress and, as corporations gradually gained First Amendment protection,²⁷ by the Supreme Court. The tinkering produced a complicated piece of machinery, but it always included limitations on corporate political spending.

²⁰ Justice Stevens reviews this early history in his dissenting opinion in *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 948–52 (2010).

²¹ *See id.*

²² *See id.*

²³ *See id.* at 953 (quoting President Roosevelt’s speech to Congress).

²⁴ Tillman Act, Pub. L. No. 59-36, ch. 420, 34 Stat. 864, 864–65 (1907).

²⁵ S. REP. NO. 59-3056, at 2 (1906).

²⁶ *See United States v. Int’l Union United Auto., Aircraft & Agric. Implement Workers of Am. (UAW-CIO)*, 352 U.S. 567, 576 (1957) (link).

²⁷ The process began in 1886 in a railroad tax case, *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (link). Though the matter was not even discussed in the Court’s opinion, the case was later viewed as having ruled that the railroad corporation was a “person” under a clause of the Fourteenth Amendment to the Constitution. *See, e.g., Morton J. Horwitz, Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 173 (1985). That came about because a Court functionary included a “headnote” to that effect in an official summary of the Court’s opinion that became embedded in later Supreme Court decisions. For a detailed discussion of the strange circumstances, see THOM HARTMANN, *UNEQUAL PROTECTION: HOW CORPORATIONS BECAME “PEOPLE”—AND HOW YOU CAN FIGHT BACK* 23–32 (2d ed. 2010). Eventually the Court included First Amendment rights among those extended to corporations, although that didn’t happen until well into the twentieth century. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 244–51 (1936) (link).

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In the 1940s, because of the growing influence of organized labor, Congress extended the ban on corporate contributions to include unions.²⁸ In addition, because the contributions ban had been construed so narrowly (only prohibiting donating money directly to a candidate) that corporations were able to defeat the purpose of the law by supporting candidates in other ways, Congress banned “expenditures” as well as contributions.²⁹ The hallmark of an expenditure was that even though it was made for the purpose of supporting or opposing a candidate, it was not paid to a candidate (or her organization or party) but was supposedly made independently, without the candidate’s participation or even prior knowledge.³⁰

As First Amendment speech law became more robust, the Supreme Court also began to make clear that restrictions on election speech had to comply with First Amendment principles. Among other requirements, legislation restricting speech had to be “narrowly tailored” to focus on the precise matter with which Congress was legitimately concerned, and it could not be so vague as to leave uncertain the conduct that was proscribed. Court decisions made it clear, for example, that the expenditure ban could not preclude unions and corporations from communicating freely with their members and stockholders.³¹

Congressional tinkering continued with the enactment in the early 1970s of the Federal Election Campaign Act (FECA), which provided some public financing of presidential races, created a Federal Election Commission to oversee election regulation, and authorized corporations and unions to set up electioneering organizations called Political Action Committees, or PACs.³² Among other requirements, organizations like PACs had to be funded with voluntary contributions that could not come from a corporation’s or a union’s treasury.³³ In a 1972 opinion, the Court quoted approvingly a member of Congress who had said that the PAC-type arrangements maintained “the proper balance in regulating corporate and union political activity required by sound policy and the Constitution.”³⁴

²⁸ See *Fed. Election Comm’n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 510 (2007) (Souter, J., dissenting).

²⁹ See *War Labor Disputes Act of 1943*, Pub. L. No. 78-89, ch. 144, § 9, 57 Stat. 163, 167–68. The temporary ban on expenditures was made permanent in the *Labor Management Relations Act*, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159–60 (1947), also known as the *Taft-Hartley Act*. See *Wis. Right To Life*, 551 U.S. at 511 (Souter, J., dissenting).

³⁰ See *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976) (per curiam).

³¹ For a discussion of the cases establishing this limit on the ban, see *Wis. Right To Life*, 551 U.S. at 511–19 (2007) (Souter, J., dissenting) (link).

³² *Federal Election Campaign Act of 1971*, Pub. L. No. 92-225, § 205, 86 Stat. 3, 10 (1972), as amended by *Federal Election Campaign Act Amendments of 1974*, Pub. L. No. 93-443, 88 Stat. 1263; *Buckley*, 424 U.S. at 85–86, 109–10.

³³ See *id.*

³⁴ See *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 431 (1972) (link). Judicial interpretation of the *Taft-Hartley Act* had earlier created the PAC arrangement. See *id.* at 402–31.

Additional tinkering by the Supreme Court dealt with nonprofit corporations—not the business corporations that had been the focus of the Corrupt Practices Act. As this narrow tailoring finally emerged from several cases, a nonprofit could engage in election speech if it was formed to promote political ideas (so its resources reflected political support rather than commercial success), if it had no shareholders (so individuals who paid money into it would not have their funds used to support candidates they opposed), and if it was not established by, and did not accept contributions from, a business corporation or union.³⁵ (Citizens United was itself a nonprofit, albeit a wealthy one, but because it received a small amount of support from business corporations it was not entitled to this nonprofit exemption.)

