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Free Speech, Fair Elections, and Campaign Finance Laws: Can They Co-Exist?

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I. TWO GREAT LAWYERS

As a constitutional law professor, it is a privilege to have an article appear in the Wiley A. Branton Symposium at an institution that has played such a central role in the development of constitutional law and the advancement of civil rights in America.

Participating in this Symposium is also special to me for personal reasons. My first legal boss was one of the most distinguished graduates of Howard University School of Law and a key player in the

* Professor of Law, Brooklyn Law School. I want to thank Dean Nick Allard, Associate Dean Michael Cahill, and the Brooklyn Law School Dean's Summer Research Stipend Program for supporting the work on this Article. I should also note that as an ACLU lawyer I helped challenge the campaign finance restrictions and requirements at issue in many of the cases discussed in this article, most notably, *Buckley v. Valeo*, 424 U.S. 1 (1976).

constitutional revolution that so many of its professors and graduates helped to bring about. His name was Robert L. Carter, and he was the General Counsel of the National Association for the Advancement of Colored People (NAACP). My second legal boss is a key participant in this Symposium, Congresswoman Eleanor Holmes Norton, for whom I had the pleasure and privilege of working at the American Civil Liberties Union (ACLU). From both of those great lawyers and leaders, I learned important lessons about principles that bear on the issues of free speech, fair elections, and campaign finance law.

I worked for Robert Carter when I was a first year summer law student intern at the NAACP. He was one of the legal masterminds for the *Brown v. Board of Education*[1] desegregation revolution and was also a key lawyer who protected the NAACP's rights to organize and lead that revolution. He went on to a long and distinguished career on the federal bench in New York after serving the cause of civil rights so ably at the NAACP.[2]

In researching this article, I came across a tribute to Judge Carter at the time of his death a year ago. It is from the First Amendment Center. Here's what they said about his career:

> Many will mourn this week's passing of Robert L. Carter, a former U.S. district judge in New York and a pioneering attorney who fought for the cause of racial equality during his long career. Carter, 94, also made great contributions to First Amendment jurisprudence, arguing numerous cases before the U.S. Supreme Court while an attorney for the National Association for the Advancement of Colored People.
>
> Carter cared deeply about the First Amendment and saw it as an essential tool for the advancement of equality. Carter noted in his book, *A Matter of Law: A Memoir of Struggle in the Cause of Equal Rights*, that he wrote his thesis at Columbia Law School (where he earned a master's in law in 1941) "on the essentiality of the First Amendment for the preservation of a democratic society."
>
> Carter later used this thesis when developing arguments before the Supreme Court, including *N.A.A.C.P. v. Alabama* (1958), in which

1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

2. Judge Carter served on the United States District Court for the Southern District of New York from 1972 until his death in 2012, serving in senior status from 1986. *See* Roy Reed, *Robert L. Carter, an Architect of School Desegregation, Dies at 94*, N.Y. TIMES, Jan. 3, 2012, http://www.nytimes.com/2012/01/04/nyregion/robert-l-carter-judge-and-desegregation-strategist-dies-at-94.html?pagewanted=all&_r=0.

> he successfully argued that the First Amendment protected the free-association rights of rank-and-file members of the NAACP from having their names disclosed to Alabama state officials bent on using that information for negative purposes.
>
> Carter's thesis became his life's work as an attorney. [As one scholar put it:] "In the eight First Amendment cases he argued before the Court between 1958 and 1965, Robert Carter had constructed a bridge between the liberty principle of the First Amendment and the equality principle of the Fourteenth Amendment."
>
> The First Amendment served as an essential tool during the civil rights movement. The late, great Robert L. Carter should be praised and remembered for his mastery in using that tool to carve out a better society.[3]

And that, in a nutshell, is one of the key points of my article: free speech and equal rights are allies, not adversaries. Civil liberties and civil rights are inextricably intertwined. You cannot have one without the other. The values they serve are not in tension, but in harmony. Sometimes with all of the scary headlines during the 2012 elections about high-spending so-called "super pacs," and secretive non-profits who used so-called "dark money" to "pollute" our politics and "steal" our elections, it is easy to forget the lessons that Judge Carter devoted his life to helping us learn. Many today insist that the *quantity* of our political speech is too high and the *quality* of it is too low, and that the government should step in and fix both problems by limiting the amount of money that people and groups can spend on politics. The less that can be spent the less that will be spent on bad "negative" speech, or so the argument goes. My main point is that the invitation to have government control the quantity and quality of our political

3. David L. Hudson, Jr., *Remembering Civil Rights Legal Pioneer, Friend of the First* Amendment, First Amendment Center (Jan. 5, 2012), http://www.firstamendmentcenter.org/remembering-civil-rights-legal-pioneer-friend-of-the-first-amendment. Among the landmark First Amendment cases that Judge Carter handled while an NAACP lawyer were, most significantly, *NAACP v. Alabama*, 357 U.S. 449 (1958), which was the magna carta for the right of associational privacy and of controversial cause organizations—in that case a non-profit corporation—to shield the identity of their members and protect them from harm and harassment for their affiliation; *Shelton v. Tucker*, 364 U.S. 479 (1960), which recognized a First Amendment right of public employees not to have to reveal indiscriminately all groups to which they belonged; *NAACP v. Button*, 371 U.S. 415 (1963), which upheld the right of organizations to use litigation as an advocacy tool and solicit lawsuits for that end and *Gibson v. Florida Legislative Investigating Committee*, 372 U.S. 539 (1963), which protected the NAACP and other advocacy groups from indiscriminate investigations into their activities in the claimed search for subversive influence in civil rights groups.

speech is a grave threat to liberty *and* equality and, therefore to democracy. And I would hope that Judge Carter would have agreed.

I learned another vital principle about the relationship of free speech and civil rights from Congresswoman Eleanor Holmes Norton. The principle is that First Amendment rights have to be *indivisible* and *universal.* If they are allowed to be taken away from one person or group, then the government is invited to take them away from other persons and groups until there are no rights left.[4] During her service as a top lawyer for the ACLU, her career famously embodied that wisdom. Although she handled a wide variety of civil rights and free speech cases and was a champion in the cause of equal rights, she received a good deal of notoriety when she represented individuals and groups with whose ideas about civil rights she was in total disagreement, but whose rights to express those ideas she supported in full. So, she represented the segregationist Alabama Governor, George C. Wallace, when, in 1968, while running for President, he was denied the right to hold a campaign rally at Shea Stadium in New York City.[5] And she represented a Maryland white supremacist group when they were denied a permit to hold a parade by defending their rights all the way to the Supreme Court of the United States.[6] In both cases the government was concerned that the controversial ideas would cause trouble, perhaps violence. But Eleanor Norton understood that the gravest danger to law and order was allowing the government to suppress controversial groups and views that it found threatening. She so well understood, as the late Justice Oliver Wendell Holmes famously put it, "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[7] In protecting freedom

4. That philosophy was exemplified in ACLU literature of the time by the following quote attributed to Pastor Martin Niemoller, a German anti-Nazi theologian:

> First they came for the socialists, and I did not speak out because I was not a socialist.
> Then they came for the trade unionists, and I did not speak out because I was not a trade unionist.
> Then they came for the Jews, and I did not speak out because I was not a Jew.
> Then they came for me, and there was no one left to speak for me.

Militia Movement Controversy Affords Baldwin Opportunity to Teach Important History Lesson, BOBMCCARTY.COM (Mar. 20, 2009), http://bobmccarty.com/tag/martin-niemoller-foundation/.

5. *See A Conversation with Eleanor Holmes Norton*, D.C. BAR (1997), http://www.dcbar.org/for_lawyers/resources/legends_in_the_law/norton.cfm.

6. *See* Carroll v. President of Princess Anne Cnty., 393 U.S. 175, 176-77 (1968).

7. United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J. dissenting).

for thoughts that she personally may have hated, she established protection for the thoughts, speech, and actions in which she believed. By defending the free speech rights of those who would take away civil rights, she safeguarded the rights of civil rights activists to exercise their own free speech rights.

II. OLD WINE IN NEW BOTTLES

Turning to how these principles impact today's election issues, it is helpful to recall that the prominent politician, former House Democratic Majority Leader, Richard Gephardt, once observed that, "[w]hat we have is two important values in conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. You can't have both."[8] In my opinion, based on the teachings of Robert Carter and Eleanor Norton, Richard Gephardt had it precisely backwards. In fact, you cannot have one without the other.

Over forty years ago, the ACLU realized that there was a clash between campaign finance laws and First Amendment rights when the government used those laws against a handful of dissenters who ran an ad in the *New York Times* criticizing the President of the United States, Richard Nixon.[9] No view of the First Amendment or democratic values or equality could possibly justify sending someone to jail for running that ad, regardless of who sponsored it, or when it ran, or how much it cost, or how it was funded. In more recent years, the government passed the McCain-Feingold Law, which made it a crime for the ACLU or the NAACP to broadcast an ad criticizing the President of the United States during an election season.[10] In the *Citizens United* case,[11] a right-wing group that funded an anti-Hillary Clinton movie—a movie—ran afoul of the campaign finance laws.[12] Why

8. Nancy Gibbs, *The Wake Up Call: Clinton Makes Serious Noises About Campaign Reform, but that May Not Be Enough to Change a Cozy System that Loves Special-Interest Money*, TIME, Feb. 3, 1997, at 25, *available at* http://www.cnn.com/ALLPOLITICS/1996/analysis/time/9702/03/gibbs.html.

9. *See* United States v. Nat'l Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972); *see also* ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom.*, Staats v. ACLU, 422 U.S. 1030 (1975).

10. The statute is the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 166 Stat. 81, the key provisions of which were upheld in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 188-89 (2003), over the objection of some of the major organizations in America, such as the U.S. Chamber of Commerce, the AFL-CIO, the NRA, and the ACLU.

11. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that the First Amendment prohibited the government from restricting independent political expenditures by corporations and unions).

12. *Id.*

would we want to put government in charge of political speech in that manner?

