

THE SORRY CASE FOR *CITIZENS UNITED*:
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Citizens United v. FEC is the impetus for this panel discussion and the backdrop for nearly all discussion concerning campaign finance over the past two years.¹ I don't wish to diminish the importance or the awful-ness of *Citizens United*, or, indeed, its adequacy as a conversation piece. I do think it is important, though, to place *Citizens United* in context and to define just how much of the current mess this case is responsible for and how much it is not responsible for. In my view, the case is almost universally misunderstood and its significance overstated. The record should be set straight. I say this not because *Citizens United* needs defending, but rather because the lust to repeal *Citizens United* distracts progressives from the campaign finance crisis's more fundamental causes. And after I give *Citizens United* this bit of context, I'll weigh in on the progressive effort to repeal *Citizens United* by constitutional amendment.

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1. *Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876 (2010).

I. *CITIZENS UNITED'S* HOLDING

Let me begin by pointing out that *Citizens United* did not establish the doctrine of corporate personhood. Corporate personhood is an old idea which is well into its second century, and artificial entities have enjoyed First Amendment protection for some time.² And at any rate, the First Amendment makes no reference to “persons” or to the identity of the speaker.³ First Amendment free speech is a negative right: that “Congress shall make no law.”⁴ Corporate personhood, whatever its merits and demerits, was never the issue in *Citizens United*.⁵

2. See, e.g., *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 395 (1886) (recognizing that the Fourteenth Amendment applies to corporate entities to the same extent to which it applies to natural persons); *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (recognizing corporations’ rights to enter into and enforce contracts as equivalent to those enjoyed by human beings). For a scholarly discussion of the origins of corporate personhood, see Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 908–30 (2011) (analyzing the different theories of corporate personhood utilized by the Court and other theorists); Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 218–24 (2011) (discussing the history of constitutional rights of corporations, focusing particularly on the Supreme Court’s decision in *Santa Clara*); Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 534–43 (2010) (criticizing courts’ extension of the Bill of Rights to corporations). See generally Jonathan A. Marcantel, *The Corporation as a “Real” Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221 (2011) (tracing the origin of corporations as “real constitutional entities”).

3. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.”).

4. *Id.*

5. See *Citizens United*, 558 U.S. at ___, 130 S. Ct at 900 (citing *First Nat’l Bank of Bos. v. Belotti*, 435 U.S. 765 (1978); *Pac. Gas. & Elec. Co. v. Pub. Utilities Comm’n of Cal.*, 475 U.S. 1 (1986) (disposing of this argument in a single paragraph by simply citing previous Court precedent). Corporate personhood receives so much emphasis today in the popular media largely because it is easy to grasp that *I, the human being*, am more literally human than Kinko’s. But in spite of the jokes, the courts have never argued that corporations have feelings or that they fall in love. And the fact that a corporation is not *literally* human doesn’t imply that corporations shouldn’t

Instead, *Citizens United* is about the balancing of interests that determines whether the First Amendment will permit government to limit the right of speech.⁶ If core political speech is to be restricted, the Government must show that it has some compelling basis to do so.⁷ Since *Buckley v. Valeo*, it has been held that preventing corruption is one such compelling interest, and the Court in *Citizens United* does not dispute that.⁸ But in the interim between *Buckley* and *Citizens United*, the Court recognized another interest as well: an interest in leveling the playing field, in producing a fairer debate, and in preventing wealthy people and corporations from amassing huge war chests that could be used to unbalance a congressional race here and there.⁹ *Citizens United's* real import is that it dismisses that second interest, saying that it is not merely trivial but indeed illegitimate. The prevention of corruption, under *Citizens United*, is the only compelling concern.

And what you get is essentially the simplest possible version of the *Buckley* rule, but without any of the little epicycles that it had accumulated over the decades: Congress may regulate direct donations to political campaigns because those direct donations are the stuff of quid pro quo corruption.¹⁰ The danger of corruption is undeniable in that context. But Congress may *not* limit the role of *independent* expenditures, meaning propaganda work by entities—whether human or artificial—that do not coordinate with the campaign.¹¹ For if there is no coordination,

have the “personal” right to own property, or to sue other corporations that defame it, or, for that matter, that a corporation shouldn’t enjoy certain Constitutional protections such as First Amendment speech rights.

