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CITIZENS DISUNITED

Steven L. Winter*

Let's face it: Something is profoundly awry in our democracy. From swift-boaters to birthers; from WMDs to death panels; from anchor babies to fictitious beheadings in the Arizona desert; from Glen Beck to Newt Gingrich, our public discourse is a toxic mix of rumor, myth, half-truth, deliberate distortion, outright fabrication, guilt by loose association, and other whopping non-sequiturs. I am skeptical that any amount of campaign finance reform can repair this situation. But I am confident that to take a crude First Amendment crowbar to the only levee that keeps the surge of corporate funding from the maelstrom of modern mass media culture is to court disaster.

To think otherwise, you would have to have your head firmly ensconced in a First Amendment bubble circa 1973, when lunch counter sit-ins, civil rights marches, and anti-war demonstrations were recent, still vivid lessons in the value of free speech; when all reporters aspired to be Woodward and Bernstein; when people actually watched the CBS Evening News and Walter Cronkite was "the most trusted man in America"; and when an old-school mistrust of governmental power was made flesh in a paranoid President with an enemies list and a secret black-ops unit operating out of the White House. Like Professor Gora, I too came of age in that time, and, as I've written previously,[1] the fundamental First Amendment question of *that* day was how far to extend the boundaries of freedom of expression. Radicals like myself thought that there should be no boundaries at all.

We live in a different time, however—one of viral emails, Fox News, Facebook and Twitter, and an ever-escalating flow of money

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* Walter S. Gibbs Professor of Constitutional Law, Wayne State University Law School. Copyright 2010; all rights reserved.

1. Steven L. Winter, *Fast Food and False Friends in the Shopping Mall of Ideas*, 64 U. COLO. L. REV. 965 (1993).

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into the political system.[2] According to the non-partisan Center for Responsive Politics, spending on the recent midterm elections is estimated at nearly $4 billion compared to $2.85 billion for the 2006 midterm and the record $4.14 billion for the 2004 presidential campaign year. Outside spending in 2010 exceeded the previous record of $448 million set in 2004. Overall, Republican-leaning groups in this cycle outspent their Democratic counterparts by more than 2-to-1.[3] And, as has been widely reported, the vast proportion of this spending has come from § 501 (c)(4) and (6) organizations that do not have to disclose their donors.[4]

Much of this money was well-spent: the $36 million spent by Karl Rove's two Crossroads groups in support of Republican candidates yielded a 58% success rate, while the $26 million spent by the Chamber of Commerce in support of Republicans yielded a success rate of 63%.[5] These efforts were highly coordinated, with the

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2. To take a high-profile example, in 2004 Don Blankenship of Massey Coal spent $3 million to support the election of a state supreme court justice who then cast the deciding vote reversing a $50 million judgment against Massey. The bulk of this money, $2.5 million, was spent entirely independently. His overall contribution was more than three times the amount spent by the candidate's entire campaign. Caperton v. A.T. Massey Coal, 129 S. Ct. 2252, 2257–58 (2009). In *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010), Justice Kennedy distinguished *Caperton* as "limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." But this remarkable formalist sleight of hand fails to rebut the *factual premise* of the constitutionally required recusal in *Caperton*—that independent expenditures create an appearance of corruption. Logically, if an appearance of corruption of this sort is sufficiently strong to constitute a due process violation, then it is hard to see why it should not suffice as a compelling governmental interest justifying congressional regulation.

3. Megan R. Wilson, *Who's Buying This Election? Close to Half the Money Fueling Outside Ads Comes From Undisclosed Donors*, OPEN SECRETS BLOG, Nov. 2, 2010, http://www.opensecrets.org/news/2010/11/whos-buying-this-election.html; Michael Beckel & Megan R. Wilson, *Election 2010 Outside Political Spending Officially Eclipses Such Expenditures From 2004 Cycle*, OPEN SECRETS BLOG, Oct. 28, 2010, http://www.opensecrets.org/news/2010/10/breaking-outside-spending-this-seas.html; *Election 2010 to Shatter Spending Records as Republicans Benefit from Late Cash Surge*, OPEN SECRETS BLOG, Oct. 27, 2010, http://www.opensecrets.org/news/2010/10/election-2010-to-shatter-spending-r.html [hereinafter *Shatter Spending Records*]. *See* Editorial, *Drowning in Campaign Cash*, N.Y. Times, Oct. 31, 2010, at WK 7. To put it in context, the top four conservative groups spent over $100 million while the top four liberal groups spent $38.6 million, with three-quarters of that amount coming from two unions. *Shatter Spending Records*, *supra* note 3.

