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"WE THE PEOPLE"? CORPORATE SPENDING IN AMERICAN ELECTIONS AFTER CITIZENS UNITED

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Page

Cardin, Hon. Benjamin L., a U.S. Senator from the State of Maryland, prepared statement 81
Cornyn, Hon. John, a U.S. Senator from the State of Texas 18
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin 15
prepred statement 97
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont 1
prepred statement 122
Sessions, Hon. Jeff, a U.S. Senator from the State of Alabama 3
Whitehouse, Hon. Sheldon, a U.S. Senator from the State of Rhode Island, politico article 203

WITNESSES

Kendall, Douglas T., President, Constitutional Accountability Center, Washington, DC 10
Rosen, Jeffrey, Professor of Law, George Washington University, and Legal Affairs Editor, The New Republic, Washington, DC 5
Smith, Bradley A., Chairman, Center for Competitive Politics, Alexandria, Virginia and Josiah H. Blackmore III/Shirley M. Nault Designated Professor of Law, Capital University Law School, Columbus, Ohio 7

QUESTIONS AND ANSWERS

Responses of Douglas T. Kendall to questions submitted by Senators Cornyn, Hatch and Sessions 39
Responses of Jeffrey Rosen to questions submitted by Senators Cornyn, Hatch and Sessions 49
Responses of Bradley A. Smith to questions submitted by Senators Sessions, Cornyn and Hatch 59

SUBMISSIONS FOR THE RECORD

Arnebeck, Clifford O., Jr., Columbus, Ohio, statement 77
Clements, Jeffrey D., Clements Law Office, Concord, Massachusetts, statement 83
Institute for Justice, Arlington, Virginia, political books 103
Kendall, Douglas T., President, Constitutional Accountability Center, Washington, DC 105
Law Professors Letter to Senators Leahy and Sessions, Citizens United 119
Organization for International Investment, Washington, DC, statement 125
Rosen, Jeffrey, Professor of Law, George Washington University, and Legal Affairs Editor, The New Republic, Washington, DC, statement 129
Smith, Bradley A., Chairman, Center for Competitive Politics, Alexandria, Virginia and Josiah H. Blackmore III/Shirley M. Nault Designated Professor of Law, Capital University Law School, Columbus, Ohio, statement and attachments 140

VerDate Nov 24 2008 12:05 Oct 13, 2010 Jkt 058420 PO 00000 Frm 00003 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\58420.TXT SJUD1 PsN: CMORC

"WE, THE PEOPLE"? CORPORATE SPENDING IN AMERICAN ELECTIONS AFTER *CITIZENS UNITED*

WEDNESDAY, MARCH 10, 2010

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 10:08 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feingold, Schumer, Cardin, Whitehouse, Klobuchar, Kaufman, Specter, Franken, Sessions, Hatch, and Cornyn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. Today's hearing is another in a series we have held that focus on how recent activist decisions by very narrow majorities on the Supreme Court affect the lives of hard-working Americans. We did this, of course, on the *Lilly Ledbetter* case where the Supreme Court basically said women could be paid less than men for the same kind of work. And in a case called *Citizens United* v. *Federal Election Commission*, five of the nine Justices acted to overturn a century of law designed to protect our elections from corporate spending. They ruled that corporations are no longer prohibited from direct spending on political campaigns. They extended to corporations the same First Amendment rights in the political process that are guaranteed by the Constitution to individual Americans.

And I believe the *Citizens United* decision turns the idea of Government of, by, and for the people on its head. It creates new rights for Wall Street at the expense of the people on Main Street. It threatens to allow unprecedented influence from foreign corporations into our elections. You can imagine what China could do with an American subsidiary if they wanted to influence an election, perhaps to defeat somebody who would criticize the use of basically slave labor or unsafe practices in China. And I think Americans concerned about fair elections have rightfully recoiled.

Our Constitution begins with the words, "We, the People of the United States." In designing the Constitution, States ratifying it, adopting the Bill of Rights, and creating our democracy, we spoke of and thought of and guaranteed fundamental rights to the American people, not to corporations.

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There are reasons for that. Corporations are not the same as individual human Americans. Corporations do not have the same rights, the same morals, or the same interests. And corporations cannot vote in our democracy.

Teddy Roosevelt proposed the first campaign finance reforms, limiting the role of corporations in the political process. Those reforms, proposed by a Republican President, were preserved and extended through another century of legal developments that followed. Eight years ago, it was these same values that informed bipartisan efforts in Congress, on behalf of the American people, to enact the landmark McCain-Feingold Act, and that legislation strengthened the laws protecting the interests of all Americans by ensuring a fair electoral process where individual Americans could have a role in the political process, regardless of their wealth.

Six years ago, in *McConnell* v. *Federal Election Commission*, the Supreme Court upheld the key provisions of the McCain-Feingold Act against a First Amendment challenge. Now, a thin majority of the Supreme Court, made possible by President Bush's appointment of Justice Samuel Alito, reversed course on the same question. In doing so, this activist majority discarded not only the *McConnell* decision, but ran roughshod over longstanding precedent, and took it upon itself to effectively redraft our campaign finance laws. As Justice Stevens noted in dissent, "The only relevant thing that has changed since . . . *McConnell* is the composition of the Court." The Constitution has not changed. In fact, nowhere in Constitution do we even mention corporations.

At the core of the First Amendment is the right of individual Americans to participate in the political process—to speak and, more crucially, to be heard. That is what the campaign finance laws were designed to ensure—that Americans can be heard and fairly participate in elections. Five Justices overruled Congressional efforts to keep powerful, moneyed interests from swamping individuals' voices and interests. They showed no deference to Congress and little to the precedents of the Supreme Court.

Now, Vermont is a small State. We have only 660,000 people. It is easy to imagine corporate interests flooding the airwaves with election ads and transforming even local elections there. It would not take more than a tiny fraction of corporate money to outspend all of our local candidates, both Republicans and Democrats combined. If a local city council or zoning board is considering an issue of corporate interest, why would the corporate interests not try to drown out the views of ordinary Vermonters, hard-working citizens though they are? I know that the people of Vermont, like all Americans, take seriously their civic duty to choose wisely on election day. Vermonters cherish their critical role in the democratic process. They are staunch believers in the First Amendment.

Vermont, in fact, would not ratify the Constitution until the adoption of the Bill of Rights in 1791. I think the rights of Vermonters and all Americans to speak to each other and to be heard should not be undercut by corporate spending. And I fear that is exactly what will happen unless both sides of the aisle—both Republicans and Democrats have a stake in this, and they should join with the President to try to restore the ability of every

American to be heard and effectively participate in free and fair elections.

When the *Citizens United* decision was handed down, I said that it was the most partisan decision since *Bush* v. *Gore*. As in *Bush* v. *Gore*, the conservative activists on the Supreme Court unnecessarily went beyond the proper judicial role to substitute their own personal preferences for the law. With all the talk about judicial modesty and judicial restraint from the nominees at their most recent confirmation hearings, those nominees of President Bush, we have seen all a Supreme Court these last 4 years that has been anything but modest and restrained.

I am just concerned that this case is going to open the floodgates for corporate spending. And in these tough economic times, I believe individual Americans should not have their voices drowned out by unfettered corporate interests. I am also very concerned that this decision is going to invite foreign corporate influence into our elections. We are in unchartered territory, and I am concerned about what this might do.

Senator Sessions, please go ahead, sir.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman.

I see my colleague Senator Cornyn. I know he would like to share a few opening comments. Maybe we could swap out on that. If you would think about it, I would appreciate it.

The first thing, on Lilly Ledbetter, the Supreme Court had a responsibility to interpret a poorly written Congressional statute on the statute of limitations. They ruled the way they felt was correct. I think it was a decision that they could very well be justified. And then Congress acted promptly and changed it and clarified it. That is the way the system is supposed to work, and I do not think we should attack the Court's integrity basically and accuse them of being political agenda-oriented on that case because we may have disagreed with how they interpreted a rather unclear statute.

I think *Citizens United* was a very important affirmation of a fundamental American liberty, it seems to me, enshrined in the First Amendment that "Congress shall make no law" infringing the right of freedom of speech. And I think the Court simply said an assembly of people can have the right to speak also. And I think the criticisms are overwrought, and it should not be nearly as personal as it is on the Court, and that this is a legitimate interpretation of the words and spirit of the First Amendment which favors the liberty of advocacy in a very clear way.

The sacred right of free speech is enshrined in our Republic from the beginning and one that becomes stronger when we protect it even for those who we disagree with, and we have a tradition of that. So I think it would be a good opportunity today to look at it honestly and accurately and talk about the Supreme Court's ruling that appeared to me to be strengthening the First Amendment rather than constricting the First Amendment.

I am concerned, though, that there has been too much alarmist rhetoric that has been flying around since this decision, and I hope

that today's hearing can shed some light and not misrepresent the nature of the decision or impugn the integrity of the Justices.

I do not think the Court is above criticism. I think they can be criticized. But I got to say, I was disappointed—dismayed, really—to hear the President of the United States mischaracterize the decision of the Supreme Court and scold the members of the Court in his State of the Union address for something they did not do, mischaracterized the case.

The President claimed that the decision "reversed a century of law" and "opened the floodgates" for special interests and foreign powers to "bankroll American elections." And I do not believe that was an accurate statement from an individual who should know better because he has taught constitutional law. If you are going to challenge the Supreme Court in the presence where they have no opportunity to respond and defend themselves, you ought to be absolutely accurate in your criticism. They are not above criticism. It does not affect their independence. They have got a lifetime appointment. So I am not worried about their independence. Sometimes they wail about it. They can be criticized, but it ought to be honest and fair.

I think the President was in error in a number of ways. It is critical for us to remember *Citizens United* found that independent expenditures, advertisements, pamphlets, books, documentaries produced independently from a party or candidate's campaign cannot be suppressed under the First Amendment simply because the funds for this political speech came from the coffers of a labor union or a corporation. *Citizens United* did not change the laws restricting corporate contributions to political parties or to campaigns. And let me say that again. It did not lift restrictions on contributions to political campaigns from corporations or labor unions.

As the Court has recognized for 30 years, there is a difference between political campaign contributions, which carry a risk of a quid pro quo type corruption—and there is some sense of that. If you give a large amount of money to a candidate for their campaign, it has implications of a quid pro quo. But that has been held to be different from independent, uncoordinated expenditures by individuals, advocacy groups, or other associations who wish to make their views heard to the American people even before an election. When do you want to speak out if it is not before an election?

So the President's charge right there before all the American people that the Court had opened the door to special interests, bankrolling elections, I think was very misleading. It is not about independent—it is about independent political speech, not about filling the campaign coffers of a party or a candidate.

Second, it did not reverse a century of law because there was no law limiting independent expenditures until 1947, when Congress passed the Labor-Management Relations Act. That Act was passed over the veto of our Democratic President Harry Truman who warned that the law was "a dangerous intrusion on free speech." So critics of the *Citizens United* decision like to point to the Tillman Act of 1907 as the first campaign finance restriction, but the Tillman Act barred contributions; it did not bar independent political speech funded by labor unions or corporations. *Citizens United*

did reverse the 1990 decision in *Austin*, but the majority opinion and the concurrence by Chief Justice Roberts clearly explained the *Austin* decision itself was an aberration. It was a departure from the Court's earlier First Amendment cases and a case based on a legal theory really that the Obama administration attorneys could not bring themselves to defend, really.

Third, the President's statement and accusations by others who have echoed him claim that the Supreme Court made the political system vulnerable to independence from foreign corporations, but the Court explicitly noted in *Citizens United* it was not changing the Federal law that already bans foreign corporations from participating in the Federal process.

The constitutional issues identified by the Court I do not think should surprise us. Many of us will recall that we have spent years debating campaign finance reform. A number of our members offered a constitutional amendment to amend the First Amendment, to restrict the First Amendment, in order to explicitly allow Congress to pass these kind of spending limits on advocacy and politics. And pretty soon that was all voted down, and we have not heard from that again, thank goodness. But in a way, this is a similar thing to ask the Court to affirm a statute that does the same thing. And the Court was worried about it.

As I said at the time that amendment was offered, it was an astounding, a thunderous, a remarkable change in policy for America. And I believed it then, and I think in the long run we are better off allowing this cauldron of competing interests to express themselves than to create a Government power to pick and choose what group of people can express themselves in a campaign.

So, Mr. Chairman, I do not know, maybe I am wrong about this. We have got some great witnesses today. Let us talk about it. But I absolutely believe that this is not the kind of open-and-shut question people say. At best, the critics ought to acknowledge this is a close call. And, in fact, I think they would have to admit that if the Court had ruled otherwise, the power of people to collectively participate in campaigns and speak out freely in America would have been constrained. Therefore, I think the Court did right. Thank you.

Chairman LEAHY. Well, let us give the panel then a chance to respond. We will start with Professor Jeffrey Rosen who teaches constitutional law at George Washington University. He has authored several books on the Supreme Court. He is Legal Affairs editor for The New Republic.

Mr. Rosen, good to have you here.

STATEMENT OF JEFFREY ROSEN, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY, AND LEGAL AFFAIRS EDITOR, THE NEW REPUBLIC, WASHINGTON, DC

Mr. ROSEN. Thank you very much, Senator Leahy and members of the Committee. Thank you for inviting me to testify in this important hearing.

The 5–4 ruling in *Citizens United* has been strongly opposed by Americans of both political parties: last month, in a Washington Post-ABC News poll, 80 percent of respondents said they opposed the Court's decision to allow unregulated corporate spending in

general elections, with relatively little difference between Republicans and Democrats. That is not a surprise during a time of financial crisis when the influence of money in politics—Justice Louis Brandeis called it "our financial oligarchy"—is the most pressing political question of the day.

Brandeis, who denounced the "curse of bigness" that led large corporations to take risks with other people's money, and also thought that the purpose of the First Amendment was to make men and women free to develop their faculties—not corporations but men and women—would not have approved of the *Citizens United* decision, and his prescient book "Other People's Money and How the Bankers Use It" makes that clear.

You asked me to testify about the constitutional implications of the decision. Unfortunately, the implications are not encouraging.

Senator Sessions, you ask critics to acknowledge that this is a close case, and you express concern about people impugning the integrity of the Court. I agree it is a close case. I agree that many civil libertarian liberals support the result. And I believe that the Justices made their decision in good faith. It was a principled decision.

What it was not is a restrained decision. It was not restrained by any measure of restraint that the Justices of the Roberts Court have embraced. It was precisely the kind of divisive and unnecessarily sweeping decision that Chief Justice Roberts pledged to avoid in his confirmation hearings and after, when he said he would try to promote narrow, unanimous opinions, rather than deciding hotly contested questions by ideologically polarized, 5–4 votes.

Chief Justice Roberts laid out this vision shortly after he took office. He did it at a commencement speech at Georgetown University Law Center and in interviews with several people, including me, and he said that he was concerned that his colleagues were acting more like law professors than members of a collegial court. He said this was bad for the Court and bad for the country in a polarized age. And he said he would embrace the vision of his greatest predecessor, John Marshall, by trying to promote narrow, unanimous opinions.

I was impressed by the Chief Justice's concern about the bipartisan legitimacy of the Court and have no doubt that he meant what he said. I watched with interest his efforts to promote unanimity over the past few terms, and he met with mixed success. In the 2007 term, the number of 5–4 decisions soared to 33 percent, a 10-year high. It dipped up and down in subsequent years. But the most striking area in which Chief Justice Roberts has been able to achieve a relative measure of unanimity is in cases affecting business interests which now represent 40 percent of the Court's docket. Seventy-nine percent of these cases are decided by margins of 7–2 or better, and the U.S. Chamber of Commerce, which represents the unified interests of American business, has had remarkable success before the Roberts Court during the past few years. In 2006 the Chamber's litigation center filed briefs in 15 cases and won 13 of them, the highest percentage of victories in the center's 13-year history.

So this was the record before *Citizens United*, divisive decisions, 5–4, in cases involving affirmative action, voting rights, abortion, campaign finance, and religion, and relative unanimity in these business cases.

Citizens United is disappointing, Senator Sessions, even to those critics like me who acknowledge that it is principled, because it was so unnecessary. You could have protected the free speech rights of producers of "Hillary: The Movie" by holding that Congress never intended to regulate video on demand or groups with minimal corporate funding. But the Court chose not to take that narrow route. It is a broad, sweeping opinion, much of the kind that Chief Justice Earl Warren might have issued. It is unconnected to arguments about constitutional original understanding, which my colleague Doug Kendall will discuss, the traditions of Congress, and it is rather radical in uprooting precedents that date back for more than a century.

Why should the public care that the Roberts Court now seems willing to impose these ideologically divided, constitutionally polarizing opinions rulings? It is because when the Court tries to challenge the public on matters of economic justice that the public cares intensely about, it often provokes backlashes that can harm the Court and the country. We know this from the experience during the 1930s, and there is a serious question about whether that historical error will be repeated. It is impossible at the moment to tell precisely what the future will bring. I still continue to hope that Chief Justice Roberts has enough political savvy to avoid this backlash, but there is no doubt that the stakes could not be higher. His success or failure will turn on his ability to make good on his promise of narrow, unanimous decisions. We have seen narrow conservative majorities strike down economic regulations in the name of corporate rights before, and it always ends badly for the Court.

Thank you so much.

[The prepared statement of Mr. Rosen appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Professor Rosen.

Next we have Bradley Smith, Professor Bradley Smith, who teaches law at Capital University Law School in Ohio. He served on the Federal Elections Commission and is currently Chairman of the Center for Competitive Politics.

Professor Smith, thank you for taking the time. Please go ahead.

STATEMENT OF BRADLEY A. SMITH, CHAIRMAN, CENTER FOR COMPETITIVE POLITICS, ALEXANDRIA, VIRGINIA, AND JOSIAH H. BLACKMORE II/SHIRLEY M. NAULT DESIGNATED PROFESSOR OF LAW, CAPITAL UNIVERSITY LAW SCHOOL, COLUMBUS, OHIO

Mr. SMITH. Thank you, Chairman Leahy, Ranking Member Sessions, and members of the Committee. I appreciate the opportunity to be here this morning.

Rarely does a decision provoke as much—I cannot use another word but "hysteria" as *Citizens United*. For example, many States which have long allowed unlimited corporate spending—Vermont is one of those States—have suddenly swept in, in great alarm in their legislature, to say, "Oh, now we must do something." A month

ago—well, I guess I should say 2 months ago, nobody in Vermont was clamoring to change the State's election law to prevent unlimited corporate spending in campaigns. Now because the Supreme Court comes down merely saying, "Vermont, this case does not affect you at all," the people, the legislature of Vermont seems to be freaking out, for lack of another word.

Chairman LEAHY. Professor Smith—and this will come out of my time—why don't you let me talk about the reactions of the Vermont Legislature? I think I understand it one heck of a lot better than you do.

Mr. SMITH. My point, Mr. Chairman, is that there has been a great deal of reaction by people, and I could use another State. I could use Maryland if you would prefer.

Chairman LEAHY. These are a group of very hard-working citizen legislators. They do not freak out, to use your expression. This is very much of a typical, far more taciturn New England legislature. We do not freak out, to use your term.

Mr. SMITH. Senator, I have been called here, I think, to offer my expert opinion. In my expert opinion, they are freaking out.

Now, to continue on, let us talk about where else we stand here. This decision was one that is clearly correct, and *Citizens United* had to win the case, and pretty much everybody agrees with that. All you have to do to come to that conclusion is look at what the position of the U.S. Government was. It was the position of the U.S. Government that under the Constitution it could prevent a publisher, such as Random House or the Free Press or Simon and Schuster, from publishing a 500-page book containing even one line advocating the election or defeat of a candidate. I am not sure that many people really want to defend that position.

It was the position of the U.S. Government that it could prevent a corporation, such as Amazon or Barnes & Noble, from using technology for Kindle and Nook to distribute books. I do not think many people think that is a correct interpretation of the First Amendment.

It was the position of the U.S. Government that it could prevent a union from hiring a person to write a book, maybe something like "Why Working People Should Support the Obama Agenda," and that was struck down or not allowed by the Court to have that kind of agenda in the Court.

It was proposed, of course, that you could limit the discrimination of *Citizens United*'s movie, and I think, again, that is something that people clearly disagreed with. In fact, when we actually look at what the public feels and asks them specifically do they agree with any of those conclusions that the Government actually argued in this case, as opposed to asking them sort of a loaded question—Do you think corporations should spend unlimited sums?—if we actually asked them, by a 3–1 majority, as we did in a poll at *Citizens United*—or I mean at the Center for Competitive Politics, we found that by a 3–1 margin they agreed that the company should be able to air ads. By a 3–1 margin, they agreed that they should be able to run movies by video on demand technology.

In fact, there was much more support for *Citizens United*'s position in this case than there was when we asked them if you should censor the press, in which 30 percent favored censoring the press,

but only 17 percent favored censoring *Citizens United* from distributing its movie.

So you are playing with fire when you start saying—working up hysteria about people participating in these things. Animosity toward the institutional press, which I think everybody thinks must be protected, is much, much higher.

Now, in terms of the activism of the Court's decision, there is a problem with activism, and it comes from the Court's dissenters. The Court's dissenters would have swept away 200 years of precedent. We have quotes in Mr. Kendall's testimony and I have quoted from *Dartmouth College* v. *Woodward* about how corporations are artificial beings and exist only in the contemplation of law. That is cited all the time now. Let us remember, *Dartmouth College* v. *Woodward* found in favor of corporate rights. It is remember, it is still included in law books precisely because it is an affirmation of the power of citizens against the Government, not an affirmation of Government power to regulate people simply because the forum in which they choose to associate—and those association rights are very important here—is a corporate forum.

And the dissent offers no principled basis for how it would distinguish. Obviously, corporations have many rights. I do not think that anybody on the panel—I hope—believes that you could simply take corporate property without providing them with due process. I hope you do not think that you can just go to Capital University, which is a corporation, and take over our dorms and quarter soldiers there because we are a corporation and we have no rights. Clearly, corporations have rights, and the question is: What rights do they have? And individuals, I think, have a right to gather and to speak about issues that are important to them.

Many people on this panel attack corporations. Many people in the public attack corporations. And the citizens who own those corporations have a right to speak in return. And the dissenters in this case would have overturned over 100 years of precedent and dozens and dozens of cases to get there.

So let us stay focused on what is really at stake, and I think if we do that, we will see that this was a very, very rational decision, one that almost everybody would agree with the specific holding. If it went too far in certain small particulars, it is fairly easy to do legislative fixes on those particulars.

Thank you very much.

[The prepared statement of Mr. Smith appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Smith, and I will be interested in seeing if anybody in the Vermont Legislature cares to see how a professor at Capital University Law School feels about their reactions.

Doug Kendall is the Founder and President of the Constitutional Accountability Center. He has co-authored several books and articles about federalism and the courts.

Please go ahead, Mr. Kendall.

STATEMENT OF DOUGLAS T. KENDALL, PRESIDENT, CONSTITUTIONAL ACCOUNTABILITY CENTER, WASHINGTON, DC

Mr. KENDALL. Thank you, Chairman Leahy, for holding this important hearing on the Constitution and the *Citizens United* ruling and for inviting me to testify.

I am the President of Constitutional Accountability Center, a non-profit think tank, law firm, and action center dedicated to the Constitution's text and history. The center is releasing today a report entitled "A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law," which examines the Constitution's text and history and the Supreme Court's treatment of corporations from the founding era to the Court's ruling in *Citizens United*.

The Constitution's text reflects a fundamental difference between corporations and the "We the People" identified in the Preamble of the Constitution. As artificial entities, it is awkward, if not nonsensical, to describe corporations engaging in the "freedom of speech," practicing the "free exercise" of religion, "peaceably . . . assembl[ing]," or "keep[ing] and bear[ing] Arms."

The debate about how to treat corporations—which are never mentioned in the Constitution's text, yet play an ever-expanding role in American society—has raged since the founding era. The Supreme Court's answer to this question has long been a nuanced one: Corporations can sue and be sued in Federal courts and they can assert certain constitutional rights, but they have never been accorded all the rights that individuals have, and have never been given rights of political participation.

The Court, under Chief Justice John Marshall and many times since, has emphasized that because corporations are artificial entities and receive special privileges, such as perpetual life and limited liability, they are subject to greater regulation by the State. Only once before, during the darkest days of the Lochner era, has the Supreme Court seriously entertained the idea that corporations are entitled to the same constitutional rights enjoyed by "We the People." And even in the Lochner era, these equal rights were never extended to the political process.

The idea of equal constitutional rights for corporations has a truly bizarre origin. In the 1886 case of *Santa Clara* v. *Southern Pacific Railroad Company*, the Supreme Court reporter decided to include in his published notes a remark by Chief Justice Waite to the effect that corporations were persons within the meaning of the Constitution's Equal Protection Clause. Through this highly irregular move, the idea that corporations were persons was introduced into American law.

Eleven years later, in *Gulf Railroad* v. *Ellis*, the Court cited *Santa Clara* in holding that "a State has no more power to deny to corporations the equal protection of the law than it has to individual citizens." This ruling, combined with other important rulings that same year, ushered in the Lochner era, a period today almost universally condemned as one of the darkest eras in Supreme Court history.

In 1937, the Supreme Court recognized its errors, and the Lochner era's constitutional revolution came crashing to a halt. Virtually every aspect of the Lochner era's protection of corporate

constitutional rights was repudiated by the Court, with the Court ultimately dismissing the idea of equal rights for corporations unanimously as "a relic of a bygone era."

In the face of these losses, corporations started aggressively fighting back. In 1971, Lewis Powell—a Virginia corporate lawyer who would soon be nominated to the Supreme Court—wrote a now famous memorandum to the Chamber of Commerce advising that corporations look to relief in the courts, noting that "the judiciary may be the most important instrument for social, economic, and political change."

Powell's strategy started to come to fruition just 7 years later in *First National Bank of Boston* v. *Bellotti*, when Justice Powell authored a 5–4 ruling for the Supreme Court that struck down limits on a corporation's ability to oppose ballot initiatives under the First Amendment.

Though deeply problematic, *Bellotti* was expressly limited to ballot initiatives, and two subsequent rulings held that the Constitution does not grant corporations the right to spend unlimited amounts of money to favor the candidates of their choice.

Citizens United wiped these later rulings off the books, and while the *Citizens United* majority offered reasons for its decision, none of them is persuasive or comes close to justifying the momentous changes in constitutional law ushered in by its opinion.

Corporations do not vote. They cannot run for office, and they are not endowed by the Creator with inalienable rights. We the people create corporations, and we provide them with special privileges that carry with them restrictions that do not apply to living persons. These truths are self-evident, and it is past time the Supreme Court got this right.

Thank you.

[The prepared statement of Mr. Kendall appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Mr. Kendall, let me just follow up on this. Justice Sandra Day O'Connor recently spoke about the risks posed to our independent judiciary by the millions of dollars flowing into State judicial campaigns. Last year, the Court seemed to share that view of the potential massive corporate spending to distort elections by handing down a case called *Caperton* v. *Massey*. In fact, John Grisham wrote a book that sort of referred to that.

In that case, Justice Kennedy wrote that the risk of bias due to campaign contributions in a State judicial election meant that the judge was wrong not to recuse himself from deciding a case involving a defendant who spent $3 million to elect him to the bench. I found it interesting. We do not elect judges in Vermont. Our State Legislature is pretty staid and conservative, and it allows them to be appointed with consent by the Governor.

Why do you believe the Supreme Court only months later in *Citizens United* did not apply these same concerns and obvious logic to corporate spending? It just seemed after *Caperton* it ruled differently.

Mr. KENDALL. I agree, Senator Leahy. And what I actually find most disturbing about the ruling in *Caperton* is that the four dissenting Justices actually believed that there was no problem with

the extreme factual circumstances, there was no violation of the Due Process Clause in that case.

I think Justice Kennedy was obviously the swing vote in *Caperton and Citizens United*, and I think what he would say is that there is a difference between the obligations of a judge to recuse under the Due Process Clause and the First Amendment rights of corporations to spend unlimited amounts in elections. But I do not think those two issues can be separated that easily. The reason the judge has an obligation to recuse is because of how much money the corporation is spending in the election, and I think the reasons for recusal also support the legislature's decision in States around the country to limit corporate campaign expenditures in judicial elections. And the great irony of the pattern that you reflect where the Court requires recusal in the *Caperton* case and strikes down limits on corporate campaign expenditures in elections in States around the country is—the Court is basically saying there is a huge problem here, but you, Congress, you, States across the country, cannot do anything about it.