6. *Citizens United*, 558 U.S. ___, 130 S. Ct. at 892.

7. *Id.* at ___, 130 S. Ct. at 898.

8. *Id.* at ___, 130 S. Ct. at 908 (citing *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

9. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654–55 (1990) (upholding a Michigan law that prohibited corporate independent expenditures); see also *McConnell v. FEC*, 540 U.S. 93, 203–09 (2003) (upholding the Bipartisan Campaign Reform Act of 2002 extending ban on corporate expenditures towards electioneering communications); *Bellotti*, 435 U.S. at 788 n.26 (suggesting Congress may be able to demonstrate real or apparent corruption in corporate independent expenditures).

10. *Buckley*, 424 U.S. at 26–27.

11. *Id.* at 45.

then a quid pro quo between the funder and the candidate, conceived as a negotiated bargain, is by definition impossible. And this is the principle that allows super PACs to solicit unlimited donations. If independent expenditures are all these organizations are chartered to do, then government has no business interfering with their fundraising.¹²

Let me make a couple more points qualifying *Citizens United* before I start to trash it.

II. CAVEAT: DISCLOSURE

First, *Citizens United* does leave the disclosure laws in place.¹³ You can still look up where a super PAC received its money.¹⁴

That said, the transparency is avoidable.¹⁵ There are 501(c)(4) organizations, charitable organizations that spend fifty-one percent of their funds on charity and forty-nine percent on elections, and they don't have to disclose their donors.¹⁶ You can launder your super PAC donation by setting up a 501(c)(4) as an intermediary, and in fact, many super PACs have their own dedicated 501(c)(4)s.¹⁷ American Crossroads GPS, for instance,

12. *SpeechNow.org v. FEC.*, 599 F.3d 686, 694–96 (D.C. Cir. 2010) (holding a political organization operating exclusively through independent expenditures does not corrupt or give the appearance of corruption, and that limits on donations to such an organization therefore violate the First Amendment.)

13. *See, e.g.*, Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 431.

14. *See Campaign Finance Disclosure Portal*, FED. ELECTION COMMISSION, <http://www.fec.gov/pindex.shtml> (last visited Mar. 25, 2012).

15. Nicholas Confessore & Michael Luo, *Secrecy Shrouds 'Super Pac' Funds in Latest Filings*, N.Y. TIMES, Feb. 2, 2012, at A1, available at http://www.nytimes.com/2012/02/02/us/politics/super-pac-filings-show-power-and-secrecy.html?_r=18pagewanted=all.

16. Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 20, 2010, at A1, available at www.nytimes.com/2010/09/21/us/politics/21money.html.

17. *See* Dan Froomkin, *Post-Citizens United Money May Swamp Congressional Candidates*, HUFFINGTON POST (Mar. 17, 2012, 8:28 AM), http://www.huffingtonpost.com/2012/03/17/citizens-united-congress-candidates-super-pacs_n_1342906.html.

does the laundry for the American Crossroads Super PAC.¹⁸ Or, if you want, you can set up a shell corporation, donate through the shell corporation, and then dissolve it.¹⁹ And, of course, even the disclosures that a super PAC does make come out only after a delay that may or may not make a difference.²⁰

These deficiencies in the disclosure scheme, though, could be eliminated by better regulation and enforcement.²¹ *Citizens United* didn't create these loopholes.²²

III. CAVEAT: COORDINATION BETWEEN CANDIDATES AND SUPER PACS

Here is the second little qualifier. The holding in *Citizens United* depends on a clear distinction between coordinated expenditures and uncoordinated expenditures, and the whole concept of a super PAC depends on the concept that the super PAC isn't working with the candidate.²³ Because if it was working with the candidate, then there would be a lot of "quid pro quoing" going on.

18. See Jessica Yellin, *Karl Rove, American Crossroads and the Super PAC Democrats Love to Hate*, CNN (Jan. 23, 2012), http://articles.cnn.com/2012-01-23/politics/politics_rove-super-pac_1_american-crossroads-crossroads-gps-democratic-candidates?_s=PM:POLITICS.

19. See, e.g., Stefanie Ostfeld, *Shell Game: Hidden Owners and Motives*, CNN (Oct. 26, 2011, 11:38 AM), <http://www.cnn.com/2011/10/26/opinion/ostfeld-shell-companies/index.html> (discussing a shell corporation that anonymously made a \$1 million donation to a pro-Mitt Romney PAC and then quickly dissolved).

