

STEPHEN COLBERT IS RIGHT TO LAMPOON OUR CAMPAIGN FINANCE SYSTEM (AND SO CAN YOU!)

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Thank you very much for having me. I'm probably more excited than you are to hear what I have to say because I'm not exactly sure what it'll be. I've been on Obamacare duty 24/7 for I don't know how long and it's hard to switch gears. This is my second time in your fair state. The last time was in 2001 when I was a summer associate at Dorsey & Whitney's New York office, and they brought us here for a long weekend. I got to meet Walter Mondale, who is still a senior counsel. I asked him what he thought of the Bush tax-cut plan—people were kicking me under the table—and, for the record, he was against it.

I don't know how many of you are fans of Stephen Colbert or Jon Stewart. I like the former, not the latter, because Stewart is all about his political agenda, while Colbert, though similar in his political views, is more of a showman. But I'm probably biased because Colbert had me on his show and Stewart hasn't.¹ In any case, this dynamic duo, more than any media pundits—real or fake—has in the last few months effectively shown the unworkability, the instability, and the farcical nature of our campaign finance regulations. They don't cover the background legal analysis and they imply that *Citizens United* caused the current mess, but as entertainers rather than legal scholars, they correctly showcase the system's absurdities.

While my diagnosis of the underlying problems—and thus my prescription for future reform—differs from Stephen Colbert, I agree that

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1. *The Colbert Report* (Comedy Central July 8, 2010), <http://www.colbertnation.com/the-colbert-report-videos/340923/july-08-2010/automatics-for-the-people---ilya-shapiro---jackie-hilly>.

our campaign finance regime leads to perverse and often comical results. That is, I think that *Citizens United* was correctly decided because political speech should be free regardless of the nature of the speaker: people don't lose their rights when they get together and associate, whether it be in unions, non-profit advocacy groups, private clubs, for-profit corporations, or any other form.² But I also think the ruling does create the odd situation whereby independent political speech is unbridled and unrestricted for the most part while candidates and parties are heavily restricted and heavily regulated. If you look at who really gained for practical purposes from *Citizens United*, it's non-profits, advocacy groups, and independent speakers of various kinds, be it the Cato Institute, the Sierra Club, the ACLU, the NRA, small business associations, or trade groups. The losers, meanwhile, are political parties and candidates because they, in relative terms, now have less money and less control over their message. That's not necessarily a bad thing—parties aren't privileged under the Constitution—but it does create a weird dynamic.

There was a satirical piece in *The Atlantic* by one of Obama's former speechwriters, John Lovett—not to be confused with Jon Lovitz; that would have been a completely different article—that presents a dystopian future where Super PACs are all-powerful, and parties exist merely to collect signatures and get candidates (themselves pawns) on the ballot.³ No money is going to candidates because it's all just two national Super PACs running everything: Karl Rove's TruePAC against George Soros's (or whoever's) GoodPAC. Every once in a while, as in 1984, they swap positions completely—"TruePAC has always been at war with outsourcing"—the way that the real parties have switched on various issues historically. There are no real political campaigns any more, just constant demonizing of *the other* for no reason anyone recollects. This scenario takes the current circumstances to the extreme: we have these big groups—largely unregulated because political speech should be unregulated—that act as "independent" proxies for the candidates and parties, often doing the dirtiest attack ads.

It creates a weird system; what we have now with strict limits on contributions to candidates but not on their expenditures—or on independent groups' contributions and expenditures—isn't stable. There's all this money being spent on enforcement but we can't really enforce the laws because the FEC splits 3-3 even when it manages to have a quorum. You couldn't design a more dysfunctional system.

2. Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. MARSHALL L. REV. 701, 707–08 (2011).

3. Jon Lovett, *PACs Americana*, THE ATLANTIC (Feb. 2, 2012), <http://www.theatlantic.com/politics/archive/2012/02/pacs-americana/252379/>.