In 1976, the Court tinkered further in an important way. In *Buckley v. Valeo*, while upholding the FECA's limitations on contributions, to avoid running afoul of the First Amendment's proscription against vagueness, it construed "expenditures" to include only communications that expressly advocated the election or defeat of identified candidates.³⁶ Then, on First Amendment grounds (restricting speech without sufficiently compelling reasons) it overturned the expenditures ban, so construed, as to "persons" (including individuals), although it did not address—and therefore left intact—the law's separate ban on expenditures by corporations and unions.³⁷

The grandest tinkering of all came about in response to the foreseeable consequence of the constrained meaning assigned to "expenditures." Just as the narrow construction of contributions had earlier led to the loophole of expenditures, so the narrow construction of expenditures led to the loophole of "issue ads." Eschewing what came to be called "magic words," such as "vote for" or "vote against," electioneering proceeded apace under the guise of discussing issues, not candidates. Instead of urging viewers to "vote against Jane Doe," an ad might condemn Jane Doe's record on a selected issue and then encourage viewers to "call Jane Doe and tell her what you think."³⁸

The result was that in 2002 Congress enacted a comprehensive new regulatory scheme, sponsored by Senators John McCain and Russell Feingold, called the Bipartisan Campaign Reform Act (BCRA).³⁹ To address the "issue ads" problem, the BCRA forbade corporations to engage in "electioneering communications" for thirty days before a federal primary and for

³⁵ See, e.g., *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263–64 (1986) (link).

³⁶ *Buckley v. Valeo*, 424 U.S. 1, 19–20 (1976) (per curiam).

³⁷ See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 902 (2010) (summarizing *Buckley*'s holdings).

³⁸ See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 126–27 (2003) (link).

³⁹ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 201, 203, 116 Stat. 81, 88–90, 91–92 (codified at 2 U.S.C. §§ 434(f)(3)(A)(i), 441b(b)(2) (2000 ed., Supp. iv)).

sixty days before a federal general election.⁴⁰ (This was the provision that immediately affected *Citizens United*, which wished to make its anti-Hillary movie available through video-on-demand technology within these time periods.⁴¹) The BCRA defined “electioneering communication” as “any broadcast, cable, or satellite communication” within the pre-election run-up periods that refers to a candidate and (except for presidential candidates) is geographically targeted.⁴²

The BCRA’s constitutionality was promptly challenged under the First Amendment, but in 2003 the Supreme Court upheld the basic scheme in *McConnell v. Federal Election Commission*.⁴³ Citing a number of opinions in which it had said that the importance of elections in a democratic society justified imposing restrictions on the election speech of business corporations, the *McConnell* opinion emphasized preventing the appearance of corruption in the electoral process and avoiding erosion of citizen confidence in government.⁴⁴ The Court also said the BCRA was not unconstitutionally overbroad because, among other reasons, corporations and unions could “finance genuine issue ads during [the run-up] timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated [PAC] fund.”⁴⁵

In short, over the nearly one hundred years from 1907 to the enactment of the BCRA, Congress exercised its constitutional power to regulate the manner of conducting federal elections by crafting regulations that limited the electoral role of corporations and, later, unions. In the process, it treated corporations and unions very differently from human beings. Although corporations, for better or worse, had managed to overcome their artificial beginnings and acquire considerable First Amendment protection, the congressional interest in preventing corruption, or the appearance of it, from infecting elections had also permitted serious regulation of corporate election speech. While insistent upon compliance with First Amendment requirements, the Supreme Court had not viewed that regulation as violating corporations’ speech rights.

⁴⁰ See BCRA § 201(a).

⁴¹ See *Citizens United*, 130 S. Ct. at 914.

⁴² *Id.*

⁴³ See *McConnell*, 540 U.S. at 224 (“In the main we uphold BCRA’s two principal, complementary features: the control of soft money and the regulation of electioneering communications”).

⁴⁴ See *id.* at 203–07. The *McConnell* opinion said that the Court had “repeatedly sustained legislation aimed at ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.’” *Id.* at 205 (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990)); see also *Austin*, 494 U.S. at 657–61 (describing cases justifying restrictions on corporate election speech based on democratic principles) (link).

⁴⁵ *McConnell*, 540 U.S. at 206–07.

II. THE APPLE CART UPSET

Citizens United upset the apple cart big time by ruling that, except for direct contributions to candidates, corporate election speech could not be restricted (and that the anti-Hillary Clinton movie could be shown) because corporations had virtually the same election speech rights as human beings.⁴⁶ Also upset (overruled) were two of the Court's earlier decisions that had upheld restrictions on corporate election speech under the First Amendment⁴⁷

The reasoning was breathtakingly simple. It amounted to asserting that the First Amendment did not permit regulation of speech based on the "identity" of the speaker, meaning "identity" as a corporation—not, say, Texaco versus Shell, but being a corporation rather than a human being.⁴⁸ Yet wasn't the speech of prisoners, soldiers, students, and government employees restricted precisely because of their "identity" as prisoners, soldiers, students, and government employees? These cases, however, are all "inapposite," says *Citizens United*. The explanation for that succinct dismissal is set out in three short sentences, written by Justice Kennedy and agreed to by the four other justices who made up the *Citizens United* 5-4 majority:

- "[T]hese rulings were based on an interest in allowing governmental entities to perform their functions. . . ."⁴⁹
- "These precedents stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech."⁵⁰
- "The corporate [election speech] at issue in this case, however, would not interfere with governmental functions"⁵¹

Let's consider the first two of these sentences—the third we'll look at later. (One of the dissenting justices, John Paul Stevens, wrote that the "proposition" in the second sentence "lies at the heart of this case."⁵²) Is it a governmental function to "operate" federal elections, just as it is a governmental function to operate prisons, armies, schools, and post offices? Not in the sense that prisons, armies, schools, and post offices are operated

⁴⁶ See *Citizens United*, 130 S. Ct. 876.

⁴⁷ *Citizens United* overruled *Austin*, 494 U.S. 652, and *McCormell*, 540 U.S. 93. See *Citizens United*, 130 S. Ct. at 913.