20. Cf. *Quick Answers to PAC Questions*, FED. ELECTION COMMISSION, http://www.fec.gov/ans/answers_pac.shtml#report (last visited Mar. 26, 2012) (noting that filings can be made monthly or quarterly and can be changed as often as once per year).

21. See Mary Kate Hogan, *Super PAC Disclosure Statements Disclose Little*, BRENNAN CENTER FOR JUSTICE BLOG (Feb. 14, 2012), http://www.brennancenter.org/blog/archives/super_pac_disclosure_statements_disclose_little/.

22. Dan Froomkin, *Don't Blame the Supreme Court for Citizens United—Blame Congress, the FEC, and the IRS*, HUFFINGTON POST (Mar. 24, 2012, 9:14 AM), http://www.huffingtonpost.com/2012/03/24/citizens-united-supreme-court-montana-challenge_n_1313579.html.

23. See *Citizens United v. FEC*, 558 U.S. ___, ___, 130 S. Ct. 876, 881–924 (2010).

In practice, noncoordination is a joke. Everybody knows the big super PACs coordinate with candidates. Jon Huntsman's father heavily contributed to his super PAC, and Romney's and Obama's former aides run theirs.²⁴ The FEC has held that candidates may appear in a super PAC's ads.²⁵ My co-panelist, Jim Bopp, runs a super PAC—called the Republican Super PAC—and the idea is that Republican candidates and office do the fundraising for it.²⁶

These problems are similar to the disclosure loopholes—they're the product of poor regulation and enforcement, not of *Citizens United's* holding. If government made better use of the authority it retains under *Citizens United* and *SpeechNow*, the worst of the abuses could be eliminated.²⁷ Strictly speaking, these loopholes are not the Court's fault—though it was naïve in my view to believe the ideal line between coordination and noncoordination can be well-policed in practice.

24. See, e.g., Catalina Camia, *Dems With Obama Ties Form Money Groups to Counter GOP*, USA TODAY (Apr. 29, 2011, 1:22 PM), <http://content.usatoday.com/communities/onpolitics/post/2011/04/democrats-fundraising-barack-obama-2012-presidential-race-1#.T29ttuxWpbY>; Eugene Kiely, *Restore Our Future*, FACTCHECK.ORG (Sept. 18, 2011, 1:30 AM), <http://www.factcheck.org/2011/09/restore-our-future>; Prameet Kumar, *Huntsman Sr. Backs Son's Campaign Through a Super PAC*, DAILY PENNSYLVANIAN (Feb. 14, 2012, 9:15 PM), <http://thedp.com/r/f7822af9>.

25. See 11 C.F.R. § 100.29 (2011) (discussing the rules of electioneering communication).

26. Ralph Z. Hallow, *GOP Fundraising Tactic Avoids Cash Limits*, WASH. TIMES (May 15, 2011), <http://www.washingtontimes.com/news/2011/may/15/gop-fundraising-tactic-avoids-cash-limits/?page=all>.

27. Though Mr. Bopp, speaking on the Republican Super PAC's fundraising coordination with candidates, reads *Citizens United* more broadly than I do. "The Supreme Court doesn't care, and I don't care, and the [Federal Election Commission] doesn't care. No one that matters cares." Elizabeth Kennedy, *Who Cares About James Bopp's Super PAC?*, BRENNAN CENTER FOR JUST. (May 19, 2011), http://www.brennancenter.org/blog/archives/who_cares_about_james_bopps_super_pac/.

IV. *CITIZENS UNITED*

So we see now that a good part of this mess is not the direct result of *Citizens United*. We could have better disclosure laws.²⁸ Maybe there is some plausible means to enforce noncoordination between super PACs and candidates. And you might ask: If it could be done, if we did have the noncoordination and the transparency, wouldn't that be better?

I would say, yes, it would be better. But things would still be very bad.

And then you might ask: Well, what exactly is the problem here, if people who are not coordinating with the candidate at all (don't fight the hypothetical) are just freer to speak than they were before? Why would I fear that the deregulation of a politically expressive activity will *harm* democracy? Is the entire thrust of *Citizens United* not to allow *more* freedom and *more* political expression than we had before?