At a certain point, there are going to be enough Democratic incumbents who say, “You know, I really want to control my message better” or “My money is going to these groups with whom I can’t coordinate.” These politicians—not the ultra-hardcore “campaign finance is my primary issue” sort of people (who only exist within the Beltway; the rest of America cares about real issues, be they economic, social, or foreign policy)—are going to say “enough is enough.” We have to liberalize the campaign finance regime and get rid of limits on, or have very high caps for, contributions to candidates—individual contributions, not corporate—and then maybe have disclosures for those who donate more than fifty thousand, a hundred thousand, or a million dollars, whatever the political compromise is. So then the big boys who want to be real players in the political market will have to put their reputations on the line, but not the average person donating a few hundred bucks and being exposed to boycotts and vigilantes.⁴ That might be a political compromise that survives constitutional scrutiny and for which there might be broad support; everyone but the most extreme goo-goos—the “good government” zealots—would back it.

But let me step back. *Citizens United* is both more and less important than you think to this whole analysis. It’s more important because, quite beyond whatever effect it has on the amount of business or union money in politics, it has revealed the instability and unworkability of the system as I have described it. It’s less important because it doesn’t stand for half of what many people think it does. Take, for example, President Obama’s famous statement at the State of the Union, that the case “reversed a century of law that I believe will open the floodgates of special interests—including foreign corporations—to spend without limit in our elections.”⁵ In that sentence, this former constitutional law professor stated four errors of constitutional law.

First, *Citizens United* didn’t overturn a century of law; it overturned twenty years at most. Obama was referring to the Tillman Act of 1907, which prohibited direct corporate donations to candidates and parties. *Citizens United* didn’t touch that issue. Instead, the overturned precedent was *Austin v. Michigan Chamber of Commerce*, a 1990 decision that, for the first time ever or since, sanctioned a regulation of political speech based on something other than corruption or the appearance thereof.⁶

4. *Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010) (Disclosure “effectively become[s] a blueprint for harassment and intimidation.”).

5. Barack Obama, President of the U.S., *Remarks by the President in State of the Union Address* (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

6. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655 (1990). See also Ilya Shapiro & Nicholas Mosvick, *Stare Decisis After Citizens United: When Can Courts Overturn Precedent*, 16 NEXUS: CHAPMAN’S JOURNAL OF LAW & POLICY 121, 125–26 (2011) (critiquing the president’s factual assertion).

Second, as far as opening the floodgates to special interests goes, it depends on how you define those terms. There isn't much indication so far in this election cycle that there's a change in kind, a geometric increase in spending by corporations or even independent advocacy groups (though there may be by unions). There might be an increase but it doesn't seem to be a revolutionary change in how politics is practiced. There are certainly now people running Super PACs who would otherwise be supporting candidates in other ways—as bundlers or directors of regular PACs—but Super PACs aren't a function of *Citizens United* (as I'll get to shortly). It's just unclear that any “floodgates” have been opened or what these special interests are that didn't exist before.

Third, the rights of foreigners—corporate or natural persons—is another issue about which *Citizens United* said nothing. Indeed, just this year, the Supreme Court summarily upheld the restrictions on spending by foreign citizens in U.S. political campaigns.⁷

Fourth and finally, there's the charge that spending on elections now has no limits. While that might be true in the context of independent political speech, it's certainly not for candidates and parties—whose spending was not at issue in *Citizens United*—nor for donors to candidates and parties. *Citizens United* did *not* rule on either individual or corporate contributions to candidates. What *Citizens United* did is to remove the limits on independent associative expenditures.

These are some very basic points that even people who agree with *Citizens United* often misperceive, not to mention political beat reporters writing about this stuff.

Indeed, what was probably more important than *Citizens United* was *SpeechNow.org*, decided two months later in the D.C. Circuit.⁸ That decision removed the limits on individual donations to independent expenditure groups, which led to the creation of the so-called Super PACs. Previously, we had plain-old PACs—political action committees—defined as any group receiving or spending \$1,000 or more for influencing elections, to which individuals could only donate \$5,000 per year. Now all of a sudden you still have to register these groups but there are no limits on how much people can donate to them. So *SpeechNow.org* is a kind of corollary to *Citizens United*. *Citizens United* concerned the use of corporate and union and other associative general treasury funds for political speech, while *SpeechNow.org* concerned the ability of people to get together and pool their money to speak in the same way that one very rich person could already do.

