TWO CONCEPTS OF FREEDOM OF SPEECH

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By holding that corporations may make independent expenditures from their general treasuries advocating the election or defeat of political candidates, *Citizens United v. FEC*[1] unleashed a torrent of popular criticism, a pointed attack by the President in the State of the Union address,[2] a flurry of proposed corrective legislation in Congress,[3] and various calls to overturn the decision by constitutional amendment.[4] Political uproar over a 5–4 Supreme Court decision upholding a controversial free speech right is not new; the Court's two 5–4 decisions upholding a right to engage in symbolic flag burning,[5] for example, elicited widespread public condemnation and efforts in Congress to overturn the Court by statute and by constitutional amendment.[6] But *Citizens United* surely marks the first time a controversial victory for

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[1] 130 S. Ct. 876 (2010).

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

[3] Some measure of the level of political outrage expressed in these bills can be found in the titles conferred upon them by their sponsors. *See, e.g.*, Prevent Foreign Influence in our Elections Act, H.R. 4540, 111th Cong. (2010); Corporate and Labor Electioneering Advertisement Reform Act, H.R. 4527, 111th Cong. (2010); Save Our Democracy from Foreign Influence Act of 2010, H.R. 4523, 111th Cong. (2010); Prohibiting Foreign Influence in American Elections Act, H.R. 4522, 111th Cong. (2010); Freedom from Foreign-Based Manipulation in American Elections Act of 2010, H.R. 4517, 111th Cong. (2010); Pick Your Poison Act of 2010, H.R. 4511, 111th Cong. (2010); End the Hijacking of Shareholder Funds Act, H.R. 4487, 111th Cong. (2010).

[4] Professor Lawrence Lessig, for example, has advocated the adoption of a constitutional amendment that would provide: "[n]othing in this Constitution shall be construed to restrict the power to limit, though not to ban, campaign expenditures of non-citizens of the United States during the last 60 days before an election." Lawrence Lessig, *Citizens Unite*, HUFFINGTON POST (Mar. 16, 2010, 7:32 AM), http://www.huffingtonpost.com/lawrence-lessig/citizens-united_b_500438.html.

[5] United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

[6] In response to *Texas v. Johnson*, which invalidated the application to symbolic flag burning of a state criminal statute protecting venerated objects, Congress enacted the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (2006)), which the Court then invalidated as applied in *United States v. Eichman*. For an account of the origins of the federal statute including a pre-*Eichman* defense of its constitutionality, see Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111 (1989). Miscellaneous proposals to amend the Constitution to permit prohibition of flag burning failed in Congress, although one commentator thought such an amendment would be less damaging to other First Amendment values than a flag-protective statute. *See* Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1339–54 (1990).

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

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

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

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

[8] 130 S. Ct. 1577 (2010).

[9] *Id.* at 1592. Liberal and conservative Justices similarly align in support of free speech rights in other contexts as well. For example, in the flag-burning cases, *see supra* notes 5–6 and accompanying text, the majority opinions were joined by "liberal" Justices Brennan, Marshall, and Blackmun as well as by "conservative" Justices Scalia and Kennedy. Such decisions show that the free-speech-as-equality and free-speech-as-liberty theories discussed below sometimes overlap, at least when dissenting groups seek protection against government restraints. The dissents in these cases by Chief Justice Rehnquist and Justice Stevens do not undermine the internal structure of either theory, but simply would have upheld flag-burning bans on the ground that unique interests in preserving a symbol of national unity trumped free speech interests on any theory. *See Eichman*, 496 U.S. at 321–22 (Stevens, J., dissenting); *Johnson*, 491 U.S. at 429–34 (Rehnquist, C.J., dissenting); *id.* at 436 (Stevens, J., dissenting). While the flag-burning cases united free-speech-as-liberty Justices and free-speech-as-equality Justices in alliance against a nationalist view, *Citizens United* set free speech as liberty and free speech as equality in opposition.

also endorses a kind of affirmative action for marginal speech in the form of access to government subsidies without speech-restrictive strings attached. By invalidating conditions on speakers' use of public land, facilities, and funds, a long line of speech cases in the free-speech-as-equality tradition ensures public subvention of speech expressing "the poorly financed causes of little people."[10] On the equality-based view of free speech, it follows that the well-financed causes of big people (or big corporations) do not merit special judicial protection from political regulation. And because, in this view, the value of equality is prior to the value of speech, politically disadvantaged speech prevails over regulation but regulation promoting political equality prevails over speech.

The second vision of free speech, by contrast, sees free speech as serving the interest of political liberty. On this view, discussed in Part II, the First Amendment is a negative check on government tyranny, and treats with skepticism all government efforts at speech suppression that might skew the private ordering of ideas. And on this view, members of the public are trusted to make their own individual evaluations of speech, and government is forbidden to intervene for paternalistic or redistributive reasons. Government intervention might be warranted to correct certain allocative inefficiencies in the way that speech transactions take place, but otherwise, ideas are best left to a freely competitive ideological market.[11]

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

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

[11] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . . That at any rate is the theory of our Constitution.").

The tension between these two competing visions — of free speech as serving equality and of free speech as serving liberty — is illuminated by analysis of four possible political reforms that might be considered in the aftermath of the *Citizens United* decision: first, invalidating limits on political contributions directly to candidates; second, allowing independent electoral expenditures by nonprofit but not for-profit corporations; third, increasing disclosure and disclaimer requirements for corporations making expenditures in connection with political campaigns; and fourth, conditioning receipt of various government benefits to corporations on their limiting political campaign expenditures. The first seems initially attractive to libertarians but not egalitarians; the second to egalitarians but not libertarians; the third to both libertarians and egalitarians; and the fourth to libertarians but not egalitarians. As addressed in Part IV, however, a closer look at each alternative reveals significant complexities.

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

I. FREEDOM OF SPEECH AS EQUALITY

Because the free-speech-as-equality vision has an older pedigree in the Court's First Amendment jurisprudence than does the free-speech-as-liberty view, the opinions in *Citizens United* are best discussed in reverse order. Writing for the four dissenters in *Citizens United*, Justice Stevens articulates a view of First Amendment freedom of speech that maps onto an analytic structure familiar from equal protection law. Government classifies all the time, but equal protection jurisprudence treats only certain grounds of differentiation (for example, race, ancestry, national origin, alienage, and qualifiedly gender) as suspect or "invidious," while treating all others (for example, age, disability, and economic status) as presumptively permissible.[12] Justice Stevens too assumes that differentiation is suspect only if drawn along suspect lines: that is to say, in the free speech context, on the basis of viewpoint or ideas.

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

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[12] *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 500–01 (17th ed. 2010).

support of or in opposition to political candidates are "viewpoint-neutral regulations based on content and identity," not embodiments of "invidious discrimination or preferential treatment of a politically powerful group."[13] So long as government does not pick and choose among speakers on the basis of viewpoint, Justice Stevens suggests, there is little cause for First Amendment concern: "speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms."[14] Accordingly, the dissent would have reviewed source limitations on corporate electoral expenditures deferentially.