Chairman LEAHY. It is interesting, because she was on the Court, I believe 6 years ago, when the McCain-Feingold Act's restrictions on corporate campaign spending were declared constitutional. Now she is off, and so 6 years later, basically we have a different answer.

I am wondering what this does for the ability of State and local governments to police their own elections. We have 24 States that have laws restraining corporate spending in elections. Some of these laws date back 100 years. Others have laws that they allow corporate spending, but they restrict the amount that can be spent.

Are these laws all called into question now?

Mr. KENDALL. I think they are called into question, Senator Leahy. I think that is one of the dramatic impacts of this ruling. And I think as you mentioned in your opening statement and Justice Stevens said in dissent, the Constitution has not changed in the last 7 years, the law has not changed. The only relevant thing that has changed is the membership of the Court. And it is really more dramatic than what has happened over the last 7 years.

If you take and put side by side the Supreme Court's majority opinion in *Citizens United* and the ruling by a unanimous Court written by Justice Rehnquist in a 1982 case called *FEC* v. *National Right to Work Committee*—which is a case that upheld limits on the ability of corporations to collect donations for PACs. If you put those two opinions side by side, I think what you see is that not a single member of the Court in 1982 would have signed on to the majority ruling in *Citizens United* today, which is how dramatically the Court has changed on these issues.

Chairman LEAHY. Well, in fact, on that, Professor Rosen has in his book, "The Most Democratic Branch"—you argue that the judiciary more than any other branch of Government most reflects the views of mainstream Americans. Would *Citizens United* be consistent with that?

Mr. ROSEN. It is not consistent, Senator Leahy. It seems ironic that the Court tends over history to reflect rather than challenge the constitutional views of the majority of Americans. But that is

the case. There is a wonderful new book by Barry Friedman, "The Will of the People," that makes this case in even greater detail.

What is so striking about the history is on the very few occasions when the Court has challenged the views of the majority of Americans on things they care intensely about, it has often provoked backlashes that necessitated judicial retreat. That was the lesson of the *Dred Scott* decision before the Civil War. It is the entire lesson of the legacy of the progressive era in the 1930s when a narrow group of five conservative Justices thought they could impose this contested vision of corporate rights on the country, provoking President Roosevelt's court-packing threat and the judicial retreat. And that is what makes *Citizens United* such an outlier. Eighty percent opposition shared similarly by Republicans and Democrats? This is very, very unusual for the Supreme Court.

Now, Mr. Smith has his own poll which shows more favorability, but he did not ask the relevant question. You did not ask, Mr. Smith, "Do you support lifting all Government limitations on corporate spending from general treasury funds in U.S. elections?" And on that proposition, it is not a surprise that the public is opposed to this because it so goes against this strong strain in our history. Doug Kendall's report is eloquent about how the suspicion of monopolies is deeply rooted in our history—and this is another important distinction. It is not opposition to all corporate forms. It is big money, the curse of bigness. It is investment banks and Exxon. That is what people like Louis Brandeis and Theodore Roosevelt were concerned about. Franklin Roosevelt was concerned about it. And the American people are obviously centrally concerned about this during a time of economic crisis.

So for all those reasons, Senator Leahy, this is not consistent with the general sensitivity of the Court to the views of the American people.

Chairman LEAHY. Thank you, and my time has expired, and I yield to Senator Sessions.

Senator SESSIONS. Well, Mr. Rosen, when you come to fundamental rights such as free speech, surely you would not contend that we ought to run a poll to decide how that is done. I think 80-plus percent believe that the act of burning the American flag is not speech and thinks that the Supreme Court was wrong on that. And the free speech advocate group on the Court was the same one basically that voted for this, with some exceptions, I suppose.

I will ask Mr. Kendall and Mr. Rosen this. In Mr. Smith's written testimony for today, he noted that the Obama administration in this case, in their arguments before the Court, took the position that the Federal Government and/or the States could prevent a corporate publishing house, such as Simon and Schuster, from publishing or distributing a book if that book contains a single sentence opposing a candidate for political office. Mr. Smith states in his testimony that he would like to know whether the other members of the panel agree.

So I guess I would ask you. Do you think that if your view of the First Amendment was in place that the Solicitor General's Office for the Obama Department of Justice is correct and that you would favor the ability of the Government to limit those kind of publishing events?

Mr. ROSEN. Well, I certainly would not, Senator Sessions, and I do not think that the Obama administration would either. It seemed to me that in the oral argument Solicitor General Elena Kagan explicitly distinguished books and media from the questions at issue in this case and resisted the hypotheticals about banning books.

But one thing is clear, Senator. It would have been easy for the Roberts Court to carve out an exception that would have completely protected books and the media and avoided all of the parade of horribles that Mr. Smith makes in his——

Senator SESSIONS. Well, I do not know. If you——

Mr. ROSEN [continuing]. Testimony.

Senator SESSIONS. If a corporation cannot produce a movie, why can't—if they can be prohibited from producing a movie, why can't they a book? Mr. Kendall——

Mr. ROSEN. Could I just say—respond to——

Senator SESSIONS. Wasn't that the whole point of the first oral argument? When that question was raised and the Solicitor General admitted it contained—it could constrain the publishing of books by Simon and Schuster or any other group, that that is what caused the Court to have a new argument and to state explicitly they were concerned about the *Austin* case?

Mr. ROSEN. In the second argument, the Solicitor General explicitly responded to that. She disavowed a desire to ban books. And Justice Stevens charges in his dissent that the only reason the Court asked for re-argument was because it was determined to overrule *Austin*, that it was really reaching out for this question on its own.

Senator SESSIONS. Professor Kendall.

Mr. KENDALL. There is a hard, narrow question about whether the specific 90-minute documentary, which is fairly viewed as a 90-minute campaign ad against Hillary Clinton, was covered within the act. And if the Court had simply ruled on the basis that it was not, I think that we would not be here. We would not be having this argument.

Senator SESSIONS. But isn't it true that a ruling on that matter—I just would like to ask a follow-up legitimately with him. Isn't it true that that implicated, though, these other questions? It would be difficult to separate that issue from the one the Court ultimately decided. Surely you would agree that implicated those issues significantly.

Mr. KENDALL. Right, but I think that Justice Stevens in dissent has a very good response about why the ruling, a ruling that permits regulation of that particular attack ad does not open up the floodgates to regulation of every book or every film.

Senator SESSIONS. Well, that was Mr. Stevens' view, but five did not agree.

Mr. Smith, would you comment on that?

Mr. SMITH. If I could just address that briefly, a couple things.

First, Solicitor General Kagan at re-argument said, as Professor Rosen said, she denied the desire to ban books. But she did not deny the authority to ban books. And she did say, "Well, we regulate pamphlets." I do not know if this is a pamphlet or a book, and I do not know at what stage it becomes a book and at which stage

it is a pamphlet that can be prohibited. And that was the Government's position in briefing as well. This was not—you know, Deputy Solicitor General Stewart was not speaking out of school.

Second, it is not clear to me that it is easy to make these distinctions. Notice that none of the dissenting Justices actually was willing to concur in the judgment on any of these more narrow grounds. All of them said, "Yeah, they can't do it," period. And I think there was some realization there that such a scheme would be very unstable and not likely to hold up.

But at a minimum, what you have is overkill. Statutes provide overkill responses. So when you have statutes attempting to totally ban this type of corporate speech, you may get a Supreme Court ruling that says, no, you cannot do that.

Congress might be able to come back in and say—you know, the early laws, we have talked about some. Elihu Root talked about corporate contributions, big corporations, as Professor Rosen notes, contributing amounts that in today's dollars would be well in excess of $1 million. But I suppose if Congress did some serious finding to show a measure of corruption and had a limit on corporate expenditures up in the realm of $2 million supported by this type of fact finding about the corruption there, and a narrowly tailored response, in other words, that it could hold up. But you cannot just go and say every nonprofit corporation, every nickel-and-dime small business in the country is absolutely prohibited. That is not a narrowly tailored solution that is satisfactory to abridge First Amendment rights.

Senator SESSIONS. My understanding is that Solicitor General Kagan said with regard to that issue, "We haven't done that yet." And she said, "The author would have a good claim if he wanted to sue." In other words, she thought that if an author was stopped from publishing their book or so forth, that they would have to sue to defend their rights, at least. Thank you for the good panel we have.

Senator HATCH. Mr. Chairman, I have to be necessarily absent, so I would like to submit my questions in writing to all three, if I can.

Chairman LEAHY. Of course, and we will keep the record open for the rest of the day for any further questions and also any statements anybody wishes to make on both sides.

[The questions of Senator Hatch follow:]

Chairman LEAHY. Senator Feingold.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Mr. Chairman, I, of course, particularly thank you for holding this hearing. The *Citizens United* decision was a tragic mistake. A mistake because the Court reached out to decide constitutional questions that were not necessary to decide the case and not raised or addressed by the courts below. Tragic because the Court damaged its own reputation and integrity by reversing precedents unnecessarily and, most important, because it opened the door to a political system that, more than ever, can and likely will be dominated and distorted by corporate wealth.

The Court showed a remarkable ignorance of how campaign money can affect legislative decisions. Just last term the Court held in the *Caperton* case that a State judge should have recused himself because one party to a case had made large independent expenditures to elect him. Yet somehow the Court concluded in *Citizens United*, "[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." And, incredibly, the Court even cast doubt on one of the central holdings in *Buckley* v. *Valeo*—that Congress can enact campaign finance laws not only to prevent actual corruption but also to prevent the appearance of corruption. The Court said in *Citizens United*, "That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy."

No matter what their political persuasion, all Members of Congress strive all the time to show their constituents that no one has influence over them and that no group has special access. The idea that these appearances have no effect on the confidence that the electorate has in us and in our democracy is naive, to put it mildly.

What is perhaps most disturbing is that the Court made these pronouncements without allowing any opportunity at all for a factual record to be developed. When it considered a facial constitutional challenge to the McCain-Feingold bill, the Court had before it an enormous legislative record developed over many years on the corrupting influence of soft money, along with a huge amount of discovery taken in the case itself. The *Citizens United* Court overturned a century of Federal and State law without considering such a record. The participation of the over 20 States whose laws were essentially thrown out in this case was limited to a single amicus brief. I simply do not understand why the majority felt that it was justified in taking this tremendous shortcut.

Now, we are in a period of great political turmoil, and the American people are expressing their opinions forcefully. They are rightfully demanding that their elected representatives listen to them and respond to their views and their needs. I think it is for that reason that so many people are baffled and angered by the Court's decision. The people I talk to in Wisconsin do not want elected officials to be more responsive to corporations. They do not think that corporations have too little power in our legislative process or that they need to be able to spend freely to elect a legislature that will do their bidding. They want a Government "of the people, by the people and for the people," as Abraham Lincoln famously put it in the Gettysburg Address. In its haste to impose its own skewed vision of the First Amendment, where a corporation has the same rights of political expression as a person, the Supreme Court seems to have forgotten that bedrock principle.

Mr. Kendall and Professor Rosen, Professor Smith says in his testimony, "While corporations do not have the ability to exercise, as corporations, all constitutional rights, they have long been recognized as able to assert constitutional rights where doing so is necessary to preserve the rights of the corporate members or shareholders. Thus, when a corporation asserts a right to speak, it is

really the members of the corporation asserting a right to associate and to speak as a group."

What do you think of that statement? And then I will let Professor Smith have a chance to respond. Professor Rosen.

Mr. ROSEN. Thank you, Senator, for that eloquent statement.

I do not mean to plug Justice Brandeis too much today, but he was our greatest theorist both of free speech and of the dangers of corporate power in American life, and he would have strenuously resisted Mr. Smith's statement. In "The Curse of Bigness," he talks about how huge corporations—investment banks, mostly -cannot possibly be an amalgam of the expressive interests of their members because they are so complicated that the people in charge do not even understand the risks that they are taking. They take these huge risks with other people's money. They end up not serving the public interest but their own interests. And that is why Brandies wanted taxation to break up these huge corporations, and his entire vision of free speech emphasized the idea that individuals have a duty to develop their faculties. Participation is a public duty. So his vision of the First Amendment, unlike the one Senator Sessions embraced, was that laws that promote public deliberation, far from threatening the First Amendment, actually serve it.

And then, finally, he was very keen on disclosure. Sunlight is the best disinfectant, electric light the best policeman.

So for all these reasons, he would have completely resisted and rejected the idea that a corporation actually meaningfully expresses the political views of its individual members. He wanted to protect small businesses and minority shareholders, and it is his vision, far more than that of Mr. Smith, that really represents the great American free speech tradition.

Senator FEINGOLD. Thank you so much.

Mr. Kendall.

Mr. KENDALL. Well, I think, Senator Feingold, you know better than anyone in the world that the campaign finance system in this country is actually not blunderbuss like Mr. Smith describes it, but actually quite nuanced and so it allows the speech of individuals that are parts of corporations, it allows corporations to form PACs and have voluntary donations to the PACs, which allows the corporation itself to speak to a degree. And the idea that corporations, these large corporations, are simply associations of citizens gathering around to express political expression just belies their very nature. We create corporations as an engine of economic growth. We give them a fiduciary duty to advance the profits of the corporations. Most people invest simply to make money—and to describe that as this core political association I think is just to belie the nature of corporations and the history of our treatment of them.

Senator FEINGOLD. Thank you.

Professor Smith.

Mr. SMITH. Thank you, Senator. I appreciate your giving me an opportunity to comment on this as well.

One of the focuses, of course, here today that we keep hearing is large corporations, large corporations, large corporations. And as I just indicated, one of the problems with having sort of a blunderbuss statute that prohibits all corporations from doing any polit-

ical spending from dollar one is that you get a response that also goes to the opposite sort of extreme.

Most corporations in America, of course, are small corporations, and many, many, many of them, like *Citizens United*, are nonprofit corporations that are specifically organized truly for speech. And most corporations are too small to support a PAC and pay the administrative costs of a PAC, and they do not have enough people to solicit to even have money in the PAC to speak. But they have interest.

For example, in the recent Senate race in Massachusetts, there was a little wine distributors that distributes wine through the mail that sent a notice out to people saying, "We think you should vote against one of the candidates in that election because that candidates wants to tax wine shipments through the mail." This is a classic case where it is of interest to the consumers of that company, it is of interest to the shareholders and the owners of that company, and it is in their interest to speak not as individuals but as a corporation to something that directly threatens the economic purposes for which they have joined together. And we allow corporations to do that kind of speech all the time under the business judgment rule.

And it goes beyond just pure political speech. It includes, for example, charitable giving to controversial groups like Planned Parenthood, or even the Boys Scouts now are often controversial. It allows clearly commercial ads. Some of you may have seen the Audi Green Police ad during the Super Bowl, and if you did not, go to YouTube and watch it. It basically portrays environmentalists as being sort of a bunch of petty little neo-Nazi sorts. And I am not sure that a lot of shareholders of Audi really were pleased with that perhaps if they were also members of environmental groups. But that is what the business judgment has historically allowed.

So, again, the problem is this sort of blunderbuss statute rather than anything that is narrowly tailored to address First Amendment concerns based on clear findings of a problem with independent expenditures of that type, and that might change the analysis here.

Chairman LEAHY. Senator Cornyn.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman.

Mr. Chairman, I think that both sides of this debate have good intentions, and I wish there was a way we could limit the impact of unlimited money affecting elections. But, frankly, I think what started from good intentions in 2002 to try to limit the impact of money in politics has been an abysmal failure.

I would just cite the point that in 2008 President Obama raised $740 million, a new record, which was twice as much money as was raised by Senator Kerry and President Bush in 2004. In the two Presidential elections since the campaign finance reform legislation passed, the candidates have raised more and spent more than the candidates in the seven previous Presidential elections combined.

And I remember what happened, for example, in the most recent special election in Massachusetts. There were 13 different organi-

zations and entities spending money for and against the candidates in that campaign toward the end. Thirteen. So to Mr. Kendall's point that there are PACs, there are 527s, there are 501(c)(4), there are legal entities through which individuals and corporations and other concerned citizens can contribute money to engage in the political process, I think we have seen an unprecedented amount of money go into political campaigns.

My own view has evolved over time because I think now what we need more than anything else is greater transparency and accountability, because I am not convinced that we can stick our finger back in the dike. I think the dike is not only leaking, but it has exploded. And as we have seen in other areas of free speech, the solution for this is not less speech but, I think, more speech to get everyone's voices and views out into the public square and to allow the voters to do the best they can to try to understand the issues, the qualifications of candidates, and then make a choice informed by whatever actor, whatever speaker that they choose or that they find more persuasive.

I really think the carve-out that was created in the McCain-Feingold legislation in 2002 demonstrates the weakness of the argument that corporations somehow do not have free speech of First Amendment rights. Indeed, the New York Times corporation and the Washington Post corporation appropriately have all the free speech rights that are conferred by the Constitution of the United States, the First Amendment. We would not have it any other way.

But why would Congress have the authority to suppress the free speech rights of one corporation when another corporation has a complete right to express their views to advocate for and against a candidate in an election?

Indeed, I think I find myself aligned with some of Mr. Smith's arguments with regard to the hysteria with which this decision has been greeted. I do not think there is going to be any Fortune 500 corporations that are going to spend money advocating for or against candidates in elections because they have to be worried about their shareholders; and if they are wasting corporate money, they may subject themselves to a breach-of-fiduciary duty lawsuit. I think they are going to be entirely circumspect about that sort of activity.

On the other hand, I do think that there are organizations like the NRA, the NAACP, the Sierra Club—let us say, for example, a nonprofit corporation was concerned about the tragedy of homelessness in America. Why in the world couldn't they—if they adopted the corporate model of doing business, why couldn't they advocate for or against candidates who supported or failed to support their agenda of dealing with the tragedy of homelessness? If there are organizations of people who want to band together in a nonprofit corporation to speak out against reckless spending in Washington and the accumulation of huge deficits and the failure to meet our unfunded Federal liabilities, why shouldn't they be able to band together as a corporation, as a sole proprietorship, as a partnership, any other format to do that?

So I think, Mr. Smith, if I could just ask you, what is the answer in terms of the huge volumes of money being spent largely in a non-transparent and opaque way by people who have enough re-

sources to hire lawyers to create 527s, PACs, 501(c)(4)s, where should we draw that line?

Chairman LEAHY. And, Mr. Smith, I try to extend as much help and courtesy to members here. Even though Senator Cornyn's time has expired, please go ahead.

Mr. SMITH. I will try to be very brief. Obviously, it is a very complex question. My own view, which is expressed in numerous writings is that the complexity of the law makes it harder and harder for average citizens to participate. You know, the joke is if you want to run for Congress, but even if you want to try to influence your Congressman and organize a group, you have to immediately hire a lawyer.

The really big corporations can get around it because they can hire the consultants and the lobbyists and the lawyers who know how to work the system, the accountants and so on. And we also need to bear in mind that large corporations, of course, spend far more money lobbying than they spend on campaign contributions. And so one of the odd effects of allowing corporations to directly make campaign expenditures is that it would actually be a little bit equalizing; that is, a car dealer may not be able to afford a lobbyist in Washington, but he can put $25,000 in expenditures out in a race.

So regulation here, as it often does, tends to harm the small players, whereas the big actors can cope with it.

Chairman LEAHY. Thank you very much.

If Senator Whitehouse does not mind, I am going to put into a record an op-ed piece that he wrote for Politico on this issue. And hearing no objection——

[Laughter.]

Chairman LEAHY. It will be made part of the record.

[The op-ed appears as a submission for the record.]

Chairman LEAHY. Senator Whitehouse, please go ahead, sir.

Senator WHITEHOUSE. Thank you very much, Chairman.

We have been discussing this decision as an ideological exercise, but, Professor Rosen, in your testimony, you also point out that there is a pattern that has developed over at the Supreme Court, and I happen to agree with you. The pattern, I think, is beyond distinct. It is now unmistakable. And it is that where corporate interests are involved, the corporation is highly likely to win. And where issues that are part of the core Republican ideology are involved, the Court becomes unhesitant about taking its 5–4 majority to take broad leaps—brand-new constitutional rights to own guns, brand-new constitutional rights of corporations to spend unlimitedly—that had never been noticed before and indeed often had overruled substantial settled precedent.

My question is: At what point should the Court lose the benefit of the doubt that these are each independent on the merits decisions as the evidence piles up and piles up and piles up that when the outcome actually comes down, it is the Republican ideology and the corporate benefit that appear almost now reflexively to be the winners?

Mr. ROSEN. Senator, the question of when should the Court lose the benefit of the doubt is one that I have struggled with personally. I had this interview with Chief Justice Roberts where he laid

out this very appealing bipartisan vision, and I was very galvanized by it. I wanted to give him the benefit of the doubt. Some people thought I was too charmed by him. I came home from the interview, and my wife decided I developed a "man crush" on Chief Justice Roberts.

[Laughter.]

Mr. ROSEN. Which is just false. I just deny that. It did not happen at all.

But, nevertheless, you know, I spent 3 years, benefit of the doubt——

Chairman LEAHY. I would note in my years on this Committee, that is the first time that expression has been used here. Please go ahead.

[Laughter.]

Mr. ROSEN. Thank you. I try to do my best. Precedents are sometimes important to overturn.

So, you know, I have been giving him the benefit of the doubt for 3 years. But when this decision was so easy to avoid and could have been decided on narrower grounds, it is hard to continue that benefit of the doubt.

Now, one thing I want to say, these pro-business decisions are not—there is nothing corrupt about them. And, remember, they are joined by Democratic as well as Republican Justices. They are 7–2 or unanimous.

Senator WHITEHOUSE. In some cases.

Mr. ROSEN. In some cases.

Senator WHITEHOUSE. In some cases it is the 5–4 bare majority working its will.

Mr. ROSEN. That is true, too.

I think you would have to say there are very few economic populists on this Court, and these Justices share a suspicion of regulation by litigation. But in the end, as you say, if the pattern just continues, it is the 13th chime of the clock, at some point you are going to have to say regardless of what is in their mind—and no doubt they are deciding things in good faith to the best of their ability—you would have to say the pattern is so unmistakable that Congress has a right to object.

Senator WHITEHOUSE. And with respect to the pattern, one of the things that most concerned me about the *Citizens United* decision was not actually in the decision itself but in Justice Roberts' opinion, in which he said—and I will be asking this to you, Mr. Smith. He said that stare decisis effect is diminished "when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases . . ." And he went on to say that "the simple fact that one of our decisions remains controversial does undermine the precedent's ability to contribute to the stable and orderly development of the law."

I read that as the Chief Justice putting the rest of the Court on notice that a persistent attack on existing precedent by his 5–4 majority should as a matter of law be allowed to undermine settled precedent by virtue of the hot contest that they maintain against settled precedent.

Is it your view that precedent, once settled, is indeed settled? Or would you accept the notion that an activist group of a Court by

consistently attacking precedent have a legitimate means of undermining it for future cases rather than accepting it as the law of the land?

Mr. SMITH. Thank you, Senator. You know, I cannot speak for Justice Roberts, but I think, you know, my understanding or my sense would be that his point is that where a case has never been broadly settled or broadly, that is to say, agreed on by the Court—it has always been viewed as a close call—that precedent simply has less force. So *Austin* was a close decision itself. I believe it was 6–3 at the time. *Austin* itself seemed to undercut, to work against prior precedents. *Austin* really is out of step with most of the Court's campaign finance jurisprudence. And even academics in the field who have long thought *Austin* is correct have recognized that its reasoning is really out of step with *Buckley* and *Bellotti* and other cases. And the same is true for *McConnell*, which was 5–4.

So I presume his argument is that simply unlike a case like, say, *Miranda* where it really does become fixed over time and Justices constantly reaffirm it, some things are up in the air. I do not know.

I will say this: On the area of campaign finance, ultimately what you have here are two very conflicting visions, and I do not mean to say that—I mean, it obviously is clear which side I come down on. I do not mean to say that they are illegitimate considerations, but you have one group of Justices who essentially see that one of the problems in American democracy right now is too much speech by particular types of actors, that they have too much influence and that this influence is corrupting and that it clogs up the process and it gives special interests too much power. And you have got another group who believe that the problem is too little speech, that regulations of speech clog up the process and give special interest too much power. And they cannot both be correct, and they are going to be at odds, and we are going to have, I think, a lot of continuing 5–4 decisions in this area.

Senator WHITEHOUSE. Well, my time has expired so I should end this.

Mr. SMITH. Thank you.

Senator WHITEHOUSE. But I do think it is regrettable that the five-member majority of the Supreme Court found as a fact on that question, because I do not think it is appropriate for Supreme Courts to be finding things as a fact, particularly without a record, and indeed particularly with a record as to the contrary.

Thank you.

Chairman LEAHY. Thank you very much.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much.

I am just trying to bring this down a little to where my constituents are, who I will say, Mr. Smith, are "freaking out"—we have gotten hundreds of letters about this—and I think for good reason.

We have just endured in this country and are only beginning to recover from a financial crisis that occurred, I think in part, because certain interests for many years were allowed to trump the interests—it is Wall Street trumping Main Street in this country. Loopholes were left open. People were put in place that did not make the kind of decisions they were supposed to make. And, understandably, regular citizens are wondering if their voices have

just been completely squelched, if some interests in this country have a megaphone and they can do nothing except write a letter to their representative in Washington. And it is a major problem.

I also want to inject some reality of what it is really like when you raise money. When I started out, I did not know anyone in Washington to raise money. I went in a little room for hours a day and called and tried to get $500, $1,000. I did in this process set an all-time Senate record of raising $17,000 from ex-boyfriends. No one has met that yet.

[Laughter.]

Senator KLOBUCHAR. But I called everyone I knew, and that is how I started, and I think that is what people want from their elected officials. And it is far from, as Senator Cornyn pointed out, a perfect system. But the last thing I want to do is to make it worse.

And when I hear these numbers—I think this was in your testimony, your written testimony, Mr. Kendall. You said that in 2008 ExxonMobil generated profits of $45 billion, and with a diversion of even 2 percent of these profits to the political process, this one company could have outspent both Presidential candidates and fundamentally changed the dynamics of the 2008 election.

Goldman Sachs just this year gave $16.2 billion—this is this year—in bonuses, and Senator Cornyn noted that Barack Obama raised $740 million. Well, one company's bonuses alone is twice that amount. I mean, this is what—more than twice that amount, $740 million. Is that what it is? I mean, it is an infinitesimal amount compared to one company's bonuses that is going out there. So that is what I am worried about.

We can talk all we want about what the Court has done here and the process of the Court, but I am more interested in fixing this. And I guess my first question—Senator Schumer is working on a bill—is just how we fix this. And one of the ideas here is to have more transparency, to require shareholders to vote before a corporation spends any money in favor of a candidate, require significant additional paper trails to ensure that shareholders can trace how corporate dollars are being spent on elections. I guess I would ask you first, Mr. Rosen: Would this work? Also, what do you think about this idea of opening—does this decision potentially open the door to allow foreign corporations that have American subsidiaries to have an outsize influence over American elections? Or are there some things we can do to fix that?

Mr. ROSEN. Thanks very much, Senator. The question of disclosure is going to be hotly contested, and if you pass Senator Schumer's bill, that will be challenged in the Court as another violation of the First Amendment. And in the *Citizens United* case, Justice Thomas has a dissent where he says that he thinks that disclosure violates the rights of anonymous speech. He was alone in that regard, but there is a serious question, as you will see from Mr. Smith's testimony, about whether the same five-member majority would have some question about disclosure requirements.

I want to cite Justice Brandeis again because he is the greatest free speech thinker, and he was often in favor of disclosure. During the time that he wrote "Other People's Money," the same concerns about huge bonuses, underwriting commissions, and unfair treat-

ment of investment bankers existed as exist now, and Brandies thought that disclosure, sunlight, forcing people to disclose their bonuses and the underwriting Commissions, would lead to reaction and accountability and basically disclosure is the way to go.

Senator KLOBUCHAR. OK. So you think there might be trouble with transparency. This idea with the foreign corporations, is there something we can do with that?

Mr. ROSEN. You know, this is a technical question which I could give a shot to, but I think I am not going to free-lance on it.

Senator KLOBUCHAR. OK. Mr. Smith, you talked about your poll. Did you ever ask in your poll if the American people think a corporation should be a person for purposes of the First Amendment?