4. Michael Luo & Stephanie Strom, *Donor Names Remain Secret As Rules Shift*, N.Y. TIMES, Sept. 21, 2010, at A1; *Shatter Spending Records*, *supra* note 3.

5. Michael Luo & Griff Palmer, *Outside Groups on the Right Flexed Muscles in House Races*, N.Y. TIMES, Nov. 4, 2010, at P6. Some of the Chamber's money was spent on Democratic candidates. *Id.* According to the Center, the Chamber spent $35 million overall. *See also Shatter Spending Records*, *supra* note 3.

Republican outside groups spending heavily on behalf of candidates who were underfunded relative to their Democratic opponents. As one media analyst remarked: "Republican groups basically provided the advertising version of bridge loans for the underfunded challengers, running ads before they could go up on the air for themselves . . . ."[6] Because so much of this spending was by outside groups funded by anonymous donors, there was a flood of negative ads characterized by a sharply aggressive tone and exaggerated—if not false and misleading—claims.[7]

Though it might be too much to say that all this was wrought by the Court's decision in *Citizens United*,[8] it is certainly true that it took place under its aegis. Not surprisingly, Americans overwhelmingly disapprove: in a poll just before the midterm elections, 80% of respondents said it was important to limit campaign spending (with Democrats and Independents more likely than Republicans to say it was very important) and 92% favored full disclosure.[9] The experience of the recent elections and the negative reaction of the vast majority of Americans surely entitle us to ask whether the Court's ruling was either necessary to or justified by our commitments to democracy and free speech.

Plainly, the Court and its supporters think so. Yet, while the Court's opinion in *Citizens United* is long on free speech rhetoric, it is painfully short on empirical data, social context, and constitutional vision.[10] In his symposium paper, Professor Gora argues that the decision represents a victory for free speech and for democracy.[11] "First-Amendment rights," he says, "should be unified, universal, and

6. Michael Luo, *Democrats Outspend G.O.P. in TV Ads in House Races*, N.Y. TIMES, Nov. 1, 2010, at A17. *See* Luo & Palmer, *supra* note 5 ("In many cases, the Republican-oriented groups got involved in the races early on, battering Democratic candidates with negative advertisements, helping to set the tone in those districts, even if Democratic candidates and their allies were eventually able to outspend them." (quoting Evan Tracey, President of the Campaign Media Analysis Group)).

7. Luo & Palmer, *supra* note 5.

8. Citizens United v. Federal Elect. Comm., 130 S. Ct. 876 (2010).

9. Megan Thee-Brennan, *Americans Want Disclosure and Limits on Campaign Spending*, N.Y. TIMES, Oct. 28, 2010, http://thecaucus.blogs.nytimes.com/2010/10/28/americans-want-disclosure-and-limits-on-campaign-spending/?scp=2-b&sq=campaign+spending&st=nyt.

10. *See Citizens United*, 130 S. Ct. at 979 (Stevens, J., dissenting) ("Today's decision . . . elevates . . . assertion over tradition, absolutism over empiricism, rhetoric over reality.").

11. Joel Gora, *The First Amendment . . . United*, 27 GA. STATE UNIV. L. REV. 935 (2011).

indivisible."[12] But one cannot assess the likely impact of *Citizens United* on our democracy without a clear understanding of the dynamics of modern mass media culture and its impact on contemporary politics. Beyond that one would need: first, a theory of free speech; second, a theory of truth or, at least, of how people come to hold the beliefs they do; third, a theory of democracy; and, fourth, a decent socio-legal understanding of corporate behavior. All this is strikingly absent both from the Court's reasoning in *Citizens United* and from Professor Gora's spirited defense of its ruling. There is little of the analysis that might help us think about the deeper questions of corporate citizenship and of the democratic sustainability of our current political system.