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

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

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[13] *Citizens United*, 130 S. Ct. at 946 (Stevens, J., concurring in part and dissenting in part).

[14] *Id.* at 945.

[15] *Id.* at 971 (quoting Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659 (1990)).

[16] *Id.* at 965.

[17] *Id.* at 974 (citing *Austin*, 494 U.S. at 660).

[18] *Id.* at 970.

[19] *Id.* at 962–63. Justice Stevens suggests that the limitations would serve as a backstop to prevent corruption even if defined narrowly, as per the majority opinion, as quid pro quo corruption or the currying of favoritism with candidates through the deployment of independent ads. But he devotes greater energy to arguing that such a narrow definition of "corruption" is too crabbed. *See id.* at 964–68.

[20] 494 U.S. 652.

[21] *Id.* at 660 (citation omitted).

"equalization" of speaking power,[22] his own description suggests that it is necessarily redistributive: he argues that source limitations on corporate political expenditures will limit the deployment of resources "on a scale few natural persons can match,"[23] and avert the "drowning out of noncorporate voices"[24] through "corporate domination of the airwaves prior to an election."[25] Such concerns about the disproportionate influence of corporate speech can be addressed only by reducing the influence that corporate speakers would have if speech were left to private ordering.

Justice Stevens's dissent thus embodies one deep strand of free speech jurisprudence that might be called free speech as equality. This vision of free speech has both an antidiscrimination component and an affirmative action component. The former bars government from discriminating against marginal, dissident, or unpopular viewpoints that are likely to suffer political subordination or hostility. The latter enforces a kind of preference or forced subsidy for marginal, dissident, or unpopular viewpoints by barring the attachment of speech-restrictive conditions to the receipt of public benefits. On this view, political equality is prior to speech: when freedom of speech enhances political equality, speech prevails; when speech is regulated to enhance political equality, however, regulation prevails. Government may redistribute speaking power so long as it does so along viewpoint-neutral dimensions such as speakers' structural or institutional features.[26]

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

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[22] *Citizens United*, 130 S. Ct. at 957–58 (Stevens, J., concurring in part and dissenting in part); *see also id.* at 971 n.69.

[23] *Id.* at 974.

[24] *Id.*

[25] *Id.* at 975.

[26] Professor Ronald Dworkin, for one, has given a theoretical account of the underpinnings of this free-speech-as-equality view. *See* RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 121 (2000) (defining liberty as "an aspect of equality rather than, as it is often thought to be, an independent political ideal potentially in conflict with it"); *id.* at 134 ("We must try to reconcile liberty and equality, if we care for liberty, because any genuine conflict between the two is a contest liberty must lose."); *id.* at 371 (allowing "regulation of free speech that improves citizen equality"); *see also* RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE 69–70 (2006) ("I propose this initial formulation: *liberty is the right to do what you want with the resources that are rightfully yours*. . . . If we accept this account of liberty, then we must also accept that liberty is not damaged when government restricts freedom if it has a plausible *distributive* reason for doing so." (footnote omitted)).

the effects of this hierarchy. The more mainstream, traditional, orthodox, and popular the speech is, the more it will be unrestricted by the government. The more challenging, unusual, or unorthodox speech is, the more government will tend to restrict it. Thus, protecting speech by dissidents and dissenters from regulation serves to equalize the relative opportunities various viewpoints have to influence political and cultural outcomes.

On this view, the World War I espionage cases and the Red Scare cases of the 1910s and 1920s[27] erred in allowing the criminalization of speech and association by socialists, anarchists, and communists, but later decisions like *Brandenburg v. Ohio*[28] properly vindicated the principle that government may not prohibit subversive speech unless the speech intentionally incites people to cause imminent and likely serious harm.[29] On this view, *New York Times Co. v. Sullivan*[30] correctly constitutionalized state defamation law, requiring a public figure or public official to show actual malice (that the speaker intentionally lied or recklessly disregarded the truth),[31] in order to ensure freedom to criticize governing officials and the prevailing orthodoxies they represent.[32] And on this view, decisions invalidating criminal bans on flag burning as symbolic protest properly allowed dissidents at the fringes of political debate to vivify their contempt for reflexive and uncritical patterns of patriotism.[33]

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

The classic paradigm of such an implicit public subsidy for unpopular speech is the protection of speech in the public forum — the

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[27] *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 672 (1925) (socialist, communist, and anarchist speech); Debs v. United States, 249 U.S. 211, 216–17 (1919) (socialist speech); Schenck v. United States, 249 U.S. 47, 52–53 (1919) (socialist speech).

[28] 395 U.S. 444 (1969) (per curiam).

[29] *See id.* at 447–48.

[30] 376 U.S. 254 (1964).

[31] *Id.* at 279–80.

[32] *See id.* at 275.

[33] *See* United States v. Eichman, 496 U.S. 310, 319 (1990); Texas v. Johnson, 491 U.S. 397, 420 (1989).

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

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

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

[35] *See* Schneider v. State, 308 U.S. 147, 162–65 (1939) (invalidating four cities' ordinances forbidding distribution of leaflets).

[36] *See* Cox v. Louisiana, 379 U.S. 536, 544–45, 550 (1965) (invalidating the conviction of the leader of a civil rights demonstration for disturbing the peace after finding that the police could handle the hostile crowd); Edwards v. South Carolina, 372 U.S. 229, 229–31, 235 (1963) (reversing the breach of peace convictions of 187 black student demonstrators who drew a large crowd while marching in protest of racial discrimination). *But see* Feiner v. New York, 340 U.S. 315, 319–20 (1951) (upholding a conviction for disorderly conduct after finding sufficient government interest to overcome the First Amendment right at stake).

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

[38] 391 U.S. 563 (1968).

[39] *Id.* at 573–75.

[40] 393 U.S. 503 (1969).

[41] *Id.* at 512–14.

[42] *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

erans may not be made to swear loyalty oaths in order to receive property tax exemptions,[43] public broadcasting stations may not be made to forswear all editorializing in order to receive public grants,[44] and legal aid providers may not be made to refrain from challenging legislation in the course of representing their clients as the price of receiving federal subsidies.[45] In these cases, more expressly than in the political dissident cases, free speech rulings serve to equalize relative speaking power, forcing the public to subsidize what would otherwise be an unpopular set of views and thus creating a kind of affirmative action for marginal speech.

