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On January 27, 2010, in his State of the Union address, President Obama declared:

> "With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities."[1]

In that succinct comment, the former professor of constitutional law at the University of Chicago Law School made three important and accurate observations about the Supreme Court majority's opinion in *Citizens*

[1] Press Release, Remarks by the President in State of the Union Address (Jan. 27, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

United v. *Federal Election Commission*[2]: first, it did reverse a century of law; second, it did authorize unlimited election-related expenditures by America's most powerful interests; and, third, the logic of the opinion extends to money spent by foreign entities. That is so because the Court placed such heavy emphasis on "the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."[3] Indeed, the opinion expressly stated, "We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."[4] Somewhat inconsistently, however, the Court also stated that it would not reach the question whether the Government has a compelling interest "in preventing foreign individuals or associations from influencing our Nation's political process."[5]

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[2] 130 S. Ct. 876 (2010).
[3] *Id.*, at 905.
[4] *Id.*, at 899.
[5] *Id.*, at 911.

Today, instead of repeating arguments that I advanced in my dissent from the *Citizens United* decision, I shall mention four post-decision events that provide a basis to expect that the Court already has had second thoughts about the breadth of the reasoning in Justice Kennedy's opinion for a five-man majority. The first relates to Justice Alito, the second to Chief Justice Roberts, the third to the Court's unanimous summary decision a few months ago in a case upholding the constitutional validity of a prohibition on campaign expenditures by a non-citizen Harvard Law School graduate,[6] and the fourth to my own further reflection about the rights of non-voters to influence the outcome of elections.

I

Justice Alito—who was in the audience for the 2010 State of the Union address and had joined the majority opinion in *Citizens United*—reportedly mouthed the words "not true" in response to the President's comment that

[6] See Jurisdictional Statement (Sept. 1, 2011), *Bluman* v. *Federal Election Commission*, No. 11-275 (U.S. Jan. 9, 2012) (hereinafter Jurisdictional Statement).

I have quoted.[7] Although I have not discussed the matter with him, I think Justice Alito must have been reacting to the suggestion that the opinion would open the floodgates for corporations controlled by foreign entities as well as those wholly owned by American citizens.

I draw that inference because, instead of responding directly to my dissenting opinion's comment that the Court's reasoning would have protected the World War II propaganda broadcasts by Tokyo Rose,[8] Justice Kennedy stated that the Court was not reaching the question.[9] Given the fact that the basic proposition that undergirded the majority's analysis is that the First Amendment does not permit the regulation of speech — or of expenditures supporting speech — to be based on the identity of the speaker or his patron, it is easy to understand why the President would not have understood that ambiguous response to foreclose

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[7] Adam Liptak, *For Justices, Attending Address Can Be Trial*, N.Y. Times, at A11 (Jan. 24, 2012).
[8] See *Citizens United*, 130 S. Ct., at 947 (Stevens, J., dissenting).
[9] *Id.*, at 911 (majority opinion).

First Amendment protection for propaganda financed by foreign entities.

But Justice Alito's reaction does persuade me that in due course it will be necessary for the Court to issue an opinion explicitly crafting an exception that will create a crack in the foundation of the *Citizens United* majority opinion. For his statement that it is "not true" that foreign entities will be among the beneficiaries of *Citizens United* offers good reason to predict there will not be five votes for such a result when a case arises that requires the Court to address the issue in a full opinion. And, if so, the Court must then explain its abandonment of, or at least qualify its reliance upon, the proposition that the identity of the speaker is an impermissible basis for regulating campaign speech. It will be necessary to explain why the First Amendment provides greater protection to the campaign speech of some non-voters than to that of other non-voters.