Mr. SMITH. No.

Senator KLOBUCHAR. Thank you.

Mr. Kendall, any ideas for how we can fix this decision?

Mr. KENDALL. Well, I think the rest of my testimony and my concerns that the Court's sweeping ruling in this case is not easy to fix, and that there are implications beyond what the Court holds in this case. If you look at the dissenting opinions by Justices Kennedy, Scalia, and Thomas in prior cases, they suggest that contributions directly to candidates would be unconstitutional. So we do not know if that has five votes on the Court right now, but it is certainly in play. And I think while the Court says, "Oh, we are not talking about foreign companies here," the thrust of the ruling, which is that you cannot distinguish between corporations and individuals, would arguably, you know, put those restrictions in jeopardy.

Senator KLOBUCHAR. The restrictions on individual contributions?

Mr. KENDALL. The Court says there is no distinction between the speaker, and that is a sweeping holding, which, as Justice Stevens said, if taken seriously, would mean Tokyo Rose gets the same protection as General MacArthur, which is absurd.

Senator KLOBUCHAR. There is a lot of emphasis on the testimony about how 28 States already allow corporate contributions in their State elections. Our State does not, and I think it has been a blessing. We have also some good matching fund laws that allows for people to not have to raise as much money for State legislative races. So will this decision potentially also intercede in those State races as well, the ability of States to ban corporate money?

Mr. KENDALL. I think it will, and I think the problem and the thing we do not know is exactly how corporations are going to respond to the idea now that they have First Amendment rights to spend unlimited amounts to influence candidate elections, which is something we have never had in this country. And I think the idea that Exxon has not spent billions of dollars so far, while it may be true——

Senator KLOBUCHAR. They have not had that opportunity.

Mr. KENDALL.—they have not had the opportunity. And we do not know how corporations are going to respond to this, but the idea that they are equal to individuals in terms of First Amendment rights and have exactly the same protection is one that could have broad ramifications in our campaigns.

Senator KLOBUCHAR. Thank you very much. I have gone over my time.

Thank you, Mr. Chairman.

Chairman LEAHY. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman, for calling this critical hearing.

My office has received 220 letters just on the *Citizens United* decision, and it might surprise Mr. Smith that by last night's count, 204 of those 220 Minnesotans were opposed to the decision. So this is something my constituents are really worried about. And when you said that you had done a poll—you have heard of Freud, haven't you? I really find the results very unpersuasive considering the questions that you asked.

Now, Mr. Smith, after the *Citizens United* decision, responding to those concerned Americans and Minnesotans, I introduced a bill called the American Elections Act. It said that if a foreign national has a controlling share of a company, that company should not be spending unlimited amounts in America. And it looks like Senator Schumer may include this provision in his own *Citizens United* bill.

Now, you criticized this in your written testimony. You said, and I quote, "A provision to ban companies with more than 20 percent 'foreign' ownership would only restrict the rights of U.S. nationals to associate for political involvement because of a non-controlling foreign shareholder."

Now, let me underscore that you are saying that 20-percent ownership does not constitute control. Is that right?

Mr. SMITH. Yes.

Senator FRANKEN. Yes. So let us look at how the law actually defines a controlling share, because you said rather confidently to the Chairman that you are here to share your expertise. So let us look at how States define a controlling shareholder.

Yes or no, please. Do you know how Delaware, the leading State for corporate law, defines a controlling shareholder?

Mr. SMITH. No, I do not, nor do I think it is relevant to the question of whether control——

Senator FRANKEN. I asked you to respond yes——

Mr. SMITH. Well, the question is——

Senator FRANKEN.—or no, sir, and you said no, you do not——

Mr. SMITH. Then the question is whether you actually want serious answers or whether you are engaged in a little showmanship. If it is the latter, I will accept that.

Chairman LEAHY. All right. Mr. Smith——

Senator FRANKEN. Sir——

Chairman LEAHY.—that ranks with your putdown of the Vermont Legislature. Please, Senator Franken, go ahead.

Senator FRANKEN. Sir, you answer me yes or no that 20-percent ownership does not constitute control. I think it is important that the State of Delaware says it is.

Now, do you know, for example, what the State I represent, the State of Minnesota, what we define as a controlling shareholder?

Mr. SMITH. Mr. Franken, Senator Franken, laws are written for different purposes, and they are defined for different purposes. So a law that is written for one purpose is not necessarily applicable to another purpose, that is, the law——

Senator FRANKEN. Well, this purpose is to decide what a controlling interest is. They have not written what a controlling interest is for election law because we have had 100 years of precedents that corporations cannot give in campaigns.

Mr. SMITH. Then it would——

Senator FRANKEN. But there is a reason that there is no law for this. Now, I asked you to answer yes or no, but you get the picture.

Now, the fact is that 32 States that define control with a number, 31 of them define it as 20-percent ownership or less, most of them less. And without objection, I would like to submit a copy of these States' statutes for the record.

Chairman LEAHY. Without objection.

[The information appears as a submission for the record.]

Senator FRANKEN. So while you assert that 20 percent is not control, if a foreign entity owns 20 percent of a company, 31 of 32 States who define what control is do. And I think that is very important.

Venezuela owns Citgo. Are we going to have Citgo putting billions of dollars into our elections?

Mr. SMITH. The answer would be no.

Senator FRANKEN. And why would that be, sir?

Mr. SMITH. Do you actually want me to answer this? OK. First, the law prohibits foreign nationals from contributing any money or spending any money in any U.S. election. Under the FEC's——

Senator FRANKEN. Wait. We have a statute that bans direct or indirect giving by foreign nationals, but this law is vague, it is out of date. Under *Citizens United*, it still allows a foreign-controlled subsidiary to spend unlimited amounts in our elections.

Now, you just said the law prohibits foreign nationals from participating in giving, but it does not.

Mr. SMITH. Now, the law allows as U.S.-incorporated and U.S.-headquartered company—that is, a U.S. company which is a subsidiary or which has foreign ownership—and, of course, U.S. citizens have great ownership in many foreign companies as well—to make—a U.S. company, in other words, can make expenditures in races.

Now, nobody believes that the 2 U.S.C. 441(b) was passed in order to prevent foreign corporations from participating. If this is a particular interest of Congress, then it may be something that Congress can address with a narrowly tailored solution. But I would also note that FEC regulations, which, of course, as you know, have the force of law, prohibit any foreign national from being involved in any decision that a corporation might make.

Senator FRANKEN. Well, if the foreign national owns 20 percent, they are not going to have any influence over this, that the people in the room making this decision are not going to know this?

Justice Kennedy explicitly reserved judgment on whether or not there is a compelling interest to limit foreign individuals or associations from influencing our Nation's political process, and you know that.

Mr. SMITH. Yes, I do.

Senator FRANKEN. In fact, Justice Kennedy assumed for the sake of argument that such an interest does exist——

Chairman LEAHY. Senator Franken.

Senator FRANKEN. My time has expired. Thank you.

Chairman LEAHY. Senator Cardin.

Senator CARDIN. Mr. Chairman, thank you very much. This has been a very interesting hearing.

I think you all would understand that the people of Maryland, whenever I go around my State, they are very interested in the way we conduct financed campaigns. It is a subject that they have very strong views about. They think the campaigns are too long. They think they are too expensive. And they think that the way that we finance campaigns is corruptive to our political system. And I agree with the way Marylanders feel about that, and this is all before the *Citizens United* case.

Every 2 years, we find elections becoming longer and more expensive, and more special interest dollars are finding their way into the system. That is, again, before the *Citizens United* case.

Marylanders want fundamental change in the way that we finance campaigns in this country, and I want fundamental change. And I guess my concern is, Professor Rosen, when we mention some of the ways that perhaps we could counter the *Citizens United*, you raised concerns as to whether any of those could withstand the challenge of the make-up of this Court.

And as I look at additional challenges that are likely, it seems to me that this Court is going to move us in a direction—the wrong direction, the opposite direction of which we need to do, and that is fundamental reform in the way that we conduct elections.

It is Congress' responsibility to set up the system for fair and open elections in the United States. It is not the Court's responsibility to do that. It is clearly the Court's responsibility to make sure that we are consistent with our Constitution. But it is Congress' responsibility to develop the nuts and bolts on how we conduct elections in this country.

And I guess my concern is—and this is a very reluctant conclusion I am coming to. It is, I guess, my conclusion that with the make-up of this current Court it is unlikely that we can pass the type of laws that can make the fundamental changes that the people of Maryland would like to see us make and that I agree with them that we need in order to protect the integrity of our system on electing our public officials.

So I come to the conclusion that we have to seriously consider amending the Constitution of the United States in order to deal with this issue, and I would like to get the panelists' views as to whether you believe—if you agree with the people of my State and their Senator that we need fundamental change, can we do it by legislation? Or will it require amending the Constitution? Professor Rosen, I will let you go first.

Mr. ROSEN. Senator, you express so well the frustration that Congress should feel in the face of uncertainty about whether it can pass these reforms. And it is striking—this is why the debate about activism is important. Conservatives said for 40 years that judges should interpret the law, not make it, and should defer to Congress about contested constitutional questions. So the fact that there is uncertainty about how the Court will treat these reforms—and I should stress when I say this majority might not uphold

them, I am not saying that they should not uphold them. I think they are constitutional. But it is not a clear case.

A constitutional amendment? Well, that is always a great thing to propose, and if the intensity of public opposition to this decision is so strong, perhaps it is not implausible that it might proceed. But you know better than anyone, Senator, how hard it is to pass an amendment even with public support.

Senator CARDIN. Let me make it clear. I am going to work with my colleagues here on legislation because a constitutional amendment takes a lot of time. But I think we need to seriously consider whether there has been a fundamental shift in who determines how elections are conducted in the United States. The Congress expressed its view. The Supreme Court knocked it down. And I really do not understand the basis of their opinion, but I must express the Supreme Court is the arbiter on the Constitution. Therefore, there is a fundamental flaw. The only way it appears to me that we may be able to correct it is through a constitutional amendment.

Mr. Smith, I welcome your thoughts on this. I think we all, all three of you would agree it is up to Congress to determine the fundamental structures of how elections are conducted in this country.

Mr. SMITH. Senator, I would say that, yes, I think the kind of major changes that I think you are thinking about would require a constitutional amendment. I do think that there are some actions that Congress can take, that it may want to take, that it feels would improve the process that would be okay within *Citizens United*. I do not like to use the phrase "fix *Citizens United*" because I think it is fine. But if you want to use the phrase "fix *Citizens United*," I think there are some things you could do.

And I would also urge members to consider responses that—for example, lifting the limits on party and candidate coordinated expenditures, because right now, for example, parties which can only raise hard money cannot coordinate, so if a corporation spends a lot, it is hard for the candidate to raise money, but the party may be able to.

Senator CARDIN. But that just puts more money into the pot. Believe me, there is enough money in the pot.

Mr. Kendall, very quickly, because my time is——

Mr. KENDALL. Sure. I agree with everyone you said. I think that there are problems that *Citizens United* creates that Congress will have a very difficult time fixing. I think that the only way this gets truly fixed is if the Supreme Court reverses course again or if we pass an amendment to fix it.

I do think that there are some things that this body is already considering that would help and that would probably withstand scrutiny. I hope that is true.

Senator CARDIN. Thank you, Mr. Chairman.

Senator SPECTER. [Presiding.] Thank you, Senator Cardin.

Senator Kaufman.

Senator KAUFMAN. Yes, I would just like to make a few comments.

First off, I am not freaked out on this, but I am very, very concerned—I mean, I cannot think of anything that happened recently that has caused me more concern than this decision. And I am not

running for re-election so it is not some populist speech or anything else. It just in so many different ways affects me, and I think sitting here and listening this morning, it does—I teach a course at Duke Law School, and I taught it for 20 years in the Congress. And we spend time with some very smart students going through the election law. And I have a more and more difficult time—Senator Cornyn is right. It is very difficult, the system that we have now, and the money is growing. I do not know what I would say to them this year, because—and I mean this with all respect, Mr. Smith. This is a blunderbuss. This is taking a system that, while not—the only disagreement I have with Senator Cornyn is I hate to think what the numbers would have been in the last couple elections without McCain-Feingold. I mean, you look at what is going on, I mean, it just would have been absolutely, in my mind, you know, incredible. And a lot of them have been caused, frankly, by the Supreme Court rulings before this one, and it was caused by people—and we sit and listen to these discussions—that are really, really, really smart people and really, really, really know a lot about the law and know nothing about campaign financing and refuse to lean on the Congress and what the Congress thinks and what the Congress found as facts in making the decisions.

It is sort of like advertising. Everybody thinks they are an expert on advertising. Everybody thinks they are an expert on campaigns. "After all, I see the campaign ads. I know what is going on."

But when you sit with the students and you go through it, while this thing did generate more money, it was an incredible effort trying to deal with legitimate concerns the Supreme Court addressed in *Buckley* v. *Valeo*, but on about free speech, which we are all concerned about. But to take a blunderbuss and blow the whole thing into next year, to say that corporations now can spend from—as Senator Klobuchar said—I mean, Goldman Sachs has a lot of interest and expressed—and I am concerned about small business people. But small business people, by and large, they can contribute their own. They can get it done. This is not about small business. It really is not. This is about very, very, very big business because this is about very, very, very big money.

So, anyway, I think this is—and I do not think there are ways out. I mean, Senator Cornyn said he is interested in transparency. I spend a lot of time on this law. I do not know how we get transparency based on Mr. Smith's definition of what this ruling means, because corporations, they are very, very smart. ExxonMobil, if they decided to put $1 million into a campaign, $5 million, $10 million into a campaign, they are not going to do it. It is going to be the Committee for Clean Government that they are going to give to one of their subsidiaries. No one is ever going to know where the money comes from. You can pick up the Hill magazine or Roll Call or Politico, and you will see page after page after page of ads trying to influence the election where no one who it is that is involved.

Now, I do not see how we can get to that based on Mr. Smith's analysis of the law and sections of the ruling. That is why I am so concerned.

Now, one other thing I just want to spend a minute and talk about is judicial activism because we hear a lot about judicial activ-

ism, and the Ranking Member and I have had a number of discussions.

Professor Rosen, you and Mr. Kendall both talk about *Citizens United* as an activist decision. Can you explain that in the context of judicial activism as we know it over the last, say, 15 years?

Mr. ROSEN. Thanks for that question, Senator. As you know, activism is a hotly contested term. It is in the eye of the beholder. Everyone has his own definition. This decision is activist by any definition of activism, so let us take the different definitions, and they point in different directions.

First, deference to text and original understanding of the Constitution. As Mr. Kendall shows, this is not deferential to the history and ignores the text's distinction between the Press Clause and the Free Speech Clause.

Second, deference to precedent. As you suggested, this is a blunderbuss to precedent.

Third, deference to history and tradition. This uproots decades of tradition and legislation dating back to the progressive era.

And then, finally, pragmatic considerations, many people think irrelevant. This is highly unpragmatic and refuses to defer to Congress in the face of uncertainty.

So it is not that it is unprincipled. Again, Earl Warren could have written this decision. And Justice Kennedy is not a restrained Justice, so that is fine for him. But the other members of the conservative majority care a lot about restraint. They say they are minimalists. This is why it is important—Chief Justice Roberts said in his hearings, "I am a bottom-up rather than a top-down judge. I want to move incrementally." The fact that he did not do that even though he could have is what makes this so activist and what makes it so troubling.

Senator KAUFMAN. Mr. Kendall?

Mr. KENDALL. I think Professor Rosen did a tremendous job of explaining my points. The one other point that I would make is Chief Justice Roberts goes through the factors of stare decisis, and one of the things he relies most heavily on is this tension between *Bellotti* and *Austin*, which are these two earlier rulings, and he completely ignores the fact that—and Justice Stevens points this out very skillfully in the dissent. He ignores the fact that there is a footnote in *Bellotti* that expressly leaves open the issue addressed by *Austin*. And so if you look at those two opinions, they really can be put together and make total sense together, and that is where the Court's rulings were, and yet the Court came back in *Citizens United* and found a problem where it really did not exist, and I think that is one definition of activism.

Senator KAUFMAN. I have felt for many years that judicial activism is in the eye of the beholder, that, you know, if it is going your way, it is not judicial activism, if it is not—I think that has kind of put that to rest. I think we can have judicial activism on the left side of the spectrum, and we can have judicial activism on the right side of the spectrum.

Thank you very much, Mr. Chairman.

Senator SPECTER. Thank you, Senator Kaufman.

Professor Rosen, your testimony, your written testimony is very critical of Chief Justice Roberts. Among other things, you say it is

precisely the kind of divisive and unnecessarily sweeping decision that Chief Justice Roberts pledged to avoid in his confirmation hearings.

When he testified on confirmation, he spoke very strongly against a "jolt to the legal system" and amplified by saying that it is not enough that the prior decision was wrongly decided, but you ought to look to other factors like settled expectations, the legitimacy of the Court, whether the precedent has been eroded by subsequent developments. And he was also very emphatic in his confirmation hearings about deference to Congressional fact finding. He said the reason—well, let me pause there and ask you some questions.

Do you think this case was a jolt to the legal system?

Mr. ROSEN. The *Citizens United* case certainly was, Senator, for the reasons that you and your colleagues have explained very eloquently.

Senator SPECTER. Could you fathom more of a jolt to the legal system than this decision, 100 years corporations cannot engage in political advertising?

Mr. ROSEN. It is very disruptive, Senator.

Senator SPECTER. How do you square that very forceful testimony with this very sweeping overruling of 100 years of law?

Mr. ROSEN. Senator, I have thought about that long and hard because, as I say, I do respect Chief Justice Roberts and his vision. There is one sentence in his concurring opinion that perhaps is the most revealing on this score. He says, "We cannot embrace a narrow ground of decision simply because it is narrow. It must also be right." And that confidence that this was the right decision obviously is what motivated him to join here, and that must have been what was in his mind. But that vision that he alone knows what is right is not the vision that he embraced in his confirmation hearings. He embraced the vision of Justice Holmes who said the Constitution is made for people of fundamentally different points of view.

Senator SPECTER. Professor Rosen, in light of the limited time, let me move to another issue. Chief Justice Roberts at his confirmation hearing said this with respect to Congressional fact finding. He said, "The reason that Congressional fact finding and determination is important in these cases is because the courts recognize that they cannot do that. Courts cannot have, as you have said, whatever it was, the 13 separate hearings before passing particular legislation. Courts, the Supreme Court, cannot sit and hear witness after witness in a particular case and develop that kind of a record. Courts cannot make the policy judgments about what type of legislation is necessary in light of the findings that are made. We simply do not have the institutional expertise or the resources or the authority to engage in that type of a process. So that is the sort of a basis for the deference to the fact finding that is made. It is institutional competence. The courts do not have it. Congress does. It is constitutional authority. It is not our job. It is your job. So the defense in Congressional findings is an area that has a solid basis."

Now, in the voting rights case, although decided on narrower grounds, Chief Justice Roberts was very dismissive of the vast

record that was compiled in this room on the voting rights case, saying, "They are too sweeping"—"they are sweeping far more broadly than they need to in addressing the intentional discrimination under the 15th Amendment."

Now, how does that statement by Chief Justice Roberts of the oral argument square with the vast deference he articulated for Congressional fact finding?

Mr. ROSEN. Senator, I agree with you that it is troubling. The voting rights case was one where Chief Justice Roberts did come up with a narrow grounds of decision. He invented an idea that Congress had not anticipated and said that electoral districts could bail out of preclearance. But he did not have to question Congress' fact finding there. Justice Souter said they should have found there was no standing to bring the suit. That would have been far more respectful of Congress, and I think you have long focused on this Senator. You are right to question this.

Senator SPECTER. Professor Rosen, what is the value of confirmation hearings if you have those statements at confirmation by a nominee and these kinds of decisions?

Mr. ROSEN. Senator, you are right to ask that question, and it was not just in his confirmation hearings that he said this. He said this in speeches and interviews afterwards.

Senator SPECTER. I know I am right to ask that question. What I would like is an answer.

Mr. ROSEN. Well, you will have to ask Chief Justice Roberts that, but I think you are right to note the tension between what he said in his hearings and his performance on the Court.

Senator SPECTER. Somebody send for the Chief Justice.

Mr. ROSEN. I am sure he will be glad to come down on a moment's notice.

Senator SPECTER. Well, my time is up. A second round, Senator Sessions.

Senator SESSIONS. Thank you, Senator Specter.

Chief Justice Roberts did a fabulous job when asked about stare decisis in his hearing, and he explained what the standards were classically understood to be the basis for overturning prior decisions. And I think his opinion indicates he felt it fell within that range, and he never said that he was going to defer to Congressional decisions on constitutional questions that violated the Constitution. And we violate it regularly around here, in my opinion, and I predicted this case violated the First Amendment—this legislation when it passed, and so did a lot of other people. We knew this was at the very edge and really thought it was over the edge of what the First Amendment would allow the Government to prohibit. And so I do not know.

I do say this: that it does appear to me that the case did implicate big issues. It was hard to decide this on a strictly narrow basis. You could have done so perhaps, but if we were proceeding under matters that, fairly considered, violation the constitutional right of a group of people to speak out, then doesn't the Supreme Court, Mr. Smith, have a right to say no, and even if Congress in its wisdom thought it was legitimate in doing so?

Mr. SMITH. Well, again, I think when precedent should be overturned is a complex question, but what I would say about this case

is, for example, suppose the Court had said that while the statute did not really intend to cover video on demand transmissions, first, that would have done some abuse to the statute because the statutory language pretty clearly does cover it. But they could have argued that in some way.

The next question would have been, the next case would have come up, which is, OK, can you ban a book, can you ban a pamphlet or whatever have you. If you ban a book in the next one and the Court said, no, you cannot ban a book, they would have gone to a pamphlet.

Similarly, you know, if you look at the various other grounds that have been offered, like, well, what if—*Citizens United* in a nonprofit. Well, what about the fact that they accepted contributions from for-profit companies? And then people would say, "Well, if it was a de minimis amount." And the next case would be, "Well, what is a de minimis amount?"

In other words, I think what the Court recognized in this case and I think one reason none of the dissenters would actually concur in the judgment on any of these grounds is because doing so would not have led to a stable system. It just would have put off a series of complex questions, and it would have further rewarded, again, the lawyers, the consultants, the lobbyists who know how to game the system and know exactly what you can do and what you cannot. So I think that a sweeping decision——

Senator SESSIONS. Well, along that line, I believe the Chief Justice—someone noted that none of the dissenters proposed a narrow ground. They took a constitutional view of it, apparently, and so we had, didn't we, Mr. Rosen, a constitutional difference of opinion?

Mr. ROSEN. Justice Stevens addresses that in his dissent, Senator, and he says it is common for lawyers to argue in the alternative. It is possible if the Chief Justice had actually in good faith embraced this narrower ground, the dissenters might have changed their mind, just as they did in the voting rights case where they embraced a reading of the statute that they might not have chosen as a primary matter, but were willing to take as a compromise.

Senator SESSIONS. It is possible, but it is also possible that he had two different views of what the Constitution says, it seemed to me. And I think it is a big issue, and sometimes you just have to decide those questions.

I do think that the——

Mr. KENDALL. Senator, if I may?

Senator SESSIONS. Yes.

Mr. KENDALL. I think the best way to describe what this case was about was the way *Citizens United* initially litigated it. They did not challenge the 1947 statute. They put the challenge to *Austin* as a total afterthought in their briefs. It was only when the Court came back and said, no, let us brief specifically whether *Austin* should be overturned that Mr. Olson focused on that question. So you are saying it raised big questions, but it raised big questions only because the Court changed the question on the litigants. And I think the——

Senator SESSIONS. But *Citizens United* had an interest in winning the case, and they did raise the other issues, but really the case took on a different dimension when the Solicitor General made

arguments that indicated that she believed books published before an election could be banned, that the U.S. Congress has the power to ban the publishing of books. And this is a big deal. It implicates the First Amendment, and it would be the first time in the history of the Republic, would you not agree, that the courts or the Congress had ever banned the publishing of a book?

Mr. KENDALL. Again, I do not think that was Solicitor General Kagan's position. It was Malcolm Stewart who initially argued it, and I do not know how that changes—I mean, again, the narrow question of whether the specific 90-minute attack ad was within the campaign finance is a fairly narrow question that was litigated on that ground. The questions that the Justices asked the SG's office and the implications that it got into, it is really about the way the case is handled by the Court, not about what the question presented by *Citizens United* and fairly within the briefing of the initial case——

Senator SESSIONS. Well, she said in her argument, later I guess, "We haven't done that yet," but indicated that there might be a possibility it could be done and that an author would—they could always fight it in court.

Mr. KENDALL. I think what she was saying is that we haven't done it and we won't do it, and if there was—if we did it, it could be challenged.

Senator SESSIONS. I thank you. It is a great discussion, an important issue, and all of you have made good points. And I would say, Mr. Smith, Senator Leahy is going to defend his Vermont Legislature.

[Laughter.]

Senator SESSIONS. As he did ably.

Mr. Chairman, good to be with you.

Senator SPECTER. Thank you, Senator Sessions.

Senator Kaufman.

Senator KAUFMAN. Yes. The Ranking Member is quite eloquent in these, but I think with all due respect, even superficial knowledge would see that this was not going to be decided on—when he got to the point in the oral argument, this was not going to be a case decided on narrow arguments. So I think it is reasonable to believe that the minority knew what was coming and acted accordingly. That is just—everybody has got a right to their opinion, but that is kind of my opinion.

Senator SESSIONS. Well, no, I think that is why they asked for new argument, and they made it publicly clear and allowed the debate to go forward on a larger basis. Rightly or wrongly, that is what they did.

Senator KAUFMAN. I would not want to miss this opportunity to follow up on both Senator Whitehouse and separate comment by Senator Klobuchar. One was Senator Whitehouse talking about the pro-business bent of the Court.

Sitting here listening, you would say, well, they overturned this one case, and it was a 100-year precedent, and, wow, you know, they have been doing this kind of on a regular basis, haven't they, in the business area? And the one that comes in common that Senator Whitehouse has, they all seem to benefit business. So, Pro-

fessor Rosen, Mr. Kendall, could you kind of talk about the business activism part of this case?

Mr. ROSEN. The statistics in recent years are really striking. When you look at the 46 business cases before the Roberts Court in which the Chamber of Commerce participated, the majority of them go the Chamber's way in areas ranging from punitive damages, preemption, False Claims Act, securities, and antitrust cases.

If you want some more stats, they are striking. The Court accepts less than 2 percent of the petitions it receives every year. The Chamber of Commerce's petitions were granted at the rate of 26 percent, and with a success rate for those of 75 percent. So the claim that this is a pro-business Court is increasingly hard to dispute.

Senator KAUFMAN. A pro-business activist Court.

Mr. ROSEN. A pro-business activist——

Senator KAUFMAN. In terms of *Leegin*, where they overturned 96 years of antitrust law, Exxon, so there is a constant theme that goes through. It is not just this case where they overturned 100 years of precedent.

Mr. ROSEN. That is right, Senator.

Senator KAUFMAN. Mr. Kendall? Mr. Smith?

Mr. KENDALL. I think your concern is entirely valid. I think it traces from a 40-year effort by the Chamber to take advantage of what Justice Powell said was an opportunity for corporations in the Court. If you look at some of the recent cases that the Chamber and corporations have funded a tremendous amount of research on, things like attacking jury verdicts—there are few things that mattered more to James Madison than the jury trial, civil and criminal jury trials, and yet corporations have aggressively taken on the idea that there should be a trial for anything and tried to advance the idea that everything should be handled by arbitrators that typically they hire.

And so it has really been an assault on one of the most essential values of our Framers and the Constitution itself, and that has had tremendous success. They have won just about every case expanding this Federal Arbitration Act from something that was intended to be a fairly narrow statute into something that throws just about every business case out of the Federal courts entirely.

Senator KAUFMAN. Let me ask another question, and that is, you know, I think most of us think that based on the recent financial meltdown, the incredible pain it has caused to so many people, I think there is total agreement on that. I think most people think that part of that was caused by, as Alan Greenspan said, a self-regulation that did not work, that he was dismayed about, and that a major part of it was dismembering of the rule of laws and regulations we put in place, laws we put in place after 1929, from Glass-Steagall to setting up the SEC to the uptick rule to all the things that we put in place in a period of just slowly but surely under both administrations dismembering this. And I think most people think that we have to go back to have more regulation—not over-regulation but more regulation.