When I first started working on these issues, we were only trying to protect the free speech rights of groups like the ACLU and the NAACP to run ads criticizing the President of the United States in an election year despite the campaign finance laws. That was classic, old-fashioned civil liberties: protecting the First Amendment right of people and groups to criticize the government. But then, after Watergate, the government passed much more sweeping restrictions on campaign funding, which would clearly protect incumbents and the status quo and make it harder to criticize or challenge the government.[13] And so, we at the ACLU came to see campaign finance restrictions as classic examples of the establishment protecting itself against challenge. Contribution limits did not hurt the powerful and the well-heeled who would always find another way to get their messages out. The limits hurt dissenting voices, such as minority voices who needed to be able to rely on supporters for seed money to get started and to get their message across. We pointed to Senator Eugene McCarthy whose 1968 challenge to the Vietnam War was funded by a few wealthy contributors, which would now be illegal. We pointed to black politicians like Georgia's Julian Bond and Los Angeles Mayor Tom Bradley whose early political careers depended on a handful of large contributors to get started. With contribution limits, they would have gotten nowhere. We pointed to the early founding of groups like the ACLU and the NAACP who were dependent on the generosity and political support of a few well-heeled financial angels to get them started and to get their ideas circulating.

We saw campaign finance limitations as undermining First Amendment rights and democracy by limiting criticism of the government, protecting incumbents, shortchanging new candidates and new movements, and generally putting the government in charge of political speech by controlling its funding.

We rejected the idea that you can enhance democracy by limiting speech or that you can have more democracy through less speech. The First Amendment is based on exactly the *opposite* premise, namely, that the *more* discussion and free flow of information we have, the *better* democracy we will have. The discussion of govern-

13. The law was the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 3 and was at issue in the landmark case of *Buckley v. Valeo*, 424 U.S. 1 (1976).

ment and politics must be robust and uninhibited, not restrained and controlled. Unlimited political speech is not the enemy of democracy, it is the engine of democracy and the foe of the status quo and the established order. As a judge recently said in a case protecting pro-choice campaign funding by *Emily's List*: "The government has unlimited resources, public and private, for touting its policy agenda. Those on the outside, whether voices of opposition, encouragement, or innovation must rely on private wealth to make their voices heard."[14]

In the famous 1976 case of *Buckley v. Valeo*,[15] the United States Supreme Court recognized these principles, though in a partial and incomplete manner. The Court, soundly and properly, ruled that limitations on political campaign *expenditures* were direct limitations on political speech and could not be justified, especially not on theories that the government could "level the playing field" by limiting and rationing the amount of political speech that each person or group could be allotted or decide how much political speech was "enough" in our elections.[16] But the Court also ruled that limitations on campaign *contributions* were acceptable because the latter was a form of second-hand speech and posed problems of corruption.[17] And that dual decision has set the stage for many of the campaign finance difficulties we have experienced ever since.

So, my submission is that our civil liberties and our civil rights traditions both (1) require that we try to keep the government from regulating political speech and undermining democracy; and (2) we not invite government control of political speech in what would be a futile and self-defeating way to improve democracy.

III. ARE FREE SPEECH AND FAIR ELECTIONS AT ODDS?

Of course, the power of speech is often badly imbalanced today, because power and wealth in our society are badly imbalanced. We only have to look at my own New York City Mayor Michael Bloomberg's campaign spending to know that. But, you cannot level the playing field without leveling the First Amendment in the process, because every legislated restriction on political speech funding creates loopholes that require additional restrictions and more government

14. Emily's List v. Fed. Election Comm'n, 581 F.3d 1, 40 (D.C. Cir. 2009) (Brown, J. concurring).
15. 424 U.S. 1 (1976).
16. *Id.* at 38-59.
17. *Id.*

controls. If we limit Mayor Bloomberg from spending his *own* money to speak out on his *own* candidacy, then what about people who want to spend money to support Bloomberg independently? That would be more imbalance, would it not? So should we limit those people also? The law we challenged successfully in *Buckley* did precisely that, and it sharply limited all independent citizens and groups from spending to speak.[18] In 2004, two of the ACLU's biggest contributors—George Soros and Peter Lewis—spent about $75 million dollars to try to defeat George Bush for re-election.[19] Are we prepared to declare *that* illegal? What about letting contributors give the money to the ACLU or the NAACP to attack George Bush's policies on civil liberties or civil rights during an election year on a daily basis? In more recent years, wealthy individuals on the right funded speech designed to prevent Barack Obama from being elected and re-elected.[20] Should we restrain that also, in order to level the playing field? And it does not take too much imagination to see where this is going. If George Soros or Peter Lewis or Sheldon Adelson or David Koch want to buy a newspaper or a television network and support or attack the President of the United States every day, should we let the government limit that in order to level all electoral speech to make sure it is, shall we say, fair and balanced? This is exactly the path that the arguments for campaign finance controls take you down, and I think it would be a disaster for the First Amendment as well as for democracy if they were to gain more of a purchase.

In a similar vein, in last year's elections, Mayor Bloomberg was reported to have donated $250,000 to support the same-sex proposal on the ballot in nearby Maryland.[21] If I were a Maryland citizen who

18. *Id.* at 39-51.

19. Ryan Grim, *Peter Lewis Leaves Democracy Alliance, The Liberal Donor Network,* HUFFINGTON POST (Mar. 21, 2012), http://huffingtonpost.com/2012/03/21/peter-lewis-democracy-alliance_n_1368551.html.

20. Tim Dickinson, *Right-Wing Billionaires Behind Mitt Romney*, ROLLING STONES, May 24. 2012, http://www.rollingstone.com/politics/news/right-wing-billionaires-behind-mitt-romney-20120524.

21. John Wagner, *New York Mayor Michael Bloomberg Gives $250,000 to Maryland Same-Sex Marriage Efforts,* WASH. POST BLOG (Oct. 10, 2012, 8:12 AM), http://www.washingtonpost.com/blogs/maryland-politics/post/ny-mayor-michael-bloomberg-gives-250000-to-maryland-same-sex-marriage-effort/2012/10/12/e870cb16-145e-11e2-ba83-a7a396e6b2a7_blog.html; *see also* Erik Eckholm, *Supporters of Same-Sex Marriage See Room for Victories*, N.Y. TIMES, Oct. 30, 2012, http://www.nytimes.com/2012/10/31/us/politics/gay-marriage-supporters-hope-to-win-in-4-states.html?ref=erikeckholm&_r=0 (reporting that Amazon chief Jeff Bezos had donated $2.5 million to support a same-sex marriage referendum in Washington State, where supporters outspent opponents by a 5 to 1 margin) The referendum passed and Washington became one of the first States to adopt same-sex marriage by popular vote. *Id.*

opposed same-sex marriage, I might ask "Where's *my* megaphone?" Why should we let billionaires like Mayor Bloomberg have so much free speech when I am unable to afford anything like that? Should we, instead, level the playing field, by denying him the right to have so much more influence than the average citizen? Should we limit to $1,000 per year the amount of money that anyone can contribute to influence the public on a referendum campaign? After all, if one is serious about leveling the playing field, that would seem to be the right thing to do. These are precisely the kinds of rhetoric you hear from the campaign finance control groups.[22] Bring out the bulldozers and flatten the First Amendment. These are the kinds of concerns that motivated the Supreme Court in *Buckley* to rule that limits on campaign expenditures made to inform the public during an election season when they most need the information violated the First Amendment.[23] Not to mention the excruciating problem of deciding exactly what content will be subject to these limits: express advocacy of the election or defeat of an identified candidate; or a mere mention of an identified political candidate raising an issue that might help one side or the other. This is precisely the path that the arguments for campaign finance controls take you down, and I think, it would be a severe setback for the First Amendment as well as for democracy to give them full sway.

When the Supreme Court heard the government's argument in *Citizens United* that the First Amendment did not prevent the government from banning the publication of a book that criticized a Presidential candidate, the Court understood that individuals and groups of individuals will inevitably try to find ways to avoid the laws and get their messages out and it saw how our campaign finance laws had become loaded with rules, regulations, exceptions, safe harbors, and qualifications.[24] Much like an internal revenue code operating in the First Amendment area, it is understandable that the Court saw the need for reform and simplification of these laws and renewed enforcement of the commands of the First Amendment.[25]

22. Derek Crissman, *A Constitutional Amendment Should Establish a Level Playing Field*, COMMON BLOG (Apr. 26, 2012), http://www.commonblog.com/2012/04/26/a-constitutional-amendment-should-establish-a-level—playing-field.

23. *Buckley*, 424 U.S. at 38-59.

24. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 884-85 (2010).

25. Indeed, the Court explicitly referenced the complexity of the laws as an ongoing threat to First Amendment freedoms observing, "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research,

As a result, in the highly controversial *Citizens United* decision three years ago, the Court reinforced and expanded the speech-protective theories of the *Buckley* decision by dismantling the system of censorship "vast in its reach" that our campaign finance controls embody.[26] The Court held that where campaign expenditures are concerned, all speakers and groups have equal rights to use their resources to get out their messages by speaking about candidates and politics and government.[27] And the beneficiaries of this expanded and clarified freedom of political speech are all of us who can hear what the voices of different groups and individuals have to say. For those who contend that the *Citizens United* ruling was a radical right-wing departure from normal constitutional rules, I would ask you to remember what the law said and what the government argued. The law made it a crime for a non-profit advocacy corporation, Citizens United, to spend one dollar on broadcast advertising of a movie harshly critical of then Senator Hillary Clinton, who was running for President, near to the time of the election. The group had to take the Federal Election Commission (FEC) to court to see if there was some way around the restriction. It still amazes me that after thirty-five years we accept so blandly the concept that people and groups that want to engage in the most fundamental political speech imaginable have to get the permission of a government agency or a court in order to do so free from the fear of punishment. The lower courts, however, said no, there was no loophole or way out.[28] And then, for the Supreme Court to justify this remarkable restraint, the government argued that even a book saying the same critical things about Senator Clinton might be banned, because the publisher was a corporation. Now *that* seems to be a breathtakingly radical proposition that would effectively put the government in charge of both broadcasting and publishing. Where was the outrage, especially from the media community that the government would actually make that argument? Where was the gratitude from the media community that the Supreme Court wanted to be sure the media were fully protected by the First Amendment from government censorship?[29] Yet, outside of the edito-

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or seek declaratory rulings before discussing the most salient political issues of our day." *Id.* at 889.

26. *Id.* at 907.

27. *Id.* at 899.

28. They were right in this regard. *See id.* at 888–92.

29. More recently, Supreme Court Justice Samuel Alito commented at a conference that if the Court in *Citizens United* had not interpreted the First Amendment to protect corporations,

rial pages of the *Wall Street Journal* and a few other pockets of First Amendment universalism, the media outcry *against* the decision was thunderous.[30] And it was critical in inciting broad popular contempt and revulsion for the Court and its ruling.[31] In some quarters that is thought of as biting the hand that feeds you. I guess it is indeed true that no good deed goes unpunished.