II

A few months after its decision in *Citizens United*, the Court upheld the constitutionality of Section 2339B of Title 18 of the U. S. Code, which makes it a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist organization."[10] Specifically, in his opinion for the Court in *Holder* v. *Humanitarian Law Project*—which I joined—Chief Justice Roberts concluded that Congress can prohibit support to terrorist organizations in the form of expert advice intended only to support the group's nonviolent activities.[11] As Justice Breyer correctly noted in his dissent, the proposed speech at issue was the kind of political activity to which the First Amendment ordinarily offers its strongest protection.[12] Nevertheless, under the Chief Justice's opinion, the fact that the proposed speech would indirectly benefit a terrorist organization provided a

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[10] See *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010) (citing 18 U.S.C. §2339B(a)(1)).
[11] *Ibid.*
[12] *Id.*, at 2732 (Breyer, J., dissenting).

sufficient basis for denying it First Amendment protection.[13]

If political speech made by an American citizen may be denied the protection of the First Amendment because it would produce an indirect benefit for a terrorist organization, I think it necessarily follows that such speech made or financed by the terrorist organization itself would receive no constitutional protection. While a reader of Justice Kennedy's opinion in *Citizens United*—specifically, one who notes his reliance on the proposition that "the First Amendment generally prohibits the suppression of political speech based on the speaker's identity"[14] – might well have assumed that the identity of the speaker should not dictate the result, Chief Justice Roberts' later opinion in *Humanitarian Law Project* surely demonstrates that the Court will not treat campaign speech by terrorist organizations like speech by ordinary voters. The Chief Justice's opinion in *Humanitarian Law Project* is

[13] *Id.*, at 2724-2730 (majority opinion).
[14] *Citizens United*, 130 S. Ct., at 905.

consistent with the Court's 1987 holding in *Meese* v. *Keene* that propaganda disseminated by agents of foreign governments—regardless of whether the government is friendly or unfriendly or whether the message is accurate or inaccurate – may be subjected to regulation that would be impermissible if applied to speech by American citizens.[15] The identity of a speaker as either a terrorist or just the agent of a friendly ally provides a sufficient basis for providing less constitutional protection to his speech.

Could the Court possibly conclude that expenditures by terrorists or foreign agents in support of a political campaign merit greater First Amendment protection than their actual speech on political issues? I think not. Indeed, I think it likely that when the Court begins to spell out which categories of non-voters should receive the same protections as the not-for-profit *Citizens United* advocacy group, it will not only exclude terrorist organizations and foreign

[15] 481 U. S. 465, 469-471, 477-485 (1987).

agents, but also all corporations owned or controlled by non-citizens, and possibly even those in which non-citizens have a substantial ownership interest. Where that line will actually be drawn will depend on an exercise of judgment by the majority of members of the Court, rather than on any proposition of law identified in the *Citizens United* majority opinion.

III

A few months ago, the Court affirmed an extremely important decision by a three-judge federal district court sitting in the District of Columbia.[16] Two residents of New York City—a Canadian citizen who recently had graduated from Harvard Law School and was employed by a New York law firm, and a medical resident at the Beth Israel Medical Center in New York who was a dual citizen of Israel and Canada – wished to express their political views by contributing money to certain candidates for federal and state office.[17] They brought

[16] *Bluman* v. *Federal Election Commission*, No. 11-275 (U.S. Jan. 9, 2012), aff'g 800 F. Supp. 2d 281 (DDC 2011).
[17] *Bluman*, 800 F. Supp. 2d, at 285; Jurisdictional Statement at 5.

suit against the Federal Election Commission challenging as unconstitutional the federal statute that makes it unlawful for them to engage in these activities.[18] Relying on the Court's opinion in *Citizens United*—and especially on the Court's condemnation of speaker-based restrictions on political speech—they contended that the federal statute's application to their proposed activities would violate their freedom of speech under the First Amendment.[19]

The district court agreed with the plaintiffs that the federal statute barred their proposed activity.[20] According to that court, the statute draws a basic distinction between campaign speech and express advocacy, on the one hand, and issue advocacy, on the other hand.[21] It prohibits foreign nationals from making expenditures to expressly advocate the election or defeat of a political candidate, but not from