"The First Amendment," Professor Gora says, "has always been based on the idea that the more speech we have, the better off we are, as individuals and as a people."[13] Not quite. As a historical and conceptual matter, there have been not one, but several First Amendments based on different normative underpinnings and different conceptions of truth. For the Framers, who held a strong view of Truth, it seemed perfectly reasonable to punish false speech after the fact. Thus, the chief innovation of the founding period was the notion that truth should operate as a defense to seditious libel—a reform carried forward in Section 3 of the Sedition Act. Even Jefferson, an opponent of the Sedition Act, had no qualms about referring what he considered offensive falsehoods for prosecution by state authorities. Justice Holmes, in contrast, held a Darwinian conception of truth as that which emerges from the contest of views. We are all familiar with his claim that the "the ultimate good desired is better reached by free trade in ideas."[14] But his was not the Miltonian faith that no one "ever knew Truth put to the wors, in a free and open encounter."[15] His, rather, was the more cynical

12. *Id.* at 939.
13. *Id.* at 940.
14. Abrams v. United States, 250 U.S. 616, 630 (1919).
15. JOHN MILTON, *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicenc'd Printing. To the Parlament of England* (1644), *in* THE PROSE OF JOHN MILTON 265, 327–28 (J.M. Patrick ed. 1967) (all spellings as in original).

understanding "that truth was the majority vote of that nation that could lick all others."[16] Holmes viewed free speech as a no-holds barred competition between vigorously contested views that must ultimately yield to "the dominant forces of the community."[17] Justice Brennan's more liberal version of unbridled free speech, in contrast, championed the idea that "debate on public issues should be uninhibited, robust, and wide-open"[18] and characterized by "the widest possible dissemination of information from diverse and antagonistic sources."[19]

But we do not live in 1644, 1789, 1919, or 1964. We live in a media age in which the insight that truth is socially constructed has become a practical axiom. There are now a multitude of social and political institutions that wield ever more sophisticated ways of designing, marketing, and disseminating images and other symbolic forms through ever faster and ever more pervasive technologies of communication. The *Citizens United* Court seems to think that this is a good thing or, at least, that corporations will helpfully identify errors and fallacies that would otherwise go undetected.[20] Yet, every day truth *is* put to the worse. According to a *Newsweek* poll, 31% of all Americans and 52% of all Republicans think that President Obama is a secret Muslim or sympathetic to the jihadi project of imposing Sharia law worldwide.[21] Between 20% and 27% of all Americans[22] and 51% of Republicans likely to vote in the 2012

16. Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).
17. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).
18. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
19. *Id.* at 266 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).
20. Citizens United v. Federal Elect. Comm., 130 S. Ct. 876, 912–13 (2010).
21. Daniel Stone, *Democrats May Not Be Headed for Midterm Bloodbath*, NEWSWEEK, Aug. 27, 2010, http://www.newsweek.com/2010/08/27/newsweek-poll-democrats-may-not-be-headed-for-midterm-bloodbath.html. The raw data is posted online at http://nw-assets.s3.amazonaws.com/pdf/1004-ftop.pdf. Question 24 asked: "Some people have alleged that Barack Obama sympathizes with the goals of Islamic fundamentalists who want to impose Islamic law around the world. From what you know about Obama, what is your opinion of these allegations?" While 7% of all respondents said "definitely true" and 24% said "probably true," the corresponding numbers among Republicans were 14% and 38%.
22. Sheryl Gay Stolberg, *In Defining Obama, Misperceptions Stick*, N.Y. TIMES, Aug. 19, 2010, at A19.

primaries[23] believe that Obama was not born in the United States, even though his birth certificate is posted online.[24] The Court observes: "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[25] And it confidently affirms its First Amendment faith, "entrusting the people to judge what is true and what is false."[26] But where is that enlightened and informed electorate? What has happened to its capacity to consider factual claims and accept or reject them on the merits? What has happened to our naive faith in the marketplace of ideas?

In his book, *The First Amendment, Democracy, and Romance*, Steve Shiffrin warns against monolithic theories of free speech. There are, he points out, "a host of First Amendment values"[27] that include tolerance; liberty; self-governance; the dignity, equality, and autonomy of all individuals; the value of self-expression and self-realization; and Emersonian Romanticism. Each of these normative conceptions asks us to think about free speech in a different way; each leads to very different conclusions about the place of corporate speech under the First Amendment. I do not have the time to draw them all out here, but the two most obvious implication are: first, that free speech is a quality of flesh-and-blood humans whose liberty, dignity, and self-realization the First Amendment was meant to

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23. *Romney and the Birthers*, PUBLIC POLICY POLLING, Feb. 15, 2011, http://publicpolicypolling.blogspot.com/2011/02/romney-and-birthers.html; Tim Rutten, *Behind the 'Birther' Blather*, L.A. TIMES, Feb. 16, 2011, at A17.