Of course, many have bemoaned the *Citizens United* decision and contended that it has led to a perversion of our politics, a buying of our elections or a selling of our democracy to the highest bidder.[32] In fact, the hyperventilated and doleful predictions to this effect have not been borne out in any significant way.[33] But, even if there had been a sharp increase in campaign spending and political speech by business corporations, non-profit groups, and labor unions as a result of the *Citizens United* decision, that is a good thing, not a bad thing. As the

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generally, it could not be used to protect media corporations from government control either. *See* Editorial, *Justice Alito, Citizens United and the Press*, N.Y. TIMES, Nov. 19, 2012, § A, at 26. Predictably, he was editorially attacked by the *New York Times*, which insisted that its constitutional rights flowed from its function and status as the press, not its rights as a corporation. *Id.* The trouble with that theory is that the Court itself has not ruled that the Freedom of the Press Clause gives the media greater First Amendment rights than the Freedom of Speech Clause gives the rest of us. Instead, the Court has protected *all* speakers, media and non-media, equally, an important First Amendment safeguard in my view.

30. Sean Higgens, *Citizens United: The Dog that Never Barked*, WASH. EXAMINER, Nov. 13, 2012, http://washingtonexaminer.com/citizens-united-the-dog-that-never-barked/article/2513358# ("The howls of outrage began almost immediately after the Supreme Court ruled on *Citizens United v. Federal Elections Commission* in January 2010. It continued for months afterward.").

31. Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST, Feb. 16, 2010, http://articles.washingtonpost.com/2010-02-16/politics/36773318-1-corporations-unions-new-limits.

32. Paul Abrams, *Supreme Court to Hand government to Republicans, Again: This Time, Forever*, HUFFINGTON POST (Dec. 19, 2010), http://www.huffingtonpost.com/paul-abrams/supreme-court-to-hand-gov_b_395239.html; Bob Edgar, *Supreme Court's Campaign Ruling: A Bad Day for Democracy*, CHRISTIAN SCI. MONITOR, Jan. 22, 2010, http://www.csmontor/commentary/opinion/2010/0122/supreme-court-s-campaign-ruling-a-bad-day-for-democracy; Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30 ("With a single, disastrous 5-to-4 ruling, the Supreme Court has thrust politics back to the rubber-baron era of the 19th century. Disingenuously waiving the flag of the first First Amendment, the court's conservative majority has paved the way for corporations to use their vast treasures to overwhelm elections and intimidate elected officials into doing their bidding."); Patrik Jonsson, *'Fighting' Obama Hits Supreme Court Over Campaign Finance*, CHRISTIAN SCI. MONITOR, Jan. 23, 2010, http://www.csmonitor.com/USA/Politics/2010/0123/Fighting-Obama-Hits-Supreme-Court-Over-Campaign-Finance; Jeffery Toobin, *Bad Judgment*, NEW YORKER, Jan. 22, 2010, http:www.newyorker.com/online/blogs/newsdesk/2010/01/campaign-finance.html.

33. *See* Matt Bai, *How Much Has Citizens United Changed the Political Game*, N.Y. TIMES MAG., July 17, 2012, *available at* http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?pagewanted=all&_r=0; Tarini Parti & Dave Levinthal, *5 Money Takeways From 2012*, POLITICO (Nov. 17, 2012, 4:00 PM), http://www.politico.com/news/stories/1112/83655.html (explaining how only about ten percent of super PAC funding came from corporations, and that figure was estimated by an aggressively anti-corporate group).

Supreme Court has observed, "that the air may at times seem filled with verbal cacophony is . . . not a sign of weakness but of strength." [34]

This is all a reflection of the fact that people and groups are going to use their resources, financial and otherwise, to get their messages out about who should run the government and how they should run the government, which increasingly influences more and more of our lives. The actions of the government have legitimacy only where the political processes for choosing, checking, and controlling the government remain free and unrestrained.

That is why the wrong lesson is being drawn about the campaign spending in the 2012 elections. The cries are out to roll-back and repeal the First Amendment protections for campaign funding and roll-in the restrictions from the past. Indeed, there are serious proposals to even amend the Constitution itself to give Congress and the state legislatures plenary power to impose broad regulation of campaign finances.[35] That is precisely the wrong idea: putting government in charge of the funding of political speech and association in America.

IV. A WORD ABOUT SUPER PACS

So much of the hysteria is focused on the super pacs. In the end, it turned out that super pacs swayed almost no significant elections.[36] But in the meantime, super pacs, like the *Citizens United* decision that supposedly spawned them, were treated like some kind of electoral Frankenstein's monster with citizens almost being urged to get their torches and pitchforks and hunt these evil creatures down. So, it is important to understand what super pacs are and to support them and the First Amendment principles which they embody and realize.

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34. Cohen v. California, 403 U.S. 15, 27 (1971).

35. One prominent version of a proposed constitutional amendment, supported by key Democratic Senators like my own Charles Schumer, would provide as follows:

> Section 1. Congress shall have power to regulate the raising and spending of money and in kind equivalents with respect to Federal elections, including through setting limits on-
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> (1) the amount of contributions to candidates for nomination for election to, or for election to, Federal office; and
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> (2) the amount of expenditures that may be made by, in support of, or in opposition to such candidates.

S.J. Res. 29, 112th Cong. (2011).

36. Editorial, *A Landslide Loss for Big Money*, N.Y. TIMES, Nov. 10, 2012, at SR 12. *See generally* Joe Trotter, *Media Watch Surprise! "Secret Money" Didn't Buy Elections*, CENTER FOR COMPETITIVE POL. (Nov. 8, 2012), http://www.campaignfreedom.org/2012/11/08/media-watch-surprise-that-secret-money-didnt-buy-election/ (collecting similar stories on campaign finance).

First, what are super pacs? They are political committees organized by individuals and/or groups that are only engaged in raising and spending funds for "independent expenditures" (i.e. speech endorsing politicians but independent of and not coordinated with any politician or campaign). Because they are not contributing directly to any candidate or campaign or working with a campaign, the money that supports them can come from corporations, unions, non-profits, as well as from individuals; it can also come in unlimited amounts. So, in their essence, super pacs trace their origins back to the landmark case of *Buckley v. Valeo*, which held that there can be no limitations on campaign expenditures, especially independent expenditures that represent citizen advocacy and criticism of government—one of the most precious protections of the First Amendment.[37]

The right of independent groups and individuals to use their funds to speak out about politicians during an election year was front and center in the *Buckley* case. The new law, enacted supposedly to cure the campaign finance ills associated with "Watergate," severely limited what any person or group could spend independently on speech about politicians.[38] The limit was $1,000 in an entire year, which silences anyone once they run a small political advertisement in a newspaper. Spend a dollar more and risk going to prison for the felony of illegal campaign spending under the law. That is a pretty frightening prospect in a democracy. The justification for this Draconian law was that because the law also limited to $1,000 how much a person or group could contribute to a candidate, it would create a "loophole" to allow such individuals or groups to go out independently and spend more to support that candidate or oppose his opponent.[39] Of course, that "loophole" was the heart of the First Amendment.

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37. Buckley v. Valeo, 424 U.S. 1, 21–23 (1976). Actually, the first modern "super PAC" may have been the small group of anti-war liberals who gathered a significant amount of money to run a newspaper advertisement in 1972 accusing President Richard Nixon of being a war criminal because of his conduct regarding the war in Vietnam. *See* United States v. Nat'l Comm. for Impeachment, 469 F.2d 1135, 1136–37 (2d Cir. 1972). The government sued the group claiming that the advertisement was a campaign message against the re-election of the President, and therefore subject to all of the limits and restrictions of the new Federal Election Campaign Act passed earlier that year. *Id.* at 1136–37. The lower courts quickly ruled that it would be wrong and a violation of the First Amendment to limit the funding of independent, issue-oriented criticism of public officials including candidates for election or re-election, in that fashion. *See id.* at 1140-42; *see also* ACLU v. Jennings, 366 F. Supp. 1041, 1054 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom*, Staats v. ACLU, 422 U.S. 1030 (1975).

38. *Buckley*, 424 U.S. at 39-51.

39. *See id.* at 44-45.

That is, indeed, precisely how the Supreme Court saw it, with only one Justice dissenting on this point. First, the Court ruled that the law had to be narrowed so that it only reached "express advocacy" of the election or defeat of a candidate.[40] To give it any broader reading would impermissibly silence issue advocacy and criticism of the stand of public officials on political issues, and it would unwisely limit the activity of groups like the ACLU and the NAACP.[41] Second, but even narrowed in that fashion, the law and its limits on independent spending cut to the core of the First Amendment by limiting criticism of the government and the officials who run it. In the process of reaching that conclusion, the Court rejected the many arguments that the government put forward to try to justify the law. In the Court's view, the values of independent political speech substantially outweighed any dangers it might pose.[42]

First, the Court rejected the idea that independent spending could corrupt the politicians benefitted by it. Because the spending was independent and could not in any way be coordinated with the candidate, there was no danger of a quid pro quo corruption or exchange of favors for funds.[43] Indeed, they might sometimes be harmful to a candidate. Second, since the Court had determined that only "express advocacy" by independent groups and individuals could be regulated at all, people could criticize candidates extensively without even urging their election or defeat.[44] So, what was the point in preventing them from doing so. Third, the Court rejected the idea that you could limit the speech of some in order relatively to enhance the speech of others.[45] This is basically the idea of so-called "leveling the playing field," and the Court said that the First Amendment cannot tolerate such a steamrolling of the right to criticize government.[46] As the Court put it:

> The concept that government may regulate the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the "widest possible dissemination of information from diverse and antagonistic sources" and to assure the "unfettered ex-

40. *See id.* at 40-44.
41. *See id.* at 42-44.
42. *See id.* at 44-51.
43. *Id.* at 45-48.
44. *Id.* at 45.
45. *Id.* at 48–51.
46. *Id.* at 48-49.

> change of ideas for the bringing about of political and social changes desired by the people."[47]

Finally, the Court also rejected the government's claim that excessive spending will lead to excessive or worthless speech.[48] That is the equivalent of today's concern that too much campaign spending, particularly in the hands of super pacs, will lead to extremely "negative" campaigns which will turn off voters. Here's how the Court answered that argument:

> The First Amendment denies government the power to determine that spending to promote one's views is wasteful, excessive or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.[49]

So, in *Buckley*, the Court gave constitutional validation to what the super pacs are doing to circulate views on government and politics, to advocate for those candidates who share those views, and to amplify the voices of those of like mind.[50]

The one issue that *Buckley* did not explicitly resolve was whether corporations in general, and labor unions as well, had the same right as individuals and groups to engage in independent political advocacy concerning government and politics and politicians, or could they be silenced because they had too much wealth and potential power (i.e., the capacity for too much speech).