⁴⁸ See *id.* at 899.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 946 n.46.

with paid government employees. But Congress does have the power to pass laws about the way members of Congress are elected. The Constitution says that the “[m]anner” of holding congressional elections within each state shall be determined by the state legislature but then adds that Congress may “make or alter such Regulations.”⁵³ In other words, Congress may “make” regulations—that is, pass laws—to govern the manner in which elections for members of Congress are held. The Supreme Court has held that this power extends to presidential elections as well: “The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress.”⁵⁴

On what basis, then, did Justice Kennedy and four other justices reach their *Citizens United* conclusion? If it was constitutional to prevent prisoners from encouraging each other to form a prisoner’s union because of the needs of running a prison; if it was constitutional to prevent army officers from encouraging soldiers to disobey orders because of the needs of running an army; if it was constitutional to prevent government employees from taking part in political campaigns because of the need to avoid an appearance that “political justice” might be dispensed; why wasn’t it constitutional to prevent business corporations from swamping voters with broadcast, cable, and satellite electioneering during the run-up to federal elections because of the need to keep those elections free from an appearance of corruption?

Unhappily, intellectual irresponsibility appears to be the answer. One way to demonstrate this is to consider how Justice Kennedy handles two Supreme Court cases, decided in 1976 and 1978, to which he attributes the “principle” that is the keystone of his *Citizens United* opinion—that the First Amendment precludes government from restricting speech based on “corporate identity.”

In *Buckley v. Valeo*, numerous plaintiffs challenged the constitutionality of each of five major features of the FECA: (1) public funding of presidential campaigns; (2) limitations on campaign contributions; (3) limitations on independent expenditures; (4) disclosure requirements for both contributions and expenditures; and (5) creation of a Federal Election Commission to administer the Act.⁵⁵ The case produced six different opinions that ranged from viewing most of the Act as constitutional to most of it as unconstitutional. The Court’s opinion was issued per curiam, meaning “by the court,” without—as is the usual practice—identifying an individual Justice responsible for authoring it.

What emerged from the per curiam *Buckley* opinion was that the Federal Election Commission and public financing measures of the FECA sur-

⁵³ U.S. CONST. art. I, § 4 (link).

⁵⁴ *Burroughs v. United States*, 290 U.S. 534, 547 (1934) (link).

⁵⁵ See 424 U.S. 1, 9 (1976).

vived, with some modifications, as did disclosure requirements.⁵⁶ Limitations on campaign contributions were also upheld because of the governmental interest in preventing corruption and the appearance of it.⁵⁷ Limitations on independent expenditures, however, were ruled unconstitutional because, the per curiam opinion said, this governmental interest was inadequate to justify the infringement on speech that resulted from barring independent expenditures.⁵⁸

Buckley's reasons for distinguishing between contributions and independent expenditures will be discussed in connection with Justice Kennedy's third sentence. Of present interest is Justice Kennedy's use of *Buckley* respecting corporations as "speakers." As to this, his *Citizens United* opinion says that, "the principle established in *Buckley* . . . [is] that the Government may not suppress political speech on the basis of the speaker's corporate identity."⁵⁹

This sentence is astonishing for three reasons. One is that *Buckley* contains no discussion of suppressing speech on the basis of the speaker's corporate identity. Both the contribution section of the law that was upheld and the independent expenditures section that was not applied to all manner of "persons"—human beings, groups, associations, corporations, and so on.⁶⁰ When *Buckley's* analysis led it to strike down limitations on independent expenditures, it was because of the restrictive effect those limitations were perceived to have on the election speech of all those "persons," including human beings.⁶¹ *Buckley's* discussion of this restrictive effect did not mention suppressing election speech "on the basis of the speaker's corporate identity."⁶²

The second reason for astonishment is that *Buckley* left untouched a provision of the FECA—the then-current version of the Corrupt Practices Act—that *did* suppress corporate election speech. This section of the Act, separate from the one that applied to "persons," prohibited both contributions and independent expenditures by national banks, corporations and labor unions, thus singling out those entities for different treatment than human beings.⁶³

⁵⁶ *Id.* at 143.

⁵⁷ *Id.* at 25–29.

⁵⁸ *See id.* at 39–45.

⁵⁹ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010).

⁶⁰ *See Buckley*, 424 U.S. at 17–23.

⁶¹ In a later opinion the Court said that ". . . *Buckley* addressed issues that primarily related to contributions and expenditures by individuals . . ." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 122 (2003).

⁶² In fact, even as to human beings *Buckley* left the door ajar for future developments, saying that independent expenditures did not "presently appear" to pose an apparent corruption threat comparable to the threat arising from direct contributions. *See Buckley*, 424 U.S. at 46.

⁶³ *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 205, 86 Stat. 10 (codified as amended at 18 U.S.C. § 610 (Supp. V 1976) (reflecting amendments through Jan. 1, 1975)).

Moreover, not only was this separate section not declared unconstitutional by *Buckley*, it was not even attacked by the plaintiffs (who did attack virtually everything else in the FECA).⁶⁴ The failure of the *Buckley* plaintiffs to include the separate section among their targets could, of course, explain *Buckley*'s silence about it—except that *Buckley* was not silent about this different treatment of corporations and unions but actually referred to it *approvingly*. Explaining that contribution limitations were being upheld in part because they left persons free to engage in political expression in ways other than through contributions to candidates, such as through “political funds” (essentially, PACs), the *Buckley* opinion said that a “prime example” of such a fund was that the bank/corporation/union section “permits corporations and labor unions to establish segregated funds to solicit voluntary contributions to be utilized for political purposes.”⁶⁵

“It is implausible,” said Justice Stevens in his *Citizens United* dissent, “that *Buckley* covertly invalidated FECA’s separate corporate and union campaign expenditure restriction even though that restriction had been on the books for decades before *Buckley* and would remain on the books, undisturbed, for decades after.”⁶⁶ He might have added that it is also implausible that *Buckley* would have referred approvingly to a section of the law it viewed as unconstitutional.