7. Bluman v. FEC, 800 F. Supp. 2d 281, 282–283 (D. D.C. 2011) *aff'd*, 132 S. Ct. 1087 (2012).

8. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

The most important thing about *Citizens United* was the Supreme Court's definitive reiteration that the only acceptable rationale for limiting speech and enacting various other campaign finance regulations was corruption and the appearance of corruption.⁹ By overruling *Austin*, *Citizens United* made it clear that equalizing voices is not a constitutionally adequate justification for limiting independent spending.¹⁰ And that means that courts will eventually be taking closer looks at restrictions on individual donations that are made out in the open and in the context of many other donations—such that there can't really be an appearance of corruption.

Now, curiously, we have been hearing a lot about these Super PACs, which are the political-speech vehicles that generated the Comedy Central satire. Because Super PACs are supposedly so big and awful, Stephen Colbert created the Colbert Super PAC, alternatively known as “Americans for a Better Tomorrow, Tomorrow.”¹¹ Then, when he decided to explore a run for “President of the United States of South Carolina,” Colbert could no longer run the Super PAC because otherwise he would be illegally coordinating with himself.¹² Super PACs can speak independently but they can't “coordinate” with any campaign, so candidate Colbert had to transfer control of Colbert Super PAC to someone else. That someone else turned out to be Jon Stewart. There was thus this hilarious skit where Colbert brought out Trevor Potter—one of the top election lawyers in the country and John McCain's counsel in 2008—to explain the different rules and preside over the transfer.¹³ The transfer document was this little one-page thing. Colbert and Stewart both signed it and then they held hands as some special effects came on with a green stream of dollar signs flowing from Colbert to Stewart. Stewart then yells something like, “I have the power!”¹⁴ Very dramatic.

9. Cf. *Davis v. FEC*, 554 U.S. 724, 741 (2008) (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985)).

10. *Citizens United v. Federal Election Commission*, 130 S. Ct. 909, 913 (2010).

11. *The Colbert Report: Corp Constituency*, Comedy Central (May 11, 2011), available at http://www.colbertnation.com/the-colbert-report-videos/386085/may-11-2011/corp-constituency?xrs=share_copy (Colbert establishes a Super PAC to exploit a legal loophole that lets him talk about his campaign during his show.). See also www.colbertsuperpac.com.

12. *The Colbert Report: Colbert Super PAC – Coordination Problem*, Comedy Central (Jan. 12, 2012), available at <http://www.colbertnation.com/the-colbert-report-videos/405888/january-12-2012/indecision-2012—colbert-super-pac—coordination-problem> (Colbert realizes that candidates can't coordinate with Super PACs, so he can't legally remain active in his Super PAC's management.).

13. *The Colbert Report: Colbert Super PAC – Coordination Resolution with Jon Stewart*, Comedy Central (Jan. 12, 2012), available at <http://www.colbertnation.com/the-colbert-report-videos/405889/january-12-2012/indecision-2012—colbert-super-pac—coordination-resolution-with-jon-stewart> (Trevor Potter explains that the law permits Jon Stewart to oversee the Super PAC notwithstanding his business relationship with Colbert. Potter presides over the transfer of control, which consists of both comedians signing a single-page double-spaced form.).

14. *Id.*

But also very funny, because obviously the only thing that has changed is that instead of Colbert being the figurehead for a Super PAC and its funders, Stewart is the figurehead—and Stewart can keep on as employees the very same people who had been working for Colbert. Even though Colbert and Stewart are close friends and colleagues, regularly discuss their mutual business and entertainment interests, and employ the same people, they're not *coordinating* for purposes of campaign finance law—as long as they don't discuss Stephen's campaign. (For this satire, they even invented a farcical business called "From Schmear to Eternity," a combination bagel shop and travel agency which takes you to places that don't have bagels but give you a bag of bagels as you board the plane.)¹⁵ Moreover, Colbert wasn't allowed to discuss his political plans with Stewart but could continue saying whatever he wanted on his national TV show; those statements, even if Stephen knows that Jon will hear them, don't constitute coordination. Hilarious! These Super PAC rules are so ridiculous, right?