Against this backdrop, it is possible to return to Justice Stevens's dissent in *Citizens United* and to situate it in the free-speech-as-equality mode. The dissent finds no *equality* basis for invalidating the source limitation on corporate political ads — and therefore no basis at all for such a decision. Emphasizing that the source limitation is "viewpoint-neutral"[46] and dismissing as "airy speculation"[47] the majority's assertion that the limitation is biased in systematic favor of the viewpoint of incumbents, Justice Stevens finds no violation of the anti-discrimination principle. By painting corporations as archetypically large, for-profit corporations with "immense aggregations of wealth"[48] and "vastly more money with which to try to buy access and votes" than individual citizens[49] — and by ignoring the majority's reminders that many of the nation's nearly six million corporations are too small to fit this archetype[50] — he finds no basis for any use of the First Amendment to promote affirmative action for their speech. Justice Stevens suggests, therefore, that any interest in political equality is served by the regulation, not the deregulation, of political advertising funded directly from corporate treasuries.

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

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[43] *See* Speiser v. Randall, 357 U.S. 513, 528–29 (1958).

[44] *See* FCC v. League of Women Voters, 468 U.S. 364, 402 (1984).

[45] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536–37 (2001).

[46] *Citizens United*, 130 S. Ct. at 975 (Stevens, J., concurring in part and dissenting in part).

[47] *Id.* at 969.

[48] *Id.* at 957 (quoting McConnell v. FEC, 540 U.S. 93, 205 (2003)).

[49] *Id.* at 965 (citing Supplemental Brief for the Appellee at 17, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 22193000 at *17 (noting $13.1 trillion combined revenues of Fortune 100 companies during previous election cycle)).

[50] *Id.* at 907 (majority opinion). Justice Stevens also would have found media corporations protected by the Free Press Clause and nonprofit advocacy groups protected by the exception from *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). *Citizens United*, 130 S. Ct. at 951–52, 955 (Stevens, J., concurring in part and dissenting in part).

might wish to impose. Justice Stevens might appear in some passages to embrace conditionality: for example, by criticizing the majority for not addressing "whether Citizens United may be required to finance some of its messages with the money in its PAC,"[51] he may seem to suggest that corporations, unlike individuals, may be required, as a condition of their legally conferred institutional advantages, to incorporate separate entities for the purpose of engaging in electoral speech. But elsewhere, Justice Stevens pointedly insists that "[n]othing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession."[52]

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

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[51] *Citizens United*, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part).

[52] *Id.* at 971 n.72 (citation omitted); *see also id.* (noting that *Austin*'s references to the "state-conferred" advantages of corporations did not determine its holding (internal quotation marks omitted)).

[53] 435 U.S. 765 (1978).

[54] *Id.* at 767.

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

[56] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 194 (1991) (Rehnquist, C.J.) (upholding family planning subsidies conditioned on forgoing advocacy or counseling of abortion on the ground that, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program"); FCC v. League of Women Voters, 468 U.S. 364, 402–03 (1984) (Rehnquist, J., dissenting) (objecting to the majority's holding that the government may not condition public broadcasting subsidies on refraining from editorializing, suggesting that the majority

Amendment contexts, Justice Stevens and other members of the *Citizens United* dissent have been equally consistent in rejecting the position that government may impose speech-restrictive conditions on any "privileges" it accords — whether public space, education, jobs, funds, or corporate charters.[57] The dissent's careful avoidance of a corporate privilege theory of why source restrictions are constitutional therefore is plausibly read as a conscious refusal to undermine unconstitutional conditions precedents in other contexts.[58]

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

had depicted the government as "the Big Bad Wolf cruelly forbid[ding] Little Red Riding Hood to take to her grandmother some of the food that she is carrying in her basket," when "a truer picture of the litigants" would show that "some of the food in the basket was given to Little Red Riding Hood by the Big Bad Wolf himself, and that the Big Bad Wolf had told Little Red Riding Hood in advance that if she accepted his food she would have to abide by his conditions"); Bd. of Educ. v. Pico, 457 U.S. 853, 910 (1982) (Rehnquist, J., dissenting) (rejecting the majority's heightened scrutiny of book removal from a public school library, reasoning that "actions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign").

[57] *See supra* notes 34–45 and accompanying text.

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

[59] *Id.* at 972 (Stevens, J., concurring in part and dissenting in part).

[60] *Id.*

[61] *Id.* (quoting Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982)) (internal quotation mark omitted).

[62] *Id.*

autonomy, dignity, *or political equality* has been impinged upon in the least."[63]

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

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[63] *Id.* (emphasis added).

[64] *Id.* at 965. For elaboration of the view that corporate speech is necessarily instrumental because corporate managers are legally obligated to pursue profit maximization on behalf of shareholders, see Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1001–04 (1998), which argues that such a limited perspective undermines any corporate claim to speech rights.

[65] *Citizens United*, 130 S. Ct. at 974 (Stevens, J., concurring in part and dissenting in part).

[66] *Id.*

[67] *See id.* at 977 ("[The ruling] will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process. Americans may be forgiven if they do not feel the Court has advanced the cause of self-government today.").

[68] 395 U.S. 367 (1969).

[69] *Id.* at 370–71.

[70] *Id.* at 387 (analogizing to sound trucks).

[71] *Id.* at 394. Writing for the Court, Justice White grounded the decision in one very specific market failure — the monopolies that resulted from the technological fact of spectrum scarcity — and expressly declined to reach the broader theory propounded in the case:

> [Q]uite apart from scarcity of frequencies, . . . Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public.

equality is advanced by governmental regulation limiting corporate incentives to decrease the diversification of electoral debate.

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

II. FREEDOM OF SPEECH AS LIBERTY

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

This view of free speech as liberty starts from a textual interpretation of the Free Speech Clause as "written in terms of 'speech,' not speakers."[72] Unlike clauses that aim to protect "persons" from government deprivations or coercion,[73] the Free Speech Clause states that "Congress shall make no law . . . abridging the freedom of speech," without mentioning "persons" or denominating any ontological prerequisites for who or what may invoke its protection.[74] The clause thus

Id. at 401 n.28 (citation omitted). This theory has some resonance with the dissenters' view in *Citizens United*. In supporting government intervention to improve any given distribution of speaking power, the free-speech-as-equality view assumes that "[t]here is no 'natural' version of public dialogue that the First Amendment could prohibit the government from distorting." C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 85.

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

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

[74] *Id.* amend. I.

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

On this reading, the clause is indifferent to a speaker's identity or qualities — whether animate or inanimate, corporate or nonprofit, collective or individual.[75] To the extent the clause suggests who or what it protects, it suggests that it protects a system or process of "free speech," not the rights of any determinate set of speakers. If this interpretation requires an ultimate foundation in the rights of individuals, corporations enable individuals to "speak in association with other individual persons," banding together in a "common cause."[76]

In this understanding of freedom of speech, both governmental redistribution of speaking power and paternalistic protection of listeners from the force of speech are illegitimate ends that, as a categorical matter, cannot justify political speech regulation.[77] On this view, government may not attempt to shift relative influence among private speakers any more than it may give relative preference to some ideas. True to this perspective, the *Citizens United* majority rejects redistribution of speaking power as a permissible justification for limiting corporate treasury expenditures on political ads. After quoting the canonical sentence from *Buckley v. Valeo*[78] stating that "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,"[79] Justice Kennedy's opinion for the Court

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[75] *See Citizens United*, 130 S. Ct. at 904 ("[T]he worth of speech 'does not depend upon the identity of its source, whether corporation, association, union, or individual' . . . ." (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978))).