24. *See, e.g.*, http://factcheck.org/elections-2008/born_in_the_usa.html; http://latimesblogs.latimes.com/washington/2008/06/obama-birth.html; http://fightthesmears.com/articles/5/birthcertificate. On Wednesday, April 27, 2011. President Obama released his "long form" birth certificate. Michael D. Shear, *Citing 'Siliness,' Obama Shows Birth Certificate*, N.Y. TIMES, April 28, 2011, at A1. "No sooner had President Obama released his long-form birth certificate than Orly Taitz, the doyenne of the ''birther"' movement, found reason to doubt it." Kate Zernike, *Conspiraces Are Us*, N.Y. TIMES, May 1, 2011, at WK1.

25. *Citizens United*, 130 S. Ct. at 898. Similarly, Professor Gora observes that "no one seriously disputes . . . that the primary purpose of the First Amendment's guarantees of freedom of speech, press, assembly and petition is to enhance democracy by insuring an informed electorate capable of governing its own affairs." Gora, *supra* note 11, at 961.

26. *Citizens United*, 130 S. Ct. at 907.

27. STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 5–6 (Harvard University Press 1990).

protect, and, second, that free speech is one of the defining aspects of citizenship and, thus, a characteristic not of commercial enterprises but of self-governing legal subjects. I will say more about these in a moment. Suffice it to say that for-profit corporations do not fare well under either of these understandings.

In a parallel vein, Ed Baker's *Media, Markets, and Democracy* reminds us that there is more than one theory of democracy, and the different theories provide different answers to the questions of what type of free speech we need and why.[28] Elite or Schumpeterian democratic theory sees democracy as a system in which policy elites compete for the approval of the masses who, truth be told, could not be bothered by the complexity, difficulty, and time-consuming nature of actual self-governance. On this view, the role of a free speech regime is to provide information and transparency—that is, to serve a "checking function" on accrued, corrupt, or ineffective governmental power.[29] Independence is the key characteristic of this model of free speech. Liberal or pluralist democratic theorists view democracy as a competition between individuals and groups over divergent interests, values, and conceptions of the good. The results of these conflicts are aggregated through voting and mediated by bargaining and compromise (particularly in the legislative process, but also in the electoral process of forming coalitions). On this view, the role of the First Amendment is to guarantee that individuals and the interest groups to which they belong receive adequate information about when their interests are at stake and about how and when to mobilize to defend them. The key characteristics of this model of free speech are the independence *and* diversity of informational sources.

Contemporary civic republicans, such as myself, understand democratic self-governance not on the model of an individual right, like the right to liberty or property, but as an unavoidably communal enterprise in which we share with others the authority to decide the

28. C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 125–213 (Cambridge University Press 2002).

29. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 521–649 (1977).

conditions of social life.[30] This requires participation, mutual recognition and respect, and conditions of solidarity in dealing with the problems of our collective existence—what, in classical republican theory, is expressed in terms of the *res publica* or the "common good." On this view, the role of a free speech regime is to promote the conditions necessary for the deliberative discourse that constitutes collective self-governance. Independence and diversity—though now in the form of inclusive participation—remain desiderata. But, on this model of free speech, fragmentation, excessive partisanship, and overtly strategic communication are absolutely deadly to democracy. The key characteristics of this model are a reflective, inclusive public discourse that respects differences and promotes responsibility and solidarity.

This listing is not exhaustive. I have passed over both classical republican theory and Baker's own "mixed" conception, which thoughtfully combines elements of pluralist and classical republican democratic theory.[31] Each yield different conceptions of the free speech that a democratic polity would require. The overall point should be clear: One cannot say that a particular ruling or practice is "a win for democracy" without both saying what you mean by democracy and explaining why that particular democratic vision is normatively superior. Even then, one would have to show that one's normative claim is either accurately descriptive of or, at least, empirically plausible under modern conditions.

Perhaps I am making too much of this silence. Surely, we can infer that it is a liberal pluralist view that animates the *Citizens United* decision and that Professor Gora is defending here. Thus, the Court says that "it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes."[32] So too, it notes that

30. *See* Steven L. Winter, *Reimagining Democracy for Social Individuals*, 46 ZYGON: J. RELIGION AND SCI. (forthcoming 2011).