Looking at the Supreme Court, what are the prospects that someone that is going to sit here and have to try to deal with this

and write laws that whatever we do in the regulatory area could be overturned by this Court?

Mr. ROSEN. Senator, this is a very serious question, obviously. The Troubled Asset Relief Program has already been challenged by libertarian organizations, and that will work its way up to the Supreme Court, and other of the regulations that you mentioned will be challenged as well.

Will this Court give a full-scale assault against these regulations in the way that the pre-New Deal Court did? Predictions are not worth much. I would doubt that they would go that far, largely because of the most conservatives on the Roberts Court, you could call them pro-business rather than libertarian conservatives. Only Justice Thomas might really believe that the post-New Deal regulatory state is unconstitutional.

But that does not mean that they could not strike down a whole lot of stuff and do a lot of damage. Later this term, they are going to decide whether the Public Company Accounting Board to create——

Senator KAUFMAN. Right.

Mr. ROSEN. You know, whether that is unconstitutional. Lots of people think—the betting is that that might well fall.

One of the striking lessons of history is it only takes a couple of really activist decisions to tar a Court as pro-business and activist in the eye of history. The New Deal Court upheld as much as it struck down. It upheld FDR's gold policy. It upheld the Tennessee Valley Authority by a vote of 8–1. But we remember the decision striking down the NRA and other aspects of the regulatory state.

So this Court is on very dangerous ground, and just a small misstep, even a few more decisions like this, could galvanize the populist outcry against *Citizens United* into much broader discontent with the Court, and the question of how Congress will respond will be just as urgent and serious nowadays as it was in the 1930s.

Senator KAUFMAN. Thank you very much, Mr. Chairman.

Senator SPECTER. Thank you, Senator Kaufman.

Without objection, a statement from Senator Feinstein will be entered into the record.

[The prepared statement of Senator Feinstein appears as a submission for the record.]

Senator SPECTER. Professor Kendall, I ask you the same question I asked Jeffrey Rosen, Professor Rosen. How would you square Chief Justice Roberts' confirmation testimony that he would not jolt the system with the holding in *Citizens United*?

Mr. KENDALL. Senator Specter, I share your concerns about it. My organization, which is a progressive legal organization, supported John Roberts, to a great deal of criticism from my progressive friends, based on his testimony, which I found inspiring and spoke to me as a lawyer, and I thought as somebody who I had litigated around John Roberts in a case, I had seen him at work. I had hoped that he would be the Chief Justice that Jeffrey Rosen speaks of him being.

And so to see a ruling like this, which really does fly in the face of so many things that he testified about and so many things that he said he would be as Chief Justice, both in his hearings and in

his interviews, really does throw many of those hopes to the wind. And I think it is——

Senator SPECTER. Professor Kendall, how about his broad testimony at confirmation about Congressional fact finding and the deference, because only Congress can find the facts, and then his dismissive attitude about it in the oral argument in the voting rights case?

Mr. KENDALL. Right. I would like to take issue with what Senator Sessions said, which is this is just a finding about whether it is constitutional. The Supreme Court has very clear guideposts as to when Congress can limit speech if it requires them to meet strict scrutiny, and you have to show a compelling interest.

What the Court did and one of the things we have not talked about much was what the Court did in *Citizens United* is really change the goalposts and change the definition of what is a compelling interest. And so it basically threw out—you know it changed on this body what it had to show and said, oh, all of this evidence of an appearance of corruption is not good enough, you have to show basically quid pro quo corruption.

And so the Court just basically dismissed all of the fact finding and said it was not relevant and said you have not met our burden. And it really has changed the goalposts and dismissed the evidence that you assembled over years of hearings.

Senator SPECTER. Professor Kendall, what is the value of our confirmation hearings if we rely upon testimony we will not jolt the system and it has been exactly the contrary, we are going to be deferential to Congress and it is dismissive? What is the value of the confirmation hearing?

Mr. KENDALL. I think, unfortunately, the confirmation hearing has become a kabuki dance in certain respects, and you said this before, Senator Specter. It is a very large problem.

Senator SPECTER. Professor Smith, you say, "Congress should abandon any attempt to circumvent the *Citizens United* decision." What about some limitation, such as the—eight of the Justices, with only Justice Thomas being on the other side, said that there could be a requirement of disclosure on corporate campaign-related expenditures. Any problem with that?

Mr. SMITH. Senator, no, I think obviously clearly the Court has upheld disclosure rules and so on. The point that I was trying to make there is that reaction by Congress and by State legislators needs to be aimed at the actual problem, and what we see in many of the proposals that I have seen just tossed around are proposals that seem pretty clearly intended to try to stop corporations from using their rights. And as you now, the Court has long held that you cannot do indirectly what you cannot do directly.

So there may be some things like added disclosure. There may be something that could be done to make a more refined foreign corporation law or, you know, subsidiary law that might be possible. But, again, they should not be subterfuge to just try to stop corporations from speaking as they are allowed to do under the decision.

Senator SPECTER. Professor Rosen, what do you think Congress could do consistent with the case?

Mr. ROSEN. Senator, my view of the First Amendment issue is broad, so I think you should do whatever you please. And the fixes will be challenged. Disclosure will be challenged. The limits on foreign corporations will be challenged. But I hope that this Court will be more restrained in those future cases than it was in *Citizens United* and will uphold whatever fixes you pass.

Senator SPECTER. What is your optimism based on?

Mr. ROSEN. In this business, I long got out of the habit of making predictions, but I guess since you ask, Senator—it is a serious question. I have enough faith in the fact that Chief Justice Roberts thinks that he is being incremental and picking and choosing his battles that he will not follow this blunderbuss with another one.

Senator SPECTER. You think he thinks this is incremental, Professor Rosen?

Mr. ROSEN. Senator, I guess he would not think that this decision is incremental, but he would think that its breadth is required by the Constitution, and I would hope that in other cases he would be less confident that he knows the right answer than he did in this one.

Senator SPECTER. Professor Kendall, what would you suggest by way of legislative changes not inconsistent with the case?

Mr. KENDALL. We do not, my organization does not support any particular legislations. We have not taken a position on them. I think that some of the disclosure laws, some of the enhanced limits on foreign corporation contributions should be upheld by the Court and I think would help——

Senator SPECTER. What kind of limits?

Mr. KENDALL. I do not really have the specifics of the legislation in hand enough to speak knowledgeably about that.

Senator SPECTER. If you have any suggestions, Professor Kendall, Professor Rosen, we would be interested in receiving them.

Mr. ROSEN. Thank you, sir.

Mr. KENDALL. Thank you, Senator.

Senator SPECTER. Even your suggestions, Professor Smith, if you have any that you would care to share.

That concludes our hearing. Thank you very much, gentlemen.

[Whereupon, at 12:10 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record.]

QUESTIONS AND ANSWERS

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March 29, 2010

Senator Patrick Leahy
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy,

Attached please find the responses to the written questions submitted by the U.S. Senate Judiciary Committee for the hearing "We the People? Corporate Spending in American Elections after *Citizens United*" held on March 10, 2010.

Sincerely,

Doug Kendall

Doug Kendall
President

58420.001

Answers to Senator Cornyn's Questions

1. **Under what legal form is the Constitutional Accountability Center formed? Should the Constitutional Accountability Center, as an organization, have the right to petition Congress? To send a representative to testify before Congress? Should the Constitutional Accountability Center be allowed to spend from its general fund to lobby Congress or to testify before Congress? Should the Constitutional Accountability Center be allowed to criticize elected politicians? Should the Constitutional Accountability Center be allowed to criticize the Supreme Court? Should the Constitutional Accountability Center be allowed to criticize candidates for federal elective office within 60 days of an election? Outside of the 60 day window?**

Constitutional Accountability Center ("CAC") is a non-profit organization, set up pursuant to Section 501(c)(3) of the Internal Revenue Code. Like other tax-exempt 501(c)(3) organizations, in return for a tax exemption, CAC does not directly or indirectly participate, or intervene, in any campaign for elective office, either on behalf of or in opposition to any candidate, and does not engage in lobbying as a substantial part of its activities, as defined by law. As the Supreme Court's decision in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), recognizes, because 501(c)(3) organizations receive a valuable tax break from the government, Congress has the authority to limit political activity by 501(c)(3) organizations. Consistent with these established limits, CAC works in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all Americans and to protect our judiciary from politics and special interests. In showcasing the progressive promise of the Constitution's text and history, CAC can and does testify before Congress, lobby within the limits prescribed by section 501(c)(3), and criticize Justices of the Supreme Court as well as members of the legislative and executive branches for failing to adhere to the Constitution's text and history.

2. **See the charts attached as Exhibit A, which track the amount of money raised and spent by all presidential candidates in every presidential election since 1976. The y-axis shows the total number of dollars raised and spent, in millions. The Bipartisan Campaign Reform Act of 2002 first affected presidential campaigns in 2004. As demonstrated in the attachment, the curve of the amount of money raised and spent by presidential candidate has bent considerably upward in the 2004 and 2008 campaigns. Has BCRA succeeded in decreasing the amount of money in politics, and the existence or appearance of corruption?**

The question whether the Bipartisan Campaign Reform Act ("BCRA") has decreased the amount of money in politics and the existence or appearance of corruption is a thorny, complex question. While the charts attached as Exhibit A document a significant rise in the amount of funds spent by presidential candidates in the last two elections, they alone do not provide any answer to the intensely factual question of BCRA's effects on political spending; indeed, the charts attached as Exhibit A do not even address all the federal elections to which BCRA applies. A full answer to this question goes well beyond my expertise, which is the Constitution's text and history and, relevant to the question of campaign finance laws, the Supreme Court's treatment of corporations from the founding era to the recent ruling in *Citizens United*.

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3. **The provisions of the 2002 Campaign Finance Reform Act that the Court struck down equally banned electioneering communications by corporations and unions. Do you believe that any new restrictions placed on corporate speech should also apply to unions?**

The *Citizens United* ruling invalidated long-standing restrictions on political spending by corporations and unions, and Congress should consider whether new legislation aimed at political spending by both corporation and unions is warranted. However, in considering legislation in the wake of *Citizens United*, Congress should be sensitive to the fact that corporations and unions are not identical in all respects. Two specific differences between unions and corporations are particularly relevant. First, unions, more so than corporations, are composed of citizens banding together for a common cause. Members of unions often play an active role; by contrast, as my written testimony spells out, the vast majority of a corporation's so-called members do nothing more than invest their money in the corporation in the hopes of sharing in the company's profits. Because so many "members" of a corporation play a passive role, concerns that shareholders may lack notice of or opportunity to object to corporate political spending they disagree with may take on added force. Second, a well-developed body of law recognizes the constitutional rights of dissenting union members to refuse to pay for political spending they oppose; no similar body of law exists for shareholders. Beginning with the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), it has been settled law that union members have a constitutional right to object when unions use compulsory dues to pay for political or ideological spending with which union members may disagree. *Abood* dealt with the rights of public-sector employees, and later cases have extended its reasoning to include employees in private-sector unions as well. Thus, while union members have a right to insist that the union pay for political advertisements solely out of dues from members who support that spending, no similar protections currently exist for shareholders of a corporation.

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Answers to Senator Hatch's Questions

1. **Critics of the *Citizens United* decision have claimed that the decision has opened the door for foreign corporations to influence American politics. The President has made this claim and it is the basis for some of the legislative proposals we have seen to "correct" what some see as problems with *Citizens United*. Yet, the majority's opinion in *Citizen United* explicitly and unambiguously stated that the current legal restrictions on foreign companies – which are broad--remain untouched by the decision.**

   Isn't the argument that this decision will somehow encourage foreign influence on our elections disingenuous? Aren't our current laws dealing with foreign spending on U.S. elections – which are, once again, unaffected by *Citizen United* – sufficient? If you do not believe this is the case, could you state specifically how, despite the clear statements of the Court's majority, *Citizens United* can be read to "open the floodgates," to use the President's words, for campaign spending by foreign entities?

President Obama's carefully phrased comments highlight two critical aspects of the majority's 5-4 ruling, both of which constitute dangerous and revolutionary shifts in well-settled law, and open the door to foreign spending on U.S. elections. First, the Court ruled that the First Amendment makes no distinction among speakers – that the identity of a speaker makes *no difference* for purposes of government regulation of speech. As Justice Stevens correctly observed, the majority's logic "would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans." *Citizens United v. FEC*, 130 S. Ct. 1876, 947-48 (2010) (Stevens, J., concurring in part and dissenting in part). Second, the Court dramatically redefined the meaning and standard of "corruption," ruling that only the strictest and most direct forms of corruption – e.g., bribery – is prohibited, and not, as was previously the standard, any "appearance of undue influence." This critical component of the *Citizens United* ruling redefined the boundaries of what constitutes corruption and made influence by special interests significantly more difficult to prove.

These two holdings, taken together, appear to sweep away vital barriers that were keeping foreign special interests from manipulating American elections. If all speakers are treated equally under the First Amendment, and the only corruption Congress can prohibit is direct vote trading for money, then there is no reason why foreign companies with a U.S.-presence couldn't spend endless amounts of money to influence U.S. elections. While the Court did not invalidate provisions of federal law specifically dealing with contributions by foreign corporations, under the logic of the Supreme Court's decision, just as Exxon can now spend millions to oppose a candidate who, for example, supports the climate bill, so, too, could Toyota or other foreign companies.

2. **There are numerous instances in which courts have allowed corporations to assert constitutional rights on behalf of shareholders. You said as much in your written testimony. For example, it would be difficult to argue that the Constitution would allow the government could deny a corporation due process or take a corporation's property without just compensation.**

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What is so different about freedom of speech that separates it from these other constitutional protections that corporations are allowed to assert? Are there other constitutional protections that are regularly asserted by Corporations that you believe should be denied to them?

I agree that there are numerous instances in which courts have allowed corporations to assert constitutional rights. As I explained in written testimony, the Supreme Court's answer to the question whether corporations have constitutional rights has long been a nuanced one: corporations can sue and be sued in federal courts and they can assert certain constitutional rights, but they have never been accorded all the rights individuals have, and have never been considered part of the political community or given rights of political participation. The Court under Chief Justice John Marshall, and many times since, has emphasized that because corporations are artificial entities that receive state-conferred special privileges, they are subject to greater regulation by the state. So, the fact that corporations have been given some constitutional rights, including some First Amendment rights, does not mean that they have the same set of fundamental rights individuals have. It's always been the case that the constitutional differences between corporations and living, breathing persons are sharpest when it comes to elections since corporations are not citizens, cannot vote, and cannot run for office.

3. **Those that oppose the Court's decision in *Citizens United* have argued that it opens the floodgates for corporations to spend untold billions on campaigns, most of them citing ExxonMobil as a particularly demonic example of a corporation that could hold our nation hostage simply by running independent campaign commercials. Yet, I hear few concerns expressed about the ability of labor unions to make independent expenditures, even though they too are allowed to do so after this decision. I'm surprised this hasn't gotten more attention as labor unions have demonstrated far more desire to organize for political purposes than most corporations. Also, they are, by comparison, far less accountable to their members than corporations are to shareholders, who, if they don't like what a corporation does, can usually just sell their shares.**

   A cynic would argue that the reason we don't hear about the degrading influence of unions on elections is that the opponents of corporate campaign spending tend to be beneficiaries of union involvement in political campaigns. We don't need to address that here, but I want to ask whether our panel believes there should be a distinction between the two. Should unions enjoy different protections than for-profit corporations under the Constitution? Constitutional questions aside, should our policies on political involvement differ at all between corporations and labor unions?

The *Citizens United* ruling invalidated long-standing restrictions on political spending by corporations and unions, and Congress should consider whether new legislation aimed at political spending by both corporation and unions is warranted. However, in considering legislation in the wake of *Citizens United,* Congress should be sensitive to the fact that corporations and unions are not identical in all respects. Two specific differences between unions and corporations are particularly relevant. First, unions, more

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so than corporations, are composed of citizens banding together for a common cause. Members of unions often play an active role; by contrast, as my written testimony spells out, the vast majority of a corporation's so-called members do nothing more than invest their money in the corporation in the hopes of sharing in the company's profits. Because so many "members" of a corporation play a passive role, concerns that shareholders may lack notice of or opportunity to object to corporate political spending they disagree with may take on added force. Second, a well-developed body of law recognizes the constitutional rights of dissenting union members to refuse to pay for political spending they oppose; no similar body of law exists for shareholders. Beginning with the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), it has been settled law that union members have a constitutional right to object when unions use compulsory dues to pay for political or ideological spending with which union members may disagree. *Abood* dealt with the rights of public-sector employees, and later cases have extended its reasoning to include employees in private-sector unions as well. Thus, while union members have a right to insist that the union pay for political advertisements solely out of dues from members who support that spending, no similar protections currently exist for shareholders of a corporation.

58420.006

Answers to Senator Sessions' Questions

1. **A common objection by critics of the *Citizens United* decision has been that corporations "aren't people" and "can't vote." In your testimony, you argued that corporations have no rights to political expression since "corporations are not citizens, cannot vote or run for office, and have never been considered part of our political community." Is it your view that the First Amendment only protects political expression at election time by natural persons that are eligible to vote?**

It's not my view that the First Amendment only protects political speech at election time by eligible voters. I recognize that there are numerous instances in which courts have allowed corporations to assert constitutional rights, including some First Amendments rights. As I explained in my written testimony, the Supreme Court's answer to the question whether corporations have constitutional rights has long been a nuanced one: corporations can sue and be sued in federal courts and they can assert certain constitutional rights, but they have never been accorded all the rights individuals have, and have never been considered part of the political community or given rights of political participation. The Court under Chief Justice John Marshall, and many times since, has emphasized that because corporations are artificial entities that receive state-conferred special privileges, they are subject to greater regulation by the state. So, the fact that corporations have been given some constitutional rights, including some First Amendment rights, does not mean that they have the same set of fundamental rights individuals have. It's always been the case that the constitutional differences between corporations and living, breathing persons are sharpest when it comes to elections since corporations are not citizens, cannot vote, and cannot run for office.

2. **In your testimony you suggested that treatment of corporations as legal "persons" protected by the 14th Amendment is intertwined with *Lochner* era rulings that triggered the Progressive movement and provoked President Roosevelt into proposing his court-packing plan. But the *Lochner* era rulings were based on expansive understandings of "freedom of contract," narrow readings of Congress's power under the Commerce Clause, and strict applications of the 10th Amendment. And the legal person-hood of corporations was established, by your own account, no later than 1886, 20 years before the *Lochner* decision heralded the Court's move to closely scrutinize economic regulation by state and federal legislatures.**

    a. **Do you believe that the 14th Amendment's guarantees of Due Process and Equal Protection do not apply to legal persons such as corporations, partnerships, or other types of associations?**

    b. **Do you believe that such associations have free speech rights (in addition to their members' free association rights) protected by the First Amendment?**

    c. **The Supreme Court has repeatedly held that corporations and other types of associations are protected under the 14th Amendment, and that they enjoy free speech protection under the First Amendment. Do you believe those**

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decisions were wrongly decided? If so, do you believe that overruling those decisions would be more or less consistent with the principles of *stare decisis*?

The *Lochner* era is most infamous and reviled today for its rulings that read the Due Process Clause of the Fourteenth Amendment to provide broad constitutional protections for liberty of contract. Less well recognized but equally a departure from the Constitution's text and history were a set of cases that wrote into the Fourteenth Amendment the idea of equal rights for corporations. In these cases, discussed in my written testimony, the *Lochner*-era Court held state laws unconstitutional for treating corporations differently from living, breathing persons, reasoning that "a state has no more power to deny corporations the equal protection of the law than it has to individual citizens." *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897); *see also Quaker City Cab. Co. v. Pennsylvania*, 277 U.S. 389 (1928)(same). Today, these *Lochner*-era precedents have been repudiated, with the Court unanimously declaring in 1973 that equal rights for corporations was "a relic of a bygone era."

The Court's constitutional error in these *Lochner*-era cases was in supposing that corporations are entitled to the same constitutional rights as living, breathing persons, and that legislatures must treat corporations and living persons equally. Neither is the case. As I explained in my written testimony, the Supreme Court's answer to the question whether corporations have constitutional rights has long been a nuanced one: corporations can sue and be sued in federal courts and they can assert certain constitutional rights, including rights to due process and equal protection secured by the Fourteenth Amendment, but they have never been accorded all the rights individuals have. The Court under Chief Justice John Marshall, and many times since, has emphasized that because corporations are artificial entities that receive state-conferred special privileges, they are subject to greater regulation by the state. So, the fact that corporations are entitled to exercise certain constitutional rights, including some First Amendment rights, does not mean that they are entitled to the same set of fundamental rights individuals have or equal treatment with living persons.

Prior to *Citizens United*, the Supreme Court's First Amendment rulings correctly struck this balance. Although the Supreme Court recognized that corporations were protected by the First Amendment, in 1990 in *Austin v. Michigan Chamber of Commerce* and in 2003 in *McConnell v. FEC*, the Supreme Court held that corporations do not have the same constitutional rights as living breathing persons to spend money on elections. *Citizens United* wiped away these precedents, bringing us back full circle to the idea of equal rights for corporations at the heart of the *Lochner* era. Justice Kennedy's opinion in *Citizen United* contains the same fundamental error at the core of *Gulf*: the idea that corporations must be treated identically to individuals when it comes to fundamental constitutional rights. In extending, once again, equal rights to corporations, the *Citizens United* majority swept aside principles dating back to the earliest days of the Republic, principles that have been reaffirmed time and again, and have proven to be wise and durable. Since the Founding, the idea that corporations have the same fundamental rights as "We the People" has been an anathema to our Constitution.

3. **In his written testimony, Mr. Smith noted that despite the fact that the state of California allows unlimited corporate political advertisements, no corporation was among the top ten sources of independent expenditures in California from 2001 to**

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2006. Instead, the top ten spenders in California consisted of two Indian tribes, two individuals, the trial lawyers' association, and five labor unions.

a. In your testimony you stated that the government should be allowed to restrict corporate political speech because corporations "are given special privileges such as perpetual life and limited liability" that allow them to "amass great wealth." But labor unions and Indian tribes also clearly enjoy special privileges under the law, and lawyers arguably have special professional rights. And as California's experience shows, all of these groups amass vast campaign coffers. Under your justification for banning speech by corporate associations, would the government also be allowed to ban political speech by labor unions, trial lawyers, and federally recognized Indian tribes?

The Constitution's text and history give governments broad authority to regulate corporations to ensure that they do not abuse their state-conferred special privileges, including imposing limits on corporate political spending on elections. Governments have this broad authority because of the special privileges corporations alone receive, and which allow them to amass great wealth and play an ever-expanding role in American life. In our Constitution's text and history and our nation's constitutional development, corporations, more so than any other artificial entity, have been treated as uniquely powerful artificial entities that necessarily must be subject to substantial governmental regulation in service of the public good.

Although campaign finance law has long treated labor unions in a manner identical to corporations, it is doubtful that federal and state governments have the same broad authority over all associations. Although any legislation regulating associations would have to be evaluated on its own terms, it is hard to imagine that the government would have any weighty interest in prohibiting outright campaign spending by an association of trial lawyers or, for that matter, an association of defense counsel, since such associations typically do not receive state-conferred special privileges analogous to those corporations receive. State and federal governments, of course, have an interest in regulating associations to ensure that corporations were not using them as a conduit for corporate political spending, but even that regulatory interest would not support an across-the-board prohibition on spending by associations like the trial lawyers group referenced in your question. Indian tribes are a unique case, and tribes are often treated differently under the law than other groups owing to their status as sovereigns and the long disgraceful history of their oppression at the hands of this country, but it is also doubtful that the government would have a compelling justification for legislation prohibiting outright campaign spending by tribes.

b. Many critics of the *Citizens United* decision argue that corporations could swamp other political speakers, citing certain major multi-national corporations as examples of this threat. Do you have any evidence of such overwhelming corporate expenditures having occurred in state elections?

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It is difficult to come by reliable evidence about whether large multi-national corporations have spent large sums of money in state elections in the twenty-six states in which state law permitted corporations to spend money on elections. (The other twenty-four states sharply limited corporations from spending money on candidate elections, and presumably corporations heeded these restrictions). Reliable evidence is lacking because, nationwide, disclosure laws applicable to independent expenditures on campaigns for elective office are riddled with loopholes. The National Institute on Money in State Politics summed up the state of these laws as follows in a 2007 report: "millions of dollars spent by special interests each year to influence state elections goes essentially unreported to the public. [Independent expenditures] form the single-largest loophole in the laws and administrative procedures implementing transparency in state electoral politics." Linda King, National Institute on Money in State Politics, *Indecent Disclosure: Public Access to Independent Expenditure Information at the State Level* 4 (2007).

c. A common complaint about "special interest" influence in the Federal government objects to the lobbying that is conducted by ideological groups, industry organizations, labor unions, and corporations. Critics point to the cost of such lobbying efforts, and note that ordinary citizens are not generally able to communicate their views to their elected representatives in the same way. Do you believe that the First Amendment's protection of "the people['s]" right to "petition the Government for a redress of grievances" is limited only to natural persons? If not, how do you distinguish the First Amendment's protections of political speech from the protections of the right to petition?

As my answer to question 1, above, reflects, it is not my position that the First Amendment's protection of the right to petition the government is limited to living, breathing persons. I recognize that there are numerous instances in which courts have allowed corporations to assert constitutional rights, including First Amendments rights. As I explained in my written testimony, the Supreme Court's answer to the question whether corporations have constitutional rights has long been a nuanced one: corporations can sue and be sued in federal courts and they can assert certain constitutional rights, but they have never been accorded all the rights individuals have, and have never been considered part of the political community or given rights of political participation. The Court under Chief Justice John Marshall, and many times since, has emphasized that because corporations are artificial entities that receive state-conferred special privileges, they are subject to greater regulation by the state. So, the fact that corporations have been given some constitutional rights, including some First Amendment rights, does not mean that they have the same set of fundamental rights individuals have.

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Jeffrey Rosen
Responses to Written Questions from Senators Cornyn, Hatch, and Sessions
Senate Judiciary Committee Hearing
We the People? Corporate Spending in American Elections after Citizens United
March 10, 2010

Written Questions from Senator Cornyn
Senate Judiciary Committee Hearing
We the People? Corporate Spending in American Elections after Citizens United
March 10, 2010

For Jeffrey Rosen

1. In your opening statement to the Committee, you linked the ruling in *Citizens United* to what you see as a broader "pro-business" bias of the current Supreme Court. You recently attributed this perceived bias to the lack of an "economic populist on the current Supreme Court—[a] justice in the tradition of William O. Douglas, who once boasted that he was eager to use the law to bend the law against the corporations . . . . " Jeffrey Rosen, *Big Business and the Robert's Court*, 49 SANTA CLARA L. REV. 929, 934 (2009). But given Justice Douglas's dissent in *United States v. Automobile Workers*, 352 U.S. 567, 593-98 (1957) (Douglas, J. dissenting), and the concurrence he joined in *United States v. CIO*, 335 U.S. 106, 155 (1948) (Rutledge, J. concurring), do you have any doubt that he would have joined the majority's opinion in *Citizens United*? In particular, isn't the following argument of Justice Douglas in harmony with the ruling in *Citizens United*: "Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate"? *Automobile Workers*, 352 U.S. at 597.

I find it hard to imagine that Justice William O. Douglas would have joined the majority opinion in Citizens United. Douglas repeatedly crusaded against what he considered the corrupting influence of big corporations. "I'm ready to bend the law in favor of the environment and against the corporations," Douglas wrote before dissenting in *Sierra Club v. Morton*, 405 U.S. 727 (1972), which held that the Sierra Club lacked standing to sue federal officials for approving a skiing development in a national forest. See Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas*, p. 455.

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With the exception of the one sentence you have quoted, Douglas's dissent *in United States v. Automobile Workers* does not suggest that Douglas would have treated for profit corporations precisely the same as labor unions and other associations of speakers. At the beginning of his dissent, he makes clear that he is specifically concerned about "whether a union can express its views on the issues of an election and on the merits of the candidates" – a principle that he said was "applicable as well to associations of manufacturers, retail and wholesale trade groups, consumers' leagues, farmers' unions, religious groups and every other association representing a segment of American life and taking an active part in our political campaigns and discussions." 352 U.S. 567, 593 (Douglas, J., dissenting). Similarly, the concurrence Douglas joined in *United States v. CIO* emphasizes the special expressive interests of labor unions and nowhere suggests that large for-profit corporations have the same interests in free expression. See *United States v. CIO*, 335 U.S. 106, 144 (1948). (Rutledge, J., concurring).