Well, yes, it is. *Citizens United* does allow for more speech than the cases that preceded it. But I encourage you to think critically about the proposition that more speech, regardless of what quarter it comes from, must always produce some corresponding benefit—more democracy, more truth, more voices in the debate.

After all, this new right to spend unlimited sums on electoral propoganda is useless to anyone but the extremely wealthy. My co-panelist, Mr. Bopp, has argued publicly that *Citizens United* enhances the power of “people of average means” to speak by pooling their resources into super PACs.²⁹ That argument fails

28. See Hogan, *supra* note 21.

29. See, e.g., Interview by Terry Gross with James Bopp (Feb. 23, 2012), available at <http://www.npr.org/2012/02/23/147294511/understanding-the-impact-of-citizens-united> (“[The wealthy] don't need a superPAC. The people that have contributed to superPACs, you know, \$10 million or whatever, they could just run the ad themselves and put their name on it. So superPACs—or any group activity, really—is *essential to people of average means*, not essential to the rich. And so when you limit group activity, you are cutting off *the only avenue that people of average means have to participate*. You're not cutting off rich people.” (emphasis added)).

the laugh test, though, and the reason is simple: hardly anyone will give to a super PAC if giving directly to a candidate is an option. And the only thing that can stop you from giving to a candidate instead of a super PAC is the cap on direct donations to candidates. The cap is \$2,500.³⁰ It stands to reason that anyone giving to a super PAC has spent at least \$2,500.01 on politics that year.³¹

And if intuition tells you that “people of average means” are spending more than \$2,500 per election cycle on politics, I want to challenge that. In 2008—a year in which people of average means spent more than usual, perhaps, on politics—less than half a percent of the American population donated \$200 or more, and less than a tenth of a percent gave \$2,300 or more.³² Under

30. Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441(a)(1) (2006) promulgated in Contribution and Expenditure Limitations and Prohibitions 11 C.F.R. § 110.1 (b) (2011). Although this authority limits individual contributions to \$2,000, the Federal Elections Commission (FEC) increases the limit every two years to adjust for inflation. 11 C.F.R. § 110.17(b). The FEC increased the contribution limit to \$2,500 in February 2011. Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold, 76 Fed. Reg. 8368, 8369–70 (Feb. 14, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-02-14/pdf/2011-3231.pdf>. For an easy-to-read chart listing all contribution limits for 2011-2012, see *FEC Announces 2011-2012 Campaign Cycle Contribution Limits*, FED. ELECTION COMMITTEE, (Feb. 3, 2011), <http://www.fec.gov/press/20110203newlimits.shtml>.

31. In fairness to Mr. Bopp, I can see two other reasons for why an individual might give to a super PAC. One is that they want to channel their funds toward negative advertising as opposed to the positive advertising that the actual campaign organization would be more likely to run. The other is that a small-time donor might want to invest in a whole portfolio of candidates, and there is a super PAC that they expect to spend the money better than a conventional PAC or an official party organization. And these people do exist. But their numbers are tiny, and so is their impact. In the January 2012 monthly filing of Mitt Romney’s “Restore Our Future” super PAC, I counted only forty-one donors who gave \$10,000 or less, in the whole month, in the whole country, in the middle of a well-publicized and contentious primary. *Restore Our Future Contributors*, OPENSECRETS, <http://www.opensecrets.org/pacs/pacgave2.php?cmte=C00490045&cycle=2012> (last visited April 1, 2012). And no one of average means is giving \$1,000—these small donors’ occupations, if not “retired,” were consistently white-collar: “accountant,” “lawyer,” “optometrist,” and “investor.” *Id.* So at best, Mr. Bopp is basing a broad argument on edge cases.

32. *Money in Politics: Who Gives?*, AM. FOR CAMPAIGN REFORM, <http://www.acrreform.org/research/money-in-politics-who-gives/> (last visited April 1, 2012).

no plausible definition of “average means” are people of average means using super PACs. And indeed, ninety-three percent of what super PACs take in comes in the form of donations exceeding \$10,000.³³

The practical importance of *Citizens United* is simply this: more political spending by the wealthy and no increase from anyone else.