There is a third reason for astonishment at Justice Kennedy’s statement that *Buckley* established the principle that political speech may not be suppressed on the basis of the speaker’s corporate identity: in the years following *Buckley* a number of Supreme Court opinions either said or strongly implied that the government might do just that, or said that the question of whether it could was open and undecided. Here are some examples:

1978—“Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.”⁶⁷

1981—“[D]iffering restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process.”⁶⁸

⁶⁴ See *Citizens United*, 130 S. Ct. at 954 (Stevens, J., dissenting).

⁶⁵ *Buckley*, 424 U.S. at 28 n.31.

⁶⁶ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 958 (2010) (Stevens, J., dissenting) (internal citations omitted).

⁶⁷ *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 788 n.26 (1978) (link).

⁶⁸ *Cal. Med. Ass’n v. Fed. Election Comm’n*, 453 U.S. 182, 201 (1981) (link).

1982—“The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized, and there is no reason why it may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals.”⁶⁹

1986—“The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation’s political ideas. . . . By requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, [the law] seeks to prevent this threat to the political marketplace.”⁷⁰

1990—“[T]he unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.”⁷¹

2003—“Today, as in 1907, the law focuses on the ‘special characteristics of the corporate structure’ that threaten the integrity of the political process. . . . ‘Substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political “war chests” which could be used to incur political debts from legislators.’”⁷²

2003—“[O]ur prior decisions regarding campaign finance regulation . . . ‘represent respect for the “legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.”’ We have repeatedly sustained legislation aimed at ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.’”⁷³

⁶⁹ Fed. Election Comm’n v. Nat’l Right to Work Comm., 459 U.S. 197, 210–11 (1982) (citing *Cal. Med. Ass’n*, 453 U.S. at 201) (internal citation omitted) (link).

⁷⁰ Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 258 (1986).

⁷¹ *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990).

⁷² Fed. Election Comm’n v. Beaumont, 539 U.S. 146, 153 (2003) (internal citations omitted) (link).

⁷³ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 205 (2003) (internal citations omitted).

Each of these statements commanded at least a majority of the then-Justices; the 1982 opinion was unanimous.⁷⁴ It is plain, therefore, that not only was the “principle” Justice Kennedy says *Buckley* established unmentioned in the *Buckley* opinion, but also that it was not thereafter viewed by the Court as having been established.

Justice Kennedy continues to astonish with his handling of another Supreme Court opinion, *First National Bank of Boston v. Bellotti*,⁷⁵ to which he also attributes the “principle” that the First Amendment precludes government from restricting speech based on “corporate identity.”⁷⁶ For some time the Massachusetts state government had been attempting to persuade voters to approve a referendum establishing a graduated personal income tax.⁷⁷ Business corporations, particularly banks, had been effective opponents in previous failed referendum votes.⁷⁸ Finally, the Massachusetts legislature came up with the stratagem of eliminating banks and their allies from the referendum “game” by forbidding them from making contributions or expenditures to influence referendum votes.⁷⁹ The law contained an exception for referendum issues that “materially affected” the businesses of banks or business corporations, but by definition income tax referenda were not in that category.⁸⁰ In 1978, *Bellotti* ruled that the Massachusetts law violated the First Amendment.⁸¹

Justice Kennedy’s handling of *Bellotti* is irresponsible in at least two ways. The first is the failure to discuss the significance of the fact that *Bellotti* is about a referendum, not a candidate election. This is important because, as first year law students are taught, general statements in judicial opinions are to be interpreted in light of, and generally confined in their application to, the situation to which they are addressed. That *Bellotti* was about a referendum, not a candidate election, is a critical fact because a referendum—unlike a candidate—cannot be politically beholden to supporters. The *Bellotti* opinion itself explicitly noted the distinction: “Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.”⁸²

As a first year law student would quickly have understood, statements in the *Bellotti* opinion that Justice Kennedy found useful for his *Citizens United* discussion should responsibly have been confined to referenda and

⁷⁴ *Nat’l Right to Work Comm.*, 459 U.S. at 197.

⁷⁵ 435 U.S. 765 (1978).

⁷⁶ See *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876, 902 (2010).

⁷⁷ *Bellotti*, 435 U.S. at 765.

⁷⁸ *Id.* at 775.

⁷⁹ See *id.* at 767–68.

⁸⁰ *Id.* at 768.

⁸¹ *Id.* at 795.

⁸² *Id.* at 790 (internal citations omitted).

not applied to candidate elections. Indeed, the *Bellotti* opinion went out of its way to make it clear that it wanted its statements to be confined in just this way:

The overriding concern behind the enactment of statutes such as the [Corrupt Practices Act] was the problem of corruption of elected representatives through the creation of political debts. The importance of the government interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest [i.e., referenda] implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.⁸³

In the face of these explicit *Bellotti* statements, emphasizing the importance of the distinction between the risk of corruption in referenda and candidate elections, a reader is incredulous to find that Justice Kennedy repeatedly cites, quotes, and paraphrases the *Bellotti* opinion without referring to that distinction.

Justice Kennedy also abuses the *Bellotti* opinion by attributing to it (as he did earlier to *Buckley*) the "principle" that speech cannot be restricted because of corporate "identity": "*Bellotti* . . . reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity."⁸⁴ "*Bellotti*'s central principle [was] that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity."⁸⁵

The trouble is that *Bellotti* neither "reaffirmed" nor articulated any such principle. What it did was strike down a law that distinguished one kind of corporation from another—one whose business was materially affected by a referendum from one whose business was not. In fact, so carried away was Justice Kennedy by his "principle" that one of his quotations failed to indicate that it truncated *Bellotti*'s language. Justice Kennedy quoted this from *Bellotti*: "[P]olitical speech does not lose First Amendment protection 'simply because its source is a corporation.'"⁸⁶ Had the omitted language been included, Justice Kennedy's quote would have read, "[P]olitical speech does not lose First Amendment protection 'simply be-

⁸³ *Id.* at 788 n.26 (internal citations omitted).