Douglas, of course, was sometimes hard to predict. (He became much more of an anti-corporate crusader in the 1960s and 70s). But he is, to say the least, an unlikely model for the five justices who joined the majority opinion in Citizens United. They more frequently claim to embrace the restrained jurisprudence of Felix Frankfurter, whose majority opinion upholding the longstanding restrictions on corporate and union speech in the *Automobile Workers* case contains a detailed history of Presidential and Congressional support for these restrictions dating back to Theodore Roosevelt administration. Frankfurter's restrained opinion stands in stark contrast with the activism of the Citizens United Majority.

For all witnesses

1. See the charts attached as Exhibit A, which track the amount of money raised and spent by all presidential candidates in every presidential election since 1976. The y-axis shows the total number of dollars raised and spent, in millions. The Bipartisan Campaign Reform Act of 2002 first affected presidential campaigns in 2004. As demonstrated in the attachment, the curve of the amount of money raised and spent by presidential candidate has bent considerably upward in the 2004 and 2008 campaigns. Has BCRA succeeded in decreasing the amount of money in politics, and the existence or appearance of corruption?

I have not studied or testified about the empirical effects of BCRA and have no special insights to offer on this question. Nevertheless, a 2007 report by

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the Campaign Finance Institute, a non-profit, non-partisan institute affiliated with George Washington University, concludes the following:

[T]he surge in small contributions to the national political parties has been a notable and positive outgrowth of the Bipartisan Campaign Reform Act. But the vast majority of Americans still do not give anything at all to candidates or parties. The authors are therefore led to wonder about the possibilities for pursuing greater equality by focusing on the role of small donors. Yet the numbers for candidates show that the fundraising balance is not so easy to change. Looking forward to 2008, the authors expect that large donors, PACs, and bundlers will continue to dominate the financial picture for congressional candidates and for presidential candidates before the early primaries. The initial results about party money have looked promising, as do the early reports about Internet fundraising. Nevertheless, the role of small donors more broadly remains a concern.

See The Campaign Finance Institute, The Ups and Downs of Small and Large Donors, available at:: http://www.pewtrusts.org/our_work_report_detail.aspx?id=36404&category=492

2. The provisions of the 2002 Campaign Finance Reform Act that the Court struck down equally banned electioneering communications by corporations and unions. Do you believe that any new restrictions placed on corporate speech should also apply to unions?

I have not studied or testified about this policy question and have no special insights to offer. If Congress chooses to place new restrictions on union as well as corporate speech, I believe that courts should evaluate both with a presumption of constitutionality, for the reasons Justice Frankfurter described in his majority opinion in *United States v. Automobile Workers.* Nevertheless, as the *Citizens United* majority and dissenters seems to acknowledge, there may be differences between the expressive interests of different speakers, including non-profit corporations as opposed to non profits; large corporations as opposed to small; foreign corporations as opposed to domestic; and advocacy organizations as opposed to other non profits. 130 S.Ct. 876, 936 & n. 12 (Stevens J., dissenting.)

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Senator Orrin Hatch
Questions for the Record
"We the People? Corporate Spending in American Elections after Citizens United"
March 10, 2010

For Professor Rosen

Q. In your written testimony, you criticized Chief Justice John Roberts for what you view to be a failure on his part to promote unanimity on the Supreme Court. The *Citizens United* case, in your view, was "an important test" of Chief Justice's ability to deliver on his stated goals for the Court. Much of your criticism of the *Citizens United* decision stems from the fact that it was not decided on narrower grounds and was, in your words, rendered by "an unnecessarily sweeping opinion," drafted by Justice Kennedy. Yet, as I read Justice Kennedy's opinion, I noted that he went to great lengths to explain why the decision could not properly be decided on narrower grounds without chilling further free speech. Furthermore, none of the narrower grounds mentioned were endorsed by the dissenters in the case, making it unlikely that such an approach would have resulted in greater consensus.

Now, we can all disagree about the conclusion the majority reached in deciding the constitutional question, and we've had a lot of discussion on that point. But is it really reasonable to argue that the fact that *Citizens United* was decided on constitutional grounds is a fundamental failure on the part of Chief Justice Roberts?

In his dissenting opinion in *Citizens United*, Justice Stevens rejected Justice Kennedy's claim that the case could not have been decided on narrower grounds without chilling free speech. As Justice Stevens noted, the Court had before it "no record with which to assess that claim" and "no meaningful evidence to show how regulated corporations and unions have experienced" the restrictions of BCRA. 130 S.Ct. 876, 933 & n. 3 (Stevens, J., dissenting). Justice Stevens also criticized the majority's suggestion that a broad facial ruling was necessary because "anything less would chill too much protected speech" – a claim that Justice Stevens said rested on the "unsubstantiated assertion" that "some significant number of corporations have been cowed into quiescence by FEC 'censor[ship]'" and was "hard to square with practical experience" and with "the legal landscape following *WRTL*, which held that a corporate communication could be regulated .... only if it was "susceptible of *no* reasonable interpretation other than as an appeal to vote for or against a specific candidate." Id. at 934-935, quoting 551 U.S., at 470 (opinion of ROBERTS, C. J.) (emphasis added).

Justice Stevens's dissent also criticized the majority for bypassing "three narrower grounds of decision," each of which he called "perfectly 'valid,'"

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Id. at 937-38, and "at least as strong as the statutory argument the Court accepted in last year's Voting Rights case." Id. at 938 & n. 16. As Justice Stevens noted, the dissenters did not have to endorse these narrower grounds explicitly because "our reading of the Constitution would not lead us to strike down any statutes or overturn any precedents in this case, and we therefore have no occasion to practice constitutional avoidance or to vindicate Citizens United's as-applied challenge." Id. But readers of the *Citizens United* decision have no way of knowing whether it is "unlikely" the dissenters would have endorsed the narrower grounds of decision if Chief Justice Roberts and his colleagues had offered them as an alternative grounds of decision – as they did in the Voting Rights case. The Voting Rights case shows that, with leadership from the Chief Justice, the liberal and conservative justices on the Roberts Court can indeed be persuaded to accept narrower statutory arguments that neither side may initially prefer.

For the whole panel:

Q. Those that oppose the Court's decision in *Citizens United* have argued that it opens the floodgates for corporations to spend untold billions on campaigns, most of them citing ExxonMobile as a particularly demonic example of a corporation that could hold our nation hostage simply by running independent campaign commercials. Yet, I hear few concerns expressed about the ability of labor unions to make independent expenditures, even though they too are allowed to do so after this decision. I'm surprised this hasn't gotten more attention as labor unions have demonstrated far more desire to organize for political purposes than most corporations. Also, they are, by comparison, far less accountable to their members than corporations are to shareholders, who, if they don't like what a corporation does, can usually just sell their shares.

A cynic would argue that the reason we don't hear about the degrading influence of unions on elections is that the opponents of corporate campaign spending tend to be beneficiaries of union involvement in political campaigns. We don't need to address that here, but I want to ask whether our panel believes there should be a distinction between the two. Should unions enjoy different protections than for-profit corporations under the Constitution? Constitutional questions aside, should our policies on political involvement differ at all between corporations and labor unions?

The Supreme Court has held repeatedly that Congress may constitutionally restrict the speech of both corporations and labor unions under the Constitution, although the expressive interests of various union and corporate associations may differ. See, e.g., *United States v. Automobile Workers*, 352 U.S. 567 (1957). I don't have any special expertise about whether Congress's policies on political involvement should different between corporations and labor unions.

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Senator Sessions' Questions for the Record for March 10, 2010 *Citizens United* Hearing

Questions for Prof. Rosen

1. In your testimony you suggested that the *Citizens United* Court was "activist" in choosing not to decide the case narrowly by carving out exceptions to BCRA that would have permitted the distribution of Citizens United's film. If the various narrower grounds offered by Citizens United were correct—or even plausible—one would expect that some of the dissenting Justices would have concurred in the judgment of the Court, but on one or more of the proffered narrow grounds.

    a. Why, then, did all nine Justices reject them?

    b. Doesn't the Court's unanimous rejection of the alternative grounds of decision demonstrate that a narrow ruling would not have been defensible on the law?

The four dissenting justices rejected the majority's suggestion that a narrower ruling would not have been defensible on the law. Justice Stevens's dissent criticized the majority for bypassing "three narrower grounds of decision," each of which he calls "perfectly 'valid.'" 130. S.Ct. 876, 938 (Stevens, J., dissenting.) As Justice Stevens noted, the dissent did not have to endorse these narrower grounds explicitly because "our reading of the Constitution would not lead us to strike down any statutes or overturn any precedents in this case, and we therefore have no occasion to practice constitutional avoidance or to vindicate Citizens United's as-applied challenge." Id at n. 16. But we have no way of knowing whether the dissenters would have endorsed the narrower grounds of decision if Chief Justice Roberts and his colleagues had offered them as an alternative grounds of decision – as they did in the Voting Rights case.

2. In your testimony you alluded to Justice Stevens' remark that the Court had been willing to engage in extraordinarily creative statutory construction to avoid a constitutional challenge to the Voting Rights act in the *NAMUDNO* case, and contrasted the Court's approach in that case with the Justices' refusal to engage in interpretive gymnastics in *Citizens United.*

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c. Was there any discussion at any stage of the *NAMUDNO* case of a risk that a narrow statutory holding that found the local government eligible to opt-out from the Voting Rights Act's preclearance regime would chill the exercise of a constitutional right by other persons or governmental agencies not involved in that particular litigation?

NAMUDNO was not a First Amendment case, and therefore there was no discussion of the First Amendment's chilling effect doctrine.

d. There was substantial discussion during the re-argument of the *Citizens United* case of the risks that indeterminate regulations—constantly under attack for several years through a series of as-applied challenges—would chill political speech that is at the core of what the First Amendment is intended to protect. Do you disagree with the Court's established doctrines about overbreadth and impermissible chilling of protected speech? If not, please explain why you do not believe those doctrines applied in *Citizens United*.

In his dissenting opinion, Justice Stevens explained at length why the Court's established doctrines about overbreadth and impermissible chilling of protected speech were applied in a speculative and unconvincing fashion in Citizens United. As Justice Stevens noted, the Court had before it "no record with which to assess" the claim that a narrower decision would have chilled protected speech and "no meaningful evidence to show how regulated corporations and unions have experienced" the restrictions of BCRA. 130 S.Ct. 876, 933 & n. 3 (Stevens, J., dissenting). Justice Stevens went on to argue that the majority's suggestion that a broad facial ruling was necessary because "anything less would chill too much protected speech" rested on the "unsubstantiated assertion" that "some significant number of corporations have been cowed into quiescence by FEC 'censor[ship]'" and was "hard to square with practical experience" and with "the legal landscape following *WRTL*, which held that a corporate communication could be regulated under § 203 only if it was "susceptible of *no* reasonable interpretation other than as an appeal to vote for or against a specific candidate." Id. at 934-935, quoting 551 U.S., at 470 (opinion of ROBERTS, C. J.) (emphasis added). Justice Stevens also noted that "The majority's "chilling" argument is particularly inapposite with respect to … the longstanding restriction on the use of corporate general treasury funds for express advocacy," a restriction that is well defined and generates no

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chilling concerns." Id. at 935 & n. 8. And he objected that the majority's chilling effect analysis acknowledged, but failed clearly to distinguish between, the very different First Amendment interests of for profit corporations as opposed to non profits; large corporations as opposed to small; foreign corporations as opposed to domestic; and advocacy organizations as opposed to other non profits. Id. at 936 & n. 12.

3. One popular basis for the charge of "activism" by critics of the *Citizens United* decision has been the oft-repeated claim that the decision "reversed a century of law" or abandoned "100 years of precedent." As I noted at the hearing, these claims are flatly untrue, since no law barred independent expenditures until 1947, and the Court never ruled on the constitutionality of expenditure bans until 1976, when the *Buckley* Court struck down such a ban as unconstitutional. Only in 1990 did the Court for the first time rule that expenditure bans were constitutionally permissible under the First Amendment. But even if these claims were more accurately restated—to say that the Court's decision cast doubt on a century's worth of legislative efforts to limit corporate and union money in political campaigns—that assertion does not automatically undermine the legitimacy of the Court's decision.

e. At the September 2009 oral argument, Floyd Abrams, a celebrated legal expert and champion of the First Amendment's free speech protections, noted that the Court's unanimous decision effectively federalizing libel law in *New York Times v. Sullivan* revolutionized 150 years of prior state practice. The *Sullivan* Court, moreover, could have ruled in favor of the New York Times on narrower grounds, but declined to do so, in part out of concern for the chilling effects that successive libel litigation would have on free speech. Do you believe that the *Sullivan* Court was "activist?"

The *Sullivan* case was indeed activist, if activism is defined as overturning state libel laws such as Alabama law at issue in the case. But *Sullivan* was arguably less activist than *Citizens United* in that it did not overturn federal laws or Supreme Court decisions that had repeatedly upheld them. As Justice Brennan's majority opinion noted, "Although the [federal] Sedition Act was never tested in this Court, 16 the attack upon its validity has carried the day in the court of history." *New York Times v. Sullivan*, 376 U.S. 254,

58420.018

276 (1964).

f. Setting aside the question of the decision's impact on prior Court precedents, was the Court's decision in *Citizens United* any more of a "jolt to the legal system" than its decision in *New York Times v. Sullivan*?

Both *Citizens United* and *New York Times v. Sullivan* represented a "jolt to the legal system," and both were activist in this sense. As I noted in my opening statement, Citizens United is a principled, activist decision of the kind that could have been written by Chief Justice Earl Warren (or Justice William Brennan). But the phrase "jolt to the legal system" comes from Chief Justice Roberts, who pledged in his confirmation hearings to avoid the kind of activist decisions for which conservatives have long criticized the justices of the Warren Court.

4. The primary precedent dealing with the question presented in *Citizens United* was the Court's 1990 decision in *Austin v. Michigan State Chamber of Commerce*. As the majority noted, and as Chief Justice Roberts discussed at some length in his concurrence, even the Obama Administration abandoned the "anti-distortion" rationale articulated in *Austin* and sought to prop up that precedent with two new arguments that the *Austin* Court had not adopted.

   a. Do you believe that the doctrine of *stare decisis* is designed primarily to preserve the results reached in a particular Supreme Court precedent?

As Justice Stevens noted in his dissenting opinion, no one is an absolutist when it comes to stare decisis, but "if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine." 130 S.Ct. 876, 938 (Stevens, J., dissenting.) The doctrine of stare decisis is designed primarily to preserve the predictability of the law, as well as the ability of legislators and citizens to rely on the stability of previous Supreme Court decisions. As Stevens also noted, the majority's claim that "'the Government's hesitation to rely on *Austin*'s antidistortion rationale 'diminishe[s]' 'the principle of adhering to that precedent'" is not convincing. Id. at 939. "We have never thought fit to overrule a precedent because a litigant has taken any particular tack. Nor should we," Justice Stevens wrote. "Our decisions can often be defended on multiple grounds, and a litigant may have strategic or case-specific reasons for emphasizing only a subset of them. Members of the public, moreover, often rely on our bottom-line holdings far more than our precise legal arguments; surely this is true for the legislatures that have been regulating corporate electioneering

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since *Austin*. The task of evaluating the continued viability of precedents falls to this Court, not to the parties." Id.

b. If the principle of *stare decisis* is intended to promote rational, organic development of the legal doctrines expressed in the Court's prior decisions, how is that policy advanced if the Court preserves the holding of a prior case but substitutes entirely new reasons to justify the result?

As the dissenting justices justices explained at length in *Citizens United*, there was no need for the Court to preserve the holding of *Austin* and other cases while substituting entirely new reasons to justify the result. By deciding the case on narrower grounds, the majority could have avoided reconsidering *Austin* entirely.

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Before the United States Senate Committee on the Judiciary

"We the People? Corporate Spending in American Elections after Citizens United"

March 31, 2010

Responses to the written questions of committee members:

Bradley A. Smith

Chairman
Center for Competitive Politics
124 S. West St., Suite 201
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http://www.campaignfreedom.org

and

Josiah H. Blackmore II/Shirley M. Nault Designated Professor of Law
Capital University Law School
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Questions from Ranking Member Sessions and Responses of Prof. Bradley A. Smith

Questions for Prof. Smith:

1. In your hearing testimony you noted that the Obama Administration in this case took the position before the United States Supreme Court that the federal government or the states could bar a corporate publishing house, such as Simon & Schuster, from publishing or distributing a book before an election if that book contains a single sentence opposing a candidate for political office. Some of your fellow witnesses argued that the Solicitor General had tried to walk back from that position when the case was re-argued in September 2009. As I read the transcript of that argument, however, Solicitor General Kagan did not, and could not, foreswear the logical end-point of the government's argument—that the First Amendment would not prohibit the government from banning books (or communications in any other media) published, created, or distributed with general corporate funds, that support of oppose political candidates.

    a. Solicitor General Elena Kagan conceded in her argument to the Court that the statute on independent expenditures covered books and other media, but argued that "that there has never been an enforcement action for books" and that there would be "a good as-applied challenge"—i.e. the author or publisher of a book could bring another lawsuit all the way to the Supreme Court and would probably win—if the law were enforced to the full extent that the statute permits. What would be the practical implications for freedom of political speech if an author were required to litigate his or her case before publication could go forward? Would the courts be able to vindicate the author's and publisher's First Amendment rights in time for the political speech to have the effect intended by the speaker?

Answer: First, you are correct in your description of the case's second argument: Solicitor General Kagan continued to assert the authority to regulate books, saying only that there was no need to do so at this time. Second, there has been at least one enforcement action against a book; the FEC spent over three years investigating George Soros over publication of his book, The Bubble of American Supremacy, before dismissing the matter on a 3-3 vote (see MUR 5642).

The investigation of Mr. Soros came after the election in which the alleged violation occurred, and the book had already been published and distributed. However, the chilling effect must not be overlooked, and *Citizens United* provides a pointed example of why. In 2004, the FEC had held that documentary filmmaker David Hardy could not advertise a film, "The Rights of the People," with pictures of political candidates within 30 days of a primary election (see AO 2004-15). Similarly, the FEC ruled that year that Citizens United could not broadcast a documentary movie, Celsius 41.11 (see AO 2004-30). Based on Advisory Opinions 2004-15 and 2004-30, David Bossie, President of Citizens United, has stated that was told by the FEC that if his group aired "Hillary: The Movie," it would be considered a "knowing and willful" violation of the Act, subjecting Bossie to criminal penalties including possible jail time. One can imagine the chilling effect that this might have. In other cases, the courts have repeatedly proven unable to decide cases on a timely basis. For example, in SpeechNow.org v. Federal Election Commission (a suit in which I am co-counsel), the non-profit group SpeechNow.org filed an advisory request with the FEC in November of 2007. After the FEC denied SpeechNow's request, SpeechNow filed suit in federal court in February of 2008. More than

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two years later, SpeechNow.org has already been forced to sit out one election cycle, and has already missed early the first 2010 primaries, waiting for a final ruling on its request.

In other words, individual actions in specific cases are not a realistic alternative to clear constitutional rules. Indeed, it should be noted that in *Wisconsin Right to Life v. FEC*, the Court had tried to carve out a narrow, as applied exemption. In practice, it turned out to be unworkable. The court initially tried, in other words, a more narrow approach, but that approach proved inadequate to secure First Amendment rights.

b. In the 2007 *Wisconsin Right to Life* case, the Supreme Court tried to carve a narrow ruling that excluded certain kinds of "issue" advertising from BCRA's ban on political speech in the run-up to federal elections. The Federal Election Commission then promulgated a 2-part, 11-factor test to determine when speech did or did not fall within the zone regulated by BCRA. What would be the practical effect of such technical carve-out rules if they were to be applied to books or other non-broadcast media? Would candidate biographies that are now *de rigueur* in national campaigns be considered electioneering communications? What of the various popular political books or films criticizing an incumbent candidate seeking reelection or books criticizing or praising a particular political party while mentioning its candidates by name? Could the government have banned showings of Michael Moore's *Fahrenheit 9/11*?

Answer: Under the authority claimed by the government in *Citizens United*, it is clear that the government could have prohibited *Fahrenheit 9/11*. Following is a small sampling of books that contain express advocacy, or that promote, support, attack or oppose a candidate, and therefore would be subject to a ban if published or distributed by a corporation (which all were):

- Al Franken, "Lies (And the Lying Liars Who Tell Them)," ("George W. Bush is the worst environmental president in our nation's history.")
- Bill Press, "Bush Must Go."
- Michael Moore, "Dude, Where's My Country? ("There is probably no greater imperative facing the nation than the defeat of George W. Bush in the 2004 election.")
- Meghan McCain, "My Dad, John McCain" ("My dad... would make a great president")
- John Kerry, "A Call to Service," ("It is that determination I hope to bring to ... the presidency of the United States... .")
- Molly Ivans, "Shrub"
- Maureen Dowd, "Bushworld"
- William J. Clinton, "Between Hope and History" ("This is another moment for Americans to Decide")

Note that it is not clear that all of these books would be subject to ban under current law, but they would rather clearly be banned under the authority claimed by the government in *Citizens United*. As I have noted, movies, in fact, have been restricted, most notably Citizens United's "Celsisus 41.11" and David Hardy's "The Rights of the People."

2. You mentioned in your testimony that 26 states currently have no prohibition on independent expenditures in state political races by corporations or labor unions.

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a. Please provide a list of these states.

Answer: Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New Jersey, Oregon, South Carolina, Utah, Vermont, Virginia, and Washington. Additionally, two other states, New York and Alabama, allow limited corporate expenditures.

b. What has the experience of these states been in terms of corporate and labor union expenditures in political campaigns? How much labor union and corporate money has been spent in these states' campaigns? What types of entities have dominated political expenditures in these states? Has there been a measurable shift in state policy as a result of such corporate or union expenditures?

Answer: I regret that I cannot answer these questions for you in this limited time frame for responding. I would note that *Governing Magazine* regularly publishes a ranking of the best-governed states. *Governing* bases its rankings on non-ideological measures such as state procurement practices and management efficiency. It has regularly ranked Utah and Virginia as the best governed states in the country. In the last ranking, the top governed states, in addition to Utah and Virginia, were Georgia, Washington, Missouri and Delaware, all of which permitted unlimited corporate expenditures.

What is clear, I think, is that no effort has been made, let alone consummated, to demonstrate that states that prohibit corporate expenditures are better governed, or that their citizens live better, than in states that allow corporate expenditures. For example, presently the four states with the lowest unemployment rates all prohibit corporate contributions (Wyoming, North Dakota, and South Dakota). But the next four lowest unemployment rates belong to states that allow unlimited corporate expenditures (Utah, Nebraska, New Mexico, New Hampshire). The highest unemployment is found in states that prohibit corporate expenditures (Michigan and Rhode Island), but the next two highest states permit corporate expenditures (California and South Carolina). The top states for per capita income are Connecticut (prohibited) and New Jersey (permitted); the bottom states for per capita income are West Virginia (prohibited) and Mississippi (permitted). In 2008, four states had voter turnout in excess of 70 percent. Two of them (Minnesota and Wisconsin) prohibit corporate expenditures, while two (Maine and New Hampshire) do not. Turnout was lowest in Hawaii (unlimited) and West Virginia (prohibited).

This is, of course, a simplistic means of analysis. For example, per capita incomes are high in Connecticut and New Jersey in part because the cost of living is high. Voter turnout is historically high in Minnesota, Wisconsin, Maine, and New Hampshire for a variety of longstanding cultural norms and the competitive nature of the 2008 elections in those states. But that is, in a sense, the point. There is no immediately obvious benefit to states that prohibit corporate expenditures. Given that restrictions on political speech clearly tread on core First Amendment freedoms, the burden must be on those who argue for restrictions to demonstrate that there is some meaningful, not fanciful, benefit to such restrictions.

3. In 1976, when the Supreme Court decided *Buckley v. Valeo*, the Court drew a clear distinction between contributions to political campaigns and independent expenditures by people wishing to express their political views in connection with an election. The *Buckley* Court upheld the limit on contributions because they concluded that the limitation:

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> focuses precisely on the problem of large campaign contributions – the narrow aspect of political association where the actuality and potential for corruption have been identified – while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. *Buckley v. Valeo*, 424 U.S. 1, 28 (1976))

In other words, the Court in *Buckley* treated freedom of political expression as the default rule, but carved out campaign contributions as an area that could be regulated because the limit on contributions was precisely targeted to reduce the risk of corruption. It appears that the dissenting Justices in *Citizens United* would effectively overturn *Buckley* and find that political speech—and in particular all use of money to promote political speech—is presumptively subject to "reasonable" regulation.

a. Would the dissent in *Citizens United* undo *Buckley*?

Answer: Justice John Paul Stevens, the author of the *Citizens United* dissent, has consistently indicated his desire to overturn *Buckley v. Valeo*. That this precedent is older than *Austin* has never disturbed him.

The other *Citizens United* dissenters have not, to my knowledge, explicitly indicated a desire to overrule *Buckley*, and in his plurality opinion in *Randall v. Sorrell*, 548 U.S. 230 (2006), Justice Breyer relied heavily on *Buckley* as settled precedent in overturning a Vermont law intended to challenge *Buckley*.

As a practical matter, however, as I have stated in response to other questions, *Austin* itself (and *McConnell v. FEC*) is incompatible with *Buckley*. Moreover, we should not ignore the radicalism of the *Citizens United* dissenters. These four Justices would have prohibited a non-profit membership corporation from distributing a political movie. Much has been made of the idea that the majority decision is out of step with popular opinion, based on a *Washington Post* poll Forgetting, for moment, the idea that the Constitution exist to protect rights from popular opinion, the Center for Competitive Politics poll, attached to my original written statement, found that by a three to one margin voters approved of the majority holding (and thereby disapproved of the dissenters' view) in favor of allowing distribution of "Hillary: The Movie." Further, by suggesting that corporate speech rights can be freely abridged by government because "the speakers are not natural persons," Justice Stevens' dissent hints at a truly radical willingness to toss out nearly 200 years of constitutional precedent, with deep roots in the common law, affirming that corporations, as assemblies of citizens, do have constitutional rights and do benefit from constitutional protections. (Justice Sotomayor also questioned this deeply rooted precedent at the second oral argument).

In my view, *Austin* and *McConnell* are flatly incompatible with *Buckley*, and justices who voted for those decisions effectively sought to overturn *Buckley* without saying so. *See* Lillian R. BeVier, McConnell v. FEC: *Not Senator Buckley's First Amendment*, 3 Election L. J. 127 (2004).

b. If so, is that a more radical solution than the majority's holding?

Answer: Yes, see above.

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c. At oral argument, Justice Sotomayor appeared to suggest that the Court erred a century ago in finding that corporations were "persons" entitled to protection under the 14th Amendment. Similar claims have been advanced in the popular press, and were repeated by some Senators and at least one witness at last week's hearing. Would a decision by the Court that corporations do not have First Amendment rights to political speech have been a more radical conclusion than the ruling announced by the majority in *Citizens United*?

Answer: Clearly so. Since at least the 1886 case *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394, it has been settled that the equal protection clause applies to corporations. As noted, this holding is firmly rooted in the earliest constitutional precedents, *see e.g. Dartmouth College v. Woodward*, 17 U.S. 518 (1819) and in the common law. Corporations are not people, of course, and there is nothing remarkable in that observation. But they are associations of people, bound together in a complex web of imperfect contracts. The law allows for the legal fiction of a corporation because it benefits the citizenry and the members of the corporation. Imagine if corporations were not treated as "persons:" to sue a corporation, you would have to name every shareholder, and serve each; every time one person sold a share of stock, all property owned by the association would have to be retitled to reflect the new ownership. And imagine if corporations—associations of people— did not enjoy have constitutional rights: the government could seize corporate property without due process or just compensation; corporations would not have rights against warrantless, unreasonable searches of their properties. And there would be no particular reason to extend such protections to partnerships or unions or informal associations, either— after all, unions are not persons either, but artificial entities. Like corporations, they have rights because they are made up of people.