[76] *Id.* at 928 (Scalia, J., concurring) (emphasis omitted). While Chief Justice John Marshall famously wrote in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law," he also wrote that "[i]t is chiefly for the purpose of clothing bodies of men, in succession, with . . . qualities and capacities, that corporations were invented, and are in use." *Id.* at 636.

[77] If the dissent's analysis maps onto the structure of equal protection law, the majority's maps onto the structure of substantive due process analysis — albeit pre–New Deal. Just as *Lochner v. New York*, 198 U.S. 45 (1905), invalidated maximum-hours laws for bakers (holding that neither the redistributive end of leveling inequalities of bargaining power between employers and employees nor the paternalistic end of protecting employees from accepting bad bargains may justify such a law, *see id.* at 64), the *Citizens United* majority reiterates that the First Amendment itself forecloses government redistribution of speaking power and expresses skepticism toward any view that government may regulate corporate speech to protect listeners from their possible responses to political ads. For the insight that the commercial speech cases similarly track the antidistribution and antipaternalist rationale of Lochnerian substantive due process, see Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30–33 (1979), which criticizes this approach.

[78] 424 U.S. 1 (1976) (per curiam).

[79] *Citizens United*, 130 S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 48–49) (internal quotation marks omitted).

takes the crucial step of equating *Austin*'s purportedly distinct "antidistortion" rationale with just such a forbidden form of redistribution,[80] concluding that "*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment."[81]

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

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

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[80] *See id.* at 905.

[81] *Id.* at 906 (citations omitted).

[82] *Id.* at 907.

[83] *Id.* at 911.

[84] *See id.* at 899 ("The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.").

[85] *See id.* at 908–11.

[86] *Lochner* accepted that protecting public health from unsafe bread or diseased workers was a permissible end, unlike redistributive or paternalistic ends, but found the law too poorly tailored to fit it. *See* Lochner v. New York, 198 U.S. 45, 57, 62 (1905).

[87] *Citizens United*, 130 S. Ct. at 911.

any doubt left by open-ended phrases in prior opinions, Justice Kennedy states that "we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" as a categorical matter.[88]

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

The commercial speech cases — beginning with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[89] which invalidated a law regulating pharmacists that effectively barred the truthful advertisement of drug prices[90] — illustrate this approach. Under *Virginia State Board*, the First Amendment precludes the government from keeping consumers in ignorance of truthful information because it thinks it knows better than they do what is good for them.[91] While the case was litigated by consumer protection advocates and others seeking to lower drug prices by lowering information costs,[92] corporate speakers soon became the principal beneficiaries of subsequent rulings that, for example, struck down restrictions on including alcohol content on beer can labels,[93] limitations on outdoor tobacco advertising near schools,[94] and rules governing how compounded drugs may be advertised.[95]

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

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[88] *Id.* at 909.

[89] 425 U.S. 748 (1976).

[90] *See id.* at 770.

[91] *See id.* ("It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."). Early commentators on this line of cases noted its similarity to *Lochner*. *See* Jackson & Jeffries, *supra* note 77, at 30–33.

[92] *See Virginia State Board,* 425 U.S. at 748–49.

[93] *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 478 (1995).

[94] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 534–35, 565–66 (2001).

[95] *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 377 (2002).

[96] 505 U.S. 377 (1992).

unanimously struck down a city ordinance that prohibited the display of symbols tending to arouse anger, hatred, or alarm on the basis of race, reasoning in the principal opinion that, even if antidiscrimination laws may alter racially discriminatory conduct,[97] a similar leveling approach is not permissible with respect to expression of racist views or ideas.[98] On the free-speech-as-liberty view, government may not assume authority to denominate some hateful expression false,[99] and racist speech or symbols may not be suppressed on the paternalistic assumption that they silence their victims;[100] members of subordinated groups and their allies should be counted on to talk back.[101]

A third line of cases in this strand further supports the idea that free speech protects a system of private ordering — and only a system of private ordering — by increasingly rejecting the unconstitutional conditions claims that the free-speech-as-equality view generally accepts to ensure affirmative action for disadvantaged speech. In recent Terms, speakers frequently have lost challenges to speech-restrictive conditions applicable to using public property,[102] holding a public job,[103] attending public school,[104] or receiving public funds.[105]

In public forum cases, for example, the Court has held that the free speech rights that proselytizers and leafleters enjoy in public streets and parks do not extend to public facilities deemed nonpublic forums — including airports,[106] post office sidewalks,[107] teacher mailboxes,[108] and government workplace charitable campaigns[109] — in all of which government may define permissible modes or topics of speech

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[97] Shortly after *R.A.V.*, the Court upheld against First Amendment challenge a sentencing enhancement for racially motivated assault. *See* Wisconsin v. Mitchell, 508 U.S. 476, 479 (1993).

[98] *See R.A.V.*, 505 U.S. at 391–92.

[99] *See* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 237–39 (1992).

[100] *See id.* at 249–50.

[101] *See* Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249, 1257–63 (1995). The result in *R.A.V.* was unanimous, and the decision can be explained on free-speech-as-equality as well as free-speech-as-liberty grounds; the *R.A.V.* regulation can be viewed as impermissible on political equality grounds because it was drawn on the basis of viewpoint and thus violated First Amendment equal protection for ideas. *See supra* pp. 146–47.

[102] *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (upholding the prohibition of signs posted on public property).

[103] *See* Garcetti v. Ceballos, 547 U.S. 410, 425–26 (2006).

[104] *See* Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007).

[105] *See* Rumsfeld v. Forum for Academic & Inst'l Rights, Inc., 547 U.S. 47, 70 (2006). *But see id.* at 60 ("As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do* — afford equal access to military recruiters — not what they may or may not *say*.").

[106] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 685 (1992).

[107] *See* United States v. Kokinda, 497 U.S. 720, 736–37 (1990) (plurality opinion).

[108] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983).