⁸⁴ *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 902 (2010).

⁸⁵ *Id.* at 903.

⁸⁶ *Id.* at 900 (internal quotation marks and citation omitted).

cause its source is a corporation *that cannot prove, to the satisfaction of a court, a material effect on its business or property.*⁸⁷

Bellotti does say that the “inherent worth” of speech—its capacity for informing the public—does not depend on whether the source is a corporation or an individual.⁸⁸ But this is promptly followed by two disclaimers—that the Court is neither addressing “the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment,” nor considering “whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations”⁸⁹

In two respects, therefore, Justice Kennedy mangles *Bellotti*. First, *Bellotti* decided nothing—was indeed at pains to decide nothing—about corporate expenditures in *candidate* elections. Second, the opinion did not say or decide that corporations could never be distinguished from human beings under the First Amendment. Had Justice Kennedy written his discussion of *Bellotti* in a law school examination, he would have flunked.

There is one additional observation to be made about Justice Kennedy’s treatment of *Buckley* and *Bellotti*. Justice Kennedy wrote that had the FECA’s prohibition of direct expenditures by banks, corporations, and unions been challenged in the wake of *Buckley*, the prohibition “could not have been squared with the reasoning and analysis of [*Buckley*].”⁹⁰ Presumably, this means that the FECA’s prohibition of independent expenditures by banks, corporations, and unions would also have been declared unconstitutional had that issue been submitted to the *Buckley* Court.

Yet the Justices who approved *Bellotti*’s language were, for the most part, the same Justices who had approved *Buckley*’s language two years earlier.⁹¹ In *Bellotti*, these Justices wrote that, “Congress might well be able to demonstrate . . . a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.”⁹² This provides an obvious way to “square” the reasoning and analysis of *Buckley*—which addressed “issues that primarily related to contributions and expenditures by individuals”⁹³—with the FECA’s prohibition limited to banks, cor-

⁸⁷ *Bellotti*, 435 U.S. at 784. This is not an inconsequential deletion of a few words, for in following sentences the *Bellotti* opinion makes clear its view that the “materially affecting” phrase amounts to a requirement “that the speaker have a sufficiently great interest in the subject to justify communication.” *Id.*

⁸⁸ *See id.* at 777.

⁸⁹ *See id.* at 777 & n.13.

⁹⁰ *Citizens United*, 130 S. Ct. at 902.

⁹¹ The composition of the Court was, in fact, unchanged, but Justice Stevens did not participate in *Buckley*. *See Buckley v. Valeo*, 424 U.S. 1, 5 (1976) (per curiam).

⁹² 435 U.S. at 788 n.26.

⁹³ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 122 (2003) (describing the *Buckley* opinion).

porations, and unions. As a matter of the plain meaning of language,⁹⁴ it is impossible to imagine that the Justices who subscribed to *Bellotti*'s statements (for example, that Congress might be able to demonstrate a corruption danger in corporate independent expenditures in candidate elections) could have meant what Justice Kennedy understands them to have meant in *Buckley* just two years earlier—that political speech could never be suppressed based on the corporate identity of the speaker.⁹⁵

We come, finally, to Justice Kennedy's third sentence: "The corporate independent expenditures at issue in this case [paying for the anti-Hillary movie and for making it available through video-on-demand technology in the final weeks before a federal election] . . . would not interfere with governmental functions . . ." The sentence is crucial because if it is concluded that no governmental function is being interfered with—in this case that corporate electioneering communications do not give rise to an appearance of corruption that interferes with the governmental function of regulating elections—there is nothing to offset the First Amendment's command. What exactly is Justice Kennedy's basis, then, for this crucial third sentence?

At the outset we should put aside Justice Kennedy's several paeans to the value of corporate speech and the harm that may flow from suppressing it. Had soldiers been free to speak against our Vietnam misadventure the country might have been spared a great tragedy. Millions of government employees may have particularly useful things to say about what goes on inside government agencies. The issue is not the value of speech; that is acknowledged by all. The issue is whether independent expenditures by corporations give rise to an appearance of corruption, for avoiding that appearance is acknowledged to be a governmental interest compelling enough to justify restricting the speech that causes the appearance.

⁹⁴ See *supra* text accompanying notes 86–87.

⁹⁵ Four years before *Buckley* was decided, Justice Powell, who joined in the *Buckley* opinion and authored *Bellotti*, dissented from a decision holding that unions might lawfully make political contributions and expenditures, notwithstanding the FECA's bank/corporation/union prohibition, so long as the contributions and expenditures came from funds voluntarily given to the union for such purpose. *Pipefitters Local Union No. 562 v United States*, 407 U.S. 385, 444–46 (1972) (Powell, J., dissenting).

Contending that the prohibition on banks', corporations', and unions' contributions and expenditures should be accepted as written, Justice Powell said: "[O]pening of the door to extensive corporate and union influence on the elective and legislative processes must be viewed with genuine concern. This seems to me to be a regressive step as contrasted with the numerous legislative and judicial actions in recent years designed to assure that elections are indeed free and representative." *Id.* at 450.

It demands considerable mental agility to imagine that between arguing in 1972 that it was "regressive" to open the door to extensive corporate and union influence on the elective and legislative processes, by not upholding the prohibition of FECA as written, see *Pipefitters*, 407 U.S. at 450, and in 1978 that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections," see *Bellotti*, 435 U.S. at 788 n.26, Justice Powell had concluded in *Buckley* that a ban on corporate expenditures was facially unconstitutional.