Just remember that the reason for all these seemingly nonsensical regulations is that the law restricts donations to candidates and parties but not to independent groups. *Citizens United* said that the government can't limit associative spending on independent political speech and *SpeechNow.org* then logically struck down limits on individual PAC donations, but one key legal rule that came even before McCain-Feingold still stands: the government can severely limit the amount an individual can donate to a candidate, as opposed to an independent political advocacy group or PAC.

I'll get to the history of that rule and why I think it's untenable in a moment, but first I should note that even if there's significantly more independent spending in this year's campaign, blaming Super PACs (and thus *Citizens United* or *SpeechNow.org*) for this phenomenon is a bit of a stretch. At least given what we've seen in the Republican primaries, it's not corporate spending or even masses of people pooling their money that has been the story, but good ol' billionaires. Think about it: there's been all this hubbub about Rick Santorum and Newt Gingrich and Ron Paul each having Super PACs to attack Mitt Romney, but almost all the money from these respective Super PACs came from one wealthy individual: Foster Friess for Santorum, Sheldon Adelson for Gingrich, and Peter Thiel for Paul. These guys didn't need Super PACs to do this stuff, though they formed them so they could have other people run them and solicit donations. They could've been doing this anyway, even without *SpeechNow.org* (let alone *Citizens United*). Again, it's unclear how this supposed legal revolution is really affecting things, even to the extent that there is more money involved in this election cycle.

15. *Id.*

Moving past President Obama's four errors and related misstatements and misapprehensions about *Citizens United*, there's a more serious critique of the case that needs to be addressed. Striking down the law, the argument goes, is judicial activism, a sort of hubris that disrespects stare decisis and all that's good and pure and true.

Look, I've written an article that I'll commend to you, "Stare Decisis after *Citizens United*: When Should Courts Overturn Precedent," coauthored by my former legal associate Nick Mosvick, who happens to be a University of Minnesota alumnus.¹⁶ Our point there is that, much less than disrespecting stare decisis, *Citizens United* vindicates it. That is, stare decisis isn't a forever-binding principle that prohibits courts from ever overturning precedent, but rather a way to ensure that courts factor in reliance interests. As the Supreme Court put it, stare decisis "is neither an inexorable command nor a mechanical formula of adherence to the latest decision."¹⁷ Think about it: if stare decisis meant what those who criticize *Citizens United* want it to mean, then *Plessy v. Ferguson* could never have yielded to *Brown v. Board of Education* and *Bowers v. Hardwick* could have never have yielded to *Lawrence v. Texas*. Those earlier decisions—upholding state laws regarding racial segregation and homosexual activity, respectively—would still be good law.

Stare decisis is instead a prudential—not constitutional or ideological—doctrine that has evolved as part of jurisprudential practice, one that encourages deference to past decisions to promote predictable and consistent development of the law, cultivate reliance on judicial decisions, and contribute to the integrity of the judicial process. Stare decisis says that reliance interests sometimes dictate that an incorrect legal ruling be maintained, that the social cost of fixing a bad decision may be greater than the benefit from fixing that decision. The Court will, after all, get the law wrong on occasion, but it expresses no commitment to justice or its own integrity if it rigidly refuses to retreat in the face of persuasive logic. That would be a sign of closed-mindedness, not wise jurisprudence of legal fidelity. So the question is, how do we apply stare decisis? When to overturn old precedent and when to let it be?

The Supreme Court has identified a set of factors relevant to stare decisis analysis: (1) the area of law that's at issue; (2) workability; (3) antiquity; and, as I've stressed, (4) reliance interests. Let's apply those, in turn, to *Citizens United*.

First, the Court had little incentive to sustain the kind of "leveling the playing field" justifications for political-speech restrictions that were put in play by *Austin v. Michigan Chamber of Commerce* and reinforced by

16. Shapiro & Mosvick, *supra* note 6, at 125-26.

17. *Payne v. Tennessee*, 510 U.S. 808, 828 (1991).

*McConnell v. FEC*¹⁸ because this was a constitutional (First Amendment) issue. While stare decisis is strong with respect to common law cases or state statutes—judicial rulings in these areas can be reversed by an act of the legislature—courts cannot give as much deference to constitutional decisions because those are much harder to change non-judicially; you need a constitutional amendment. So when *Citizens United* came before the Court and questioned the Court’s interpretation of the First Amendment, the strength of stare decisis was already at its lowest ebb.