That, of course, was the issue in the famous *Citizens United* case.[51] There, the Court ruled that organizations, corporate and union, as well as individuals, had the First Amendment right to use

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47. *Id.*

48. *Id.* at 57-58.

49. *Id.* at 57.

50. Since *Buckley*, the Court has reaffirmed that independent campaign expenditures lie at the core of the First Amendment and has applied this principle. *See* Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 614 (1996) (protecting independent expenditures by political parties to support their candidates); Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238, 251 (1986) (protecting a non-profit ideological corporation funded only by individuals); Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 493 (1985) (protecting a small donor PAC's independent advertisements); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788–89 (1978) (protecting corporate speech about a referendum election). The deviation from this principle, reflected in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668 (1990) and applied in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 221–22 (2003) was at last, in my view, properly repudiated and corrected in *Citizens United.*

51. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 130 S. Ct. 876 (2010).

their resources to engage in free speech about the government, politics, and politicians during elections.[52] In reaching that conclusion, the Court swept away all of the pointless distinctions and limitations on expenditures for independent political speech.[53] Individuals and groups—corporations, unions, non-profits, any individual or group—all have the same rights to use their resources to get out their messages about the government and the officials and politicians who run it. In that case the Court upheld the right of a conservative non-profit advocacy group to make, distribute, and advertise a movie criticizing a leading candidate for President of the United States.[54] But that ruling protected all corporate and union groups of any kind. It is difficult to imagine a stronger blow for freedom of speech and association and press than that decision. It was based on the principles of the *Buckley* case that where independent political speech was concerned, there can be no limits on the amount or source because the free flow of information to the public from as many sources as possible is mandated by the First Amendment and necessary for our democracy.[55]

Are these super pacs evil? Should we support measures to dismantle them? Two arguments are made against super pacs, but, to my mind, they do not support overturning the principles of the First Amendment. First is the equality argument, the same one rejected in *Buckley*. Namely, no one person or groups should have too much free speech.[56] One person should not have a bigger megaphone than anyone else, especially since we believe in "one person, one vote."[57] But to think that this requires some sort of principle of "one person, one picket sign" is to reject the core purpose of the First Amendment: to get as much information to the public from as many different sources as possible so that the public will be able to exercise its democratic

52. *See id.* at 866.

53. *See id.* at 916-17.

54. *See id.* at 886-88

55. Based on the principles of both *Buckley* and *Citizens United*, a lower court unanimously held that since one individual or group could spend unlimited amounts on independent political speech, such individuals or groups could join together and support a political committee that did the same thing. *See* SpeechNow.Org. v. Fed. Election Comm'n, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc); *see also* Emily's List v. Fed. Election Comm'n, 581 F.3d 1, 11 (D.C. Cir. 2009). So, the freedom of speech and the freedom of association helped to create what we call Super PACS. *See generally* Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644 (2012) (analyzing the development of Super PACs since the Supreme Court's decision in *Citizens United*).

56. *See* Buckley v. Valeo, 424 U.S. 1, 48-51 (1976).

57. The phrase comes from the Supreme Court decision in *Reynolds v. Sims*, 377 U.S. 533, 558 (1964), where the Court ruled for the first time that malapportioned legislative districts violated the Equal Protection Clause.

choices most effectively. It ignores the fact that the views put out by super pacs and its supporters are shared by millions of Americans and are thereby amplified. Finally, it is often new, insurgent, and dissident voices and viewpoints that need to be able to get their message of change out in a way that leveling the playing field will frustrate.

Likewise, the corruption argument falls short as well. This is the argument that the backers of super pacs will have the same access to and influence on the politicians they support as if they made contributions directly.[58] But that does not strike me as a valid concern but as an appropriate element of democracy. People and groups support politicians because of their stands on issues that affect those people and groups. If their support results in electing their favored candidates, such people and groups rightly expect those candidates to be responsive through policy and action to their concerns. That is called democracy, not corruption.

Finally, despite all of the *sturm und drang* about the super pacs, super pacs wound up influencing almost no significant election in a decisive way. Of all the money raised and spent by super pacs – the vast majority of it fully disclosed—many of the candidates supported, particularly on the Republican side, did not win, and many of the candidates opposed, often on the Democratic side, did not lose.[59] President Obama was re-elected handily and the Republicans spectacularly lost their seemingly strong bid to take over the Senate. Though the House remained in Republican hands, there is little evidence that super pac spending was decisive in many of those races. Because most of the claims that super pacs, like corporations, were going to steal the election and buy up our democracy were coming from the Democratic side of the ledger, the election results did much to undermine those claims and make them seem more like political assertions than real dangers.

58. Richard Hasen, Opinion, *Of Super Pacs and Corruption*, POLITICO (Mar. 22, 2010), http://www.politico.com/news/stories/0312/74336.html.

59. There was a good deal of election-related spending by non-profits that are not organized as super pacs and do not have to publicly disclose their donors. But because there is no disclosure, claims as to how much election-related spending occurred are mostly estimations, usually by groups critical of such activity, and not based on hard government mandated data. *See, e.g.*, Paul Blumenthal, *"Dark Money" in 2012 Elections Tops $400 Million*, HUFFINGTON POST (Nov. 2, 2012), http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million_n_2065689.html. While it can be argued that some of these groups are really thinly-disguised campaign groups that should have to disclose, traditional non-profits, like the ACLU, NAACP, and many of the major non-profit cause organizations in America, have been using their funds to put out arguably "political" messages for decades without publicly disclosing their sources of funding.

What the super pacs did do is generate a great deal of campaign speech, heighten interest in the issues in the election, and increase electoral competition.[60] And in some races they did help even the odds, a bit, and "level the playing field," without the use of a government steamroller over the First Amendment. That strikes me as a pretty good accomplishment, one that should be praised, not bemoaned.

Finally, the one valid concern raised by the super pacs as well as the high-spending non-profits is that two of the most important actors in the political process—the candidates and the parties—are much more limited in their campaign funding rights than all of these outside groups and individuals. Parties and candidates can only raise money in limited amounts and from people, while all around them are groups and individuals, including the mass media that can use unlimited funds to support or oppose those candidates and parties. Surely those kinds of disparities warrant revisiting those restrictions.

V. ELECTORAL SPEECH MUST BE "UNINHIBITED, ROBUST, AND WIDE-OPEN"[61]

My view of the principles that should guide us in thinking about these issues is based on the touchstone that campaign and electoral speech should be "uninhibited, robust and wide-open" both in amount and content. I have long been involved in opposing governmental limitations on the amount of money that individuals or groups can spend to voice and amplify their political views, as well as any official restraints on the content of that speech on the theory that it is too "negative" and not fruitful for political discourse. On the contrary, our First Amendment and our democracy require that, in the words of the Supreme Court's landmark decision in *New York Times Co. v.*

60. *See* Editorial, *Super Democracy: Why Super PACs Are Good for Our Political System*, CHI. TRIB., Feb. 9, 2012, http://articles.chicagotribune.com/2012-02-09/news/ct-edit-superpacs-20120209_1_romney-super-pac-gop-groups-priorities-usa-action; Bradley A. Smith, *Why Super PACs Are Good For Democracy*, U.S. NEWS & WORLD REP., Feb. 17, 2012, http://www.usnews.com/opinion/articles/2012/02/17/why-super-pacs-are-good-for-democracy; Ross Douthat, *The Virutes of the Super PAC*, N.Y. TIMES, Apr. 3, 2012, http://campaignstops.blogs.nytimes.com/2012/04/03/the-virtues-of-the-super-pac/; Manu Raju & John Bresnahan, *Outspent Democratic Super PAC Made Dollars Count*, POLITICO, Nov. 11, 2012, http://www.politico.com/news/stories/1112/83699.html; Paul Blumenthal, *Democratic Super PACs Trim Conservative Advantage in Congressional Races*, HUFFINGTON POST (Nov. 10, 2012), http://www.huffingtonpost.com/2012/11/10/democratic-super-pacs-red_n_2104668.html.

61. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

Sullivan,[62] "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[63] There should be few limits in the First Amendment market place of ideas, and, to my mind, "negative" campaign speech really may be properly sharp criticism of government and those who run or seek to run it.

So, when I look back on the 2012 elections, I see a great deal of campaign spending that produced a great deal of campaign speech with dozens of hotly-contested campaigns all across the country, which raised a host of critical public issues topped by a presidential race that was very competitive and hard-fought.

Whether all of the campaign spending is a *cause* or an *effect* of the increased interest in and competitiveness of the elections is anybody's guess. But the closeness of the election is not surprising given the magnitude of the stakes. As one conservative pundit put it, "Every four years we are told that the coming election is the most important of one's life. This time it might actually be true. At stake is the relation between citizen and state, the very nature of the social contract."[64] To his supporters, President Obama's accomplishments rivaled those of Lyndon B. Johnson and Franklin Delano Roosevelt. To his detractors, the key elements of his program, such as "Obamacare," were shoved through and passed without a single vote from the "loyal opposition," hardly an homage to bi-partisanship, compromise or finding common ground.[65] And, most observers would agree, the Obama campaign was overwhelmingly a summer long attack on Governor Romney in an effort to demonize him and his candidacy, which is a classic example of "negative" campaigning.[66] So it should not be surprising that President Obama's opponents would try to raise and

62. *Id.*

63. *Id.* at 270.

64. Charles Krauthammer, *The Choice*, WASH. POST, Nov. 1, 2012, http://articles.washingtonpost.com/2012-11-01/opinions/35504507_1_health-care-conservative-ascendancy-affirmative-action.

65. *E.g.*, *Background on Obamacare: Why We Fight*, FREEDOM WORKS (2013), http://www.freedomworks.org/repeal-obamacare-background (charging that among the reasons the law is "Bad Medicine" is that it was "rammed through Congress . . . without garnering a single Republican vote.").

66. *See* Jeff Zeleny, *Obama's Team Taking Gamble Going Negative*, N.Y. TIMES, July 28, 2012, at A1, *available at* http://www.nytimes.com/2012/07/29/us/politics/obama-campaign-takes-gamble-in-going-negative.html?pagewanted=all&_r=0; *see also* Tarini Parti & Dave Levinthal, *5 Money Takeaways From 2012*, POLITICO, Nov. 17, 2012, http://www.politico.com/news/stories/1112/83655.html.

spend as much as they could to counter these attacks and oppose his re-election.