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Evidence that corporate independent expenditures give rise to an appearance of corruption is extensive. The formal record begins in the 1940s when, because corporations and unions had become adept at circumventing the contributions ban that dated back to 1907, Congress outlawed independent expenditures.⁹⁶

By the time Congress enacted the BCRA over fifty years later,⁹⁷ substantial information on corporate independent expenditures had been accumulated. In *McConnell*, the case that ruled that much of the BCRA was constitutional, one of the trial judges had summarized the following from a trial record that ran over 100,000 pages:

- Corporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications.
- Members of Congress express appreciation for those communications.
- Campaign organizations are aware of who runs advertisements on the candidate's behalf, and when and where they are run.
- Members of Congress seek to have corporations and unions run such advertisements.
- After elections are over, corporations and unions often seek "credit" for their support.⁹⁸

On the basis of this and much other testimony, the judge concluded, "The record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting."⁹⁹

None of this is surprising. Nor did it seem so to the American public. The *McConnell* record included a poll in which some 80% of respondents said they believed that those who engaged in electioneering communications received special consideration from the elected officials they had supported.¹⁰⁰

Against this background, then, what is the factual basis for Justice Kennedy's contrary conclusion that "[for] the reasons explained

⁹⁶ See Labor Management Relations Act, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159-60 (1947).

⁹⁷ See *supra* note 39.

⁹⁸ *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d. 176, 623-24 (D.D.C. 2003) (link).

⁹⁹ *Id.* at 622-23.

¹⁰⁰ See *id.* at 623.

above, . . . independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption”?¹⁰¹ Astonishingly, there isn’t any. The reasons “explained above” are these:

- A reference to *Buckley*’s conclusion that the government’s interest in preventing the appearance of corruption was inadequate to justify banning independent expenditures. *Buckley*’s conclusion, however, was about a ban that included humans; *Buckley* expressed no conclusion about whether corporate independent expenditures, considered separately from humans’ independent expenditures, could lead to an appearance of corruption.¹⁰²
- An assertion that absence of coordination with the candidate “alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate . . .”¹⁰³ addresses actual corruption, not the appearance of it. (And “alleviates” is not synonymous with “eliminates.”)
- An assertion that “[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt”¹⁰⁴ likewise deals with actual corruption, not its appearance.
- A reference to the government’s failure to assert that political processes had been corrupted in the twenty-six states that do not restrict independent expenditures¹⁰⁵ similarly refers to actual corruption, not the appearance of it.
- An unsupported assertion that “the appearance of influence or access . . . will not cause the electorate to lose faith in our democracy” is followed by two sentences to the effect that spending money to persuade voters presupposes that the voters have ultimate influence over elected officials, a presupposition said to be inconsistent with any suggestion that corporate independent expenditures may cause the feared loss of faith.¹⁰⁶

¹⁰¹ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 909 (2010).

¹⁰² *See supra* notes 59–62 and accompanying text.

¹⁰³ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam)).

¹⁰⁴ *Id.* at 910.

¹⁰⁵ *Id.* at 908–09.

¹⁰⁶ *See id.* at 910.

After pointing out that the *McConnell* record contains no direct examples of votes being exchanged for expenditures¹⁰⁷—it would have been “quite remarkable,” observes Justice Stevens’ dissent, if Congress had created a record detailing such behavior by its own members¹⁰⁸—Justice Kennedy concludes as follows:

If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule.¹⁰⁹

What emerges from this review of Justice Kennedy’s “reasons explained above” is that over six decades of congressional regulation of corporate independent expenditures are swept away by fiat. There is no—literally no—factual support for Justice Kennedy’s crucial third sentence.

Three further observations may be made about that sentence. The first is to note the irony that Justice Kennedy complains of the government’s failure to offer evidence that corporate independent expenditures may lead to an appearance of corruption, while offering up his own contrary conclusion without any evidence at all.¹¹⁰

The second observation relates to a 2009 case involving a West Virginia judicial election in which Justice Kennedy wrote the Court’s opinion. In

¹⁰⁷ *Id.* (citing *McConnell v. Fed. Election Comm’n*, 251 F. Supp. 2d 176, 560 (D.D.C. 2003)).

¹⁰⁸ *Id.* at 965 (Stevens, J., dissenting).

¹⁰⁹ *Id.* at 911 (majority opinion).

¹¹⁰ Moreover, there is at least one reason for the government’s failure in which Justice Kennedy is complicit: supplying such evidence became unnecessary when *Citizens United* withdrew its claim that the BCRA section it challenged was unconstitutional on its face. When that claim was, in effect, reinstated by Justice Kennedy’s opinion, Justice Kennedy did not offer the government a renewed opportunity to supply evidence in the now changed circumstances. As the dissenting opinion put it, “five Justices . . . changed the case to give themselves an opportunity to change the law,” *id.* at 932 (Stevens, J., dissenting), but they did not give the government an evidentiary opportunity to address the changed case. The dissent added, “By reinstating a claim that *Citizens United* abandoned, the Court gives it a perverse litigating advantage over its adversary, which was deprived of the opportunity to gather and present information necessary to its rebuttal.” *Id.* at 933 n.4.

Having changed the case, Justice Kennedy could still have decided *Citizens United* on any number of narrow grounds and not made the proscription of electioneering communications invalid under any and all circumstances and as applied to any type and size of corporation. *Citizens United* is, after all, not *General Motors*. During oral argument, as Justice Stevens points out, *Citizens United*’s own lawyer conceded that its argument “definitely would not be the same” if the *Hillary* movie were to be distributed by *General Motors*. *Id.* at 936 (quoting the transcript from oral argument).