31. BAKER, *supra* note 28, at 143–47. I have also left out postmodern conceptions of democracy (which, in my view, offer an important complement to contemporary republicanism) such as Chantal Mouffe's "agonistic pluralism." *See, e.g.*, CHANTAL MOUFFE, THE DEMOCRATIC PARADOX (Verso 2000).

32. Citizens United v. Federal Elect. Comm., 130 S. Ct. 876, 899 (2010).

"[f]actions should be checked by permitting them all to speak."[33] But there is an equivocation that runs through both the Court's opinion and Professor Gora's paper, which undermines this otherwise obvious conclusion.

The dominant *motif* of the Court's opinion is, as Justice Stevens observes in dissent, the extensive (one might say, obsessive) repetition of the "glittering generality" that the First Amendment prohibits "distinctions based on a speaker's identity, including its 'identity' as a corporation."[34] In much the same vein, Gora argues that free speech rights "should be available to all those individuals and groups which seek to exercise them."[35] At the same time, both maintain that it is "the importance of the speech, not the identity of the speaker" that determines protection.[36] Thus, the Court observes that "the worth of speech 'does not depend upon the identity of its source, whether corporation, association, union, or individual.'"[37] And Gora insists: "We protect the speaker to protect the speech."[38]

I raise this ambiguity for two reasons. First, the argument for the primacy of the speech over the speaker is the traditional hallmark of a civic republican approach. As Alexander Meiklejohn remarked: "The First Amendment . . . does not require that . . . every citizen shall take part in the public debate. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said."[39] It matters here because what is at issue in the campaign finance debate is not the substance of the speech, but its *provenance*. It is not just, in the case of restrictions on campaign expenditures, that there are other people out there saying the same things; it is, rather, that the same speaker can say exactly the same thing as long as he/she/it does so at

33. *Id.* at 907.
34. *Id.* at 930 (Stevens, J., dissenting).
35. Gora, *supra* note 11, at 950.
36. *Id.* at 951.
37. *Citizens United*, 130 S. Ct. at 904 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1976)).
38. Gora, *supra* note 11, at 951.
39. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (Harper & Brothers 1948).

an earlier time or using a different legal form.[40] The Court in *Citizens United* observes that, "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content."[41] But that is not at all what is at stake here.

Second, and this goes to the heart of the argument, the systematic conflation of speaker and speech is a rhetorical device that allows the Court and its defenders to have their cake and eat it too. "The civic discourse," the Court says, "belongs to the people."[42] But who are "the people" when it is a corporation that speaks? The Court extols the citizens' right to use the information as they see fit in the exercise of "enlightened self-government." But a corporation is an economic entity, not a citizen; a profit-making enterprise, not an enlightened intelligence; a creature of the law, not a partner in a democratic project of political self-governance. The Court's rejoinder is—in effect—that it is the speech, not the speaker that matters. At the same time, however, the Court misappropriates the moral attributes of personhood when it argues that restrictions on corporate speech are a form of discrimination: "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."[43] Worth and standing are qualities of *persons*; so, too, respect is a moral obligation that one owes to other human beings.

Gora employs just the same rhetorical sleight of hand when he argues that corporations cannot be treated as second-class citizens or "political untouchables."[44] "A 'caste system' with privileged speakers and pariah speakers," he says, "is anathema to First Amendment principles."[45] But these kinds of dignitary harms are

40. In a second remarkable bit of formalism, the Court explains that § 441b is a restriction on corporate speech even though the corporation is free to form a PAC for that purpose because "[a] PAC is a separate association from the corporation." Citizens United v. Federal Elect. Comm., 130 S. Ct. 876, 897 (2010).

41. *Id.* at 899.

42. *Id.* at 917.

43. *Id*. at 899.

44. Gora, *supra* note 11, at 945.

45. *Id.* at 969.

unique to persons, not abstract legal entities. To get a proper sense of the distortion, consider your reaction if I said that Ralph Nader or Michael Moore is "racist against corporations." If you did not think me odd, you would assume that I was speaking metaphorically.