This matters because wealthy people, as a group, are more conservative than the general public.³⁴ They are more than twice as likely to say, for instance, that deficits, as opposed to unemployment, are the worst problem we face and twice as likely to say that those deficits should be closed through program cuts alone.³⁵ Combine that with the fact that the better-financed candidate wins more than nine out of ten times, and you see that in practical terms, *Citizens United* will tend to move governments further to the right of the general public than they already are.³⁶ Perhaps you shrug and say that is a good result for conservatives and a bad result for liberals. But there is also the simple nonpartisan reply that elections are built to approximate voters’ preferences,³⁷ and democracies, more generally, are built to make the policies that the people want.³⁸ If *Citizens United* widens the gap between government and the majority, then that is a count against *Citizens United*.

Defenders of campaign finance deregulation might point out that there is no *censorship* taking place.³⁹ For no one is silencing

33. Blair Bowie & Adam Liotz, AUCTIONING DEMOCRACY: THE RISE OF SUPER PACS & THE 2012 ELECTION 1 (2012), available at <http://www.demos.org/sites/default/files/publications/AuctioningDemocracy-withAppendix.pdf> (citing JOHN GREEN ET AL., INDIVIDUAL CONGRESSIONAL CAMPAIGN CONTRIBUTORS: WEALTHY, CONSERVATIVE, AND REFORM-MINDED (1998)).

34. *Id.*

35. *Id.*

36. *Id.* at 8.

37. U.S. DEP’T OF STATE, DEMOCRACY IN BRIEF 20–21 (2007).

38. *Id.* at 4–5.

39. But see Jim Sleeper, *How the Supreme Court Aids Government-Controlled Speech*, HUFFINGTON POST (Mar. 25, 2012, 4:06 PM), http://www.huffingtonpost.com/jim-sleeper/how-citizens-united-stren_b_1376786.html (“[C]onservatives . . . brandish the First Amendment against ‘censorship’ every time anyone tries to put reasonable restrictions on the political ‘speech’ . . .”).

people of average means. No one is silencing the left. It is just that no one is “silencing” the wealthy anymore, and now they are speaking more than they used to.

But of course more speech on one side of an issue will tend to drown out speech from the other side; it is not a positive-sum game. This is common sense; we can’t *both* win the election. Any change in the regulation of campaign finance will necessarily burden one side as much as it benefits the other, and there is no change to campaign finance law that does not result in a reallocation of power.

And the Supreme Court has recognized this truth when the shoe is on the other foot.⁴⁰ When a law subsidized the electoral opponents of millionaires, the Court struck it down because it encumbered the speech of millionaires.⁴¹ When a law subsidized the opponents of big spenders who forewent public financing, the Court struck it down because it encumbered the speech of big spenders who forewent public financing.⁴²

What, then, is the policy justification for reallocating power in this manner in the direction that *Citizens United* does, away from the majority and toward an already disproportionately powerful wealthy superminority?

I see three justifications. I would dismiss the first as a straw argument if it weren’t gaining such a disturbing amount of traction in right-wing news sources. This first argument is that the “productive class”—the wealthy—simply knows better than the rest of us.⁴³ I won’t dignify this despicable slur against

40. *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759 (2008).

41. *Id.*

42. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. ___, 131 S. Ct. 2806 (2011).

43. See, e.g., Matthew Vadum, *Registering the Poor to Vote is Un-American*, AM. THINKER (Sept. 1, 2011), http://www.americanthinker.com/2011/09/registering_the_poor_to_vote_is_un-american.html (“Welfare recipients are particularly open to demagoguery and bribery. Registering them to vote is like handing out burglary tools to criminals. It is profoundly antisocial and un-American to empower the nonproductive segments of the population to destroy the country . . .”). Vadum was given a spot on FOX News the next day. See Chris Kromm, *Should the Poor Be Allowed to Vote?*, HUFFINGTON POST (Sept. 13, 2011, 7:19 PM), http://www.huffingtonpost.com/chris-kromm/should-the-poor-be-allowe_b_955444.html.

working people with a response.