Caperton v. A.T. Massey Coal Co., a West Virginia judge had been elected with the aid of enormous independent expenditures by Massey's principal officer.¹¹¹ The newly elected judge then cast the deciding vote in a case of great significance to Massey Coal.¹¹² Justice Kennedy wrote that the risk of bias arising from these facts meant that the judge should have not have voted in the case.¹¹³

In his *Citizens United* opinion Justice Kennedy concluded, correctly, that *Caperton* was distinguishable from *Citizens United* in a number of ways. For example, it involved a judge and the issue of fair trial, not members of Congress and the First Amendment. Nonetheless, *Caperton* acknowledges that independent expenditures in candidate elections can lead to an appearance of bias. This makes it all the more surprising that in *Citizens United* Justice Kennedy in effect reaches the contrary conclusion.¹¹⁴

The third observation is that in deciding that the needs of running prisons, armies, schools, and federal elections justified restrictions on speech, the Court had consistently said that it should pay great deference to the judgment of those in charge. In a prisoner case, for example, these matters were said to be peculiarly within the province and professional experience of corrections officials.¹¹⁵ In *Citizens United*, deference to the judgment of those charged by the Constitution with regulating federal elections is conspicuous by its absence.

III. IN DEFENSE OF JUSTICE KENNEDY?

Justice Kennedy is an accomplished jurist, and a number of arguments may be advanced in an effort to understand how he could have written as he did in *Citizens United*. *Buckley* did, after all, rule unconstitutional a section of the FECA that banned independent expenditures by corporations (who were included in the definition of "persons").¹¹⁶ Post-*Buckley* Supreme Court opinions that leave open the question of whether corporate independent expenditures can be treated differently than individual expenditures address issues that are technically distinguishable from the issue posed by *Citizens United* and are therefore not binding precedents.

¹¹¹ See 129 S. Ct. 2252, 2257 (2009) (link).

¹¹² See *id.* at 2257–58.

¹¹³ See *id.* at 2266.

¹¹⁴ It is also noteworthy that, while distinguishing *Caperton* because of its different context, see *Citizens United*, 130 S. Ct. at 910, Justice Kennedy did not similarly distinguish *Bellotti* because it addressed referenda rather than candidate elections.

¹¹⁵ See *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977) (link).

¹¹⁶ See *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (per curiam). *Buckley's* reasons for setting aside limitations on expenditures while upholding those on contributions, see *id.* at 14–23, 44–51, are complicated and ultimately unpersuasive. In practice, they led to a distinction between issue ads and electioneering which both "sides" in the campaign finance debate agreed was useless. See David B. Magleby, *The Importance of the Record in McConnell v. FEC*, 3 ELECTION L. J. 285, 287–88 (2004).

In addition, as Harry Kalven observed long ago, the Supreme Court's First Amendment opinions do not flow ineluctably out of a comprehensive theory; neither are they all models of clarity. A court could scissor snippets from them to fashion almost any desired word picture. It is not surprising, then, that in election speech cases the Court has typically been divided, and that in some of them Justice Kennedy wrote dissenting opinions arguing much as he later did in *Citizens United*.¹¹⁷

Moreover, in the real world of politics, it is difficult to draw a clear line between discussing issues and electioneering, yet that must be done if corporations are to remain free to speak about issues that arise in candidate elections. And even if that line is drawn with reasonable clarity, we face the challenge of juxtaposing the speech and press clauses of the First Amendment, because no one suggests that the "press"—newspapers and other media organizations—should be precluded from either candidate or issue advocacy even though they are organized in corporate form.

There is also something to be said in defense of Justice Kennedy's refusal to give more weight to the prisoner, soldier, student, and government employee precedents. Elections and election speech lie at the core of our democratic system and at the heart of the First Amendment. Speech about election issues and candidates is our central political forum—our national town hall meeting, so to speak—where we make fundamental decisions about the conduct of our collective lives as citizens. Here, above all, the First Amendment should hold sway. The same cannot be said about those precedents.

Underlying these and other difficult issues is America's strong First Amendment tradition that the cure for unpopular or harmful speech is not suppression, but more speech (leading the ACLU, for example, to support the *Citizens United* result).¹¹⁸ In the concluding justification for his third sentence, Justice Kennedy references "our law and our tradition that more speech, not less, is the [First Amendment's] governing rule."¹¹⁹

Justice Kennedy's ultimate reliance on First Amendment law and tradition harkens back to Harry Kalven's comment on the challenges of theorizing about the First Amendment. As legal philosopher Ronald Dworkin points out, some theorizing is nonetheless necessary. Otherwise the Amendment's language would be a "meaningless mantra to be incanted

¹¹⁷ In a separate opinion in a 2003 case, Justice Kennedy referred to several of his dissents in previous election speech cases, saying he could "give no weight to those authorities." Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 163–64 (2003) (Kennedy, J., concurring in the judgment).

¹¹⁸ See *Amicus Curiae* Brief of the American Civil Liberties Union in Support of Appellant on Supplemental Question, *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) (No. 08-205) (link).

¹¹⁹ *Citizens United*, 130 S. Ct. at 911.

whenever a judge wants for any reason to protect some form of communication."¹²⁰

So what is Justice Kennedy's theory in *Citizens United*? The most prominent is the "informed electorate" theory: "Freedom of political speech is," as Dworkin phrases the theory, "an essential condition of an effective democracy because it ensures that voters have access to as wide and diverse a range of information and political opinion as possible."¹²¹

Does the "informed electorate" theory provide a solid philosophical base for Justice Kennedy's opinion? Hardly. Justice Kennedy's *Citizens United* opinion offers no reason for supposing (to quote Dworkin again) "that allowing rich corporations to swamp elections with money will in fact produce a better-informed public."¹²² In fact, Dworkin argues, there are reasons for believing that a worse-informed electorate will be the consequence.