[109] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 813 (1985).

and may discriminate on the basis of speaker identity. In public employee cases, the Court has held that the speech rights of government employees do not extend to expression of internal workplace dissent[110] or speech critical of government within the scope of official duties.[111] In the public education context, the Court has rejected a free speech claim by a student who unfurled a banner proclaiming "BONG HiTS 4 JESUS" at a school-organized outdoor event as inconsistent with the school system's antidrug policy even though the student's actions caused no material disruption.[112] And in public funding cases, the Court has held that, within broad limits, government may dictate the contours of the programs it funds, thus rejecting free speech claims by doctors seeking to accept federal family planning funds without having to forgo providing abortion counseling,[113] by artists seeking to be free of restrictions on national arts grants exhorting them to decency,[114] and by law school faculties seeking to exclude military recruiters under their nondiscrimination policies without costing their universities a campus-wide loss of federal funds[115] under the so-called Solomon Amendment.[116]

These decisions, like the commercial speech and anti–hate speech cases, distinguish free speech as liberty from free speech as equality. Unlike decisions invalidating, as unconstitutional conditions, speech restrictions on public benefits, these decisions embody a view that the First Amendment may invalidate government regulation of speech by those who have their own resources, but does not compel government support enabling a speaker who depends upon government resources to defy the government's own preferred approach. As Justice Holmes famously quipped when upholding the dismissal of a loquacious Boston police officer, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[117] Or as Justice Scalia wrote, concurring in the judgment in the arts funding case, "*Avant-garde artistes* such as respondents remain entirely free to *épater les bourgeois*; they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it."[118] Such quips reflect a rejection of the view that government has any affirmative obligation under the Free Speech Clause to underwrite the speech

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110 *See* Connick v. Myers, 461 U.S. 138, 154 (1983).
111 *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
112 *See* Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).
113 *See* Rust v. Sullivan, 500 U.S. 173, 192 (1991).
114 *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 583 (1998).
115 *See* Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 60 (2006).
116 10 U.S.C. § 983 (2006).
117 McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).
118 *Finley*, 524 U.S. at 595–96 (footnote omitted).

of those who defy the majority's resource-backed expression of ideological preferences.

With this backdrop in place, it is possible to return to the majority opinion in *Citizens United* and to situate it in the free-speech-as-liberty approach. To begin with, Justice Kennedy's opinion expresses a deep antipaternalism. Echoing earlier dissents in campaign finance decisions,[119] he stresses that whether corporate political ads are unduly toxic or enlightening is a judgment to be left to the evaluation of citizens: "The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."[120]

In keeping with the premises of the libertarian view, Justice Kennedy assumes that corporate political advocacy arises in a highly competitive private order, painting the corporate sector as containing a large number and a wide range of speakers of diverse interests and viewpoints, rather than an entrenched hierarchy supposedly dominated by immense aggregations of concentrated wealth, as the dissent depicts.[121] In the majority's view, these background conditions foreclose any justification that the government's structural intervention to redistribute speaking power is warranted on grounds of market failure.[122]

Thus, in contrast to Justice Stevens's focus on the archetype of large for-profit corporations, Justice Kennedy emphasizes that a very large percentage of the nation's 5.8 million for-profit corporations "are small corporations without large amounts of wealth" and with relatively few employees and modest revenues.[123] Conscripting the free-speech-as-equality view rhetorically in its own cause, the majority goes so far as to suggest that eliminating expenditure restrictions on corporations will itself have an equalizing effect, enabling independent expenditures by small corporations to gain some competitive purchase against the influence that large corporations wield through lobbying and that wealthy individuals levy through independent campaign expenditures.[124]

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

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

[121] *See id.* at 904–08, 910.

[122] *See id.* at 906–07.

[123] *Id.* at 907.

[124] *Id.* at 908 ("Even if § 441b's expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although smaller corporations may not have the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. Yet certain disfavored associations of citizens — those that have taken on the corporate form — are penalized for engaging in the same political speech." (citation omitted)).

Justice Kennedy also emphasizes that the universe of corporations includes "television networks and major newspapers owned by media corporations," which operate as "salient" sources of political speech and which might be undermined as checks on government tyranny if equalization rationales were found to be a permissible basis under the First Amendment for limiting corporate expenditures in general.[125] While the dissent downplays such concerns in light of the statutory exception media corporations enjoyed under the invalidated federal election law provisions,[126] Chief Justice Roberts interjects in his concurrence that freedom of speech for media corporations is too important to "public discourse" to be "simply a matter of legislative grace."[127]

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

In short, the majority opinion and concurrences in *Citizens United* see freedom of speech as forbidding the reordering of private political speech for redistributive or paternalistic reasons, reflecting a fear that government intervention is a more pernicious threat to the distribution

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125 *Id.* at 906.

126 *Id.* at 943 (Stevens, J., concurring in part and dissenting in part); *see* 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i) (2006).

127 *Citizens United*, 130 S. Ct. at 923 (Roberts, C.J., concurring).

128 *See id.* at 899 (majority opinion) (distinguishing cases discussed by dissent, *see id.* at 945–46 & nn.41–45 (Stevens, J., concurring in part and dissenting in part)).

129 *Id.* (emphasis added).

130 In one respect, the majority significantly departs from the acceptance of conditionality that is characteristic of the free-speech-as-liberty view. Justice Kennedy expressly rejects the view that government may exact from corporations a forfeiture of speech rights because "[s]tate law grants corporations special advantages — such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." *Id.* at 905 (quoting Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 658–59 (1990)) (internal quotation marks omitted). For a discussion of other cases that illustrate this complexity, see *infra* pp. 165–66.

of speech than is any supposed vast accumulation of private capital. The government remains free, however, to place conditions on those dependent on public resources for their ability to speak.

III. Alignments and Tensions Between the Competing Visions of Free Speech

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

First, in some categories of cases, such as those in which dissenting groups seek protection against government restraints, free-speech-as-equality and free-speech-as-liberty theories point in the same direction. To return to the example of flag burning, free speech egalitarians reject bans on flag burning because flag burning is a powerful condemnation of prevailing orthodoxy, and free speech libertarians do so because government is not entitled to pass judgment on the value of dissenting ideas.[131] The same can be said of the Court's unanimous decision protecting subversive advocacy by fringe groups from punishment as incitement absent intentional risk of imminent serious harm.[132] And in *R.A.V. v. City of St. Paul*, free-speech-as-equality Justices likewise joined free-speech-as-liberty Justices in invalidating a regulation of racist symbols.[133]

In such cases, the egalitarian and libertarian positions converge in support of a strong prohibition on viewpoint discrimination.[134] Acceptance of this canonical principle places a significant limitation on the free-speech-as-equality approach of members of the current Court compared with other, more aggressive equality-based approaches to the First Amendment that might be imagined. For example, free-speech-as-equality proponents might argue that regulations promoting equality should trump speech even where they draw viewpoint-based distinctions — such as where government discriminates against a

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[131] *See supra* note 9.

[132] *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam).

[133] *Compare* R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (invalidating the ordinance because it was drawn along impermissible lines of viewpoint and subject matter), *with id.* at 413–14 (White, J., concurring in the judgment) (arguing that the ordinance should have been invalidated on the basis of overbreadth because it swept in protected speech causing anger or resentment in addition to symbols akin to unprotected fighting words), *id.* at 416 (Blackmun, J., concurring in the judgment) (same), *and id.* at 417 (Stevens, J., concurring in the judgment) (same).