Second, there is the argument, often raised by Mr. Bopp, that campaign finance laws are merely incumbent prevention devices.⁴⁴ This cartoonish “government versus the people” account of politics overlooks the fact that much campaign finance legislation at the state level has been enacted not by incumbent legislators, but by popular referendum, and that campaign finance regulation generally enjoys massive public support.⁴⁵

The third argument, and the most substantial of the three, relies on a “marketplace of ideas” metaphor, arguing that a more laissez-faire exchange of information will always reveal more truth than a closely regulated one.⁴⁶ It is difficult to overestimate this metaphor’s currency in the American civic tradition. But I don’t think it provides meaningful support for the intuitively absurd proposition that super PACs meaningfully advance the search for truth.⁴⁷

This is partially because markets *do* fail. Remember that for economists, “efficient market” means perfectly interchangeable goods, perfect and universally distributed information, and an absence of transaction costs.⁴⁸ To the extent that a market

44. See, e.g., Bradley A. Smith, *The Myth of Campaign Finance Reform*, 2 NAT’L AFFAIRS 75, 83 (2010), available at <http://www.nationalaffairs.com/publications/detail/the-myth-of-campaign-finance-reform>.

45. E.g., Arizona Citizens Clean Elections Act, ARIZ. REV. STAT. ANN. § 16-940 (2006) (West). The Act was struck down in *Bennett*. See 564 U.S. at ___, 131 S. Ct. at 30.

46. See John Kramer, *Super PACs Turn Two Years Old*, INST. FOR JUST. (March 21, 2012), <http://www.ij.org/about/4358> (“The D.C. Circuit’s ruling in *SpeechNow.org* vindicated our most fundamental First Amendment principles: Everyone has the right to speak, to listen, and to think for themselves. When laws limit those rights, it is the proper role of the judiciary to declare them unconstitutional. The Institute for Justice will continue to promote this sort of principled judicial engagement and to defend the right of everyone, including super PACs, to add their voices to the marketplace of ideas.” (quoting Institute for Justice President and General Counsel Chip Mellor)).

47. See generally Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951 (1997), available at <http://scholar.valpo.edu/vulr/vol31/iss3/4>.

48. See RANDALL DODD, SPECIAL POLICY REPORT 12: THE ECONOMIC RATIONALE FOR FINANCIAL MARKET REGULATION 1–2 (2002); Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383, 383–86 (1970).

deviates from these conditions, inefficiencies result—shortages, surplus, and rent-seeking.⁴⁹ And even conservative neoclassical economists would call for regulation where these inefficiencies rise to market failure.⁵⁰

Why should a marketplace of ideas be any less prone to failure than, say, a market for housing or for health insurance? Because no matter how much information is out there, only so much of it will be soaked up by participants in the market. Most people have jobs that don't involve reading about politics, and when they get home, they have other things to do—cooking, child care, or a second job. There is only limited attention to go around, limited time to be the thorough and dispassionate weigher of arguments that the marketplace of ideas demands. The market cannot be efficient, and the persistence of racism, astrology, and any number of other false beliefs demonstrates this plainly.

And at any rate, the marketplace of ideas is a purely rhetorical metaphor. The specifics don't line up. I understand that the speaker is the supply side and the listener is the demand side. But how do you draw the supply curve and the demand curve? What could their shape possibly signify, even by a loose analogy? And what could it mean when the curves intersect? What corresponds to price and quantity, the twin desiderata that the supply and demand curves and their intersection are designed to obtain?

These incongruities matter. They matter because the basis of Smith's invisible-hand argument is mathematical, and it depends on the intersection of supply and demand curves.⁵¹ Without the math, the laissez-faire analogy has no more authority than, say, "the cream will always rise to the top." And how much money are you willing to bet on that proposition? Does it strike you as an adequate basis for deciding complex policy problems?

49. See, e.g., DODD, *supra* note 47, at 3–4.

50. Cf. Fama, *supra* note 41, 384–88 (describing the theory of efficient markets).

51. See, e.g., ROBERT H. FRANK, MICROECONOMICS AND BEHAVIOR 25–30 (7th ed. 2007). See generally ADAM SMITH, THE WEALTH OF NATIONS (Modern Library 2000) (1776) (explaining, in Smith's own words, the basis and implications of the invisible-hand theory).

In short: there is no reasonable basis to believe a priori that less censorship universally yields more truth. And if it is not categorically true that less government intervention in the marketplace of ideas yields more truth, then as a corollary, there is no reason to believe that removing limits on campaign spending will produce a better government. All of the benefits of *Citizens United* flow to the wealthy, and broad majorities of people of average means feel it as the contemptuous slap in the face that it is.