But, despite all of this high spending and frequently negative campaigning, the demonizing of much of it by much of the media has been exaggerated and unjustified. First, the total spent on federal elections last year, perhaps $6 billion, will only be about 15% or 20% more than in 2008, and still less than we, as a nation, spend annually on potato chips.[67] More importantly, this spending helped to fuel a great deal of electoral competition, which is all to the good in a democracy. The two main parties seemed to be about evenly matched in their financial resources.[68] President Obama's campaign raised and spent somewhat more than Governor Romney's and the independent spending on the Republican side matched and probably exceeded the independent and labor campaign spending on the Democratic side.[69] Unlike 2008, when President Obama raised and spent *seven times* what Senator McCain did and, indeed, raised more money than any candidate in American political history—and won by almost ten million votes—this time we were closer to the proverbial level playing field by letting the major parties and their candidates and supporters raise and spend as much as they could to get their respective electoral messages out to the American people.[70] All told, each side spent about $1 billion on the Presidential election.[71] And encouraging a healthy electoral competition can be an antidote to the rigidness of one-party rule and an encouragement to political compromise and conciliation.

Moreover, the vast majority of the money being spent was fully disclosed, down to the $200+ contributors, including spending by super pacs.[72] And a very small proportion of it came from corpora-

67. *See* Nicholas Confessore & Jess Bidgood, *Little to Show for Cash Flood by Big Donors*, N.Y. TIMES, Nov. 7, 2012, http://www.nytimes.com/2012/11/08/us/politics/little-to-show-for-cash-flood-by-big-donors.html;*see also* Janet Raloff, *Potato Chips: A Symptom of the U.S. R & D Problem*, SCI. NEWS (Jan. 23, 2013), http://www.sciencenews.org/view/generic/id/63647/description/Potato_chips_A_symptom_of_the_US_R+D_problem.

68. *See infra* note 71.

69. Jeremy Ashkenas et al., *The 2012 Money Race: Compare the Candidates*, N.Y. TIMES (2012), http://elections.nytimes.com/2012/campaign-finance.

70. *See infra* note 71.

71. The non-partisan Campaign Finance Institute reported that the two sides spent $1.0 and $1.1 billion dollars respectively. *See* Press Release, Campaign Fin. Inst., Money vs. Money-Plus: Post-Election Reports Reveal Two Different Campaign Strategies (Jan. 11, 2013), *available at* http://cfinst.org/Press/PReleases/13-01-11/Money_vs_Money-Plus_Post-Election_Reports_Reveal_Two_Different_Campaign_Strategies.aspx.

72. Under the Federal Election Campaign Act, campaigns, parties, and political committees must disclose the name, address, business occupation, and business address of every person or

tions.[73] The baleful media predictions that the *Citizens United* decision would lead to a tsunami of corporate money swamping our political shores and drowning our democracy never materialized.[74] Ironically, *unions* seem to have taken far more advantage of *Citizens United* than corporations have, by being able to use union treasury funds for general political advocacy for the first time ever at the federal level, thereby freeing up member-contributed funds for more targeted political action.[75] To be sure, there was a good deal of spending on ads that criticized or supported candidates sponsored by non-profits that are not organized as super pacs, but it is not the new "dark money" that some journalists claim. Non-profits have engaged in such public advocacy for some time without having to publicly disclose their contributors. This applies to the ACLU and the NAACP, as well as the Karl Rove groups. And all groups, including those, are subject to regular Federal Election Campaign Act of 1971 (FECA) disclosure when they engage in the kinds of independent, candidate-related speech subject to FECA.[76] Run an ad on television that even whispers the name of a federal candidate and you have to file a report with the FEC within twenty-four hours identifying who you are and how much was spent on the ad. You may not have to disclose your individual contributors because of a long-standing FEC interpretive ruling, recently upheld by an appellate court.[77] But the ACLU and the NAACP have never had to publicly disclose their contributors in similar circumstances.

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entity that contributes in excess of $200 in any election cycle (as well as recipients of expenditures of more than $200). Likewise, anyone who makes more than $250 in "independent expenditures" (i.e., for communications "expressly advocating" the election or defeat of a federal candidate) must file reports identifying $200+ contributors. Every person or organization that makes "electioneering communications" (i.e., broadcast and similar media mention of a federal candidate during the periods near an election) must file reports once they spend in excess of $10,000 in a calendar year and disclose everyone or group that contributes $1,000 or more toward those communications. These various disclosure provisions are contained in 2 U.S.C. § 434 (2012).

73. *See supra* note 33.

74. *See supra* note 33.

75. T.W. Farnam, *Unions Outspending Corporations on Campaign Ads Despite Court Ruling*, WASH. POST (July 7, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/06/AR2010070602133.html; Melanie Trottman & Brody Mullins, *Union is Top Spender for Democrats*, WALL STREET J. (Nov. 1, 2012), http://online.wsj.com/article/SB10001424052970204707104578091030386721670.html, (SEIU spent almost $70 million supporting President Obama and Democratic candidates; almost as much as some of the conservative groups on the opposite side).

76. *See supra* note 72.

77. *See* Ctr. for Individual Freedom v. Van Hollen, 694 F.3d 108, 109 (D.C. Cir. 2012).

So, why demonize the campaign financing of this election with the common refrain that billionaires spending "dark money" through "outside groups" were buying the election and stealing our democracy? First, the whole concept of "outside groups" or "outside" spending strikes me as contrary to the idea of citizen criticism of government. "Outside" of what? The candidates? Is that our view of democracy, that only the politicians can speak and that speech by any other individual or group about the politicians is illicit or alien or wrong or "outside" of democratic norms? If parties run ads supporting their candidates or attacking the opponents, is that "outside" spending? How about ads by labor unions, environmental groups, abortion rights groups criticizing or praising the candidate's record on issues of concern to those groups, is that also "outside" spending by "outside" groups? Finally, of course, what about the Press? Is its daily editorializing and often partisan news coverage also "outside" speech? In my day, the phrase "outside agitators" was the ugly epithet that die-hard segregationists used to try to tar civil rights advocates who traveled to the South to fight for equal rights.[78] To my mind, the persistent use of the term "outside groups" in the campaign finance area to disparage and demean individuals and groups who use their resources to raise their voices about politics and government is just as offensive and just as much an effort at de-legitimization.

In fact, one of the main reasons we are witnessing the super pac and related developments is precisely because we have imposed limits on the ability of individuals and groups to contribute directly to candidates and parties. As a result, supporters have no option but to use their resources to get their messages out independently. It might be far better for accountability and transparency in our political system to think about raising or even eliminating those contribution limits so that the funding would be back inside the tents of the parties and the candidates, and they would be responsible for its use. We might have less "negative" campaigning under those circumstances.

The criticism of unlimited campaign spending has always been with us, ever since the *Buckley* case decided that limits on spending for political speech were effectively limits on the political speech itself. But it intensified dramatically in 2010 with the *Citizens United* decision. Why then? Well, one possible explanation, as one journalist

78. *See* Dr. Martin Luther King, Jr., Letter From a Birmingham Jail (April 15, 1963), *available at* http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

suggested, is that "outside spending tilted left in every year from 2000 to 2008, but that in 2010—in the aftermath of deregulation – the balance skewed decisively to the right. In the current 2011-12 election, it shifted overwhelmingly to the right."[79] The extent to which this is attributable to the *Citizens United* decision in January 2010 is debatable, though some supporters of the decision have suggested that the increase in spending is proof that the law before that decision did indeed impose the "vast" censorship that the Court found to be a violation of the First Amendment, which needed to be ended.[80] Also, the statistics do not take account of the hundreds of millions of dollars of union expenditures the vast majority of which favor Democrats, from President Obama on down, or to the perhaps billions of dollars worth of "expenditures" resulting from favorable news media coverage of President Obama.[81] But it is clear that in 2010 the Republicans and their allies swept the congressional elections, and this past year they came closer to leveling the playing field than in previous elections.

Perhaps, as a result, the media coverage of campaign financing is usually heavily tilted toward opposing, condemning, and demonizing "excessive" "outside" "dark money funded" campaign spending. Charles Koch and Sheldon Adelson and other big donors on the right have become scorned household names in ways that George Soros, Peter Lewis, and Jeffrey Katzenberg on the left never have been, even though the latter have spent tens of millions of dollars trying to elect

79. Thomas B. Edsall, *Campaign Stops: Billionaires Going Rogue*, N.Y. TIMES BLOG (Oct. 28, 2012, 10:53 PM), http://campaignstops.blogs.nytimes.com/2012/10/28/billionaires-going-rogue/.

80. During the 2010 election, in responding to claims that independent spending following *Citizens United* was unduly influencing the election, Bradley Smith pointed out that, in fact, the Democrats were largely outspending the Republicans, and the independent spending was only helping to level the playing field and make the elections more competitive—as they turned out to be: "This independent spending is serving as an equalizer. The Citizens United decision has done just what it was intended to do—increased competition, assisted challengers, and allowed more voices to be heard." Brad Smith, *AP News Flash: Citizens United Equalizes Playing Field; Independent Groups Add to Competition*, CTR. FOR COMPETITIVE POL. (Sept. 28, 2010), http://www.campaignfreedom.org/2010/09/28/ap-news-flash-citizens-united-equalizes-playing-field-independent-groups-add-to-competition/. And in an email exchange about whether independent spending had increased dramatically and was overwhelming the 2012 elections, William Maurer replied: "What a fantastic result! It is marvelous to see such an outpouring of political speech and associational freedom. Alternatively, what a clear demonstration of how McCain-Feingold suppressed speech and deprived the American people of information about who should represent them. This proves Justice Kennedy's assertion that that law was censorship vast in scope." ELECTION LAW LISTSERVE (July 9, 2012).

81. *See* Matthew Continetti, *See No Evil*, THE WASH. FREE BEACON (Nov. 30, 2012, 5:00 AM), http://freebeacon.com/see-no-evil/.

