

**THE ROBERTS' COURT TAKES A SLEDGE HAMMER TO
ASHWANDER AND CAUTIOUS CONSTITUTIONAL
JURISPRUDENCE: *CITIZENS UNITED V. FEDERAL
ELECTION COMMISSION***

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*I come to bury Caesar, not to praise him;
The evil that men do lives after them,
The good is oft interred with their bones,
So let it be with Caesar¹*

In this January's decision of *Citizens United v. Federal Election Commission*,² the Supreme Court overturned more than 100 years of legislative precedent,³ as well as its own precedent of twenty years,⁴ to permit corporations to spend unlimited amounts of money on direct advocacy of the election or defeat of candidates for political office.⁵ The breadth of the holding is startling. Although the specific context

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1. WILLIAM SHAKESPEARE, *THE TRAGEDY OF JULIUS CAESAR*, act 3, sc. 2.

2. 130 S.Ct. 876 (2010).

3. In 1907, Congress passed the Tillman Act, which was designed to prohibit corporate contributions to political campaigns. 34 Stat. 864, 59 Pub. Law 36 (1907); *see also infra* note 11.

4. The Court overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which had held that a Michigan campaign finance act that prohibited corporations from using treasury money to advocate for or against political candidates did not violate the First and Fourteenth Amendments. *Citizens United*, 130 S.Ct. at 913.

5. 130 S.Ct. 876 (2010).

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considered a video-on-demand ninety minute diatribe regarding Presidential aspirant Hillary Clinton,⁶ the plain import of the holding reaches all federal and state elections, presidential, congressional, gubernatorial, judicial, and janitorial!

The sweep of the decision is simply mind-boggling! The only other Supreme Court decision of such broad electoral impact is *Buckley v. Valeo*,⁷ which sustained in large part Congress's campaign finance reforms⁸ designed to deal with the public perception of the electoral shenanigans that led to the Watergate scandal.⁹ That was an era in which criminal break-ins occurred, not only into the Democratic National Committee headquarters, but also into Daniel Ellsberg's psychiatrist's office.¹⁰ Ellsberg had leaked the Pentagon Papers, thereby becoming an enemy of the administration in Washington.¹¹ The public was disgusted by such high level corruption, particularly that wrought by invisible campaign expenditures¹² and political slush funds. Congress

6. *Id.* at 887.

7. 424 U.S. 1 (1976).

8. *Id.* at 23-28

9. Ryan Watkins, *The Political Implications of 527 Organizations Necessitate Reform*, 50 SANTA CLARA L. REV. 547, 548 (2010) (citing Brandi Cherie Sablatura, *Reformation of 527 Organizations: Closing the Soft Money Loophole Created by the Bipartisan Campaign Reform Act of 2002*, 66 LA. L. REV. 809, 818 (2006)).

10. On Sept. 3, 1971, the burglary of Daniel Ellsberg's Psychiatrist, Lewis Fielding's office, authorized by top Presidential Advisor John Ehrlichman, was carried out by E. Howard Hunt, G. Gordon Liddy and CIA agents Eugenio Martinez, Felipe de Diego, and Bernard Barker. These so called "Plumbers" failed to find Ellsberg's file. Pat Shellenbarger, *Silent Witness Wrote History*, GRAND RAPIDS PRESS, Jan. 15, 2006, at A1.

11. Liz Halloran & Scott Michels, *Curbing the Press: Why the Government Hasn't Been This Antagonistic Since the Pentagon Papers Case*, U.S. NEWS AND WORLD REPORT, June 12, 2006.

12. Eight justices in *Citizens United* did vote to permit the requirement that corporate advertisements must identify the sponsor, although Justice Thomas dissented on this precise point. Justice Thomas has been recently quoted speaking at a law school in Florida. In a revisionist view of history that would have made Cold War Soviet historians proud, he describes the initial federal legislation prohibiting all corporate financing of federal elections as if it were a racist conspiracy. Adam Liptak, *A Justice Responds to Criticism From Obama*, N.Y. TIMES, Feb. 4, 2010, at A17. In fact President Teddy Roosevelt called for its adoption in his annual address to Congress in 1905:

All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use

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acted to remedy both the reality and appearance of corruption through campaign finance reform, hoping to restore confidence in America's system of governance.¹³

The methodology of the *Citizens United* decision is just as startling as its holding, rejecting an anticorruption rationale.¹⁴ Not only is the holding expansive, the majority opinion fails to even cite *Ashwander v.*

stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts. Not only should both the National and the several State Legislatures forbid any officer of a corporation from using the money of the corporation in or about any election, but they should also forbid such use of money in connection with any legislation save by the employment of counsel in public manner for distinctly legal services.