Second, with respect to workability, the system wasn’t doing well. It was (hypothetically) banning books. It was hard for the FEC to implement and a lot turned on subjective interpretations of various magic words like “electioneering communications.” It wasn’t clear to major actors what the real rules of the game were, and all of these cases from *McConnell* to *Wisconsin Right to Life*¹⁹ to *FEC v. Davis*²⁰ to *Citizens United* showed that there was a natural progression undoing the unworkable aspects of the regime that McCain-Feingold had put in.

Third, antiquity. In *Austin v. Michigan Chamber of Commerce*—which, again, was decided in 1990, not 1900—the Court recognized a unique state interest in guarding against corporations’ unduly influencing elections by making election-related expenditures from their general accounts (rather than PACs or other segregated funds). It upheld a law under an equality rationale to eliminate so-called distortions caused by corporate spending. That’s the first and only time that the Court endorsed something other than a “corruption or appearance of corruption rationale,” and it wasn’t even clear if that’s what they were doing because *Austin* was facially inconsistent with existing case law. That is, the Court had resolved in both *Buckley v. Valeo* and in *First National Bank v. Bellotti* that not only no compelling state interest existed in limiting independent corporate expenditures, but also that the government could not limit any persons—defined to include corporations (see another article of mine, “So What if Corporations Aren’t People?”²¹)—from making independent expenditures.²²

While *Austin* would eventually be reinforced by *McConnell*, the years between *McConnell* and *Citizens United* saw a series of cases that eroded *Austin*’s holding with respect to corporate political speech. In *Wisconsin Right to Life*, the Court held that the state interest in addressing the coercive and distortive effect of immense aggregations of wealth could not be

18. *McConnell v. FEC*, 540 U.S. 93 (2003).

19. *FEC v. Wisconsin Right To Life (WRTL II)*, 551 U.S. 449 (2007).

20. *Davis v. FEC*, 554 U.S. 724 (2008).

21. Shapiro & McCarthy, *supra* note 2, at 701.

22. *Buckley v. Valeo*, 424 U.S. 1 (1976); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

extended to “genuine” issue ads.²³ The following year, in *Davis*, the Court struck down the so-called Millionaire’s Amendment to McCain-Feingold, which relaxed campaign finance restrictions for opponents of self-funded candidates, because it burdened those “millionaire” candidates’ First Amendment right to spend money on political speech.²⁴ *Davis* didn’t grapple with *Austin* directly, but it did revitalize *Buckley*’s holding that a restriction on *expenditures* wasn’t justified by the government’s concern in preventing corruption. It also rejected the government’s argument that the expenditure cap should be upheld on the ground that it equalizes the relative resources of the candidates.²⁵ *Davis* thus reinvigorated *Buckley*’s point that the government’s ability to restrict the speech of some to enhance the relative voice of others—“leveling the playing field”—is incompatible with the First Amendment. And so, the legal rule overturned by *Citizens United* didn’t possess the force of antiquity. Indeed, even the precedent that had been in place for twenty years had slowly been eroded in subsequent cases. It was *Austin* itself that turned out to be a departure from precedent.

That conclusion segues nicely into the final factor: reliance interests. Chief Justice Roberts said it best in his *Citizens United* concurrence, which focused on stare decisis: “[W]hen fidelity to any particular precedent does more to damage this constitutional ideal [the rule of law] than to advance it, we must be more willing to depart from that precedent.”²⁶ “Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law’s coherence and curtail the precedent’s disruptive effects.”²⁷ Of course, in *Citizens United*, it wasn’t even clear there was any precedent or stare decisis value to rely upon. During re-argument, then-Solicitor General Elena Kagan abandoned the equalizing-speech claim—the distortion by corporate voices issue—that had been *Austin*’s rationale, in favor of an argument regarding shareholder interests and a different kind of quid pro quo corruption. How is a court supposed to apply stare decisis or credit reliance on an interest that the government defending it has abandoned? The government’s new argument may or may not be meritorious, but there’s quite literally no reliance value here. As the Cato Institute pointed out in our second *Citizens United* brief, “no one is relying on having less freedom of speech.”²⁸

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So what does all this mean for the brave new world after *Citizens*

23. *WRTL II*, 551 U.S. at 471.