Democrats and defeat Republicans or otherwise use their wealth and financial clout to advance electoral causes they support[82] This disparity and one-sided coverage have always been the case because campaign financing is very much a partisan issue. The Democrats are for regulation, because they think the Republicans benefit without it. The Republicans see campaign financing restrictions in precisely the same way: efforts by Democrats and their media allies to silence Republicans and their speech funding.[83]

Some of the media and the campaign finance "reform" groups they favor envision an electoral model where private campaign funding will be banned or severely limited; candidates will rely for most of their campaign funding on public or government funding with severe limits on how much they will be allowed; "outside" groups will be severely curtailed in what they can spend to inform the public on politics, and, as a result, the media—who are exempted by the politicians from the campaign finance control laws—will have a clear field to dominate the debate and tell us who to vote for.[84]

I reject that view of political and electoral speech. Fortunately, so too does the Supreme Court in its interpretation of the First Amendment. Ever since the modern First Amendment doctrine was born in the stirring dissents of Justices Holmes and Brandeis almost a century ago, one of its central themes has been that speech about the government, politics, public officials, and politicians has to be as *unfettered*

82. *See id.*; Kenneth P. Vogel & Tarini Parti, *Democratic Super PACs Get Jump on 2014, 2016*, POLITICO (Nov. 27, 2012, 12:25 AM), http://www.politico.com/news/stories/1112/84205.html (showing information for the original report of the meeting); *see also* John Hinderaker, *Bad Money Rising*, POWERLINEBLOG (Jan. 12, 2013), http://www.powerlineblog.com/archives/2013/01/bad-money-rising.php? (reporting on the virtual press blackout of the secret meeting of well-heeled, left-wing groups and prominent Democratic politicians pledging, ironically, if not hypocritically, to spend excessive amounts of money on a campaign to get the "big money" out of politics.).

83. *See* Joseph E. Cantor, *Campaign Finance*, ALMANAC OF POL'Y ISSUES (Oct. 23, 2002), http://www.policyalmanac.org/government/archive/crs_campaign_finance.shtml; Thomas B. Esdall, *Billionaires Going Rogue*, N.Y. TIMES, Oct. 28, 2012, http://campaignstops.blogs.nytimes.com/2012/10/28/billionaires-going-rogue/; David E. Rosenbaum, *Campaign Finance Reform Fails Again*, N.Y. TIMES, Oct. 2, 1994, http://www.nytimes.com/1994/10/02/weekinreview/sept.25-oct.1-campaign-finance-reform-fails-again.html; Cleta Mitchell, *Campaign Finance Reform and its Casualties*, WALL STREET J., Aug. 30, 2012; http://online.wsj.com/article/SB10000872396390444327204577617133260342296.html. *See generally* Amy Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 578-79 (2012).

84. The primary, pro-regulation campaign finance groups are the Brennan Center of New York University, Common Cause, the Campaign Legal Center and Democracy 21. Except for Common Cause, these groups are not membership organizations, and they receive extensive funding from foundations, corporations, law firms or wealthy individuals. More irony, if not hypocrisy.

and *unrestrained* as possible.[85] And that constitutional message has so often been delivered on behalf of speakers whose own message was militant and "negative."[86] Those are the voices we most need to hear to tell us that the emperor of the day has no clothes. And those principles of unfettered political speech are just as applicable to campaign finance restrictions as they are to any other efforts by the government to censor what we the people want to say and how we want to say it. That is why restrictions on the quantity and quality of political speech, through controls of its funding, are antithetical to the purposes and principles of the First Amendment and subversive of open political debate in a free society. Elections are therapy for our democracy, where we air our grievances and our differences on political issues, and they cannot function properly if we repress that conversation.

VI. "ANOTHER SUCH VICTORY AND I AM UNDONE."[87]

Finally, the same is true of the frequent cries that our campaigns are "too negative" and too filled with vicious "attack ads."[88] But as much as we may bemoan the "negativity" that some say has been the hallmark of this past election season—though many historians have pointed out that political campaigns, cartoons and slogans of yesteryear make our current attack ads seem like Disney productions[89]—we must realize that the First Amendment welcomes and encourages such free-wheeling, as well as free-spending political speech. Indeed, the Court has made clear starting almost fifty years ago that limitations on speech about government, politics, politicians, political candidates, and public officials run directly contrary to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open and that it may well include vehe-

85. *See* Abrams v. United States, 250 U.S. 616, 630 (1919); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 934 (1982) (upholding provocative speech by civil rights boycott leaders); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (upholding challenging speech by civil rights leaders criticizing official wrongdoing); Whitney v. California, 274 U.S. 357, 375 (1927); Gitlow v. New York, 268 U.S. 652, 672-73 (1925).

86. *See* Texas v. Johnson, 491 U.S. 397 (1989) (speaker burned American flag to express contempt for the country); Brandenburg v. Ohio, 395 U.S. 444 (1969) (speaker threatened "revengence" against racial and religious minority groups).

87. Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (dissenting opinion).

88. Devin Dwyer, *Too Negative: Voters Blast Obama, Romney Ads*, ABC NEWS (Aug. 22, 2012, 6:00 AM), http://abcnews.go.com/blogs/politics/2012/08/too-negative-voters-blast-romney-ads (recounting voter reactions to the 2012 presidential race).

89. *See generally* DAVID MARK, GOING DIRTY: THE ART OF NEGATIVE CAMPAIGNING (2009) (surveying campaigns from Thomas Jefferson's through George W. Bush).

ment, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[90]

The landmark case that fashioned that principle, *New York Times Co. v. Sullivan*[91] was a civil rights case, as well as a corporate speech case involving legal threats against a media corporation.[92] The case involved a "negative" newspaper advocacy ad attacking southern segregationist officials for police brutality against civil rights demonstrators. The civil rights leaders who paid to run the ad and the newspaper that carried it were socked with enormous libel damage judgments in state court, which threatened to stop harsh criticism of such officials in its tracks.[93] That is why the Supreme Court pushed back hard and established strong First Amendment protections for such "negative" speech. In doing so, the Court recognized what true civil rights and civil liberties advocates have long understood: it is the outsider groups, the insurgents, and those who would change the existing order the most who need free speech the most to get their dissident message of change out to the people.[94] And it is the established order that seeks to use the laws to stifle such advocacy. Without the strong protections for "negative" political speech that the Court fashioned during the tumultuous struggles for civil rights in the 1960's, the Civil Rights Movement would have been stifled, and later anti-war, feminist and gay rights movements would have had a harder time getting frequently "negative" messages out, as well. Indeed these crucial First Amendment principles do their most important work when they afford protection not just for the ideas we like or which are embraced by the powers-that-be or reflect the conventional wisdom, but when they provide immunity from restraint and "freedom for the thought that we hate."[95]

The true defenders of civil rights understand that so well. In a 1950's case, the Supreme Court majority upheld an Illinois law which

90. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

91. *See id.* at 292 (explaining the importance of free speech in a democratic form of government).

92. *See id.* at 256.

93. *See generally* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).

94. *See id.* at 269.

95. United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting); *see also* Texas v. Johnson, 491 U.S. 397, 418 (1989) (right to burn an American flag in protest, the Court's observing that under the First Amendment "concepts virtually sacred to our Nation as a whole–such as the principle that discrimination on the basis of race is odious and destructive [will not go unquestioned in the market place of ideas]."); Collin v. Smith, 578 F. 2d 1197, 1210 (7th Cir. 1978) (holding that Nazi march in Jewish community cannot be prevented).

punished making derogatory remarks about any racial religious or ethnic groups.[96] We now call that a "hate speech" law. The Court back then, in an era when First Amendment rights were not very special or protected in the Supreme Court, said that such a law was necessary to insure social order and harmony.[97]But the dissenters, among the strongest civil rights champions on the Court, saw it differently. They understood that outside groups and minority groups needed the most free speech protection to advance their causes and that cheering on a ruling that lets the government control controversial or hateful speech was a short-sided view.[98] As the dissenting opinion put it, invoking the historic metaphor of a Pyrrhic victory (i.e. a victory that is really a loss) "another such victory and I am undone."[99] In the years since then the Court has invigorated First Amendment protection, secured it for even the most hateful and hurtful political speech and effectively overruled the Illinois decision.[100] The Court has now made it clear that our tolerance of the most hateful ideas, is a strength of our democracy and not a weakness.[101] And some of the most civil rights friendly Justices, like William Brennan and Thurgood Marshall, have understood that laws against ugly, hurtful, hateful, or negative speech, if upheld, most threaten minority groups and outsiders.[102]

Indeed, in October 2012, President Obama himself took the same stand in a United Nations speech discussing the anti-Islam video that caused riots in the middle east,

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96. Beauharnais v. Ill., 343 U.S. 250, 251 (1951) ("[The Illinois statute made it a crime to communicate publicly any message] which . . . portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion, which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.").

97. *See id.* at 261-62.

98. *See id.* at 274-75.

99. *Id.* at 275.

100. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 396 (1992) (invalidating a hate speech ordinance).

101. *See generally* Snyder v. Phelps, 131 S. Ct. 1207 (2011) (ruling that the First Amendment protected anti-gay hate speech); Texas v. Johnson, 491 U.S. 397 (1989) (ruling that burning the American flag is free speech protected by the First Amendment); Cohen v. California, 403 U.S. 15 (1971) (prohibiting California from making the public display of an expletive a criminal offense); Brandenburg v. Ohio, 395 U.S. 444 (1969) (ruling that an Ohio statute that punished advocacy of violence was unconstitutional).

102. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 775 (1978) (Brennan, J. & Marshall, J., dissenting) ("[I]n our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share [the majority Justices'] fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications based solely because of the words they contain.").

> Here in the United States, countless publications provoke offense. Like me, the majority of Americans are Christian, and yet we do not ban blasphemy against our most sacred beliefs. As president of our country, and commander in chief of our military, I accept that people are going to call me awful things every day, and I will always defend their right to do so. Americans have fought and died around the globe to protect the right of all people to express their views—even views that we profoundly disagree with. We do so not because we support hateful speech, but because our founders understood that without such protections, the capacity of each individual to express their own views and practice their own faith may be threatened.
>
> We do so because in a diverse society, efforts to restrict speech can quickly become a tool to silence critics and oppress minorities. We do so because, given the power of faith in our lives, and the passion that religious differences can inflame, the strongest weapon against hateful speech is not repression, it is more speech—the voices of tolerance that rally against bigotry and blasphemy, and lift up the values of understanding and mutual respect.[103]

Unfortunately, around the world, free speech is on the decline and governments are rushing in to outlaw "hate speech."[104] Even in America, the "anti-bullying" movement raises many of the same censorship concerns.[105] There seems to never to be a paucity of arguments against free speech and in favor of its limitations. Even more reason to celebrate the sentiments expressed by the President and the principles of the First Amendment they reflect. Robert Carter understood these principles so well, and so does Eleanor Holmes Norton.

VII. WHAT IS TO BE DONE?

One who has labored in the field of campaign finance law for quite some time, starting even before the *Buckley* case and including

103. *Obama's Speech to the United Nations—Text*, N.Y. TIMES, Sept. 25, 2012, http://www.nytimes.com/2012/09/26/world/obamas-speech-to-the-united-nations. The current Supreme Court shares the President's expressed opposition to censorship and has invalidated almost all of the speech restrictions to come before it in recent years. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537 (2012); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011); Snyder v. Phelps, 131 S. Ct 1207 (2011); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010); United States v. Stevens, 130 S. Ct. 1577 (2010).