When Justice Sotomayor suggests that perhaps we should not grant corporations constitutional rights, she proposes a radical remake of American Constitutional and common law and a willingness to overrule literally dozens, if not hundreds, of precedents and to overturn innumerable statutes. First Amendment rights are among the most common rights exercised in association with other people. The lone protestor is not the norm in America, but the oddball. The normal American protest is a rally or march. Americans form groups to lobby and to coordinate their efforts. Most enterprises in America now assume the corporate form: colleges, churches, local charities and historical societies, and virtually every small business. The true judicial radicals are those who would deprive Americans of their rights on the grounds that they have joined in the corporate form.

4. In an exchange with Sen. Franken regarding his proposal to bar political spending by any U.S. corporation with more than 20% of shares held by foreign investors, Sen. Franken asserted that Delaware's corporations law treated 20% ownership as "control" of a corporation. You responded that "laws are written for different purposes."

   a. What, in your understanding, does the "corporate control" threshold in corporations law seek to measure or define?

Answer: Laws defining corporate control typically exist for the purpose of securities regulation or for regulating and limiting conflicts of interest within management. Senator Franken was referring, I believe, to 8 Del. Code Sec. 203 (c)(4). The statute creates a rebutable presumption of "control" at 20 percent ownership. The statute, however, is for the purpose of regulating corporate takeovers, including anti-takeover and poison pill provisions, and corporations may opt out of the Chapter

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completely [8 Del. Code Sec. 203 (b)(1)]. But, for example, when it comes to management of the corporation, Delaware courts have held that a party who alleges control of a corporation must prove it, and that stock ownership alone, at least when it amounts to less than fifty percent, is insufficient to prove "control." [*See e.g. Kaplan v. Centex Corp.*, 284 A. 2d 119 (Del. Ch. 1971)]. Further, fiduciary duties are owed by those who "in fact" control the corporation, which is not based on a set percentage of ownership. [*See e.g. Cinerama v. Technicolor Inc.*, 663 A 2d. 1156 (Del. 1995); *Harriman v. E. I. DuPont de Nemours & Co.*, 372 F. Supp. 101 (D. Del. 1974)]. In other cases Delaware courts have interpreted "control" as two-thirds, *see Orman v. Cullman*, 794 A. 2d 5 (Del Ch. 2002).

Attempting to define control as twenty percent for the purposes of then limiting the corporation's speech rights is highly problematic. For one thing, corporate ownership in any publicly traded corporation, and in many privately held corporations, is quite fluid. A question would arise on what date to fix the percentage of foreign ownership: the date the expenditure is made; the date it is contracted for; or some other date. For publicly traded corporations near the twenty percent (or other) threshold, the company might pass back and forth over and above the line several times in a day. These are practical concerns, and it may be that they can be overcome— for example, by setting the ownership percentage at some date certain once a year. However, given the Supreme Court's ruling that individuals associated through the corporate form have a right to speak as an association of persons, it is questionable whether twenty percent foreign ownership can be used by the government to silence the 80 percent American ownership that wishes to speak. It seems highly unlikely that government could deny a parade or rally permit to a group consisting substantially of U.S. citizens on the basis that they have foreign nationals in their group, or deny a newspaper the right to publish or editorialize based on substantial foreign ownership, as with Carlos Slim's partial ownership of the *New York Times*.

This illustrates the difficulty with attempting to import a statutory definition designed for one purpose—in this case, to regulate corporate mergers— to a statutory scheme dealing with another issue, particularly one that is, as in this case, intimately tied to constitutional rights of speech and association.

I do not mean to say that no such threshold can be established. Rather, as I have already indicated in other responses, if Congress feels it must act, it must develop an appropriately, narrowly tailored solution to the problem. Given that corporations with more than twenty percent foreign ownership have long been able to make expenditures in a majority of state and local elections, and this was so uncontroversial that most Americans were not even aware of that fact, Congress should, I believe, avoid rushing to action without substantial, patient consideration of the issue.

b. Is corporate "control"—in the sense of ability to vote a significant bloc of shares and control corporate governance, board membership, or management decisions of a widely-held public company—relevant to the way that current federal law or FEC regulations regulate the involvement of foreign nationals in political expenditures by U.S. corporations?

Answer: As discussed previously, current federal law prohibits any foreign national from being involved in decisions about corporate political spending. Prior to *Citizens United*, this would have included spending in state and local races, where permitted by state law, and spending through corporate PACs, under either federal or state law. This is, in fact, a much stricter standard than proposals to use a percentage of shares, as it precludes foreign national involvement regardless of

share ownership. At the same time, it provides maximum protection to the First Amendment rights of U.S. citizen shareholders. The perceived problem is that the standard is difficult to enforce. But this is frequently true in the area of the First Amendment. For example, it is extremely difficult for a public figure to prove libel under the standard of *New York Times v. Sullivan*. Moreover, given the lack of concern that this has created, with virtually no complaints or enforcement actions, and virtually no controversy, any effort to address the enforcement problem should be carefully considered, and, as always, must be narrowly tailored.

c. How would a "control" test based on shareholding percentage translate to the labor union context? Is there a similar concept that would apply to international labor unions that would bar labor unions with foreign membership from participating in U.S. elections?

Answer: Presumably, the parallel regulatory structure might be based on foreign membership, foreign representation on the governing body of the union, or perhaps revenue derived from foreign sources. It would be my general sense, however, that the current structure, which prohibits foreign nationals from participating in decisions about spending in U.S. elections, is preferable.

d. Would a flat ban on political speech by corporations or labor unions with foreign ties be constitutional in light of the Court's decision in *Citizens United*?

Answer: The Court specifically reserved judgment in that issue in *Citizens United*. I believe that the current ban on expenditures by foreign corporations would be upheld, but a flat ban on expenditures by U.S. corporations with foreign ownership is much more problematic. Some of these reasons I have outlined above. But further, bear in mind that U.S. subsidiaries employ U.S. workers and are subject to U.S. laws. The law before *Citizens United* allowed foreign citizens who were U.S. lawful permanent residents to make unlimited expenditures. Generally speaking, we do not limit First Amendment rights only to U.S. Citizens— indeed, most constitutional rights are available to any person in the United States.

The bottom line, then, is that such a flat out ban would raise serious constitutional issues. At the risk of sounding like a broken record, I would say only that if Congress wishes to restrict political speech by U.S. corporations that have some degree of foreign ownership, it must establish a serious record that demonstrates that the alleged harms to be addressed are real; and that the solution adopted is narrowly tailored to address those harms. At this point, Congress has not even begun to take either of those steps.

e. Current FEC regulations state that no foreign national may "direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's Federal or non-Federal election-related activities..." Some critics have argued that a U.S.-based company that is wholly-owned or majority-owned by a foreign entity will, by definition, not be able to avoid "direct or indirect participation in the decision-making process" related to the U.S. entity's political activities. Do you agree with this criticism? Are U.S. subsidiaries of foreign corporations currently banned from political activity in the United States? If not, how have such corporations and their U.S. citizen managers, employees, and shareholders

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structured their behavior to comply with the prohibition on foreign nationals' direct or indirect participation in the corporation's political activities in the U.S.?

Answer: I believe that I have addressed the points raised by this question in answering prior questions. If U.S. corporations with majority foreign ownership cannot avoid having foreign nationals involved in their decision making, it either has not shown itself in the real world of enforcement and political participation, or it simply has not been perceived as a problem. One searches in vain for press reports that this is an issue (at least prior to the decision in *Citizens United*. The Thompson investigation of the 1996 campaign is not to the contrary— the abuses it found involved foreign corporations and foreign nationals making contributions and expenditures, not U.S. corporations with foreign ownership making expenditures. This has not been an issue in state campaigns (surely some U.S. subsidiaries have much at interest in New York, California, or Delaware races) or with corporate PACs. Most U.S. subsidiaries have had little apparent problem in creating walls between any foreign national owners or management and the U.S. citizens who guide such decisions.

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Written Questions from Senator Cornyn and Responses of Prof. Smith

Questions for all witnesses:

1. *See the charts attached as Exhibit A, which track the amount of money raised and spent by all presidential candidates in every presidential election since 1976. The y-axis shows the total number of dollars raised and spent, in millions. The Bipartisan Campaign Reform Act of 2002 first affected presidential campaigns in 2004. As demonstrated in the attachment, the curve of the amount of money raised and spent by presidential candidate has bent considerably upward in the 2004 and 2008 campaigns. Has BCRA succeeded in decreasing the amount of money in politics, and the existence or appearance of corruption?*

Answer: No. The Center for Competitive Politics, as part of its follow-up polling on the *Citizens United* decision, asked respondents, "In 2002 Congress passed the Bipartisan Campaign Reform Act, also known as 'McCain-Feingold.' The law placed new restrictions on corporate and union political spending and contributions to political parties, with the goal of reducing special interest influence. Do you believe that McCain-Feingold has been successful in reducing special interest influence?"

Just 14.2 percent said "Yes," while 44.2 percent said "No," and 32.3 percent were not sure.

Meanwhile, public confidence in government has plummeted since the passage of BCRA.

Two points are worth noting. First, since passage of the original Federal Election Campaign Act om 1971, which BCRA amended, public confidence in government has declined. There have, however, been two major upswings in public confidence. The first occurred during the early years of the Reagan Administration. The second occurred after the Republican take-over of Congress in 1995. In both cases, public confidence in government appears to have been directly correlated to government doing less—that is, to government sticking to its core functions. Figure I below shows the results of national surveys measuring three questions related to public confidence in government over time. This is from the landmark University of Michigan's long-running American National Electorate Survey (ANES), the bible of public opinion studies for political scientists. Notice that during the peak period of "soft money," corporate contributions to political parties for "issue ads" and "party building," confidence and trust in government was rising steadily, although the final peak in early 2002 probably reflects the reaction to the terror attacks of Sept. 11, 2001.

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Figure I

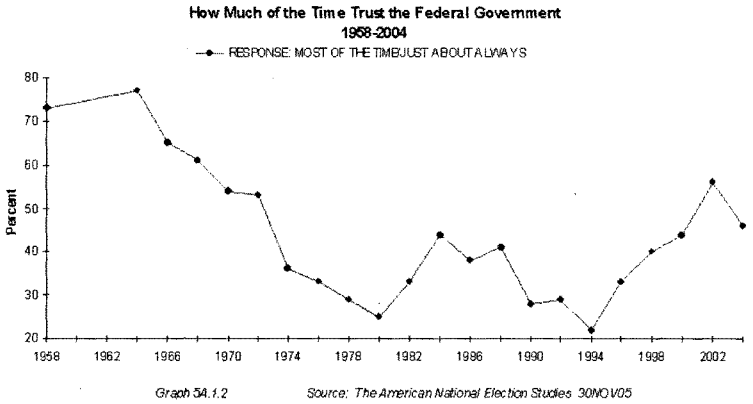
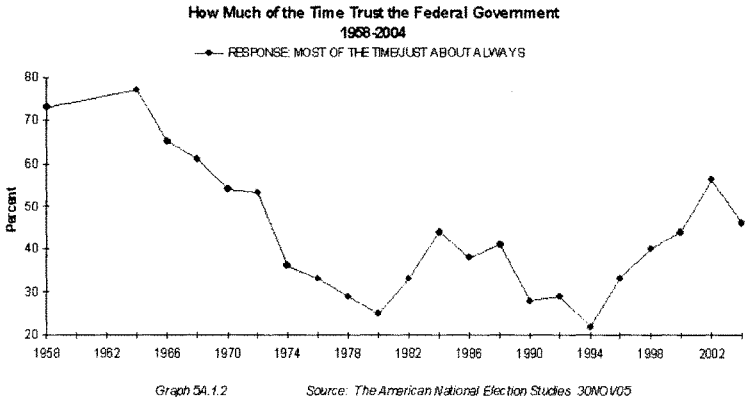


Chart from: http://www.electionstudies.org/nesguide/graphs/g5a_5_1.htm.

Figure II shows the data from the single question pertaining directly to how often voters trust government to do what is right:

Figure II:



[Table available at http://www.electionstudies.org/nesguide/graphs/g5a_1_2.htm]

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Second, BCRA and most other so-called reform measures have sought to control influence by controlling contributions. However, as repeated studies by political scientists have shown, campaign contributions play a statistically insignificant role in legislative voting records. See Stephen Ansolabehere, James Snyder, and John de Figueiredo, *Why is There So Little Money in U.S. Elections*, 17 J. Econ. Perspectives 105 (2003).

Let me emphasize that this is not a point of major contention in the political science literature; as the summary of peer-reviewed studies provided by Ansolabehere, de Figueredo, and Snyder shows, *id. at* Table 2, the consensus of peer-reviewed literature that campaign contributions are not corrupting is greater than the consensus of peer reviewed literature, for example, that supports various theories of global warming for which it is often said that the "science is settled." In short, campaign finance restrictions have been chasing the wrong suspect, and doing so by restricting the freedom of citizens to participate in political debate and making the system so arcane and complex that it cannot be understood by ordinary citizens or, indeed, most anyone who has not devoted considerable time to studying the maze of laws and regulations.

As eight former FEC Commissioners (a majority of living former Commissioners) noted in an amicus brief filed in *Citizens United*, federal law now has separate regulations for 33 types of speech and 71 types of speakers. See Brief Amici Curiae of Seven for Chairmen and One Former Commissioner of the Federal Election Commission, at 11-13 and 14-15, n.10. (Brief available at http://www.fec.gov/law/litigation/citizens_united_sc_08_formercomm_supp_brief_amici.pdf).

Removing the political system from the realm of understanding for the ordinary citizen is, in my opinion, a recipe for further distrust of government. Many of the proposals being bantered about to "fix" *Citizens United* would simply add to the complexity of the regulatory scheme— indeed, they seem specifically designed to try to discourage political activity by making the regulatory scheme so complex that speakers will decide it is not worth the trouble. This is the wrong path to take if the goal is to increase confidence in government. Instead, Congress would be well-served to look for ways to simplify the system and increase participation, such as, for example, removing restrictions on coordinated expenditures by political parties and candidates, simplifying disclosure and raising disclosure thresholds (which, adjusted for inflation, are now about one-third as high as they were when originally enacted), and urging the FEC to streamline its hundreds of pages of complex regulations.

2. *The provisions of the 2002 Campaign Finance Reform Act that the Court struck down equally banned electioneering communications by corporations and unions. Do you believe that any new restrictions placed on corporate speech should also apply to unions?*

Answer: Since the passage of the Smith-Connolly Act of 1943 and the Taft-Hartley Act of 1947 (a portion of which was overturned in *Citizens United*), it has been congressional policy to treat unions and corporations in a parallel manner. Obviously, not every restriction on a union is applicable to a corporation, and not every restriction on a corporation is applicable to a union. But generally, Congress has attempted to treat these two types of entities equally. Failure to do so in any response to *Citizens United* would mark a radical change in the legal framework, overturning more than 60 years of congressional policy— that is to say, failure to continue this parallel system of regulation would be as "radical" a measure as was *Citizens United* itself.

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Generally speaking, such regulatory parallels are obvious. For example, restrictions on spending by U.S. subsidiaries of foreign corporations, or on U.S. corporations with some percentage of foreign ownership, would, in this longstanding regulatory framework, expect to be accompanied by restrictions on unions with international scope, such as the Service Employees International Union, or substantial foreign membership, such as the UAW.

With that in mind, however, I emphasize that I believe that there is no need to place new restrictions on corporations or unions. Rather, the system would substantially benefit from a reduction in regulation. *Citizens United* is a sound case, clearly correct (I continue to find it interesting that virtually none of the critics of the decision actually argue that the Court should have upheld the prohibition on airing "Hillary: The Movie"), and really does not need "fixing." And panicky moves to "fix" the decision, without seeing how it plays out in practice (I again note that a majority of states have operated quite well under the rule of *Citizens United*), should be viewed with particular skepticism.

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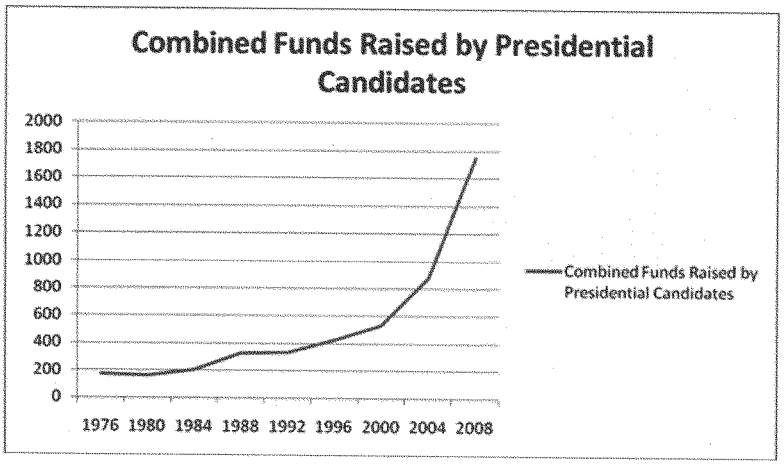
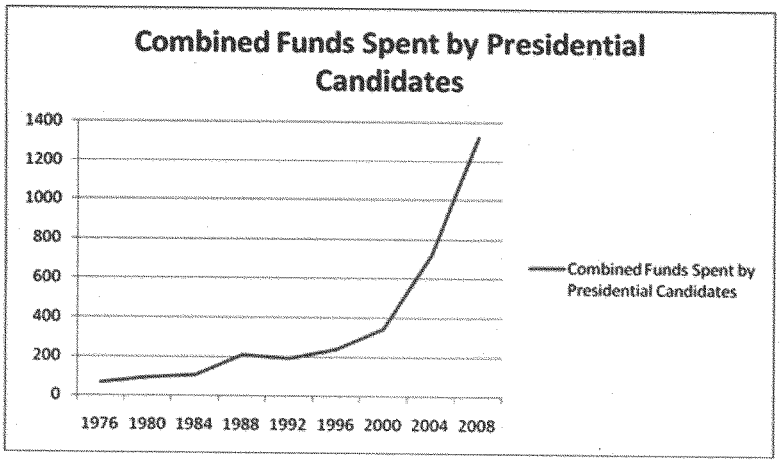
Exhibit A





[Source: http://www.opensecrets.org/pres08/totals.php?cycle=2008]

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Written Questions from Senator Hatch and Responses of Prof. Smith

Questions for Prof. Smith:

1. I am concerned about what appear to be distortions on the part on those who oppose the Court's decision in *Citizens United*. Specifically, there are people, including the President and Members of Congress, who have blurred the distinction between political expenditures, which were addressed by the decision, and campaign *contributions*, which were not. In addition, many have claimed that the decision will allow foreign corporations to influence American elections. For example, in his State of the Union address, President Obama said of the *Citizens United* decision: "The Supreme Court reversed a century of law to open the floodgates for special interests – including foreign companies – to spend without limit in our elections. Well I don't think American elections should be bankrolled by America's most powerful interests, and worse, by foreign entities."

   Setting aside the question of whether it was appropriate for the President to chide the Supreme Court in that setting, was the President's characterization of *Citizens United* remotely accurate?

Answer: *Citizens United* has been regularly misrepresented, in some cases because people do not understand the difference between contributions (donations to candidates and political committees) and expenditures (money spent independently of any candidate or party), sometimes due to carelessness by the speaker, and in some cases, most likely, intentionally.

To briefly review the history, in 1907 Congress passed the Tillman Act, prohibiting certain corporate contributions. However, not until the 1947 Taft-Hartley Act did Congress prohibit corporate and union expenditures. Thus, at most the law struck down by the Court was some 60 years old. But perhaps more importantly, prior to the 1990 decision in *Austin v. Michigan Chamber of Commerce* the Supreme Court had never upheld a law prohibiting expenditures. Thus, the oldest precedent overturned by the Court was less than twenty years old. One reason no such case had previously been decided by the Supreme Court is that prior to BCRA and *McConnell v. FEC*, there had been relatively inexpensive and effective ways for corporations and unions to participate despite the direct prohibition on their expenditures (such as "issue ads.")

Furthermore, *Austin* itself is an outlier in Constitutional jurisprudence. In the landmark decision *Buckley v. Valeo*, 424 U.S. 1 (1976) the Court had emphatically held that Congress could not limit or prohibit speech in an effort to equalize voices. In 1978's *First National Bank of Boston v. Bellotti*, 435 U.S. 765, the Court had struck down a Massachusetts law prohibiting corporate expenditures in non-candidate races. *Austin* purported to address a "new kind of corruption," the "distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." But while purporting to be faithful to *Buckley*, such as rationale can only be deemed an effort to equalize voices, as even many proponents of the decision have conceded. See e.g. Elizabeth Garrett, *Thurgood Marshall: His Life, His Work, His Legacy: Article & Essay: Influence and Legacy: The Future of the Post-Marshall Court: New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics*, 52 How. L. Rev. 655 (2009) (Professor Garrett was a law clerk for Justice Marshall at the time of *Austin*). In short, in *Citizens United* the Court simply harmonized its existing precedents by removing the more recent, outlier decisions.

VerDate Nov 24 2008 12:05 Oct 13, 2010 Jkt 058420 PO 00000 Frm 00077 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\58420.TXT SJUD1 PsN: CMORC

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The charge that the Court opened up elections to foreign corporations is, in my view, wholly incorrect, to the point that for many observers it is hard to credit good faith to its proponents. First, contributions, expenditures, and electioneering communications by foreign corporations, in both federal and state and local elections, are all prohibited by 2 U.S.C. 441g, which was not at issue in the case, and the *Citizens United* Court specifically noted it was not ruling on that provision. So the president's statement on this part of the case is flat out incorrect. There is no question that foreign corporations are forbidden from spending in U.S. elections.

However, while foreign corporations are prohibited from spending in elections, it is true that U.S. headquartered and incorporated subsidiaries of foreign corporations, or U.S. headquartered and incorporated companies with some foreign ownership, may make expenditures. However, even this is more restricted than it might appear. FEC regulations currently prohibit any foreign national from playing any role, direct or indirect, in making decisions on corporate political spending. And the FEC has, in enforcement actions, further interpreted the law to require that any funds so spent must be earned income in the United States. In other words, it is clearly illegal after *Citizens United* for a Venezuelan company to funnel capital to the U.S. for use in political campaigns, or for a Saudi billionaire or a Venezuelan president to play any role in determining corporate political spending in the U.S.

Could people still violate the law to have foreign nationals involved in decisions on spending in U.S. elections? Of course, there is always a chance that people will violate the law, and that applies to any law Congress might pass in response to *Citizens United* as well. But we also should note, once again, that in 28 states, representing some 60 percent of the population, including Delaware, New York, and California, U.S. subsidiaries of foreign corporations were already allowed to spend in state elections, with no apparent ill effects (New York limited such expenditures, whereas Delaware and California placed no limits on expenditures). Also, even in federal elections, PACs operated by U.S. subsidiaries of foreign corporations have long been able not only to make expenditures in federal races, but to directly contribute to federal candidates. Yet this has never caused alarm in Congress, and prior to the decision in *Citizens United* this was not an apparent concern in Congress. Similarly, unions often have substantial foreign membership; so do advocacy groups such as Amnesty International and Greenpeace; yet even today neither the President nor Congress seems terribly alarmed by the political involvement of these groups.

No one seriously believes that a complete ban on corporate spending is needed, or was originally passed, due to concern over political spending by U.S. subsidiaries of foreign corporations. If this is now considered a problem, Congress may wish to address it in a reasoned fashion. Under the Constitution, it must adopt a "narrowly tailored" approach to the issue. An approach that, for example, would prohibit U.S. citizens owning 75 percent of a company from engaging in speech would not, in my view, pass constitutional muster.

2. I am troubled by the notion that the government should be able to prohibit speech—political speech in particular— based on the identity of the speaker. In one of the more pointed passages of the majority opinion in *Citizens United*, Justice Kennedy wrote: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." I don't think that most Americans would disagree with that characterization of our nation's tradition of free speech. Over the years the First Amendment has been applied to protect numerous forms of speech, some of which

VerDate Nov 24 2008 12:05 Oct 13, 2010 Jkt 058420 PO 00000 Frm 00078 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\58420.TXT SJUD1 PsN: CMORC

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was clearly not anticipated by the Founders. Yet, with *Citizens United*, we're talking about purely political speech.

Now, I understand concerns about corruption in politics. No one wants to see a political system wherein corporate interests dictate every policy decision. Yet, isn't the presence of speech that some deem unwanted or inappropriate simply a natural byproduct of the First Amendment?

Answer: Yes. I won't add much to your eloquent expression of the issue, Senator Hatch, except to say, once again, that the only government interest recognized to date by the Court as compelling enough to justify restrictions on speech is the prevention of corruption or its appearance, with "corruption" clearly defined to mean quid pro quo transactions akin to bribery. Any law must be narrowly tailored to meet this interest.

Questions for all witnesses:

1. Those that oppose the Court's decision in *Citizens United* have argued that it opens the floodgates for corporations to spend untold billions on campaigns, most of them citing ExxonMobil as a particularly demonic example of a corporation that could hold our nation hostage simply by running independent campaign commercials. Yet, I hear few concerns expressed about the ability of labor unions to make independent expenditures, even though they too are allowed to do so after this decision. I'm surprised this hasn't gotten more attention as labor unions have demonstrated far more desire to organize for political purposes than most corporations. Also, they are, by comparison, far less accountable to their members than corporations are to shareholders, who, if they don't like what a corporation does, can usually just sell their shares.

   A cynic would argue that the reason we don't hear about the degrading influence of unions on elections is that the opponents of corporate campaign spending tend to be beneficiaries of union involvement in political campaigns. We don't need to address that here, but I want to ask whether our panel believes there should be a distinction between the two. Should unions enjoy different protections than for-profit corporations under the Constitution? Constitutional questions aside, should our policies on political involvement differ at all between corporations and labor unions?

Answer: As I noted in my answers to Senator Cornyn's questions, Congress has, beginning with the Smith-Connolly Act of 1943 and the Taft-Hartley Act of 1947, provided for parallel treatment of corporations and unions under campaign finance laws. Thus, to alter this parallelism would be to change a pattern of federal law stemming from 1943, or longer than the statute overturned by the Court in Citizens United. Most states have also adopted parallel treatment of unions and corporations under campaign finance laws.

There may be good reasons for dropping this longstanding parallel treatment, but there is no doubt it would be a dramatic change in the law, in many respects as dramatic as *Citizens United* itself. Further, for those who truly are concerned about large scale spending, we might again look to the states. California, the nation's largest state, has allowed both corporations and unions to make unlimited expenditures in political races. The California Fair Political Practices Commission recently

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published a report documenting the ten largest makers of independent expenditures in political races from 2001 to 2006. In order, they were:

1. Pechanga Band of Luiseno Indians, $6.2M.
2. Angelo Tsakopoulos, $6M.
3. Cal. Teachers Association/Association for better citizenship, $4.8M.
4. Cal. State Council of Service Employees, $3.6M.
5. Cal. Correctional Peace Officers Association, $3.5M.
6. Morongo Band of Mission Indians Native American Rights PAC, $3.4M.
7. Cal. State Council of Service Employees Small Contributor Committee, $3M.
8. Eleni Tsakopoulos Kounalakis, $2.5M.
9. SEIU Local 1000 Candidate PAC, $2.3M.
10. Consumer Attorneys Independent Campaign, $1.7M.

This list, as you can see, includes five unions, 2 Indian tribes, the trial lawyers, and two individuals, but no corporations [See California Fair Political Practices Commission, Independent Expenditures: the Giant Gorilla in Campaign Finance 22, (2008), available at http://www.fppc.ca.gov/ie/IEReport2.pdf)]. It is no secret that I have argued against regulation of both unions and corporations. However, so long as the system does regulate expenditures and contributions, it would appear that the burden is on those who would argue for ending such parallel treatment.

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SUBMISSIONS FOR THE RECORD

Testimony of Clifford O. Arnebeck, Jr., Esq.
on *Citizens United v Federal Elections Commission*[1]
Before the Senate Judiciary Committee, Patrick Leahy, Chairman
March 10, 2010

I offer this testimony today in honor of the memory and legacy of Doris "Granny D" Haddock, who walked across the United States of America to demonstrate her commitment to limiting the role of money in politics and the role of Congress to check the excessive power of money to influence policymaking. Her efforts were recognized as a prominent factor in the enactment of the McCain-Feingold Bipartisan Campaign Reform Act.