24. *Davis*, 554 U.S. at 738.

25. *Id.* at 741–742.

26. *Citizens United*, 130 S. Ct. at 921 (2010) (Roberts, C.J., concurring).

27. *Id.* at 921.

28. Supplemental Brief for Amicus Curiae Cato Inst. in Support of Appellant at 17, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), 2009 WL 2365223, at *17.

United and *SpeechNow.org*? Well, the big question presented here is whether the Court gave us a workable rule that enables participants in the political market to enter and partake in the electoral process in an easy and fair manner.

We have the Super PAC, which is based on the incentives coming from the state of the law as I have described it and as Colbert and Stewart satirized. How much of a problem is that? Why do we care that people are able to spend independently? After all, without any further legislation, we can already look up the corporate disclosures of a Super PAC and the groups that fund it to find out the president, treasurer, and other officers. So it's not clear what the problem is. If the problem is insufficient disclosure rules, let's have a debate about how to set them properly, rather than trying to restrict political speech. I don't know what else the problem could be, because it seems hard to argue that independent political speech shouldn't be protected.

No, the real culprit in our ridiculous situation is the pretense that policing *coordination* between candidates and those who run their Super PACs—even if they're long-time buddies or business partners²⁹—will eliminate the appearance of corruption that would otherwise plague the electoral system. So what has caused this pretense that leads to the farce that undermines the respect for the law? Well, it's not the First Amendment or the Supreme Court interpreting the First Amendment to loosen speech restrictions in *Citizens United* or any other case. The real culprit is the contribution/expenditure distinction imposed by *Buckley*—those caps on donations to candidates.

When Congress enacted the Federal Election Campaign Act (FECA) in the 1970s, it attempted to fashion a kind of a packaged framework of regulations that would remove the need for big money in at least one area of federal elections.³⁰ To accomplish that, Congress tried to control both the supply and demand sides of campaign funding. First, it prohibited individuals from contributing more than \$1,000 to any candidate per campaign. Second, it forbade individuals from spending more than \$1,000 per year “relative to clearly identified candidates” while also curtailing a candidate's use of his personal resources and limiting his overall campaign expenditures. Third, it offered candidates public funding equal to the expenditure cap at least in regards to the presidential race. The legislation's success thus depended on how each component interacted with the other; the pre-packaged deal would balance the different interests, resulting in

29. The Super PAC supporting Mitt Romney is run by his former lawyer, for example. See *The Colbert Report – Coordination Problem*, *supra* note 12.

30. Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3, as amended by Federal Election Campaign Act Amendments of 1974, Pub. L., No. 93-443, 88 Stat. 424, now codified at 2 U.S.C. § 431 et seq. (2006).

what Congress judged to be the fairest, most-open system.

By limiting candidates' spending, FECA made the accrual of campaign funds more burdensome but offered, at least with respect to presidential elections, an alternative source of funding. It also arranged the funding in a way designed to purge elections of the supposedly corrupting influence of big money and put impecunious candidates on equal footing. That was the goal of this finely balanced scheme.

In *Buckley*, the Court casually knocked a couple of FECA's pillars, leaving the remaining structure of campaign finance regulation to collapse on itself. It ruled that expenditure caps have to further a compelling interest and must be narrowly tailored to achieve that interest—which is insurmountable because it also said that preventing corruption and the appearance thereof didn't justify the caps, and that's the only governmental interest the Court has ever recognized as compelling enough to overcome free speech rights.³¹ At the same time, the Court severely handicapped the effectiveness of, and incentives for candidates to participate in, public funding programs.³² And even as candidates and independent groups can spend unlimited amounts, *Buckley* permitted contribution limits to stand.³³ The result of *Buckley*'s piecemeal approach, knocking out some but not all of FECA's global reform, was to compound the system's bugs.