104. *See* Jonathan Turley, *Shut Up and Play Nice: How the Western World is Limiting Free Speech*, WASH. POST, Oct. 12, 2012, http://articles.washingtonpost.com/2012-10-12/opinions/35499274_1_free-speech-defeat-jihad-muslim-man.

105. *See* William Creeley, *New Anti-Bullying Initiatives Threaten Protected Speech, Infantilize College Students*, FIRE (Nov. 10, 2010), http://thefire.org/article/12454.html.

the *Citizens United* case, as well, must be thoroughly aware of the excruciatingly difficult issues of trying to reconcile campaign finance concerns with First Amendment principles and protections. My own position should be clear by now. Government limitations on contributions and expenditures made for the purpose of advocating candidates and causes in the public arena violate core First Amendment principles and should be opposed. That approach is most consistent with those principles and with the unrestrained flow of political information so vital to our democracy. Now let me suggest five fundamental reasons why this is so.

First, remember who is writing the campaign finance rules. The people in power. Do not be shocked if they write those rules in ways most guaranteed to perpetuate their power. When we, at the ACLU, confronted and challenged the brand new FECA in the *Buckley* case, we called it not "reform," but an Incumbent Protection Act that in the process cut to the heart of the First Amendment's protections of the freedoms of speech, press, association, assembly, and petition. It imposed very low overall campaign limits designed to handicap challengers and protect incumbents whose franking privilege and other perks of office did not even count against the limits. It set very low contribution limits to make it harder for challengers to rely on the help of wealthy supporters, while incumbents could easily raise money in $1,000 chunks by holding one $1,000 per plate dinner with lobbyists and special interests. It limited how much a candidate could spend of his or her own money, even though one cannot corrupt oneself, so incumbents would not have to worry about some guy named Bloomberg coming along with a healthy self-funded campaign. And to insulate themselves even more, incumbents placed a limit of $1,000 per year on independent expenditures, which would buy you one 1/8 page ad in *The New York Times*. Then, if you spent a dollar more to speak out about politics you committed a federal crime. To be sure that people would be afraid to donate funds to challengers, incumbents imposed deep disclosure and burdensome disclosure requirements on people who gave as little as $100 to a candidate, thus guaranteeing a ready-made enemies list of people who buck the incumbent.[106] The

106. The Supreme Court upheld the disclosure in the *Buckley* case, through carving out a constitutional exemption for controversial causes and parties. *See* Buckley v. Valeo, 424 U.S. 1, 60-84 (1976). In a later case, the Court applied the exemption to spare the Socialist Workers Party from having to disclose contributions or expenditures. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 102 (1982). Many States have even lower disclosure thresholds than $100, with some States having disclosure thresholds as low as zero. At the federal level,

law also tried to control those pesky "outside" issue-oriented groups like the ACLU or the Sierra Club who published box scores criticizing the voting records of the members of Congress.[107] This was all done, of course, in the name of reform and casting sunlight on the process. Finally, to be sure these rules would not come back to bite them, the incumbents gave themselves control over the members of the brand new FEC which would enforce all these new and burdensome rules and thereby monitor and regulate the raising and spending of every dollar used for political and electoral speech in federal elections. Again, all claimed to be reform. Although the Supreme Court in *Buckley* knocked out the worst of these excesses, under the parts of the law that remain it is little wonder that the incumbency rate has remained extremely high and incumbents outraise challengers by four to one under this regime.[108] Yet, even though it is claimed that these incumbents can be corrupted so easily that we have to have all these rules and regulations, we now trust them to write them fairly and even-handedly. In fact, incumbent-protective campaign finance rules are just another form of corruption, like grossly gerrymandered districts.

Second, independent speech, or "outside" speech as it is derisively called, is the Achilles Heel of campaign finance regulation. Limit that speech, and you cut to the quick of the First Amendment's core protections of the right of citizens and the groups to criticize the people in power and to urge that the rascals be thrown out. Remove the limits, as we have and as we should, and you have an end run around the contribution limits, as the recent super pacs' phenomenon proves. It is good and vital that we protect independent speech and allow it to flourish. But if we do, what is the point of continuing to limit the money that can be given to candidates? Rather, we should bring all of that money into the tent by allowing it to be contributed directly to candidates and then holding them accountable for its use. As we have seen with super pacs, limits simply will not work. People

Congress raised the disclosure threshold to $200, which is still *lower* than the $100 figure in 1976 when adjusted for inflation. And, the level is not indexed for inflation and will remain at $200 until Congress—or a court—says otherwise.

107. Section 308 of the Act, codified at 2 U.S.C. § 437(a), was unanimously invalidated by the lower court in Buckley, a tribunal which upheld every other feature of the Act. *See* Buckley v. Valeo, 519 F.2d 821, 869-78 (D.C. Cir. 1975) (en banc), *aff'd in part, rev'd in part on other grounds,* 424 U.S. 1 (1976).

108. *See* Committee Hearing on "*Free Speech and Campaign Finance Reform" Before Subcomm. On the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Bradley Smith, Adjunct Scholar, CATO Institute).

and groups who want to get their message out will find ways around them. That has been the history ever since *Buckley* allowed expenditures to be unlimited but kept the cap on contributions.

Third, keep it simple. One of the reasons that the Court in the *Citizens United* case threw out all the restrictions on expenditures by unions, non-profits and corporations was that the campaign finance law had become so complicated that you needed to hire a lawyer to figure out how to navigate the byzantine rules and regulations in order to engage in political campaign speech.[109] After all, the Citizens United non-profit group only wanted to make and distribute a movie criticizing a leading Presidential candidate. What could be more protected under the First Amendment than that? Yet, they could not do it because of the campaign finance rules and the ban on corporate expenditures. I tell my students that before *Citizens United*, you had to be like a reporter or maybe a tax accountant to answer the following simple question: can I run an ad criticizing the president of the United States? In a country with the First Amendment, the elegantly simple answer should be: of course you can, and more power to you. In a country with the FECA and the FEC and thousands of pages of rules and regulations, the answer requires a set of interrogatories asking: who, what, when, where and why. *Who* are you? A person? A group of persons? A committee? A corporation? *What* kind of corporation? If you are a non-profit corporation, do you receive any money from a business corporation or a union? *What* are you going to say? Are you going to engage in Express Advocacy? Are you going to mention the name of a candidate? *When* are you going to say it? In the sixty to thirty days leading up to an election? During an election year? *Where* are you going to say it? In what location? Through what media? Broadcasting, newspapers, billboards? The answer will affect your right to criticize the President of the United States. Finally, *Why* are you doing this? Is it for the purpose of influencing the outcome of an election? Is it for the purpose of raising an issue, not supporting a candidate? All of this, because you want to run an ad criticizing the President of the United States!

The beauty of *Citizens United* is that it swept away all of the encrusted and convoluted distinctions underlying all of these questions and came up with one united theme: any person or any group of persons can use their resources to speak out on any issue or candidate

109. *See Buckley*, 424 U.S. at 39-51.

so that the people can hear the views of all of these individuals and groups so that our democratic debate can by fully informed. In one fell swoop, the Court eliminated regulatory complexity, undermined incumbent protection, and dismantled the "vast system of censorship" that our campaign finance laws had become.[110] Of course, the case has gotten a bad rap from the outset. President Obama launched an unprecedented and unwarranted attack on the Court and its ruling in his State of the Union Address a few days later,[111] the kind I have never seen in my lifetime. For almost three years we have been subjected to a constant unrelenting barrage of media and special interest groups commentary about how evil and demonic and anti-democratic the decision was from a radical right-wing Court. To my mind, however, the extremism in the case was the government's contention that it could censor a movie or even a book about a presidential candidate because it was sponsored by a corporation, and the fact that four Justices of the Supreme Court accepted that argument that the government could control publishing and broadcasting and political speech in that fashion.

Fourth, money matters, but it does not buy elections. We have all if the proof of that during the 2012 elections. Despite a drumbeat of fear-mongering that billionaires and corporations using "dark money" were going to buy the election and steal our democracy, none of that happened. Even *The New York Times* admitted that all of the super pac spending did not achieve the results that some desired and others feared.[112] And the avalanche of corporate money that was predicted the day *Citizens United* was decided has yet to materialize. So, you can put your pitchforks away. But whatever increase in campaign spending there was did give us much more competitive elections, and a real level playing field between the two major parties and their candidates. The lack of limits works for our First Amendment and our democracy.

Fifth, consider the alternatives. Do we really want to roll back the protections of *Citizens United* and re-impose a vast system of censorship on all of the corporations, non-profits, and labor unions in

110. That's why I wrote a law review article entitled, *The First Amendment . . . . United*, in support of the Court's decision. *See generally* Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935 (2011) (providing a summary of the *Citizens United* ruling by the Supreme Court).

111. *See* Adam Liptak, *Supreme Court Gets a Rare Rebuke, In Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), http://www.nytimes.com/2010/01/29/us/politics/29scotus.html.

112. *See supra* note 36.

America to silence their collective voices during the campaigns? Do we really want to bring back a $1,000 annual limit on political speech for any individual to kill off the super pacs? And, do we give the corporate media and its rich owners a pass from these new rules? More broadly, do we really want to pass a constitutional amendment to repeal the First Amendment and give Congress the unrestrained power to regulate campaign funding in any way a Congress full of *incumbents* sees fit, so that we are allowed only as much political speech as they see fit to give us. Why would we want to install such a neo-Orwellian system?

Our campaign finance system does need serious attention. All of the unlimited independent spending does pose problems for our candidates and our political parties, which still have to rely on limited contributions and funding sources. Maybe we should ease some of these limits to help level that playing field up and assist all candidates and parties to keep pace with the other players. We certainly should not go back to the days of limits, limits, and more limits.

Here is a sixth idea for free: Trust the good judgment and common sense of the American people to get all the information, to separate the wheat from the chaff, and to make-up their own minds. That approach is the only one in keeping with the letter and the spirit of the First Amendment.

Finally, how do these principles and precepts translate into proper reform and restructuring of our campaign finance laws? A three-fold First Amendment-friendly response should be considered.[113]

A. Limits

First, there should be no limits on contributions and expenditures used by individuals or groups in order to advocate candidates or causes in the public arena. This approach reflects the principles that limits on political funding are limits on political speech and will directly restrain and suppress speech at the heart of the First Amendment. Such limits benefit the political status quo, entrench the powers-that-be, and privilege those political speakers whose speech are not subject to the limits, most notably, the organized news media.