President Theodore Roosevelt, Annual Address to Congress (Dec. 5, 1905) (transcript available at <http://millercenter.org/scripps/archive/speeches/detail/3777>). In the preceding paragraph, Roosevelt repeated his call for a law regarding bribery of the electorate. To debase Roosevelt's message of anti-corruption by the unfortunate fact that the initial federal statute carries the name of a racist senator distorts history and is, quite frankly, dishonest and unbecoming of a Justice of the United States.

The Tillman Act of January 26, 1907 provided:

An Act to prohibit corporations from making money contributions in connection with political elections. Be it enacted, That it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator. Every corporation which shall make any contribution in violation of the foregoing provisions shall be subject to a fine not exceeding five thousand dollars, and every officer or director of any corporation who shall consent to any contribution by the corporation in violation of the foregoing provisions shall upon conviction be punished by a fine of not exceeding one thousand and not less than two hundred and fifty dollars, or by imprisonment for a term of not more than one year, or both such fine and imprisonment in the discretion of the court.

34 Stat. 864, 59 Pub. Law 36 (1907) (emphasis added). It is noteworthy that no distinction is made in the statute between direct contributions to a campaign and independent expenditures.

13. See *Watkins*, *supra* note 9.

14. *Citizens United*, 130 S.Ct. at 908-09.

Allen Shoenberger, *The Roberts' Court Takes a Sledge Hammer to Ashwander and Cautious Constitutional Jurisprudence: Citizens United v. Federal Election Commission*, 1 AKRON STRICT SCRUTINY 97 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/the-roberts'-court-takes-a-sledge-hammer-to-ashwander-and-cautious-constitutional-jurisprudence-citizens-united-v-federal-election-commission.pdf>.

T.V.A.,¹⁵ a case which describes a “constitutional avoidance doctrine.”¹⁶ *Ashwander* articulates a policy of avoidance of deciding constitutional questions, particularly broad constitutional questions, if the court can fairly decide the particular case before it on other grounds such as statutory construction, or narrower constitutional grounds.¹⁷ It is worth remembering that the first major declaration of unconstitutionality subsequent to *Marbury v. Madison*¹⁸ was *Dred Scott v. Sanford*,¹⁹ which moved the struggle for the rights of slaves from verbal battles in Congress to actual battlefields like Manassas and Gettysburg.²⁰ Broad

15. Justice Brandeis’ landmark concurrence in *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936), stated seven principles for deciding cases in which statutes are challenged on grounds that they might be unconstitutional. These principles are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding . . .
2. The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it . . .
3. The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . .
4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of . . .
5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by it . . .
6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits . . .
7. When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Id. (citations, internal quotations, and footnotes omitted).

16. Some scholars trace the doctrine back to Chief Justice John Marshall’s opinion in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”). See William K. Kelley, *Avoiding Constitutional Questions As a Three-Branch Problem*, 86 CORNELL L.REV. 831, 837 & n. 23 (2001).

17. *Ashwander*, 297 U.S. at 346-48 (Brandeis, J., concurring).

18. 5 U.S. (1 Cranch) 137 (1803).

19. 60 U.S. (19 How.) 393 (1857).

20. See Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97 (2007). “Dred Scott may not have been a sufficient cause of the War, or the only cause, but it was a cause, a major cause, and in the minds of Americans then it was at the very eye of the storm.” *Id.* at 139.

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constitutional decisions are the nuclear weapons of the judicial arsenal, and just as dangerous. The Roberts five appear oblivious.