By refusing to strike down FECA altogether, just excising the expenditure limits, the Court produced a system where candidates face an unlimited demand for campaign funds but a tapered supply. They have to spend all their time fundraising, which is another complaint people have about our current system, right? Candidates spend all their time fundraising instead of legislating. Some would say that's a feature not a bug—because, of course, the government that governs least, governs best—but nevertheless these unbalanced rules have inflated both the value of individual campaign contributions and the priority of fundraising efforts. Moreover, the regulations have gradually pushed the flow of money away from candidates and parties toward advocacy groups unaccountable to the

31. *Buckley v. Valeo*, 424 U.S. 1, 46 (1976).

32. *Id.* at 90–102. The Court's rulings in *Davis v. FEC*, 554 U.S. 724 (2008) (government can't penalize a privately funded candidate by relaxing opponent's contribution limits or restrictions on party coordination), and *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806 (2011) (nor can the government issue a candidate's opponent matching funds once spending by candidate *or by independent advocates supporting him* surpasses a certain threshold), further undermined public funding schemes. The Court is simply unwilling to accept the conditioning of an individual's free speech rights on the scope of another individual's exercise of his. *See, e.g.*, Joel M. Gora, *Don't Feed the Alligators: Government Funding of Political Speech and the Unyielding Vigilance of the First Amendment*, 2010–2011 CATO SUP. CT. REV. 81 (2011) (First Amendment compelled rejection of the "trigger" provision of the Arizona Clean Elections law, which gave participating candidates matching funds whenever a nonparticipating candidate or independent groups supporting them spent more than the public funding allotment).

33. *Buckley*, 424 U.S. at 229.

public. Ironically, this dynamic undermines the main goals of campaign finance reformers: politicians' accountability to voters and open government.

The *Buckley* Court recognized that its actions would irreparably undercut reform efforts—the justices weren't naïve—but sustained the legislation nonetheless. Chief Justice Burger admitted that the Court's decision did “violence to the intent of Congress” and questioned whether the remaining “residue” left a workable program.³⁴ Interestingly, this point made its way into the Obamacare oral arguments during the “severability” discussion on the third day of hearings.

It was fascinating that during that part of the arguments there was no discussion of the *Alaska Airlines*, or the PCAOB case from two terms ago, or any of the other leading severability precedents that had been cited throughout the briefs.³⁵ Instead there was this discussion of *Buckley* that came about after Justice Kagan, for example, asked “is half a loaf better than no loaf?”; wouldn't Congress have wanted at least some of the legislation to remain even if the Court were to find part of it unconstitutional?³⁶ Paul Clement, the most brilliant lawyer in America, responded that “sometimes half a loaf is worse” and cited *Buckley* because for nearly four decades Congress has been trying to fix the system given that the Court struck down FECA's ban on expenditures but left the ban on contributions in place.³⁷ Instead, we have this dog's breakfast of campaign finance legislation and a lurching series of Supreme Court decisions that is approaching but not quite yet a reversal of *Buckley* and *McConnell*. And *McConnell* itself is impossible to understand because you have these multiple concurrences and dissents—eight separate opinions by six different justices. It's just bizarre, and certainly no way to run a constitutional republic.

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We see, therefore, that campaign regulation, trying to manage the flow of political speech, is a graveyard of well-intentioned plans. These reformist ideals always go awry in practice because political money is a moving target that, like water, has to go somewhere. If it's not to candidates, it'll be to parties, and if not there, then to independent groups. If it's not to PACs, it will be Super PACs or unincorporated individuals acting together. Because

34. *Id.* at 235–236 (Burger, C.J. concurring in part and dissenting in part).

35. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010). *See also* *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Champlin Refining Co. v. Corp. Com. of Okla.*, 286 U.S. 210 (1932); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

36. Transcript of Oral Argument at 12, *Florida v. U.S. Dep't of Health & Human Servs.*, 132 S. Ct. 2566 (2012) (No. 11-393).

37. *Id.* at 22.

what the government does matters to people and people want to speak about the issues that concern them. Indeed, to the extent that “money in politics” is a problem, the solution isn’t to try to reduce the money—which we’ve seen is impossible—but to reduce the scope of political activity the money tries to influence. Shrink the size of government and its intrusions in people’s lives and you’ll shrink the amount people will spend trying to get their piece of the pie or, more likely, trying to avert ruinous public policies.