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[18] *Bluman*, 800 F. Supp. 2d, at 285 (citing 2 U. S. C. §441e(a)); Jurisdictional Statement at 6.
[19] Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss at 28-29 (Jan. 18, 2011), *Bluman*, No. 1:10-cv-1766 (DDC).
[20] *Bluman*, 800 F. Supp. 2d, at 283, 285.
[21] *Id.*, at 284-285, 290.

engaging in advocacy regarding policy or other issues.[22] The district court pointed out that the leading case protecting the First Amendment rights of corporations—*First Nat. Bank of Boston* v. *Bellotti*[23] — had noted that "'speak[ing] on issues of general public interest' is a 'quite different context' from 'participation in a political campaign for election to public office.'"[24] While issue advocacy by foreign nationals may well be protected by the First Amendment, the district court held that Congress did not violate plaintiffs' First Amendment rights by criminalizing their proposed activities to support particular candidates.[25]

Invoking the Supreme Court's mandatory jurisdiction pursuant to §403(a)(3) of the Bipartisan Campaign Reform Act of 2002, the plaintiffs filed a direct appeal in the Supreme Court.[26] They argued that the district court's decision was inconsistent with

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[22] *Ibid.*
[23] 435 U. S. 765 (1978).
[24] *Bluman*, 800 F. Supp. 2d, at 290 (quoting *Bellotti*, 435 U. S., at 788 n.26).
[25] *Bluman*, 800 F. Supp. 2d, at 283, 292.
[26] Jurisdictional Statement at 1.

Citizens United.[27] Given the Supreme Court's reliance in *Citizens United* on the proposition that the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office",[28] coupled with the assumption that the plaintiffs were free to engage in issue advocacy, that argument surely had merit. While the appeal unquestionably provided the Court with an appropriate opportunity to explain why the President had misinterpreted the Court's opinion in *Citizens United* – assuming that what the President said was in fact "not true," as Justice Alito had suggested–the Court instead took the surprising action of simply affirming the district court without comment and without dissent.[29] That action, unlike an order denying a petition for certiorari, was a ruling on the merits. While such a summary affirmance has less precedential weight than fully argued cases, it remains a judgment that all

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[27] *Id.*, at 19-20.
[28] 130 S. Ct., at 898 (internal quotation marks omitted).
[29] *Bluman* v. *Federal Election Commission*, No. 11-275 (Jan. 9, 2012).

other federal courts, as well as state courts, must respect in resolving future cases.[30]

Therefore, notwithstanding the broad language used by the majority in *Citizens United*, it is now settled, albeit unexplained, that the identity of some speakers may provide a legally acceptable basis for restricting speech. Moreover, and again despite the broad language in the majority's opinion, I think it is also now settled law that, at least for some speakers, Congress may impose more restrictive limitations on campaign speech than on issue advocacy. The rule that Congress may not "restrict the speech of some elements of our society in order to enhance the relative voice of others"[31] remains applicable to issue advocacy, but does not necessarily apply to campaign speech. Indeed, as a matter of common sense there is no reason why that proposition must apply to both. Given its implicit recognition of a valid constitutional distinction

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[30] See *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977) ("Summary affirmances . . . do prevent the lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.").

[31] *Citizens United*, 130 S. Ct., at 904 (quoting *Buckley* v. *Valeo*, 424 U. S. 1, 48-49 (1975)).

between issue advocacy and campaign speech, it would be appropriate for the Court to reexamine whether it is ever permissible to impose the same restrictions on all candidates in order to equalize their opportunities to persuade voters to vote for them. Recent history illuminates the importance of that question.

IV

During televised debates among the Republican candidates for the presidency, the moderators made an effort to allow each speaker an equal opportunity to express his or her views. If there were six candidates on the stage, it seemed fair to let each speak for about ten minutes during each hour. Both the candidates and the audience would surely have thought the value of the debate to have suffered if the moderators had allocated the time on the basis of the speakers' wealth, or if they had held an auction allowing the most time to the highest bidder.