[134] For explication and defense of the strong prohibition on viewpoint discrimination even in cases where viewpoints are sought to be suppressed for egalitarian ends, see Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 873, 874–83 (1993); Geoffrey R. Stone, Comment, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461 (1986).

viewpoint held by powerful rather than marginalized or dissident groups.[135]

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

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

[136] *Compare* Miller v. California, 413 U.S. 15, 24 (1973) (holding that obscenity statutes may be consistent with the First Amendment in some cases, and setting out guidelines for this determination), *and* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (upholding obscenity statutes understood to protect the "total community environment," *id.* at 58, and predominant notions of sexuality as "central to family life[and] community welfare," *id.* at 63), *with* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (invalidating an Indianapolis ordinance penalizing the production and sale of pornography defined as "the graphic sexually explicit subordination of women" (quoting INDIANAPOLIS, IND., CODE § 16-3(q) (1984) (internal quotation mark omitted)).

[137] *See Paris Adult Theatre I*, 413 U.S. at 59 ("[W]hat is commonly read and seen and heard and done intrudes upon us all, want it or not." (quoting Alexander Bickel, *On Pornography II: Dissenting and Concurring Opinions*, PUB. INT., Winter 1971, at 25, 25–26) (internal quotation mark omitted)); *Hudnut*, 771 F.2d at 329 ("[W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination [and] . . . harm[] women's opportunities for equality and rights . . . ." (quoting INDIANAPOLIS, IND., CODE § 16-1(a)(2)) (internal quotation mark omitted)); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 7–8 (1985) ("[P]ornography constructs the social reality of gender . . . . Refusing to look at what has been substantively done will institutionalize inequality in law . . . .").

[138] *See Miller*, 413 U.S. at 45 n.9 (Douglas, J., dissenting) ("[English obscenity law was sometimes] simply a roundabout modern method to make heterodoxy in sex matters and even in religion a crime." (quoting ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 151 (1969)) (internal quotation mark omitted)).

[139] *See Hudnut*, 771 F.2d at 329 ("[P]ornography is central in creating and maintaining sex as a basis of discrimination." (quoting INDIANAPOLIS, IND., CODE § 16-1(a)(2)) (internal quotation mark omitted)).

ble government control over private responses to sexual speech.[140] But free speech as equality might be invoked to uphold regulation aimed at reducing the power of a highly profitable commercial pornography industry to reinforce prevailing discriminatory economic and social patterns by eroticizing the subordination of women. Because even free-speech-as-equality Justices generally accept the prohibition on viewpoint discrimination, however, this possible divergence from the liberty view remains largely theoretical.[141]

A second complexity in the clash between the liberty and equality approaches arises with respect to conditioning government benefits on forfeiture of speech rights. Typically, free-speech-as-equality Justices reject conditionality while free-speech-as-liberty Justices permit it, the latter seeing the First Amendment as protecting private resources, but not public resources, from government constraint. But in an important subspecies of cases involving religious groups' access to government programs, including last Term's decision in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*[142] (*CLS*), the roles appear reversed. Liberal Justices who usually favor free speech as equality defended denials of access to government subsidies, while conservative Justices who usually favor free speech as liberty argued that if the government funds some viewpoints, it must also fund religious viewpoints and must not impose conditions that interfere with expression of such viewpoints. Such a topsy-turvy lineup also characterized the decision in *Rosenberger v. Rector and Visitors of University of Virginia*,[143] in which a conservative majority invalidated the exclusion of a Christian evangelical magazine from a student activities program at a public university,[144] over the dissent of liberal Justices objecting that the university should be free to exclude the subject matter of religion from its subsidies.[145]

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

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

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

[142] 130 S. Ct. 2971 (2010).

[143] 515 U.S. 819 (1995).

[144] *See id.* at 845–46.

[145] *See id.* at 895–97 (Souter, J., dissenting).

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

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

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[146] *CLS*, 130 S. Ct. at 2986; *see id.* at 2984–86 (situating the Hastings program in the line of "limited-public-forum" cases allowing viewpoint-neutral delimitations of content permissible in public programs and facilities); *see also id.* at 2997 (Stevens, J., concurring) (emphasizing that the Hastings program is a "limited forum — the boundaries of which may be delimited by the proprietor" (emphases omitted)).

[147] *See supra* note 56 and accompanying text.

[148] *CLS*, 130 S. Ct. at 3014 (Alito, J., dissenting).

[149] *Rosenberger*, for example, rejected an alternative argument that exclusion of the evangelical magazine was required by the Establishment Clause. *See* 515 U.S. at 837–46.

IV. THE AFTERMATH OF *CITIZENS UNITED* THROUGH LIBERTARIAN AND EGALITARIAN LENSES

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

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

A. Invalidating Contribution Limits

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

First, Congress could repeal the features of the federal campaign laws going back to the Tillman Act of 1907[152] that prohibit corporations from giving directly to political candidates from their own treasuries.[153] It is difficult to see how source limitations on contributions

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[150] *See* 424 U.S. 1, 1, 19–23, 58–59 (1976) (per curiam).

[151] *Citizens United*, 130 S. Ct. at 909 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.").

[152] Pub. L. No. 59-36, 34 Stat. 864 (1907).

[153] For an account of the origins and history of these provisions, see *Citizens United*, 130 S. Ct. at 952–57 (Stevens, J., concurring in part and dissenting in part). *See generally* Adam Winkler,

(as opposed to amount limitations) serve an interest in avoiding quid pro quo corruption, the only corruption interest the majority assumed (without deciding) might justify campaign finance restrictions.[154] After *Citizens United*, there would seem to be no basis for the Court to confine to the context of independent expenditures its skepticism toward any blanket legislative distinction between corporations and other political speakers.[155] And the majority opinion in *Citizens United* clearly views the requirement that corporations form separate, segregated PACs for the purpose of engaging in campaign-related speech as a grave burden on their First Amendment liberties.[156] Thus, there is a strong argument that the holding of *Citizens United* might be extended to support invalidation or repeal of source limitations on corporate contributions.

Second, Congress could eliminate the amount limitations on contributions to candidate campaigns from any source, corporate or otherwise. Several members of the current Court have suggested that *Buckley*'s holding on contribution limits was wrongly decided, and thus that the First Amendment requires the elimination of contribution limits.[157]

At first glance, the option of invalidating contribution limits altogether would seem attractive to the libertarian view of the First Amendment and anathema to free speech egalitarians. To libertarians, unfettered contributions to candidates (coupled with full disclosure, which is newly meaningful in an age of instantaneous internet communication) serve a market conception of speech. To egalitarians, contribution limits represent a mechanism for literally limiting the spread of financial inequalities in political influence.