And even if you’re concerned about the millions of dollars seemingly wasted on electioneering—though Americans spend more annually on chewing gum and Easter candy,³⁸ and nobody would make or broadcast those negative ads everyone complains about if they weren’t effective—the problem is not with your big corporate players. This is another misapprehension of those who criticize *Citizens United*. Exxon and Halliburton and all these evil companies (or even so-called good companies, like Apple)³⁹ aren’t all of a sudden dominating the political conversation. Those types of organizations spend very little money on political advertising, partly because they find it much more effective to spend money on lobbying but more importantly, why would they want to alienate half of their customer base? As Michael Jordan famously said when he was criticized for not being involved in civil rights issues or speaking out on politics, “Republicans buy sneakers too.”⁴⁰ The Fortune 500 companies are very cautious. All they want is a legal regime they can manage with their phalanx of lawyers and accountants, gladly accepting regulations and restrictions that are disproportionately onerous to their scrappier, entrepreneurial competitors. Many corporations liked the pre-*Citizens United* restrictions because that meant they didn’t have to decide whether to spend money on political ads in the first place!

38. George Will, *How States Are Restricting Political Speech*, WASH. POST, Feb. 3, 2012 (presidential campaign spending roughly the same as what Americans spend on Easter candy), http://www.washingtonpost.com/opinions/states-are-cracking-down-on-political-speech-with-burdensome-laws/2012/01/31/gIQAPe6ziQ_story.html; George Will, *A Campaign-Finance Bill That Doesn’t Pass Muster*, WASH. POST, Apr. 27, 2011 (Obama may raise \$1 billion in private contributions for the 2012 campaign, about half of what Americans spend on Easter candy annually), http://www.washingtonpost.com/opinions/a-campaign-finance-bill-that-doesnt-pass-muster/2011/04/26/AFXpSq0E_story.html; George Will, *The Democratic Vision of Big Brother*, WASH. POST, Oct. 17, 2010 (total election spending for every U.S. office during two-year cycle is less than Americans spend on candy in two Halloween seasons), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/15/AR2010101504201.html>.

39. Is Apple still “good”? I’m keeping my iPhone regardless.

40. Michael Jordan made the statement in response to questions about why he wouldn’t endorse the black Democratic candidate, Harvey Gantt, in the 1990 North Carolina Senate race against Republican Jesse Helms. Kurt Badenhausen, *The Business Of Michael Jordan Is Booming*, FORBES, Sept. 22, 2011, <http://www.forbes.com/sites/kurtbadenhausen/2011/09/22/the-business-of-michael-jordan-is-booming/>; William C. Rhoden, *Jordan Finds A New Arena To Play*, NEW YORK TIMES, Feb. 20, 2000, <http://www.nytimes.com/2000/02/12/sports/sports-of-the-times-jordan-finds-a-new-arena-to-play-in.html>.

On the other hand, groups composed of many individuals and smaller players of various kinds now get to speak: your Citizens Uniteds, your National Federations of Independent Business, your trade and advocacy associations. They can't compete with the big boys on K Street—they can't afford the same lawyers and lobbyists—but they sure as hell are going to make the public aware of Congress's shenanigans. So even if we accept "leveling the playing field" as a proper basis for campaign finance regulation, *Citizens United*'s freeing up of associative speech does level that playing field in many ways.

In sum, as I said, we're left with a system that's unbalanced, unstable, and unworkable—and we haven't seen the last of campaign finance cases before the Court or attempts at legislative reforms.⁴¹ I would wager that before the next census in 2020 and subsequent redistricting, in the next decade, we'll see a fundamental systemic transformation, either because of a legal challenge or coming from incumbents who feel threatened that they are losing control of their message. Stephen Colbert would then have to focus on other things, but I'm confident that he'll find something else to ridicule and we'll be the better for it on all counts.

Thank you.

41. I don't even mean here the Montana case recently decided by the Court, where the Montana Supreme Court effectively said that *Citizens United* doesn't apply to that state's restrictions on independent corporate political speech and the Supreme Court reversed. *Western Tradition P'ship v. Att'y Gen.*, 271 P.3d 1, 13 (Mont. 2011), *rev'd sub nom.* *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012).