A blow for freedom at the highest level

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In Citizens United v. Federal Election Commission, commonly known as the “Hillary movie” case, the U.S. Supreme Court finally vindicated a proper understanding of the First Amendment, which provides that “Congress shall make no law” restricting freedom of speech. One might ask what part of “no law” do you not understand, but for much of the last century, especially since Watergate — in what we may stipulate has been a sincere effort to reduce corruption or the appearance of the possibility of corruption — Congress has imposed restrictions on political speech and the use of money to promote or promulgate such speech.

As well intentioned as political campaign restrictions might have been, many of them run afoul, as Justice Anthony Kennedy noted in his opinion for the 5-4 majority, of constitutional guarantees of free speech, and it is precisely the high court’s job — not illegitimate “judicial activism,” as some contend — to strike down such laws.

In this case Citizens United, a generally conservative organization organized as a non-profit corporation, put together a movie critical of then-presidential candidate Hillary Clinton, sought to make it available “on demand” with some cable TV companies, and then run TV ads promoting the availability of the movie. The Federal Election Commission argued that under Sec. 441b of the 2002 Bipartisan Campaign Reform Act widely known as McCain-Feingold, the ads constituted a violation of the law’s ban on using corporate funds to undertake an “electioneering communication” or any speech advocating the election or defeat of a candidate within 30 days of a primary election and 60 days of a general election.

Federal campaign laws are curious. Although the First Amendment has been used (properly in our view) to protect speech and expression that many people find lewd or objectionable, its most fundamental purpose is to protect the freedom of political speech. It would seem that this freedom is most important precisely in the periods leading up to elections. Yet McCain-Feingold, passed in 2002, explicitly banned such speech and political expression. As Justice Kennedy noted in his opinion:

“Thus the following acts would all be felonies under Sec. 441b: The Sierra Club runs an ad … that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate’s defense of free speech. These prohibitions are classic examples of censorship.”

This censorship is compounded by the fact that the FEC has created dense and extensive rules implementing various laws that, as Justice Kennedy put it, “allows it to select what political speech is safe for public consumption by applying ambiguous tests.”

Ilya Shapiro, a legal analyst at the libertarian Cato Institute, took note of an argument Chief Justice Roberts made in his concurring opinion. There is an argument for not overturning prior court decisions, as this one did, because people have come to rely on those decisions even if they were wrong. However, nobody relies on having less freedom than the constitution guarantees, so some decisions are ripe to be overturned.

All that said, some of the concerns about corruption and influence that campaign finance laws have sought to address are serious or potentially serious. Such concerns can be best addressed, however, by mandating full and immediate disclosure, by candidates and issue-oriented organizations, of contributions and spending on electioneering. With the Internet this is perfectly feasible, and would allow voters to decide whether, for

example, a contribution by an insurance company or electioneering by an environmental organization is sufficient to decide how one votes.

This decision does not mark, as a coalition of groups calling for a constitutional amendment in the wake of the decision declared, a “Pearl Harbor for American democracy.” It would be more accurate to call it, as President Lincoln said in a different context, a “new birth of freedom.”