I was trial counsel in *Alliance for Democracy v. Citizens for a Strong Ohio and Ohio Chamber of Commerce.* This was a twin case to that originally brought by Common Cause/Ohio which had been dismissed by the Ohio Elections Commission in October 2000. After our new case appeared to be making headway, Common Cause/Ohio filed a new case against the U. S. Chamber of Commerce as a companion case to ours. I soon joined the Common Cause/Ohio Governing Board to serve as Chairman of its Legal Affairs Committee during the progress and success of this companion litigation against the U. S. Chamber of Commerce.

Both the Alliance for Democracy case against the Ohio Chamber and the new Common Cause/Ohio case against the U. S. Chamber concerned the Chamber's argument that it had a First Amendment right to expend millions of dollars in corporate treasury money to influence Ohio

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[1]This testimony regarding *Citizens United v Federal Elections Commission* (*Citizens United)* supplements the statement I submitted to the White House, the House and the Senate for the record on February 24, 2010, the 207th anniversary of *Marbury v. Madison*, 5 U. S. 137 (1803).

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Supreme Court elections, and particularly that the Chamber of Commerce had the right to spend more than $7 million in corporate treasury money to overwhelm and adversely dominate the reelection campaign of Democratic Justice Alice Robie Resnick.

The complainants in both of these public interest cases were ultimately successful in defeating, through multiple rounds of litigation in state and federal courts, the Chamber's deeply flawed First Amendment argument. Both the Ohio Tenth Appellate District Court of Appeals and the U.S. Sixth Circuit Court of Appeals recognized that "Citizens for a Strong Ohio" was but a thinly corporate veiled political action committee that had failed to submit to Ohio's election laws.

In a groundbreaking investigative piece in the Wall Street Journal on September 11, 2001, Jim VandeHei exposed four one million dollar checks that had been given by Wal-Mart, Home Depot, DaimlerChrysler and the American Council of Life Insurers to fund the U. S. Chamber's part of the attack upon Justice Resnick. In June of 2001 Mike Wallace of 60 Minutes had filmed his investigation of the Chamber's attack upon Ohio Justice Alice Robie Resnick, but his report never aired, I believe because of corporate and political pressure.

I am currently trial counsel for the King Lincoln Bronzeville Neighborhood Association, Ohio Voting Rights Alliance for Democracy, Rainbow PUSH Coalition, among others, that on July 17, 2008, asserted a cause of action against Karl Rove and the U.S. Chamber of Commerce Institute for Legal Reform under the Ohio Corrupt Practices Act. This assertion was based upon the substantial evidence that Karl Rove and Tom Donahue conspired to overturn the Constitution of the United States and the constitutions of the various states, including Ohio, in order to achieve corporate domination of American politics in the twenty-first century.

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The Roberts five justice Republican partisan majority of the U.S. Supreme Court in *Citizens United,* in conspicuous violation of Article I that vests legislative power in the Congress, presumed to endow corporations with the free speech privilege of citizenship in the United States. By presuming to overrule *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), which upheld the power of states to restrict CEOs of corporations from spending corporate treasury money to influence candidate elections, the Roberts five justice partisan majority also violated the Article IV, Section 4 guarantee to every state of a republican form of government, and sought to elevate chief executive officers of corporations to a position of nobility in relation to other citizens. The *Citizens United* majority would entitle corporate CEOs to command the expenditure of money other than their own in support or opposition to candidates for public office.

There is no precedent in either English or American law for this judicial attempt to establish a new aristocracy of corporate princes to lord over governments at all levels, through their ability to command practically unlimited private corporate treasuries in the aid of or in opposition to candidates for political office. The Taney seven justice majority in *Dred Scott v Sanford,* 60 U.S. 393 (1857), is precedent for a similar flagrant judicial attempt to usurp the powers of Congress in Article I and the power of the people in Article V to Amend the Constitution.

Just as President Lincoln proclaimed the emancipation of slaves contrary to the pronouncement of the Taney Supreme Court seven justice majority in *Dred Scott v Sanford,* 60 U.S. 393 (1857), that slaves could not be freed without compensation to their owners and could never be citizens of the United States, President Obama should proclaim that the laws of

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Congress, requiring that corporate expenditures relating to political candidates in proximity to an election, except in application to the facts of the *Citizens United* case, shall continue to be enforced by the Executive Branch, irrespective of the Roberts five justice Republican partisan majority pronouncement to the contrary. That would limit the court's decision to the scope of its jurisdiction under Article III to adjudicate the case before it.

And, Congress and the states must also decline to accept the Court's Roberts five justice Republican partisan majority transgression of separation of powers in presuming to amend the Constitution by judicial fiat. Corporations including the Royal African Company, East India Company and Hudson Bay Company were well known entities at the time the Constitution was framed. Congress and the states must not defer in any way to the Roberts five justice Republican partisan majority's notorious attempt to anoint such entities and their descendant creatures of state charter with any element of precious citizenship in the United States, much less to install their chief executive officers as the princes and overlords of American politics.

Respectfully submitted,

/s/ *Clifford O. Arnebeck, Jr.*

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Statement of

The Honorable Benjamin L. Cardin

United States Senator
Maryland
March 10, 2010

OPENING STATEMENT OF

SENATOR BENJAMIN L. CARDIN

"WE THE PEOPLE? CORPORATE SPENDING IN AMERICAN ELECTIONS AFTER CITIZENS UNITED"

SENATE JUDICIARY COMMITTEE

March 10, 2010

Mr. Chairman, I thank you for calling this very important hearing today.

My view of the Citizens United decision is clear. A very activist Supreme Court has tipped the scales of justice further against American voters, which will only exacerbate the great imbalance that currently exists in U.S. campaigns. By effectively legislating in areas that Congress has set reasonable guidelines, the Supreme Court is swinging the door wide open for special interests and corporate America to have an even greater influence over our political system.

The Supreme Court runs the risk here of literally returning to Lochner-era jurisprudence of the 1920's and 1930's, which threatened numerous New Deal programs as America was trying to recover from the Great Depression. That Court's extreme views on the rights and privileges of corporations – at the expense of society and the American people – were ultimately rejected by the President, Congress, American people, and ultimately by the Supreme Court itself.

I am increasingly concerned that this Supreme Court is not inclined to follow precedent, and that it is deciding cases much more broadly than necessary in order to reach a desired policy conclusion. Justice Stevens is correct in his dissent that "essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law?there were principled, narrower paths that a Court that was serious about judicial restraint could have taken."
The Court's action here flies in the face of their proper role of constitutional interpretation, and ignores the role of Congress in weighing competing interests and passing necessary legislation

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under its Article I authority.

I again agree with the dissent of Justice Stevens in this case, when he writes that "our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races." And that's what we did in 2002, when Congress acted on a bipartisan basis to pass the Bipartisan Campaign Reform Act, which President Bush signed into law.

We don't really know how much more corporate money this ruling will inject into our political system, but I fear it will increase dramatically, to the detriment of the free and fair nature of our electoral process.

So I have great difficulty in understanding the Court's decision here, which overruled the Austin case from 1990 and the McConnell case from 2003 which had upheld restrictions on political spending by corporations. Indeed, I find myself again agreeing with Justice Stevens on the explanation of the Court's action here: "the only relevant thing that has changed since Austin and McConnell is the composition of this Court."
So I look forward to today's hearing and examining how Congress can respond to this decision, whether by legislation or constitutional amendment. Congress must now work together in a bipartisan fashion to restore the original intent of the law.

United States Senate Committee on the Judiciary

March 10, 2010

We the People? Corporate Spending in America after Citizens United

Written Testimony of Jeffrey D. Clements
Free Speech for People (www.freespeechforpeople.org)

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Chairman Leahy and Members of the Senate Judiciary Committee:

I appreciate the opportunity to submit this written testimony on my behalf and on behalf of Free Speech for People (www.freespeechforpeople.org). You are to be commended for holding this hearing on one of the most important subjects now facing the American Republic: "*We the People? Corporate Spending After Citizens United.*"

As an attorney I have handled public interest and private litigation matters on behalf of global corporations, small businesses, and people for more than two decades. Before opening Clements Law Office, LLC in 2009, I served as Assistant Attorney General and Chief of the Public Protection & Advocacy Bureau in Massachusetts, as a partner in the law firms of Mintz Levin and Clements & Clements, LLP in Boston, and as a litigation attorney in Portland, Maine.

Following the Supreme Court's announcement in June 2009 that the Court would hear re-argument on the question of overruling *McConnell v. Federal Election Commission* and *Austin v. Michigan Chamber of Commerce*, I filed an amicus brief in *Citizens United v. Federal Election Commission* on behalf of several citizen groups. When the Court announced its 5-4 decision in *Citizens United*, I worked with others in launching Free Speech for People, and now serve as its general counsel.

Free Speech for People is a campaign sponsored by Voter Action (voteraction.org), Public Citizen (citizen.org), the Center for Corporate Policy (corporatepolicy.org) and the American Independent Business Alliance (amiba.net) to restore the First Amendment's free speech guarantees for the people, and to preserve and promote democracy and self-government in the United States. In a little more than a month since the *Citizens United* decision, nearly fifty thousand Americans from across the country have signed the Free Speech for People petition at www.freespeechforpeople.org and at the Public Citizen website calling on Congress to pass and send to the States a Constitutional amendment to restore free speech rights to people, not corporations.

Congresswoman Donna Edwards of Maryland and Congressman John Conyers, Jr. of Michigan (Chair of the House Judiciary Committee) have introduced a Constitutional amendment resolution in the U.S. House of Representatives, and it now has more than a dozen co-sponsors. In the Senate, Senators John Kerry, Christopher Dodd, Arlen Specter, and Tom Udall have led the call for a Constitutional amendment to restore the fundamental premise that in a self-governing democracy, it is people, not corporations, who debate, vote, serve, and, if necessary, die for our nation and the rights that protect our freedom.

The extraordinary response to the *Citizens United* decision reflects widespread understanding that the Supreme Court majority's radical interpretation of the First Amendment to hold that the American people and our elected representatives are

powerless to regulate corporate political expenditures is fundamentally wrong as a matter of constitutional law, history, and our republican principles of self-government. The revulsion against the majority's action in *Citizens United* cuts across all partisan lines: 81% of Independents, 76% of Republicans, and 85% of Democrats oppose the decision, and 72% of the people support reinstating the very limits that the Court struck down. (February 2010 Washington Post-ABC News poll).

In this testimony, I will address the consequences of the pernicious "corporate speech" theory that resulted in the *Citizens United* holding, and the far worse consequences to come. I also hope to show why these consequences are not the result of the limitations or implications of our First Amendment and Bill of Rights, but arise from a new and deeply flawed activism on the bench that the American people and Congress should move promptly to correct.

Consequences of the Corporate Speech Theory

Citizens United involved a corporate challenge to the most recent effort to control the corrupting and unfair influence of corporate money in politics: the Bipartisan Campaign Reform Act passed in 2002, frequently called the McCain-Feingold law after its Republican and Democratic Senate sponsors. This law extended pre-existing statutes prohibiting corporations from using corporate funds to advocate voting for or against a candidate for federal office.

Sweeping aside *McConnell v. FEC*, decided only six years ago, and overruling *Austin v. Michigan Chamber of Commerce*, a 1990 case upholding state law restrictions on corporate political expenditures, the Court held that the restrictions on corporate expenditures violated First Amendment protections of free speech. In effect, the majority decision (Justice Anthony Kennedy, joined by Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas and Samuel Alito) equates corporations with people for purposes of free speech and campaign expenditures.

The extraordinary ruling in *Citizens United* is unhinged from traditional American understandings of both the First Amendment and corporations. As Justice Stevens' dissent in *Citizens United* makes clear, *Austin*, *McConnell* and a substantial line of Supreme Court and lower court cases, backed by two centuries of Constitutional jurisprudence, correctly ruled that Congress and the States may regulate corporate political expenditures not because of the type of speech or political goals sought by corporations but because of the very nature of the corporate entity itself. In other words, cases challenging corporate political expenditure regulations are not really about the speech rights of the American people; they are about the power of the American people to regulate corporations and the rules that govern such entities. Justice John Paul Stevens' dissent rightly calls the majority opinion a "radical departure from what has been settled First Amendment law."

Remarkably, in a case where the central question is the role and place of corporations in our democracy, Justice Kennedy's opinion does not once define or explain what a corporation is, nor does he even touch upon the legal definition or features of a corporation. Instead, in what Justice Stevens' compelling dissent calls "glittering generalities," the majority opinion focuses on "associations of citizens," "speakers," "voices," and, apparently without irony, a "disadvantaged person or class." *Citizens United, slip op.* at XX.

It is a basic and fundamental understanding in the law that corporations are not "associations of citizens," but are creatures of statute, usually State statute, with characteristics defined by their charters and the state laws that authorize the use of corporate charters. "Those who feel that the essence of the corporation rests in the contract among its members rather than in the government decree ... fail to distinguish, as the eighteenth century did, between the corporation and the voluntary association."[1]

Corporations cannot exist unless elected representatives choose to enact laws that enable people to organize a corporation and provide the rules of the road for using a corporation. People can start and run businesses without government involvement or permission; people can form advocacy groups, associations, unions, political parties and other groups that exist without the government's authorizing statute. But people, or even "associations of citizens," cannot form or operate a corporation unless the state enacts a law providing authority to form a corporation, and providing the rules of the road that go with use of the corporate form.

Advantages of the corporate form are a privilege provided by government for sound policy reasons. We the people do that through our legislatures because we think, accurately I believe, that such advantages are economically to the advantage of all of us and society over the long haul. Yet corporations, particularly powerful global corporations, — and too many judges — confuse these privileges and policies with Constitutional rights.

The Supreme Court used to resist this confusion. As the Court said in *Austin v. Michigan*, one of the cases overruled by *Citizens United*:

> State law grants corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets . . . These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic

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[1] Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy. Massachusetts, 1774-1861* at 92 and n. 18.

> marketplace' to obtain 'an unfair advantage in the political marketplace.'[2]

Similarly, in *McConnell v. FEC*, the Court pointed to "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[3]

What is the likely impact of *Citizens United's* "radical departure" from this understanding? The data suggest the consequences if the American people do not — or, according to the Court, cannot — control corporate money in politics:

- According to the 2009 Statistical Abstract of the United States, post-tax corporate profits in 2005 were almost $1 **trillion**.
- During the 2008 election cycle, Fortune 100 companies — the 100 largest corporations — alone had combined revenues of $13.1 **trillion** and **profits of $605 billion**.
- In contrast, during the same 2008 cycle, all political parties combined spent $1.5 billion and all of the federal PACs or political action committees, spent $1.2 billion.

If we take only the profit of the 100 largest corporations alone, those corporations would need **less than 2 percent of their $605 billion in profit** to make political expenditures that would **double** all current political spending by all of the parties and all of the federal PACs. Another way to look at it: Assume the 100 largest corporations wished to double — and therefore, swamp — President Obama's 2008 record fundraising effort, much of it from small, individual contributions. That would require shaving a little more than the slightest fraction — 1/100 — off the top of corporate profits from those 100 corporations.[4]

To suggest that corporations will choose not to use these resources to seek control of political outcomes would ignore reality, not to mention market imperatives. Corporations already spend vast sums of corporate money to dominate political debate and outcomes.

The national Chamber of Commerce — the lobbying federation for the biggest corporations in America — ranks first in spending for lobbying in the past decade,

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[2] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658- 59 (1990) (quoting *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986)).

[3] *McConnell*, at 205 (citations omitted).

[4] According to a study by the Campaign Finance Institute (CFI), about one-third (34 percent) of the $337 million the Obama campaign raised from individuals for the general election came from donors who gave the general election campaign a total of $200 or less. http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=236

spending literally hundreds of millions of dollars to determine what happens, and more often, what does not happen in Washington.[5] Each year, the Chamber of Commerce spends hundreds of millions of dollars on lobbying and related political activity.[6] And it was recently reported that the Chamber of Commerce promises to spend even more on the 2010 mid-term elections than it has previously. (New York Times, January 10, 2010).

In second place, the General Electric corporation spent $161 million on lobbying in the past decade.[7] Pharmaceutical manufacturers gave more than $92 million to federal campaigns from 1989 to 2006. The financial services industry contributed $460 million to congressional and presidential candidates in 2008. And so on . . .

So what is the result of the corporate money onslaught in politics in recent decades, even before the *Citizens United* Court lifted all restraints? Americans feel deeply estranged from their government. According to the Pew Research Center, barely a third (34%) agree with the statement, "Most elected officials care what people like me think," a 10-point drop since 2002.[8] No matter the issue or concern, whether one is a Democratic, Republican, Libertarian, Green or Independent, most people believe that our government cannot seem to move on what a majority of the American people desire. More and more Americans have begun to associate corporate dominance in Washington with increasing powerlessness among people and dysfunction in our government.

Citizens United not only bars Congress and the States from addressing this fundamental problem in our democracy; the decision promises to make the current state of our corporate-dominated politics look quaint by comparison. And the impacts go far beyond the federal Bipartisan Campaign Reform Act and federal elections. With no State even in the case before the Court, the *Citizens United* majority essentially erased the law of twenty-four states that banned corporate political expenditures. Thus, with virtually no consideration of the federalism implications and the circumstances in the States, State elections are now likely to be transformed.

In Montana, for example, before *Citizens United*, the average state legislator spent $17,000 to win election to the state legislature.[9] On March 8, 2010, two corporations, citing *Citizens United*, sued the State of Montana to strike down a 1912 law providing

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[5] Center for Responsive Politics/OpenSecrets.org. According to the Chamber of Commerce website, the current president of the Chamber of Commerce "has built the Chamber into a $200 million a year lobbying and political powerhouse with expanded influence across the globe." (http://www.uschamber.com/about/board/donohue.htm). According to the Los Angeles Times, this same head of the Chamber of Commerce describes the lobbying organization as "so strong that when it bites you in the butt, you bleed." (*Los Angeles Times*, January 8, 2008)

[6] Center for Responsive Politics/OpenSecrets.org

[7] Center for Responsive Politics/OpenSecrets.org

[8] Pew Research Center for the People and the Press
http://people-press.org/report/312/trends-in-political-values-and-core-attitudes-1987-2007

[9] Testimony of Montana Attorney General Steve Bullock United States Senate Committee on Rules and Administration February 2, 2010

that "A corporation may not make a contribution or expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party." It is unlikely that state elections in Montana and elsewhere will remain accessible to most people, or that people will not be alienated by the transformation of state politics into contests among corporate-funded campaigns from competing corporate interests.

Citizens United also will dramatically impair the impartiality, and the perceived impartiality, of justice in America. Twenty-one states have elected Supreme Court justices, and thirty-nine states elect at least some appellate or major trial court judges. Even before *Citizens United*, as former Justice Sandra Day O'Connor has said, "In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution." [10] Now corporations will have even greater ability to bring their financial resources to bear on those elections, further undermining the independence of the state judiciaries.

Finally, because *Citizens United* rests on the transformation of the expenditure of corporate general treasury funds into new "corporate speech" rights under the First Amendment, every elected official and person interested in representing their fellow citizens in America, from candidates for the presidency to candidates for the local school and water district, must now reckon with the power of corporate money to change the outcome of elections.

Beyond Citizens United and Campaign Finance

Unfortunately, the damage to democracy from dubious "corporate speech" doctrines goes beyond *Citizens United* and beyond campaign finance. The disdain shown by the majority in *Citizens United* for the policy judgments of the people's elected representatives in Congress and the States is striking, but it reflects a growing disdain that has driven corporate speech activism in the judiciary for the past two decades.

Judicial respect for the people's choices about corporate regulation began to erode in the late 1970s and 1980s. The path to *Citizens United* follows from the fabrication beginning in those years of a corporate rights/commercial speech doctrine under the First Amendment. This new doctrine reached its zenith in *Citizens United*, but its damaging effects on democracy have already gone far beyond campaign finance laws.

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10 See www.justiceatstake.org. State Supreme Court candidates raised $200.4 million from 1999-2008, compared with an estimated $85.4 million in 1989-1998. Source: National Institute on Money in State Politics. In *Caperton v. Massey*, 556 U.S. ____ (2009) the Supreme Court held that the due process clause required the recusal of a justice who was elected with the help of $3 million in campaign expenditures from a West Virginia coal executive whose corporation was in the midst of appealing a $50 million jury award against his company. The justice, once elected, cast the deciding vote to overturn the suit.

For 200 years, there was no such thing as a right to corporate speech under the First Amendment. And the First Amendment did not prevent legislatures from enacting restrictions on corporate expenditures to influence elections. During the Nixon Administration, however, in reaction to increasing legislative efforts to improve environmental, consumer, civil rights and public health laws, corporate executives began aggressively to push back for the creation of corporate rights. They followed a playbook spelled out in a memo from Lewis Powell, then a private attorney advising the Chamber of Commerce.[11] President Nixon then appointed Lewis Powell to the Supreme Court. Over the following years, a divided Supreme Court, over powerful dissents by Justice William Rehnquist and others, transformed the First Amendment into a powerful tool for corporations seeking to evade democratic control and sidestep sound public welfare measures.

In 1978 several large corporations — including Gillette and Bank of Boston — challenged a Massachusetts prohibition on corporate expenditures to influence ballot questions.[12] In an opinion authored by the former Chamber of Commerce lawyer, the now-Justice Powell, a 5-4 decision agreed with the corporate First Amendment claim, and cast aside the people's wish to keep corporate money out of Massachusetts citizens referenda. With increasing aggressiveness, the judiciary has since used this new corporate-rights doctrine to strike down state and federal laws regulating corporate conduct. Even a partial list of decisions striking down public laws shows the range of regulations falling to the new corporate rights doctrine, from those concerning clean and fair elections; to environmental protection and energy; to tobacco, alcohol, pharmaceuticals, and health care; to consumer protection, lotteries, and gambling; to race relations, and much more.[13]

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[11] The background of the 1971 Lewis Powell memorandum and the text of the memorandum itself are available at http://www.reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html.

[12] *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

[13] *See Bellotti*, 435 U.S. 765; *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (as applied to issue advocacy advertisements of non-profit corporation, BCRA held to violate First Amendment); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002) (federal restriction on advertising of compounded drugs invalidated); *Lorillard v. Reilly*, 533 U.S. 525 (2001) (Massachusetts regulations of tobacco advertising targeting children invalidated); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999) (federal restriction on advertising of gambling and casinos held unconstitutional); *44 LiquorMart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Rhode Island law restricting alcohol price advertising invalidated); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (federal restriction on advertising alcohol level in beer invalidated); *City of Cincinnati v. Discovery Network Inc.*, 507 U.S. 410 (1993) (municipal application of handbill restriction to ban news racks for advertising circulars on public property held unconstitutional); *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of California*, 475 U.S. 1 (1986) (invalidating California rule that utility corporation must make bill envelopes, which are property of ratepayers, available for other points of view besides that of the corporation); *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980) (New York rule restricting advertising that promotes energy consumption invalidated); *Bellsouth Telecomm., Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008) (Kentucky may not prohibit corporation from stating on the customer bill that a fee that is to be assessed from the corporation and not passed on to consumers was a "tax" suggesting inaccurately that consumers paid in their bill); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007) (Texas law

One example in particular illustrates how the new corporate speech doctrine departs from the meaning of the people's speech rights under the First Amendment. In the 1990s, the Monsanto corporation used recombinant DNA to develop a bovine growth hormone product that resulted in significant increases in milk from cows treated with the Monsanto drug. Most of Europe, Australia, New Zealand, and Canada banned the use of recombinant bovine growth hormone. The United States did not. Vermont, home to many of New England's surviving local dairies and a leader in organic and local agriculture, did not go so far as to ban the product but merely enacted a law requiring that milk products derived from cows treated with the Monsanto drug be labeled to disclose that information. That way, people could decide for themselves.

The law was challenged by the industrial dairies, and was struck down as a violation of the First Amendment. *Int'l Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67 (2d Cir. 1996). This result twisted First Amendment protections of conscience that prevent the government from compelling people to say what they do not believe into something to prevent people from knowing what corporate managers do not wish to disclose. Corporations, of course, do not have consciences and indeed, unlike people, do not exist in the absence of government action. Yet more and more corporations now misuse the First Amendment to advance narrow corporate interests at the expense of the public interest.

The examples of corporate misuse of the First Amendment continue to increase. Recently, tobacco corporations have sued the United States of America and tried to use the corporate speech doctrine to block enforcement of the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (*Commonwealth Brands, Inc. et. al. v. United States of America, et. al.* (W.D. Ky.)); rating agency

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regulating advertising of auto body shops tied to auto insurers invalidated); *This That & the Other Gift & Tobacco, Inc. v. Cobb County, Georgia*, 439 F.3d 1275 (11th Cir. 2006) (Georgia ban on advertisements of sexual devices invalidated); *Passions Video, Inc. v. Nixon*, 458 F.3d 887 (8th Cir. 2006) (Missouri statute restricting advertisements of sexually explicit businesses invalidated); *Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 91 & n.1 (2d Cir. 1998) (New York regulation barring beer bottle label with gesture described by the Court as "acknowledged by Bad Frog to convey, among other things, the message 'fuck you'" held unconstitutional); *Int'l Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (Vermont law requiring disclosure on label of dairy products containing milk from cows treated with bovine growth hormones invalidated); *New York State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834 (2d Cir. 1994) (invalidating New York law authorizing the Secretary of State to declare "non solicitation" zones for real estate brokers); *Sambo's Rest., Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981) (First Amendment allows corporation to break agreement with City and use name found to be deeply offensive and carry prejudicial meaning to African Americans); *John Donnelly & Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980) (invalidating Maine law restricting billboard pollution, even though law allowed (and paid for) commercial signs put up by state of uniform size at exits and visitors centers); *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998) (invalidating federal law regulating drug manufacturers' use of journal reprints and drug corporation-sponsored educational seminars to promote off-label uses for prescription drugs); *Equifax Services Inc. v. Cohen*, 420 A. 2d. 189 (Me. 1980) (invalidating portions of Maine credit reporting statute as First Amendment violation). Many more such cases may be found in the state and federal reports.

corporations accused of fraud and misrepresentation in connection with the financial crisis have claimed immunity under the First Amendment (*Abu Dhabai Commercial Bank v. Morgan Stanley Co.* (S.D.NY)); a pharmaceutical corporation has sued the United States of America claiming that the federal Food, Drug, & Cosmetic Act, 21 U.S.C. § 352(a), rules that prohibit a drug manufacturer from marketing a drug for "off-label" uses, meaning purposes for which the FDA has not approved the drug, violate "corporate speech" rights (*Allergan, Inc. v. United States of America, et al,* (D.D.C.); The Caterpillar corporation, backed by the national Chamber of Commerce, used "corporate speech" claims to stonewall basic information requests about the corporation's membership and financial dealings with the Chamber of Commerce and 33 other organizations, with the Chamber filing an amicus brief claiming the right to conceal that information based on the corporate "defendants and the Chamber's First Amendment Rights to freedom and privacy." (*In re Asbestos Cases*, (http://www.uschamber.com/nclc/caselist/issues/freespeech.htm)

Restoring the First Amendment Free Speech Rights of People

More than ever before, corporate money in politics corrupts and distorts our political and legislative process, and shouts down the voice and speech and wishes of the American people. And even when a legislative victory in the people's interest occurs, armies of corporate lawyers go into battle to take the matter to a Supreme Court that has forgotten its place in the American experiment in self-government, and all too often, accedes to the corporate claims of immunity from regulation or control by the people.

It would be one thing if the Court's handcuffing of our ability to regulate corporate political money was an unfortunate but necessary price of liberty, or rooted in long-held Constitutional principles of free speech. We put up with views we find obnoxious and even repellent. We put up with rivers of crude and offensive expression in all media, and we tolerate every variety of dissent and opinion. That is a price we pay for freedom of speech.

But the notion of corporate First Amendment rights is not about freedom of speech, or even about any kind of speech or expression. It is about a kind of economic entity that we ourselves created and permit by legislation because we chose to do so for economic policy reasons. To appreciate how radical the corporate rights claim in Citizens United is, it helps to remember our history.

The growing view among many people that we must restrain and control corporate power is not new in America and it is far from fringe. Throughout American history, at least until very recent times, that was the mainstream view. The American people have sought to keep corporate money out of elections virtually since the beginning of the Republic, and the root of the law struck down in *Citizens United* goes back to the 1907 Tilman Act, which banned corporate political contributions in federal campaigns.