But that's the point: Money is not speech, though it can be a useful instrument in getting speech heard. A corporation is not a person, though it is an effective vehicle for accomplishing various human purposes. Gora, at least, acknowledges this. But then he asserts that because corporations "are made up of, run by and embody the interests and concerns of real people" they should get the same rights.[46] But this a monumental fudge. First, he is once again shifting his ground from the argument that it is the speech and not the speaker; he explicitly invokes the interests and concerns of flesh-and-blood humans to justify the free speech rights that, he claims, should not be restricted to real people. Second, he is eliding entirely the question that lies at the heart of the objection to *Citizens United*: What are the interests and concerns of the real people who make up the corporation? When we are talking about an advocacy-oriented, not-for-profit like the ACLU or Citizens United, it is precisely the protected speech interests of flesh-and-blood humans at issue. But when we are talking about a commercial corporation such BP or Halliburton, the interests and concerns of the people who staff the corporation and speak for it are entirely irrelevant. The corporation has only one interest, and it is mandated both by the market and by law: to maximize the return on the shareholders' investment.[47]

As Justice Stevens points out in dissent, the commercial corporation is not at all like a real person.[48] It is not interested in self-realization. It finds no inherent value in self-expression. It could not care less about Emersonian romance. It has no loyalty to its employees or community that is not trumped by the bottom-line. If it

46. *Id.* at 954.

47. Anne Tucker, *Rational Coercion:* Citizens United *and a Modern Day Prisoner's Dilemma*, 27 GA. STATE UNIV. L. REV. 1105 (2011).

48. *Citizens United*, 130 S. Ct. at 948 (Stevens, J., dissenting) ("[T]he Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.").

is more cost-effective, it will outsource its jobs or relocate its factories abroad because its sole concern is profit. In short, the real people whose dignity and self-governance we care about are complex moral beings. The commercial corporation is a single-purpose entity that, in a word, is not an object of citizenship.

In Chicago, there is a statute of George Washington flanked by Robert Morris and Haym Salomon.[49] My bet is that most readers have never heard of Haym Salomon. He was a Polish Jew who immigrated to New York in the mid-1770s. He was a financial broker, a member of the Sons of Liberty, arrested by the British as a spy during the Revolutionary War, and an expert broker who worked with Morris to finance the American Revolution.[50] Estimates put his loans to the fledgling nation at $800,000 in 18th Century dollars.[51] When Washington needed $20,000 to march the troops to Yorktown and the Treasury was empty, legend has it that his four-word dispatch read: "Send for Haym Salomon."[52] According to the legend, Salomon had lent so much money to the government that he died broke. Although the reality was more complex, his descendents did petition Congress unsuccessfully for repayment of some of the loans.[53]

Why do I mention him? Does anyone in his or her wildest imagination think that Halliburton would similarly underwrite the War in Iraq? Given our whopping deficits, would it rebate to the

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49. In their brief in *Buckley v. Valeo*, Professor Gora and his co-authors invoked the financial contributions of Robert Morris and Haym Salomon to the Revolutionary War cause in support of their argument that campaign expenditures are a form of free speech. Brief of the Appellants at 122–23, Buckley v. Valeo, 424 U.S. 1 (1975) (Nos. 75–436, 75–437). From a practical standpoint, of course, the "campaign" they helped underwrite was a military one; from a legal standpoint, what they were engaged in was not free speech but *treason*. Presumably, no one thinks that financial contributions to a military group committed to overthrowing the existing legal government is protected by the First Amendment. *Cf.* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

50. JACOB RADER MARCUS, EARLY AMERICAN JEWRY, VOLUME 2: THE JEWS OF PENNSYLVANIA AND THE SOUTH, 1655-1790, at 132–54, 161–64 (Jewish Publication Society of America 1953); LAURENS R. SCHWARTZ, JEWS AND THE AMERICAN REVOLUTION: HAYM SALOMON AND OTHERS 5–114 (McFarland & Co., Inc. 1987).

51. MARCUS, *supra* note 50, at 134. In fact, he was instrumental in floating at least $200,000 in securities on behalf of the Revolutionary cause. He also made personal loans (for which he refused repayment) to an impecunious James Madison while the latter served in the Continental Congress in Philadelphia. *Id.* at 164; SCHWARTZ, *supra* note 50, at 65–66.

52. Donald N. Moran, *Haym Salomon—The Revolution's Indispensable Financial Genius* (1999), http://www.revolutionarywararchives.org/salomon.html.

53. MARCUS, *supra* note 50, at 132, 162.

United States some of the billions in profits it earned during that war? A First Amendment that equates corporations like Halliburton with citizens like Haym Salomon is not "unified, universal, and indivisible," but dangerously oversimplified.