113. I also made these suggestions on the Corporate Political Activity Law Blog. *See* Joel Gora, *Guest Blogger Series: Five Ideas for Campaign Finance Reform*, CORPORATE POLITICAL ACTIVITY LAW BLOG (Oct. 3, 2012), http://www.corporatepoliticalactivitylaw.com/index.php/2012/10/guest-blogger-series-five-ideas-for-campaign-finance-reform-ii/.

The Court has rejected expenditure limits, but upheld contribution limits.[114] Contribution limits should be reconsidered, either as a constitutional matter or as a legislative policy determination. Ever since the Court in *Buckley* mistakenly upheld limits on the amount of contributions that individuals could give to candidates, we have seen constant and understandable efforts to get around those limits: greater reliance on Political Action Committees (an incumbents-favoring device), use of soft money by parties and independent groups and individuals, and, highlighted in the most recent electoral season, independent spending "super pacs" and non-profits. So, much of this activity is attributable to the limits on direct contributions to candidates. People and groups are going to try to use their resources to get their message out, especially in an election year, whether by direct or independent support of the candidates and causes they espouse.

In this regard, strong political funding may have been a pivotal factor in securing the passage of same-sex marriage equality in my own home state of New York. As it became well-known, key politicians who supported same-sex marriage were given generous campaign finance support for taking such a stand.[115] Few claimed that this phenomenon reflected "corruption," and it resulted in a major legislative victory for an important minority group of people. By the same token, though much more ironically, a major push for state-wide public funding of political campaigns is currently being lavishly financed by, among others, an internet multi-millionaire whose group will be giving campaign finance support in an effort to persuade key Republican state senators to vote for public funding of political campaigns.[116] This is the very same kind of campaign finance stratagem which was successful with marriage equality. Again, there have been few complaints of "corruption" from the usual suspects. Perhaps "big money" in politics does not seem so bad if it is supporting political outcomes

114. Buckley v. Valeo, 424 U.S. 1 (1976).

115. *See* The Associated Press, *Gay-Rights Groups Give Cuomo $60,000 As He Pushed Marriage Bill, Records Show*, N.Y. TIMES, July 15, 2011, http://www.nytimes.com/2011/07/16/nyregion/gay-rights-group-donated-60000-to-cuomo-campaign.html; Editorial, *Campaign Speech and Gay Marriage*, WALL ST. J., June 29, 2011, http://online.wsj.com/article/SB10001424052702304447804576413914228779664.html; Frank Bruni, *The GOP'S Gay Trajectory,* N.Y. TIMES, June 9, 2012, http://www.nytimes.com/2012/06/10/opinion/sunday/the-gops-gay-trajectory.html?pagewanted=all.

116. *See* Laura M. Holson, *A Powerful Combination,* N.Y. TIMES, May 6, 2012, http://www.nytimes.com/2012/05/06/fashion/chris-hughes-and-sean-eldridge-are-the-new-power-brokers.html?pagewanted=all&_r=0; Thomas Kaplan, *Groups Push To Highlight Campaign Finance Reform,* N.Y. TIMES, Oct. 21, 2012, http://www.nytimes.com/2012/10/22/nyregion/groups-push-to-highlight-campaign-finance-reform-in-new-york.html.

you approve. To my mind, campaigns like this are good examples of free speech and democracy in action and a strong argument for raising or eliminating contribution limits.

Party contribution limits should be raised or eliminated as well. We should resist efforts to weaken the funding of our political parties. Strong parties are essential to a strong democracy and a balance of power in governance. In sum, let the people decide for themselves—individually and in groups—how much speech is necessary and proper in an election campaign and not cede to government the power to control political speech.

B. Disclosure

The benefits and value of disclosure to the electorate are overrated and the harm to freedom of association and political privacy from disclosure underappreciated.[117] To be sure, some kinds of disclosure can be an antidote to governance concerns, which may flow from campaign finance patterns, by allowing people to decide who has too much access or influence to politicians or office holders. But make it what we might call today "smart" disclosure: focus only on large contributions to major party candidates. Disclosure any broader or deeper than that (e.g., on minor parties, on issue organizations, on small contributors even to major party candidates) needlessly sacrifices cherished protections for the rights of political association, political privacy and political anonymity. It is outrageous that at the federal level, the public disclosure threshold—$200.01—the amount that will get your name, address, employer and employer address on the FEC website and open to surveillance and scrutiny by everyone in the world—is much lower, in 1976 dollars—than the $100.01 threshold upheld by the Supreme Court in *Buckley*, despite the fact that it was "indeed, low."[118] Other than satisfying the political prurient interests of campaign finance control groups searching for "bundled" $200 contributions from employees of the same company, for example, little

117. *See* Dick Carpenter et al., *Campaign Finance Disclosure Has Costs*, ROLL CALL (Nov. 26, 2012), http://www.rollcall.com/news/carpenter_primo_tendetnik_and_ho_campaign_finance_disclosure_has_costs-219370-1.html; Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2168343; Symposium, *Disclosure, Anonymity and the First Amendment*, 27 J. L. AND P. NO. 4 (2012).

118. Buckley v. Valeo, 424 U.S. 1, 83 (1976).

purpose in preventing serious corruption is served by these low limits and a great deal of harm to political privacy is visited.[119]

Just as the depth of disclosure should be "smarter" than that, the breadth of disclosure should be limited to groups that engage in express advocacy of electoral outcomes. Any broader scope of disclosure, encompassing issue advocacy, poses a serious threat to such advocacy and should be resisted. One of the reasons the ACLU got into the campaign finance debate in the first place was to protect the right of itself and all other non-profits like the NAACP and other similar issue groups to criticize politicians and public officials without having to disclose the identities of their supporters in order to do so. That should be the proper approach now as well.[120]

C. Public Financing

Finally, address the imbalances and disparities that might result from no limits on giving or spending by significant public funding to expand political opportunity, without restricting political speech. The public funding should be generous and equally available to all qualified candidates, not just to those representing the two major parties. And that public funding should not be limits-based, but rather should provide "floors, without ceilings," platforms to facilitate speech, rather than roofs to restrain it. To impose spending or similar limits as

119. The $99.00 disclosure threshold in my home state of New York is also an outrageously low figure. Give a penny more than that to a candidate or committee in a year and your name, address and other identifying information have to be supplied. The amount is not even adjusted or varied or indexed with the level of office in the way that certain contribution limits are. Whatever claimed value there is in knowing who gave that paltry sum to a politician is greatly outweighed by the harm to freedom of association and political privacy. Even the most ardent campaign finance reformers believe that low-level disclosure thresholds like that do much more harm than good. In many other States, the disclosure threshold is even lower, sacrificing associational privacy and political anonymity for an almost prurient desire to disclose contributions, thereby violating the spirit, if not the letter, of the protections safeguarded in *NAACP v. Alabama*. *See generally* NAACP v. Alabama, 357 U.S. 449 (1958) (prohibiting Alabama from scrutinizing the membership list of the NAACP because of the right of the members to associate freely).

120. Unfortunately, the Supreme Court recently has been much too receptive to the government's claims, touting the benefits of disclosure and minimizing its burdens. The one exception, Justice Clarence Thomas, has been the sole dissenter, insisting on the need for strict scrutiny of all political disclosure requirements in order to protect political anonymity and associational privacy. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 979-82 (2010) (Thomas, J., dissenting in part); Doe v. Reed, 130 S. Ct. 2811, 2837-47 (2010) (Thomas, J., dissenting); McConnell v. FEC, 540 U.S. 93, 275-77 (2003) (Thomas, J., concurring in part and dissenting in part); McIntyre v. Ohio Elections Comm'n., 514 U.S. 334, 358-71 (1995) (Thomas, J., concurring). At the very least, there should be legislative efforts to raise disclosure thresholds to more realistic and less invasive levels.

the condition of receiving public benefits would be a back door way to restrain political speech.

Unlike the late, great liberal Senator Eugene McCarthy, who compared public financing of politics with the American Revolutionists' asking King George to fund their revolution, and unlike many contemporary politicians who characterize public financing as "food stamps for politicians," I think public funding and subsidies for politics can serve positive First Amendment purposes. But not if the scheme is limits-based as are many, if not most, of the public funding schemes extant in America today. You can summarize the most effective argument against limits-based public financing in just two words: Barack Obama. In 2008, candidate Obama had no intention of letting his reputation as a campaign finance reformer encumber him with the spending limits that went with accepting presidential public financing, even though they were almost $100,000,000. So he rejected the "clean" public money, raised and spent more than $750,000,000 in private funds—becoming the biggest spender in American political history—and won an historic presidential election, and in 2012 he exceeded that level and may have become our first political Billion Dollar Man.[121]

That's why we need to rethink the limits-based model of public financing, rather than replicate it at the national level. Models such as New York City's public financing program or others like it, despite being much ballyhooed in the press, have not been sufficiently successful in either enhancing electoral competition or deterring official corruption as to justify automatic implementation without further review.[122] In addition, in its recent decision in the Arizona public funding case,[123] the Supreme Court, for the first time, entertained serious constitutional concerns about some of the more popular campaign finance mechanisms—such as "trigger" matches for high spending opponents or independent groups—and struck them down. Arrangements should be developed which provide floors to facilitate electoral speech not ceilings to limit it.

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121. In fact, the President raised about the same amount as in 2008, roughly $750 million, but his party and allies took his cause over the $1 billion mark. *See supra* note 37.

122. SEE Peter J. Wallison & Joel M. Gora, Better Parties, Better Government: A Realistic Program for Campaign Finance Reform 62-64 (2009).

123. *See also* Joel M. Gora, *Don't Feed the Alligators: Government Funding of Political Speech and the Unyielding Vigilance of the First Amendment*, 2010-11 CATO SUP. CT. REV. 81 (2011). *See generally* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) (finding the Arizona law requiring a matching of public funds to be unconstitutional).

CONCLUSION

Our elections would be more free and more fair if our campaign finance system embodied the wisdom of those three principles: (1) no limits; (2) smart disclosure; and (3) "floors without ceilings" public funding. Applying these principles would lead to the following five proposals. First, contribution limits should be as high as possible, if not eliminated completely, and certainly not reduced. Second, public funding needs to be seriously rethought, be as simple and straightforward as possible, and not be limits-based. Third, disclosure requirements should be as focused and smart as possible. Fourth, likewise, they should be limited to express political advocacy expenditures. Finally, all of this should be guided by the realization that the best election reform provision ever enacted is the First Amendment's injunction that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The more we follow its letter and spirit, the better off we will be.