McConnell v. FEC*, Corporate Political Speech, and the Legacy of the* Segregated Fund Cases, 3 ELECTION L.J. 361 (2004) (analyzing the impact of the *Segregated Fund Cases* on corporate speech rights, campaign finance legislation, and later Supreme Court decisions).

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

155 *Cf.* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428 (1993) (finding no basis for distinguishing categorically commercial advertisements from noncommercial periodicals distributed from newsracks).

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

157 *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 266 (2003) (Thomas, J., concurring in part and dissenting in part) (arguing, in an opinion joined by Justice Scalia, that a majority opinion with respect to Titles I and II of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.), "continue[d] the errors of *Buckley v. Valeo*[] by applying a low level of scrutiny to contribution ceilings"); Nixon v. Shrink Mo. Gov't PAC, 528 U.S 377, 407–09 (2000) (Kennedy, J., dissenting) (criticizing the "wooden" distinction between contributions and expenditures, *id.* at 407, and stating, "I would overrule *Buckley*," *id.* at 409).

But this lineup is not inevitable; there is good reason to believe that unfettered contributions to candidates (subject to the disclosure caveat) might serve the goal of political equality better than the existing regulatory scheme. It is worth recalling that the situation that political critics of *Citizens United* now regard as a nightmare — the prospect of a flood of independent political ads funded by corporate treasuries that will "drown out" noncorporate voices at election time — exists only as the unintended consequence of federal election campaign finance laws combined with judicial decisions that altered their original contours. *Buckley v. Valeo* split the baby by holding that the First Amendment protects expenditures, but not contributions, from federally imposed ceilings.[158] This split result ensured that demand for political money has remained unlimited while government nonetheless has limited its supply. Wherever there is unlimited demand and limited supply, substitution effects set in and black markets and gray markets emerge.[159] As Justice Kennedy observed in an earlier case, contribution limits had the effect of shifting political money away from the candidates' own campaigns to secondary and tertiary organizations.[160] The Bipartisan Campaign Finance Reform Act of 2002[161] (BCRA) sought to shut down the flow of "soft money" to secondary organizations like political parties[162] and to tertiary organizations like trade associations and other advocacy groups that could fund and produce independent broadcast ads — with Congress deeming such substitution effects "loophole[s]" in the regulatory scheme.[163]

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

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158 424 U.S. 1, 143 (1976) (per curiam).

159 For accounts of this phenomenon of substitution effects, see Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1713 & n.41 (1999); Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 312–13; Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 688 (1997).

160 *See Nixon*, 528 U.S. at 406–07 (Kennedy, J., dissenting) (arguing that *Buckley*'s split result had "adverse, unintended consequences," forcing "a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits" and giving rise to "covert speech," *id.* at 406 — in all, a "misshapen system" that "mocks the First Amendment," *id.* at 407).

161 Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.).

162 *See McConnell*, 540 U.S. at 122–33 (describing the rise of "soft money" after *Buckley* and Congress's reaction).

163 *Id.* at 133.

date who acts partially toward a contributor and against that voter's interests. And because *Citizens United* has removed one more component from a comprehensive regulatory scheme, election financing may now be more unequal than it would have been if fewer campaign finance regulations existed in the first place. For example, as Justice Stevens notes in dissent, *Citizens United* alters the balance between corporations and political parties.[164]

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

B. Distinguishing For-Profit from Nonprofit Corporations

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

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

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164 *Citizens United*, 130 S. Ct. at 940 (Stevens, J., concurring in part and dissenting in part).

165 *See id.* at 962; *McConnell,* 540 U.S. at 260 (Scalia, J., concurring in part and dissenting in part) (noting congressional members' concern about "attack ads" in enacting BCRA and suggesting that "[t]here is good reason to believe that the ending of negative campaign ads was the principal attraction of the legislation").

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

167 *See, e.g.*, Brief of Amicus Curiae National Rifle Association in Support of Appellant on Supplemental Question at 5–15, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 2359481, at *5–15 [hereinafter NRA Amicus Brief]; Brief of Family Research Council et al. as Amici Curiae in Support of Appellee at 22–26, FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) (No. 06-969), 2007 WL 894820, at *22–26 [hereinafter Family Research Council Amicus Brief] (on which the

asked the government, seemingly with some incredulity, why it was not pushing harder for the approach these amici urged.[168]

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

The Court, however, declined to take this path in *Citizens United*. Justice Kennedy's majority opinion suggested that the reason was that Citizens United had funded its critical movie about then-candidate Hillary Clinton in part with donations from for-profit corporations,

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author was counsel of record). Some commentators likewise urged the Court to adopt this approach. *See, e.g.*, Stuart Taylor, Jr., *Campaign Finance and Corporations*, NAT'L J., July 11, 2009, at 15, 15 (urging the Court to adopt "a principled, pragmatic, nonideological line between business corporations and nonprofit advocacy corporations").

168 *See* Transcript of Oral Argument at 43–45, *Citizens United*, 130 S. Ct. 876 (No. 08-205), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205[Reargued].pdf. In his dissent, Justice Stevens noted specifically that the Court had "bypassed [the] ground, not briefed by the parties," urged in NRA Amicus Brief, *supra* note 167, at 5–15, 2009 WL 2359481 at *5–15, of "allowing certain nonprofit corporations to pay for electioneering communications with general treasury funds, to the extent they can trace the payments to individual contributions." *Citizens United*, 130 S. Ct. at 937 n.15 (Stevens, J., concurring in part and dissenting in part).

169 2 U.S.C. § 441b(c)(2) (2006), *invalidated by Citizens United*, 130 S. Ct. 876.

170 *Id.* As Senator Jeffords explained, under the provision, "[a]ny organization can, and should be able to, use their grassroots communications to urge citizens to contact their lawmakers. Under the Snowe-Jeffords provisions any organization still can undertake this most important task." 147 CONG. REC. 4464 (2001).

171 2 U.S.C. § 441b(c)(6).

172 147 CONG. REC. 4502 (2001). Senator Wellstone conspicuously referred to the groups by name: "[I]t can be the NRA, it can be the Christian right, it can be the Sierra Club." *Id.*

173 2 U.S.C. § 454.

rendering it ineligible for Snowe-Jeffords treatment, and that the Court was reluctant to read into the statute an exception where, as here, such corporate contributions were de minimis in amount.[174] He expressly noted that the Government had been at best lukewarm about the possibility of a Snowe-Jeffords solution with a de minimis exception.[175]

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

C. Increasing Disclosure and Disclaimer Requirements

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

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[174] *See Citizens United*, 130 S. Ct. at 891–92.

[175] *See id.* at 892.

[176] *See id.* at 905–06.

[177] For a counterargument articulating possible grounds for a for-profit/nonprofit distinction, see Family Research Council Amicus Brief, *supra* note 167, at 16–21, 2007 WL 894820 at *16–21.