Citizens United flatly ignores the teaching of constitutional modesty set forth in *Ashwander*.²¹ The decision similarly ignores the caution of Justice Jackson in regard to the use of the Due Process clauses of the U.S. Constitution: “Invalidation of a statute or an ordinance on due process grounds leaves *ungoverned* and *ungovernable* conduct which many people find objectionable.”²² A decision based on the First Amendment, as *Citizens United* is, similarly leaves conduct *ungoverned* and *ungovernable* by both Congress and the States.²³ Constitutional modesty “[p]rinciples rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation’s laws.”²⁴

Instead of narrow construction, the *Citizens United* Court reached out and dealt with the case as if it presented an “unconstitutional on its face” attack—a ground withdrawn at the three judge district court level²⁵—in favor of a narrower “unconstitutional as applied” attack.²⁶ In my forty years of teaching constitutional law I cannot remember another Supreme Court decision that did anything similar to this.²⁷ In many, many decisions the court has converted “on the face” attacks into “as

21. See 297 U.S. at 346-48 (Brandeis, J., concurring).

22. *Railway Express Agency Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

23. See *id.*

24. *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973).

25. *Citizens United* stipulated at the District Court level to dismissing Count 5 of its complaint, which raised a facial challenge to the act. *Citizens United*, 130 S.Ct. at 892. As the dissenting opinion notes, this dismissal meant that a record was not developed in the district court on the actual effects of the statute. “The Court operates with a sledge hammer rather than a scapel when it strikes down one of Congress’ most significant efforts to regulate the way that corporations and unions play in electoral politics.” *Id.* at 933 (Stevens, J., dissenting).

26. *Id.* at 892.

27. Even *Bush v. Gore* did not quite reach as far, although the “tone” may not be all that dissimilar.

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applied” attacks, but never in the opposite direction.²⁸ Facial attacks in First Amendment cases ordinarily require “substantial overbreadth,”²⁹ a requirement first articulated in *Broadrick v. Oklahoma*.³⁰ However, the Supreme Court later observed that:

Broadrick examined a regulation involving restrictions on political campaign activity, an area not considered “pure speech,” and thus it was unnecessary to consider the proper overbreadth test when a law arguably reaches traditional forms of expression such as books and films. As we intimated in *Broadrick*, the requirement of substantial overbreadth extended “at the very least” to cases involving conduct plus speech.³¹

28. According to Marc E. Isserles:

It is well-established that a litigant has the primary responsibility for controlling the contours of his or her constitutional case through the claims asserted in the complaint . . . [A] court should only invalidate a statute on its face if the litigant’s constitutional challenge can fairly be identified as a valid rule facial challenge.

Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 425-26 (1998).

29. Moreover, “[without] a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.” Harvard Law Review Association, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, n.61 (1970). Overbreadth challenges are only one type of facial attack. A person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face. *See, e. g., Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949). However, the Supreme Court in *Terminiello* was clear that that actual challenge by the petitioner was to the ordinance as construed and as applied to him. *Id.* at 3.

30. 413 U.S. 601 (1973). The statute challenged in *Broadrick* prohibited state employees from soliciting or receiving political contributions, becoming a candidate for paid public office, being a member of a political party’s committee or of a political club, or taking part in the management or affairs of any political party or in any political campaign, except to express an opinion and to cast a vote. *Id.* The Court found it “not a censorial statute, directed at particular groups or viewpoint . . . [R]ather, [it] seeks to regulate political activity in an even-handed and neutral manner.” In effect, the price of employment in the civil service of Oklahoma was curtailment of speech and action in the sphere of electoral politics. *Id.* at 616.

31. *New York v. Ferber*, 458 U.S. 747, 771 (1982) (sustaining a New York law criminalizing child pornography) (emphasis added).

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Under this rationale, *Citizens United* is wrongly decided.³² Even Justice Black, the staunchest defender of free speech rights ever to sit on the Court, was sensitive to the argument that absolute speech had its limits. In a biography of his father, Hugo Black, Jr. recounts that his father observed that a labor picket sign was “more than pure expression,” it was “a two by four with air holes cut in the sign.”³³ “Is that speech?” he asked skeptically.³⁴ Today this might be called speech plus!