V. THE MISGUIDED RHETORIC OF THE REFORM MOVEMENT

I shouldn't be saying anything at all about *Citizens United* if I can't come up with at least one nice thing to say about it, though, so here it is: for reasons I don't have time to detail here, I believe *Citizens United* represents at least a plausible interpretation of the First Amendment. It butchers decades of precedent, sure. But it also implements the First Amendment more elegantly than what came before—the framework that would have let McCain-Feingold survive.⁵²

Of course, the case's legal merits cannot change the fact that it is a policy disaster. And if the First Amendment is what gives us that framework, then the First Amendment itself needs adjustment. We need a constitutional amendment to carve out some carefully limited domain in which Congress and the states can regulate campaign finance without fear of judicial intervention under the First Amendment. There are quite a few proposals floating around.⁵³ I don't have one, and I have not

52. See Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 431.

53. *E.g.*, H.R.J. Res. 78, 112th Cong. (2011) (“[T]his Constitution shall [not] prohibit Congress and the States from imposing content-neutral regulations and restrictions on the expenditure of funds for political activity by any corporation, limited liability company, or other corporate entity, including but not limited to contributions in support of, or in opposition to, a candidate for public office.”); Evzen, *Proposed Constitutional Amendment: Reverse Citizens United Ruling*, GLOBAL NEWS (Feb. 14, 2012), <http://qglobalnews.com/?p=493> (granting Congress “the authority . . . to regulate and restrict the political activity of corporations of any sort, including but not limited to contributions in support of or in opposition to a candidate for public office”).

picked a favorite.

I want to comment, though, on a couple of slogans in the amendment movement that I fear threaten the whole enterprise. These slogans are:

1. “Corporations are not people.”⁵⁴
2. “Money is not speech.”⁵⁵

Each of these slogans makes a legal mistake and a tactical mistake. The “corporations are not people” slogan, for reasons I discussed earlier, is mostly a non-sequitur to the problem of campaign finance.⁵⁶ It adds catharsis, but it doesn’t add value. Yet it would fatally narrow the amendment’s potential base of support. Republicans view this anti-corporate language—rightly—as liberal red meat, and no Republican who wants to win the next primary will want it attached to them. Without Republican support, a campaign finance amendment will not pass.⁵⁷ The corporate personhood angle needs to go, but most of the most popular amendments, including the Sanders amendment, contain it.⁵⁸ These amendments are rally-the-base stuff, and they need to be supermajority stuff.

And as for the “money is not speech” slogan, it’s just false. Money talks, after all, and you can’t make a big budget movie without a big budget. Hypothetically, a law proscribing the payment of money for books would raise a free speech concern. No competent free speech regime can neglect money. No, money is speech, or at least expressive, in certain contexts, and there is

54. CORPORATIONS ARE NOT PEOPLE, <http://corporationsarenotpeople.com> (last visited Mar. 27, 2012).

55. WE THE PEOPLE, NOT WE THE CORPORATIONS, <http://movetoamend.org> (last visited Mar. 27, 2012) (including the slogan “money is not speech” in their coalitions petition).

56. See discussion *supra* note 5.

57. See *To Elect Conservatives, the GOP Needs Campaign Finance Reform*, REDSTATE (Mar. 15, 2012, 6:47 AM), <http://www.redstate.com/goldwater-conservative88/2012/03/15/to-elect-conservatives-the-gop-needs-campaign-finance-reform/>.

58. See Matthew Rothschild, *L.A. and Bernie Sanders Challenge “Corporate Personhood.”* PROGRESSIVE (Dec. 9, 2011), http://progressive.org/bernie_sanders_challenges_corporate_personhood.html.

no speech more protected than political speech.⁵⁹ There is no point in trying to ignore this fact. Indeed, I believe that “money is not speech” actually reinforces the free-speech libertarian mindset that makes a case like *Citizens United* possible. For the implication of the slogan is that if money *were* speech, then of course you could not regulate it because speech is always sacred. A more mature response to *Citizens United* will require us to recognize that speech is not categorically sacred, and that if certain types of speech threaten the ideal of democracy, then some degree of well-considered censorship is not just permissible but indeed imperative. If you have a good slogan for that, let me know.

59. See *Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876 (2010).