[178] Ribstein, *supra* note 55, at 141.

[179] Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), H.R. 5175, 111th Cong. (2010). Congressman Van Hollen (D-Md.) introduced the Act on April 29, 2010, and it passed the House on June 24 in a 219–206 vote divided mostly along party lines, *see Final Vote Results for Roll Call 391*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, http://clerk.house.gov/evs/2010/roll391.xml (last visited Oct. 2, 2010). The DISCLOSE Act, S. 3628, 111th Cong. (2010), fell short of cloture in the Senate on July 27, 2010, by a vote of 57–41–2, again along party lines, *see U.S. Senate Roll Call Votes 111th Congress — 2nd Session*, U.S. SENATE: LEGISLATION & RECORDS, http://senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00220#position (last visited Oct. 2, 2010). The DISCLOSE Act would have subjected corporations to a variety of increased disclosure and disclaimer obligations, including reporting the identity of donors of funds used to make campaign-related expenditures, H.R. 5175 § 301, and "stand by your ad requirements" that CEOs or other officers appear on camera to state personal approval of corporate-funded ads, H.R. 5175 § 214(b).

would appear to align the libertarian and egalitarian visions of free speech. By a vote of 8–1, with only Justice Thomas in dissent, Justices from both camps in *Citizens United* joined the Court's second holding, which upheld against First Amendment challenge existing federal disclosure and disclaimer rules for corporate expenditures in support of or opposition to political candidates.[180] *Citizens United* held that disclosure requirements, long upheld in the contribution context as substantially related to an important governmental interest in an informed electorate,[181] serve similar purposes when applied to independent political expenditures.

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

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

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[180] *Citizens United*, 130 S. Ct. at 913–16.

[181] *Id.* at 914 (citing Buckley v. Valeo, 424 U.S. 1, 66 (1976) (per curiam)).

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

[183] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958).

[184] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

[185] *See* U.S. CONST. amend. V.

[186] *See Citizens United*, 130 S. Ct. at 979–82 (Thomas, J., dissenting). Justice Thomas expressed similar views when he concurred in *McIntyre*, 514 U.S. at 358 (Thomas, J., concurring in the judgment), and filed the lone dissent in *Doe*, 130 S. Ct. at 2837 (Thomas, J., dissenting).

The free-speech-as-liberty approach that prevails in *Citizens United*, however, is not a theory of free speech as autonomy, nor a theory focused on the dignitary interests of speakers. It is rather a negative theory that focuses on the interests of listeners, in a system of freedom of speech, to assess speech and speakers without paternalistic government intervention. This view traces back to the listener-focused reasoning in the commercial speech cases,[187] which similarly noted that compelled disclosures have a beneficial information-forcing function that is not inconsistent with First Amendment values.[188] Thus, free-speech-as-liberty advocates may favor forced disclosure as a vehicle for enhancing the capacity of listeners to assess political speech without paternalistic government intervention to adjust or redistribute the mix of voices that will be heard.

Technological change reinforces this understanding by making disclosure more robust. When the 1974 campaign finance laws were enacted, disclosure meant that an overburdened civil servant might retrieve an index card from a musty file cabinet; today, disclosure of the source and amount of expenditures can be instantaneously disseminated over the internet. As Justice Kennedy observed in the majority opinion, "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[189]

D. Conditions on Government Benefits to Corporations

A fourth possible response to *Citizens United* is to make restrictions on corporate electoral speech a condition of the receipt of government benefits. Some conditions might be imposed on the use of the corporate form itself, while others might be attached to "goods" that the government provides to particular corporations, including government contracts, subsidies, or bailout money. Such conditions, like disclosure rules, are prominently featured in proposed legislation like the DISCLOSE Act.[190]

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187 *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipients both.").

188 *See id.* at 771 n.24.

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

190 Section 101 of the DISCLOSE Act, H.R. 5175, 111th Cong. (2010), for example, would have required "a person who enters into a contract" with the government worth more than ten million dollars, *id.* § 101(a)(2)(B), as well as certain "[r]ecipients of [a]ssistance [u]nder [the] Troubled Asset Program," *id.* § 101(b), to refrain from "making any independent expenditure or disbursing funds for an electioneering communication," *id.* § 101(a)(2)(B).

Such conditionality is normally anathema to liberals who, on free-speech-as-equality grounds, dislike government's use of its leverage to exact conformity as the price of reliance upon government resources. Conditions on government benefits, by contrast, are normally acceptable to conservatives, who see the First Amendment, on free-speech-as-liberty grounds, as protecting private resources from government encroachment but not as tying government's hands to define the limits of its own programs. The fact that advocacy for speech-limiting conditions on corporate benefits now emanates from the political left, over conservative opposition, places both sides in uncomfortable positions vis-à-vis their stances in other unconstitutional conditions cases.

It is difficult to extract clear views from the *Citizens United* opinions predicting whether the Justices in either camp would likely uphold conditions on government benefits to corporations. In some places, Justice Stevens's dissent can be understood as defending conditionality in the corporate context despite the dissenters' overarching commitment to the free-speech-as-equality perspective: for example, Justice Stevens criticizes the majority for not addressing "whether Citizens United may be required to finance some of its messages with the money in its PAC,"[191] suggesting that the dissenters believe government may condition the adoption of the corporate form on the requirement that political contributions flow through PACs. The free-speech-as-liberty majority, by contrast, rejects such conditionality, portraying segregated-fund conditions as so burdensome as to amount to a "ban" on political speech.[192] Such a reverse lineup is not unlike the one the Justices evinced last Term in *CLS*.[193]

Conditioning government benefits to corporations on surrender of the right to make independent political expenditures would have implications for other aspects of First Amendment jurisprudence. *Citizens United* forecloses future attempts to distinguish such conditions on the ground that corporations are categorically different from other speakers. Thus, liberal critics of *Citizens United* should be careful what they wish for; endorsing speech-restrictive conditions in this context may lower the barrier to conditions in other contexts as well.

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[191] *Citizens United*, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part).

[192] *See supra* note 156 and accompanying text. Elsewhere in the opinions, to be sure, the majority appears to approve some forms of conditioned government benefits, *see supra* p. 162, while the dissenters dispute the breadth of government's freedom to limit speech because the government is engaged in governmental functions, *see supra* note 58 and accompanying text.

[193] 130 S. Ct. 2971 (2010); *see* pp. 165–66.

V. CONCLUSION

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

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

The Court's deference to compelled disclosure requirements in the electoral context is illustrated both by the 8–1 portion of *Citizens United* upholding existing corporate disclosure and disclaimer requirements and by the Court's similarly lopsided decision in *Doe v. Reed*[194] rejecting a facial challenge to compelled disclosure of the identities of those who sign petitions to place initiative and referendum measures on the ballot. To free speech libertarians, such measures

[194] 130 S. Ct. 2811 (2010).

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

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