In *Buckley*, the Court invalidated restrictions on individual, non-coordinated expenditures to advocate the election or defeat of a candidate because, “[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.”³⁵ Today, it is quite clear that the *Buckley* rationale blinks reality. Even the underdeveloped record in *Citizens United* makes it clear that the *Buckley* decision fundamentally misunderstood the real world of election campaigning. Today, Members of Congress are notified about such “independent expenditures” made by corporations and labor unions as soon as the advertisements air.³⁶ Members of Congress are particularly grateful when negative issue advertisements run because it allows them to run positive announcements and appear “above the fray.”³⁷ Today, the potential for both the occurrence and the appearance of corruption are quite obvious. Instead of time undermining the decisions that the court overruled in *Citizens United*, a good argument can be made that the

32. *See id.* at 771.

33. Hugo Black Jr., *My Father, A Remembrance*, 185 (Random House 1975).

34. *Id.*

35. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

36. *Citizens United*, 130 S.Ct. at 962 (Stevens, J., dissenting) (citing *McConnell v. Federal Election Commission*, 251 F.Supp.2d 176, 623 (D.D.C. 2003)).

37. *Id.*

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underpinnings of the relevant part of *Buckley* have themselves been undermined instead.³⁸

The dissenting justices point out three of the narrower grounds that could have been used by the majority, but were rejected. These include:

1. The video-on-demand feature-length film could have been ruled not to qualify as an “electioneering communication.”³⁹
2. The court could have expanded an exemption recognized in an earlier case to cover non-profits that accept only a de minimus amount of money from for-profit corporations.⁴⁰
3. The court could have applied unconstitutional as-applied scrutiny, precisely because *Citizens United* resembled organizations the Supreme Court exempted from regulation in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*⁴¹

There were other potential grounds available as well. For example, the court considered only the application of the Federal Election Commission regulations for the time period thirty days prior to a primary election.⁴² Speech prior to this limited period was unaffected, as was speech through alternative mechanisms such as Political Action

38. Justice Stevens’ dissent in *Citizens United* correctly points out that the majority opinion did not even attempt to suggest exceptional circumstances justifying the court reaching questions not presented to the court or passed on by the court below. *Id.* at 960.

39. *Citizens United*, 130 S.Ct. at 937 (Stevens, J., dissenting). The video-on-demand feature refers to the requirement that the ninety-minute video advocating Hillary Clinton’s defeat was to have been posted on a cable television site, which required payment of \$1 million for the posting, but then viewers would have been able to see the video without charge. *Id.*

40. *Id.*

41. *Id.* at 937-38 (Stevens, J., dissenting) (citing *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)). The dissent also mentions in a footnote yet another ground, briefed vigorously by the National Rifle Association as amicus curiae, arguing that nonprofit corporate financing of electioneering communications should be permitted to the extent that the money can be traced back to individual contributions, a brief described as “arguing forcefully that this is indeed what Congress intended.” *Id.* at 937 n.15 (Stevens, J., dissenting).

42. *Id.* at 876.

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Committees.⁴³ The majority portrayed their decision as a blow liberating speech,⁴⁴ although in many alternative ways the very speech implicated had many other places, times, and manners in which it could have been communicated. Treatment of the regulations as time, place, and manner regulations would almost certainly have resulted in sustaining the regulations.⁴⁵ Were that unsatisfactory, the court would have also had the option of invalidating various regulations, and need never have reached the issue of statutory constitutionality.

Another alternative decision ground would have been a simple remand to the Federal Election Commission for further rulemaking to elucidate its views on video-on-demand distribution. The majority opinion rejected a belated argument from Citizens United that the video-on-demand feature precluded the film from qualifying as an election communication because its message would only be delivered to those households requesting it.⁴⁶ Instead of how many people actually received it, the majority said the determinant factor was the number of subscribers who could possibly see it.⁴⁷ The Court could simply have held this regulation unconstitutional as applied and/or vague when applied to video-on-demand systems—systems not explicitly discussed in the Federal Election Commission regulations or the associated commentary.⁴⁸

43. *Id.* at 887.

44. “[T]he Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment.” *Id.* at 892.

45. “Time, place, and manner” regulations are only subject to intermediate scrutiny, and thus need not be as narrowly tailored, nor be the “least restrictive means” of achieving the particular objective. *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

46. The majority argued that *Hillary* was not “publicly distributed” because a video-on-demand transmission is only sent to a requesting cable converter box. *Citizens United*, 130 S.Ct. at 888-89.