Yet that is essentially what happens during actual campaigns in which rules equalizing campaign expenditures are forbidden. There is a finite amount of prime television time available for purchase by candidates during the weeks before an election. Rules equalizing access to that time – rules providing the same limits on expenditures on behalf of both candidates—would enhance the quality of the candidates' debates. The quality of debate on important public issues in the Supreme Court is enhanced by imposing limits on the length of the adversaries' briefs and the time allowed for their oral arguments. Why shouldn't we expect comparable rules to have the same beneficial effect when applied to campaign debates? Of course, in both contexts the rules must allow each party an adequate opportunity to express his or her point of view.

It is judge-made doctrine rather than the Constitution's text that is the source of the all-encompassing prohibition against rules imposing any

limit on the amount of money that candidates or their supporters may spend to finance speech during political campaigns. Congress' enactment of the so-called "Millionaire's Amendment" of the Bipartisan Campaign Reform Act made it clear that that our elected representatives recognize the value of such rules. Nevertheless the same five Justices who decided *Citizens United* invalidated that amendment, reasoning that "it is a dangerous business for Congress to use the election laws to influence the voters' choices." *Davis* v. *Federal Election Commission*, 554 U. S. 724, 742 (2008). Under such reasoning, I suppose moderators of the Republican debates were engaging in a "dangerous business" of using their authority "to influence voters' choices" whenever they tried to equalize the candidates' time to respond to questions.

V

Finally, I want to speculate about how former Speaker of the House "Tip" O'Neill would probably have reacted to the Court's decision in *Citizens United* to

overrule *Austin* v. *Michigan Chamber of Commerce*.[32] One of his most frequently quoted observations about the democratic process was his comment that "All politics is local."[33] In *Austin*, the Court upheld the constitutionality of a Michigan statute that prohibited corporations from using their general treasury funds to finance campaign speech.[34] The statutory prohibition was important not only because it limited the use of money in Michigan elections, but also because it limited the ability of out-of-state entities to influence the outcome of local elections in Michigan.

Of course the respondent in that case, the Michigan Chamber of Commerce, represented corporations doing business in that state, but presumably a number of them were foreign corporations that did substantial business in states other than Michigan. From the point of view of Michigan voters, those corporate non-voters were comparable to the non-voting foreign corporations that

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[32] 494 U. S. 652 (1990).
[33] See Tip O'Neill with Gary Hymel, All Politics Is Local, and Other Rules of the Game (1995); Mario M. Cuomo, The Last Liberal, N.Y. Times (Mar. 11, 2001), http://www.nytimes.com/2001/03/11/books/the-last-liberal.html?src=pm.
[34] *Id.*, at 654-655.

concerned President Obama when he criticized the *Citizens United* majority opinion. A state statute that limits the influence of non-voting out-of-state entities – whether corporate or human – is consistent with Tip O'Neill's emphasis on the importance of local issues in political campaigns. On the other hand, a rule that opens the floodgates for foreign campaign expenditures will increase the relative importance of out-of-state speakers and minimize the impact of voters' speech that addresses purely local problems.

The decision to overrule *Austin* was therefore significant not only because it enhanced the relative importance of cash in contested elections, but also because it enhanced the relative influence of non-voters. In candidate elections—unlike debates about general issues such as tax policy, global warming, abortion, or gun control—the interest in giving voters a fair and equal opportunity to hear what the candidates have to say is a matter of paramount importance.

If the First Amendment does not protect the right of a graduate of Harvard Law School to spend his own money to support the candidate of his choice simply because his Canadian citizenship deprives him of the right to participate in our elections, the fact that corporations may be owned or controlled by Canadians – indeed, in my judgment, the fact that corporations have no right to vote – should give Congress the power to exclude them from direct participation in the electoral process. While I recognize that the members of the Supreme Court majority that decided *Citizens United* disagree with my judgment on this issue, I think it clear—for all the reasons explained in my *Citizens United* dissent and earlier in this talk—that their disagreement is based not on some controlling rule of law, but rather on their differing views about what rule will best serve the public interest.

Thank you for your attention.