One reason is that the "volume" of corporate electioneering "will suggest more public support than there actually is."¹²³ (The resources in a business corporation's treasury are obviously not an indication of popular support for the corporation's political ideas.) Another reason is that, although corporate electioneering purports to address the public interest, corporate managers "are legally required to spend corporate funds only to promote their corporation's own financial interest."¹²⁴ Dworkin offers this illustration of these "worse-informed" consequences:

A public debate about climate change, for instance, would not do much to improve the understanding of its audience if speaking time were auctioned so that energy companies were able to buy vastly more time than academic scientists.¹²⁵

Indeed, precisely because elections lie at the core of our democratic system, Congress' desire to protect the integrity of the electoral process against the appearance of corruption and the erosion of confidence in this core feature of our governance system should be given great weight as one of the most compelling of governmental interests. Perhaps the most frustrating aspect of Justice Kennedy's *Citizens United* opinion is its failure even to discuss in any meaningful way the tension between a core First Amendment value and a most compelling governmental interest. One searches Justice Kennedy's opinion in vain for any serious discussion of

¹²⁰ Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. BOOKS (May 13, 2010), <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy> (link).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

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why swamping the electorate with corporate-funded broadcast, cable, and satellite electioneering communications in the final weeks before federal elections will lead to a better-informed electorate. Instead we are given a First Amendment mantra and an airy assertion that corporate electioneering will not give rise to an appearance of corruption or cause the electorate to lose faith in democracy.

CONCLUSION

“Intellectually irresponsible,” then, remains a fair characterization of Justice Kennedy’s opinion. The mishandling of *Buckley* and *Bellotti* is egregious, the assertion that they compel *Citizens United* is indefensible. The complaint about the absence of factual support, with none supplied for his crucial third sentence, is disingenuous. The corporate “identity” mantra ignores the reality that although the capacity of speech to inform the electorate may not depend on whether the speech comes from a corporation or a human being, the capacity of speech to give rise to an appearance of corruption assuredly may.

Most breathtaking of all is the way in which Justice Kennedy’s third sentence takes leave of common sense. Recall all those profits of just the top 100 of the Fortune 500 companies, and the ratio of more than six lobbyists for every member of Congress on health care alone. Without a smidgeon of supporting evidence, Justice Kennedy’s third sentence, in effect, asserts that members of Congress will be unaffected by now-credible threats from those and other lobbyists to spend unlimited sums advertising against their reelection. That the expenditure of such overwhelming sums on electioneering will not create precisely the “political debts” that *Bellotti* termed the overriding concerns of the Corrupt Practices Act. And that the making of such credible threats will not create an appearance that justifies congressional restrictions on how those billions of corporate dollars can be deployed in candidate elections.

“Political debts” may, however, be too tame a description of a harsh reality. As law professor Jamie Raskin puts it, although their outsized coffers would easily enable the Fortune 500 companies to “participate in every single federal and state race in the nation,” that will not be necessary.¹²⁶ If the *Citizens United* opinion has not already made the new reality clear, companies spending whatever it takes to defeat a small number of “target” candidates will quickly succeed in “destroy[ing] any future political opposition in Congress or the states to corporate positions.”¹²⁷

¹²⁶ Jamie Raskin, *Corporations Aren't People*, NPR (Sept. 10, 2009), <http://www.npr.org/templates/story/story.php?storyId=112714052> (link).

¹²⁷ *Id.*

Polls indicate that the American people have not similarly taken leave of common sense.¹²⁸ What they will or can now do remains to be seen; numerous proposals for a constitutional amendment and for partial legislative fixes (such as requiring corporate CEOs to take on-camera responsibility for their ads and strengthening disclosure requirements) have surfaced.¹²⁹ What is plain, however, is that, while being handed a new paradigm of “activist” judging, the American people have been confronted with a fearsome problem that cuts to the very core of their governance system. In a functioning democracy, said Justice Stevens, “the public must have faith that its representatives owe their positions to the people, not to the corporations with the deepest pockets.”¹³⁰

¹²⁸ A 2002 poll reflected that 71% of Americans believed “Members of Congress cast votes based on the views of their big contributors, even when those views differed from the Member’s own beliefs about what was best for the country.” Fed. Election Comm’n v. Wis. Right to Life, Inc., 551 U.S. 449, 507 (2007) (Souter, J., dissenting).

¹²⁹ See, e.g., Tony Romm, *Specter Pitches Constitutional Amendment in Response to Citizens United*, HILL’S BLOG BRIEFING ROOM (Jan. 21, 2010), <http://thehill.com/blogs/blog-briefing-room/news/77473-specter-pitches-constitutional-amendment-in-response-to-citizens-united-case> (link); Press Release, Representative Van Hollen Statement on Legislative Framework to Address *Citizens United* Ruling (Feb. 11, 2010), available at <http://vanhollen.house.gov/News/DocumentSingle.aspx?DocumentID=169969> (link).

¹³⁰ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 960 (2010) (Stevens, J., dissenting). Finding that spending by outside groups in the 2010 mid-term elections as compared with the previous (2006) mid-terms quadrupled, and that much of the new money came from undisclosed sources, one advocacy organization concludes that although corporate lobbyists have long enjoyed special access on Capitol Hill, “today they can play the role of king-makers in Congress.” 12 Months After: The Effects of *Citizens United* on Elections and the Integrity of the Legislative Process, Public Citizen’s Congress Watch, January 2011, p. 2, www.citizen.org.