47. *Id.* at 889 (citing 11 C.F.R. § 100.29(b)(3)(ii) (2009)). The entire cable system had 34.5 million subscribers. Indeed, as suggested below, were the video a book, it would not be covered, whether or not it was contained in a million-volume research library or not.

48. *See* 11 C.F.R. § 100.29 (2009).

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Indeed, the definition of electioneering communications excludes all print media, including magazines as well as electronic mail—forms of communication far more analogous to video-on-demand than ordinary broadcast media, the primary aim of the regulatory scheme.⁴⁹ It is indeed ironic that the ninety-minute Hillary Clinton special could have been mounted on many free Internet sites and made available for streaming, with no payment whatsoever. Thus, the entire point of what Citizens United attempted, payment of a million dollars to obtain access to a market for distribution, might be described by young Americans as an antiquarian exercise, about as reflective of modern society as the wind-up victrola or eight track tapes. The underlying injury in *Citizens United* seems quaint in an era of iPads, iPods, iPhones, and Blackberrys.

Finally, methodological criticism of the *Citizens United* decision might also make reference to its cavalier treatment of the Court's recent decision in *Caperton v. A.T. Massey Coal Co.*⁵⁰ *Caperton* held that Due Process required recusal of a judge whose election to the state supreme court was traceable to campaign expenditures of \$3 million by a coal company with a pending case before the court involving a \$50 million damage award.⁵¹ The *Citizens United* majority described *Caperton* as only implicating Due Process rights.⁵² The opinion thus sidestepped the practical fact that its decision in *Citizens United* encourages other litigants to do precisely the same thing, distorting the justice system by buying the elections of "right-thinking judges." Furthermore the court did not consider whether the Due Process clause of the Fifth Amendment⁵³ might also have constitutional relevance to First Amendment jurisprudence. For example, the Due Process guarantee is normally described as being related to fair process, and indeed, to justice. What fairer process in the judicial arena can there be than judges who are not corrupted by an electoral system dominated by substantial

49. 11 C.F.R. § 100.29(c)(1).

50. 129 S.Ct. 2252 (2009).

51. *Id.*

52. *Citizens United*, 130 S.Ct. at 910.

53. *Caperton* considered the Due Process Clause of the Fourteenth Amendment.

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financial interests? Indeed, what fairer process in the legislative arena can there be than that achieved by an uncorrupted electoral system? Should the holding of *Caperton* not relate back quite directly to the ability of Congress to secure fair elections?

One might suggest that the practical impact of *Citizens United* was not only to overrule the Court's decisions in *Austin v. Michigan Chamber of Commerce*⁵⁴ and part of its decision in *McConnell v. Federal Election Commission*,⁵⁵ but includes sub rosa overruling of *Caperton* itself.⁵⁶

Hugo Black Jr. declares: “[I]t can be fairly said that until [Justice Black] was appointed to the Supreme Court and the conservative-liberal balance changed, that institution was used by the privileged to put the underprivileged back in their place.”⁵⁷ Is it unfair to suggest that both in substance and in methodology, *Citizens United* has restored a variant of governance by judicial fiat last seen from the conservative cohort of justices during the high water mark of substantive due process and *Lochner v. New York*?⁵⁸ There is irony indeed in the fact that President Theodore Roosevelt called for restrictions on corporate campaign expenditures the very same year *Lochner* was decided!⁵⁹ Are we

54. 494 U.S. 652 (1990).

55. 540 U.S. 93 (2003).

56. It is also worth noting that the *Citizens United* majority did not consider it necessary to justify its overruling of previous constitutional decisions by reference to the standards for such overrulings. As Justice O'Connor wrote in *Planned Parenthood of Southeastern Pennsylvania v. Casey*:

Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification . . .

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992) (citations omitted).

57. Black Jr., *supra* note 33 at 182.

58. 198 U.S. 45 (1905).

59. *See id.*; *supra* note 12.

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doomed to repeat the mistakes of the past by enduring a similar cycle of judicial activism? The judicial activism embodied in *Citizens United* yields no happy answer to this fearful scenario.

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