For many years after the founding of our nation, state legislatures enacted corporate laws that allowed corporations, but only permitted these to be chartered for specific *public* purposes, and often limited the time period in which the corporate entity could operate.[14] Restrictions on corporate purposes were the norm, and distrust and concern about the ability of corporations to grasp political power prevailed.[15]

James Madison, often considered the primary author of our Constitution, viewed corporations as "a necessary evil" subject to "proper limitations and guards."[16] Thomas Jefferson hoped to "crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country."[17] These views prevailed among Americans through the decades. Until recently, it was presidents and our leaders as much as those outside of politics who were vigilant about corporate power.

President Andrew Jackson warned of the partisan activity of the second Bank of the United States corporation: "[T]he question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions."[18] President Martin Van Buren warned of "the already overgrown influence of corporate authorities."[19] Later, President Grover Cleveland in his 1888 message to Congress said, "Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters."[20] Theodore Roosevelt successfully called on Congress to enact federal restrictions on corporate political contributions, stating: "Let

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[14] HANDLIN & HANDLIN, *supra* note 15, at 106-33; Louis K. Liggett Co. v. Lee, 288 U.S. 517, 548-60 (1933) (Brandeis, J., dissenting). Justice Brandeis's dissenting opinion comprehensively documents the development of the corporation in America. *See Liggett*, 288 U.S. at 548-67.

[15] *Liggett*, 288 U.S. at 549; *Head & Amory v. Providence Ins. Co.*, 6 U.S. 127, 166-67 (1804) ("corporation can only act in the manner prescribed by law").

[16] WRITINGS OF JAMES MADISON, VOL. 9 (Gaillard Hunt ed., G.P. Putnam's Sons, 1900), To J.K Paulding, http://oll.libertyfund.org/title/1940/119324 (last visited July 22, 2009).

[17] University of Virginia, Favorite Jefferson Quotes, Thomas Jefferson Digital Archive, To George Logan, http://etext.virginia.edu/jefferson/quotations/jeff5.htm (last visited July 22 2009).

[18] Andrew Jackson, 1833 Annual Message to Cong. (Dec. 3, 1833) (transcript available at the University of Virginia, Miller Center of Public Affairs, http://millercenter.org/scripps/archive/speeches/detail/3640).

[19] Martin Van Buren, 1837 Annual Message to Cong. (Dec. 5, 1837) (transcript available at the University of Virginia, Miller Center of Public Affairs, http://millercenter.org/scripps/archive/speeches/detail/3589).

[20] Grover Cleveland, 1888 Annual Message to Cong. (Dec. 3, 1888) (transcript available at the University of Virginia, Miller Center of Public Affairs, http://millercenter.org/scripps/archive/speeches/detail/3758).

individuals contribute as they desire; but let us prohibit . . . all corporations from making contributions for any political purpose, directly or indirectly."[21]

Usually, the Supreme Court, with significant exceptions and deviations from time to time, respected this American consensus. Since the beginning of the Republic, the Court has affirmed that elected governments of the states and nation may regulate, in an even-handed manner, "the corporate structure" because governments create that structure. *Dartmouth College* described the corporate entity as "an artificial being ... existing only in contemplation of law," and created only for such "objects as the government wishes to promote."[22] The Court brought this understanding of the corporation to other Constitutional provisions, such as diversity jurisdiction under Article III and the Judiciary Acts.[23] In the Founders' era and beyond, the Court considered state citizenship of shareholders rather than the corporation itself to determine whether people who formed corporations could enter the federal courts in the corporate name.[24] The Court eventually bowed to expediency and overruled these cases, developing a shortcut strictly limited to diversity jurisdiction.[25]

In *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), and *Paul v. Virginia*, 75 U.S. 168 (1868), the Court refused to extend "special treatment" for corporations to the protection of citizen rights under the Privileges and Immunities Clause of Article IV. Repeatedly, the Court has held that corporations are not citizens under that clause, nor under the Privileges or Immunities Clause of the Fourteenth Amendment.[26]

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[21] Theodore Roosevelt, 1906 Annual Message to Cong. (Dec. 3, 1906) (transcript available at the University of Virginia, Miller Center of Public Affairs, http://millercenter.org/scripps/archive/speeches/detail/3778).

[22] 17 U.S. at 636-637.

[23] Article III provides "The judicial Power shall extend ... to Controversies ... between Citizens of different States...." U.S. CONST. art III, § 2.

[24] *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809) (corporation is a "mere legal entity ... not a citizen"); *Hope Insurance Co. v. Boardman*, 9 U.S. (5 Cranch) 57, 58 (1809); *Sullivan v. Fulton Steamboat Co.*, 19 U.S. (6 Wheat.) 450 (1821); *Breithaupt v. Bank of Georgia*, 26 U.S. (1 Pet.) 238 (1828); *Commercial & Railroad Bank of Vicksburg v. Slocomb*, 39 U.S. (14 Pet.) 60 (1840).

[25] *Carden v. Arkoma Associates*, 494 U.S. 185, 197 (1990) ("special treatment for corporations."). A thorough discussion of diversity jurisdiction corporate "citizenship" is beyond the scope of this testimony. In short, *Louisville Railroad Co. v. Letson*, 43 US (2 How.) 497, 557-558 (1844), decreed that a corporation "is to be deemed" a citizen of the state of its creation. 43 U.S at 557-8. Nine years later, the Court followed *Letson* but reiterated that "an artificial entity cannot be a citizen," and "State laws by combining large masses of men under a corporate name, cannot repeal the Constitution." *Marshall v. Baltimore and Ohio Railroad Co.*, 57 U.S. (16 How.) 314, 327 (1853) (quotation and citation omitted). The Court soon began simply to treat "a suit by or against a corporation in its corporate name, as a suit by or against citizens of the State which created the corporate body...." *Ohio and Mississippi Railroad Co. v. Wheeler*, 66 U.S. 286, 296 (1861). The Court confined this doctrine to diversity jurisdiction, and it has never been defended with enthusiasm for its soundness. *See Carden*, 494 U.S. 185. See also Frankfurter, Distribution of Judicial Power between United States and State Courts 13 CORN. L. Q. 499, 523 (1928).

[26] *Id.*; *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181 (1888); *Asbury Hosp. v. Cass County*, 326 U.S. 207 (1945). Note that an unrelated part of *Paul* was overruled by *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

As the Industrial Revolution gathered pace, the Court maintained with clarity that "[t]he only rights [a corporation] can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state...."[27] The Court did not examine the Constitution to determine rights "given to it in that character" because the Constitution does not create corporate rights. In upholding corporate contracts outside the place of incorporation, *Bank of Augusta* declined to rest on any Constitutional provision, instead applying the law that created the corporation, the law of the state where the corporation wished to enforce a contract, and "comity."[28]

While the increasingly dominant role of corporations in the American economy did not go unnoticed by the Court, most Justices did not see any grounds for infusing that development with Constitutional significance.[29] By 1868, corporations had "multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them."[30] Despite this recognition, the Court denied the claim of corporations to the privileges and immunities of citizenship, as a corporation is "a mere creation of local law."[31]

The Court — with exceptions during the substantive due process era characterized by *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952) — continued through most of the twentieth century to distinguish between the rights of people and corporations. In *Asbury Hospital*, for example, the Court, citing numerous cases and without dissent, rejected a Constitutional challenge to a state law requiring corporations holding land suitable for farming to sell the land within ten years.[32] Five years later, the Court again emphasized the "public attributes" of corporations in turning aside corporate privacy claims:

> [C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.[33]

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[27] *Bank of Augusta*, 38 U.S. at 587.

[28] 3 8 U.S. at 586-590.

[29] *But see McConnell*, 540 U.S. at 257-258 (Scalia, J. dissenting); *compare Liggett*, 288 U.S. at 548 (Brandeis, J., dissenting) ("The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life, and, hence, to be borne with resignation.")

[30] *Paul*, 75 U.S. at 181-182

[31] *Id.* at 181.

[32] 326 U.S. 207.

[33] *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (citations omitted).

The Court has recognized, in a limited fashion, assertions of corporate rights under the Fourth Amendment.[34] As the Court has observed, however, a corporation has lesser Fourth Amendment rights because:

> Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce. Correspondingly it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters.[35]

Accordingly, "it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons...."[36]

Justice Rehnquist closed his dissent in *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), by saying "[I] regret now to see the Court reaping the seeds that it there sowed [referring to the early corporate speech cases]. For in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence."

That day has come, and Congress and the States now are considering several worthwhile initiatives to address the Court's egregious error in *Citizens United* — public funding of elections, shareholder and governance reform, among others. As with so many previous challenges to democratic self-government, however, *Citizens United* also requires a 28th Constitutional Amendment to correct the Court, restore the First Amendment to the people's right, and remove unwarranted judicial controls on our lawmakers' oversight of corporate power.

Americans have amended the Constitution repeatedly to expand rather than dilute democratic participation of people in elections. Most of the seventeen amendments that followed the ten amendments of our Bill of Rights were adopted to expand democracy and eliminate barriers to democracy for everyone. One amendment even overruled the Supreme Court when the Court sided with economic power and held that Congress had no power to enact a graduated income tax. The people responded with an amendment making clear Congress did indeed have that power. We can and should do that again and end the misuse of the First Amendment by corporations to evade and invalidate reforms and public welfare measures.

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[34] *See infra.* Part II; Carl Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L.J. 577, 664-667 (1990); *GM Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (corporations have "some Fourth Amendment rights").

[35] *Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186, 204-205 (1946) (footnotes omitted).

[36] *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 823 (1978) *citing United States v. White*, 322 U.S. 694, 698-701 (1944). *See also Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) ("The liberty referred to in that [Fourteenth] Amendment is the liberty of natural, not artificial, persons.")

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
March 10, 2010

Opening Statement of U.S. Senator Russ Feingold
Hearing on "We the People? Corporate Spending in American Elections after Citizens United"
Senate Judiciary Committee

As Prepared For Delivery

"The Citizens United decision was a tragic mistake. A mistake because the Court reached out to decide constitutional questions that were not necessary to decide the case and not raised or addressed by the courts below. Tragic because the Court damaged its own reputation and integrity by reversing precedents unnecessarily and, most important, because it opened the door to a political system that, more than ever, can be dominated and distorted by corporate wealth.

"The Court showed a remarkable ignorance of how campaign money can affect legislative decisions. Just last term the Court held in the Caperton case that a state judge should have recused himself because one party to a case had made large independent expenditures to elect him. Yet the Court concluded in Citizens United, '[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.' And, incredibly, the Court even cast doubt on one of the central holdings in Buckley v. Valeo – that Congress can enact campaign finance laws not only to prevent actual corruption but also to prevent the appearance of corruption. The Court said in Citizens United, 'That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy.'

"No matter what their political persuasion, all members of Congress strive to show their constituents that no one has influence over them, that no group has special access. The idea that these appearances have no effect on the confidence that the electorate has in us and in our democracy is naïve, to put it mildly.

"What is perhaps most disturbing is that the Court made these pronouncements without allowing any opportunity for a factual record to be developed. When it considered a facial constitutional challenge to the McCain-Feingold bill, the Court had before it an enormous legislative record developed over many years on the corrupting influence of soft money, along with a huge amount of discovery taken in the case itself. The Citizens United Court overturned a century of federal and state law without considering such a record. The participation of the over 20 states whose

58420.059

laws were essentially thrown out in this case was limited to a single amicus brief. I simply do not understand why the majority felt it was justified in taking such a shortcut.

"We are in a period of great political turmoil, and the American people are expressing their opinions forcefully. They are rightfully demanding that their elected representatives listen to them and respond to their views and their needs. I think it is for that reason that so many people are baffled and angered by the Court's decision. The people I talk to in Wisconsin don't want elected officials to be more responsive to corporations. They don't think that corporations have too little power in our legislative process, or that they need to be able to spend freely to elect a legislature that will do their bidding. They want a government 'of the people, by the people and for the people,' as Abraham Lincoln famously put it in the Gettysburg Address. In its haste to impose its own skewed vision of the First Amendment, where a corporation has the same rights of political expression as a person, the Supreme Court seems to have forgotten that bedrock principle."

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Corporate Control Definitions:
Statutes from 32 States that Define "Control" in Terms of Specific Percentage of Stock Ownership

Alaska: AS § 10.06.990 (12): "Control" means (A) owning directly or indirectly, or having the power to vote, 25 percent or more of a class of voting securities of a corporation subject to this chapter; or (B) influencing or affecting in any substantive manner the election of a majority of the directors or trustees of a corporation subject to this chapter

Arizona: A.R.S. § 10-2701: "A person's beneficial ownership of ten per cent or more of the voting power of a corporation's outstanding securities creates a presumption that the person has control of the corporation."

Connecticut: C.G.S.A. § 33-840(6): ""Control", including the terms "controlling", "controlled by" and "under common control with", means the possession, directly or indirectly, of the power to direct or cause the direction of the board of directors, the management or the policies of a person, whether through the ownership of voting securities, by contract, or otherwise, and the beneficial ownership of ten per cent or more of the voting power of the voting stock of a corporation creates a presumption of control."

Delaware: 8 Del.C. § 203(4) "A person who is the owner of 20% or more of the outstanding voting stock of any corporation, partnership, unincorporated association or other entity shall be presumed to have control of such entity, in the absence of proof by a preponderance of the evidence to the contrary"

Georgia: Ga. Code Ann., § 14-2-1110 (7): ""Control," including the terms "controlling," "controlled by," and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise, and the beneficial ownership of shares representing 10 percent or more of the votes entitled to be cast by a corporation's voting shares shall create an irrebuttable presumption of control."

Idaho: I.C. § 30-1601(7): ""Control," "controlling," "controlled by" or "under common control with" means the possession, directly or indirectly, of the power to direct or to cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise. A person's beneficial ownership of ten per cent (10%) or more of the voting power of a corporation's outstanding shares entitled to vote in the election of directors creates a presumption that the person has control of the corporation."

Illinois: 805 ILCS 5/11.75(4): ""Control", including the term "controlling", "controlled by" and "under common control with", means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract or otherwise. A person who is the owner of 20% or more of the outstanding voting shares of any corporation, partnership, unincorporated association, or other entity shall be presumed to have control of such entity, in the absence of proof by preponderance of the evidence to the contrary."

Indiana: IC 23-1-43-8: ""Business combinations": (b) A person's beneficial ownership of ten percent (10%) or more of the voting power of a corporation's outstanding voting shares creates a presumption that the person has control of the corporation.""

Iowa: I.C.A. § 490.1110d. "A person who is the owner of twenty percent or more of the outstanding voting stock of any corporation, partnership, unincorporated association, or other entity is presumed to have control of such entity, in the absence of proof by a preponderance of the evidence to the contrary."

58420.061

Kansas: K.S.A. 17-12,100d: ""Control," "controlling," "controlled by" and "under common control with" mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract or otherwise. A person who is the owner of 20% or more of a corporation's outstanding voting stock shall be presumed to have control of such corporation, in the absence of proof by a preponderance of the evidence to the contrary."

Kentucky: KRS § 271B.12-200(7): ""Control," including the terms "controlling," "controlled by" and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise, and the beneficial ownership of ten percent (10%) or more of the votes entitled to be cast by a corporation's voting stock creates a presumption of control."

Louisiana: LSA-R.S. 12:132(6): ""Control," including the terms "controlling," "controlled by," and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. The beneficial ownership of ten percent or more of the votes entitled to be cast by a corporation's voting stock creates a presumption of control."

Maine: 13-C M.R.S.A. § 1109: "A person's beneficial ownership of 10% or more of the outstanding voting shares of a corporation creates a presumption that that person has control of that corporation"

Maryland: MD Code, Corporations and Associations, § 3-601(g): ""Control", including the terms "controlling", "controlled by" and "under common control with", means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise, and the beneficial ownership of 10 percent or more of the votes entitled to be cast by a corporation's voting stock creates a presumption of control."

Michigan: M.C.L.A. 450.1777(2): ""Control", "controlling", "controlled by", or "under common control with" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. The beneficial ownership of 10% or more of the voting shares of a corporation shall create a presumption of control."

Minnesota: Minn. Stat. § 302A.011: "A person's beneficial ownership of ten percent or more of the voting power of a corporation's outstanding shares entitled to vote in the election of directors creates a presumption that the person has control of the corporation."

Mississippi: Miss. Code Ann. § 79-27-5: ""Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of the corporation, whether through the ownership of voting securities, by contract, or otherwise. A person's beneficial ownership of ten percent (10%) or more of the voting power of a corporation's outstanding shares entitled to vote in the election of directors (except a person holding voting power in good faith as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group control the corporation) creates a presumption that the person controls the corporation. "

Missouri: V.A.M.S. 351.459(8): ""Control", including the terms "controlling", "controlled by" and "under common control with", the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by

58420.082

contract, or otherwise. A person's beneficial ownership of ten percent or more of a corporation's outstanding voting stock shall create a presumption that such person has control of such corporation. Notwithstanding the foregoing, a person shall not be deemed to have control of a corporation if such person holds voting stock, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of such corporation."

Nebraska: Neb.Rev.St. § 21-2438: "Control, controlling, controlled by, or under common control with shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person who is the owner of ten percent or more of a corporation's outstanding voting stock shall be presumed to have control of the corporation in the absence of proof by a preponderance of the evidence to the contrary."

Nevada: Nev. Rev. Stat. Ann. § 78.418: ""Control," "controlling," "controlled by" and "under common control with" defined; presumption of control. 1. Except as otherwise provided in subsection 2: (a) "Control," used alone or in the terms "controlling," "controlled by" and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise. (b) A person's beneficial ownership of 10 percent or more of the voting power of a corporation's outstanding voting shares creates a presumption that the person has control of the corporation."

New Jersey: N.J.S.A. 14A:10A-3h: ""Control," including the terms "controlling," "controlled by" and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract, or otherwise. A person's beneficial ownership of 10% or more of the voting power of a corporation's outstanding voting stock shall create a presumption that that person has control of that corporation."

New York: McKinney's Business Corporation Law § 912: "A person's beneficial ownership of ten percent or more of a corporation's outstanding voting stock shall create a presumption that such person has control of such corporation."

Ohio: R.C. T. XVII, Ch. 1704, Refs & Annos: "New Chapter 1704 applies only to Business Combinations between an Issuing Public Corporation and an Interested Shareholder (a person who, directly or indirectly, beneficially owns, controls, or is entitled to own or control ten percent or more of the voting power of such Issuing Public Corporation)."

Oklahoma: 18 Okl.St.Ann. § 1090.3(4): "A person who is the owner of twenty percent (20%) or more of the outstanding voting stock of any corporation, partnership, unincorporated association or other entity shall be presumed to have control of the entity, in the absence of proof by a preponderance of the evidence to the contrary."

Oregon: O.R.S. § 60.801(3)(a): "As used in this subsection, "control," including the terms "controlled by" and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract or otherwise. A person who is the owner of 10 percent or more of a corporation's outstanding voting shares shall be presumed to have control of the corporation in the absence of proof by a preponderance of the evidence to the contrary."

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Pennsylvania: 15 Pa.C.S.A. § 2543(a): "General rule.--For the purpose of this subchapter, a "controlling person or group" means a person who has, or a group of persons acting in concert that has, voting power over voting shares of the registered corporation that would entitle the holders thereof to cast at least 20% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation."

Rhode Island: Gen.Laws 1956, § 7-5.2-3(8): ""Control", including the terms "controlling", "controlled by", and "under common control with", means the possession, directly or indirectly, or the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract, or otherwise. A person's beneficial ownership of ten percent (10%) or more of a corporation's outstanding voting stock creates a presumption that the person has control of the corporation."

South Carolina: Code 1976 § 35-2-208: "A person's beneficial ownership of ten percent or more of the voting power of a corporation's outstanding voting shares creates a presumption that the person has control of the corporation."

South Dakota: SDCL § 47-33-3(k): ""Control," including the terms "controlling," "controlled by," and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise. A person's beneficial ownership of ten percent or more of the voting power of a corporation's outstanding voting shares creates a presumption that the person has control of the corporation."

Tennessee: T. C. A. § 48-103-203(8): "Control," including the terms "controlling," "controlled by" and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract or otherwise. A person's beneficial ownership of ten percent (10%) or more of the voting power of a corporation's outstanding voting stock shall create a presumption that such person has control of such corporation."

Virginia: Va. Code Ann. § 13.1-725: ""Control" means the possession, directly or indirectly, through the ownership of voting securities, by contract, arrangement, understanding, relationship or otherwise, of the power to direct or cause the direction of the management and policies of a person. The beneficial ownership of 10 percent or more of a corporation's voting shares shall be deemed to constitute control."

Washington: West's RCWA 23B.19.020(8): ""Control," "controlling," "controlled by," and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise. A person's beneficial ownership of ten percent or more of a domestic or foreign corporation's outstanding voting shares shall create a rebuttable presumption that such person has control of such corporation."

Wisconsin: W.S.A. 180.1142(2): "For purposes of ss. 180.1140 to 180.1144, a person's beneficial ownership of at least 10% of the voting power of a corporation's outstanding voting stock creates a presumption that the person has control of the corporation."

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Could These Books Be Banned?

As Supreme Court Considers Ban on "Hillary: The Movie," Institute for Justice Asks if First Amendment Protects "Top Ten" Political Books

Arlington, Va.—What do Bill Clinton, Peggy Noonan, John Kerry, Michael Moore, Maureen Dowd and Swift Boat Veterans for Truth founder John O'Neil have in common?

All wrote books that could have been banned, just like "Hillary: The Movie," the film at the heart of the campaign finance case *Citizens United v. Federal Election Commission*. The U.S. Supreme Court will hear new arguments in the case Wednesday, Sept. 9, in an unusual session ordered after justices appeared troubled by the government's suggestion during the first oral argument that it could ban corporate-funded books. Indeed, Democracy 21 President Fred Wertheimer, a leading advocate of campaign finance regulations, admitted this week to *The New York Times*, "A campaign document in the form of a book can be banned."

Today, the Institute for Justice released a "top ten" list of political advocacy books from the last four presidential election cycles and asked: If the First Amendment doesn't protect "Hillary: The Movie," would it protect books like these?

1. ***Dude, Where's My Country?*, Michael Moore, 2003** ("There is probably no greater imperative facing the nation than the defeat of George W. Bush in the 2004 election.")
2. ***Bush Must Go*, Bill Press, 2004** ("If you need any ammunition for voting against George Bush, here they are: the top ten reasons why George Bush must be denied a second term.")
3. ***My Dad, John McCain*, Meghan McCain, 2008** ("There are a few things you need to know about my dad, and one of them is that he would make a great president.")
4. ***The Case Against Hillary*, Peggy Noonan, 2000** ("And that is the great thing about democracy: Before Hillary Clinton gets to decide your future, you get to decide hers."); and ***The Case for Hillary*, Susan Estrich, 2005** ("And when I say a woman president, it means Hillary.")
5. ***Unfit for Command*, John E. O'Neil and Jerome R. Corsi, Ph.D., 2004** ("I do not believe John Kerry is fit to be commander in chief of the armed forces of the United States.")
6. ***A Call to Service*, John Kerry, 2003** ("It is that determination I hope to bring to the election of 2004, to the presidency of the United States, and to the common challenges Americans face.")
7. ***Lies and the Lying Liars Who Tell Them*, Al Franken, 2003** ("George W. Bush is the worst environmental president in our nation's history.")
8. ***Shrub*, Molly Ivins & Lou Dubose, 2000** ("George W. Bush is promising to do for the rest of the country what he has done for Texas.")
9. ***Bushworld*, Maureen Dowd, 2004** ("So it's understandable why, going into his reelection campaign, Mr. Bush wouldn't want to underscore that young Americans keep getting whacked over there [in Iraq].")
10. ***Between Hope and History*, President Bill Clinton, 1996** ("Now, I believe with all my heart, this is another moment for Americans to decide.")

—More—

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Institute for Justice—Could These Books Be Banned?
September 2, 2009
Page Two of Two

"Every one of these books takes a position on a candidate's qualifications for office, just like 'Hillary: The Movie,' and every one was published by a corporation," said Steve Simpson, a senior attorney with the Institute for Justice, which filed a friend-of-the court brief in *Citizens Untied*, available at www.ij.org/citizensunited. "Every election season, candidates and their backers and detractors flood stores with similar titles. The question for the government and campaign finance 'reformers' is: Why not ban these books, too?"

Under McCain-Feingold's electioneering communications ban, the nonprofit corporation Citizens United was barred from airing "Hillary: The Movie" on cable TV during the 2008 primary season. A lower court ruled the film fell under McCain-Feingold because "it takes a position on [then-presidential candidate Hillary Clinton's] character, qualifications, and fitness for office." The Supreme Court is now revisiting the parts of *McConnell v. FEC* that upheld McCain-Feingold's ban on corporate electioneering communications, as well as *Austin v. Michigan Chamber of Commerce*, which upheld a ban on corporate express advocacy.

Although McCain-Feingold applies only to broadcast speech, if the Court okays the banning of "Hillary: The Movie," there is no principled reason Congress could not extend the ban to books and other media, like newspapers and the Internet.

"Speech is speech, no matter who is speaking, who funds it or in what form it comes," continued Simpson. "The same ideas do not become dangerous because they are funded by corporations or because they appear in an ad or film instead of a book or newspaper. The Supreme Court must return to first principles and protect all speech, regardless of the speaker, and overturning *Austin* and *McConnell* is a critical first step."

"Political ads, books and films, like 'Hillary: The Movie' or Michael Moore's 'Fahrenheit 9/11,' contribute to a robust and healthy debate, and they all deserve the fullest protection of the First Amendment," said IJ Senior Attorney Bert Gall. "What's at stake in *Citizens United* is whether the First Amendment protects this speech from censorship if Congress decides that it prefers silence over debate. The Supreme Court should reject censorship and open the floodgates to all speakers—and then let citizens and voters decide for themselves."

The Institute for Justice defends First Amendment rights and challenges campaign finance laws nationwide. In May, the Institute secured a federal court ruling striking down Florida's electioneering communications law, and IJ previously won a ruling in the Washington Supreme Court that stopped an attempt to regulate media commentary as "in-kind" political contributions. IJ is currently challenging laws in Colorado that suppress speech about ballot issues by grassroots groups and nonprofit organizations, as well as Arizona's "Clean Elections" law for funding political campaigns with taxpayer dollars. For more information, visit www.ij.org/firstamendment.

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Statement of Douglas T. Kendall
President
Constitutional Accountability Center

Before the United States Senate Committee on the Judiciary

Hearing on:
"We the People? Corporate Spending in American Elections after *Citizens United*"

Wednesday, March 10, 2010

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Thank you Chairman Leahy for holding this important hearing on the Constitution and the Supreme Court's ruling in *Citizens United v. Federal Election Commission*, and for inviting me to testify.

I am the President of Constitutional Accountability Center, a non-profit think tank, law firm, and action center dedicated to the progressive promise of the Constitution's text and history. Constitutional Accountability Center submitted an amicus brief in the *Citizens United* case on behalf of the Center and the League of Women Voters. Today we are releasing a report entitled *"A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law,"* examining the Constitution's text and history and the Supreme Court's treatment of corporations from the founding era through its ruling in *Citizens United*. This report, written by David Gans and me, demonstrates that the majority's opinion in Citizens United is completely divorced from the text and history of the Constitution.

The Constitution's text reflects a fundamental difference between corporations and the "We the People" identified in the Preamble. The individual-rights provisions of the Bill of Rights – designed in James Madison's words "to declare the great rights of mankind"[1] – use words that, on their face, make little sense as applied to corporations. As artificial entities, it is awkward, if not nonsensical, to describe corporations engaging in the "freedom of speech," practicing the "free exercise" of religion, "peaceably . . . assembl[ing]," or "keep[ing] and bear[ing] Arms." The framers who drafted the Fourth Amendment to protect the "right of the people to be secure in their persons" and the Fifth Amendment to secure to all "person[s]" rights against "be[ing] twice put in jeopardy of life or limb," being "compelled in any criminal case to be a witness against himself," and being deprived of "life" and "liberty . . . without due

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process of law" used language that refers to living human beings, not to corporations. The text of the Constitution thus fully supports the idea that the Constitution guarantees fundamental rights for living persons, and does not extend the same rights to corporations.

The debate about how to treat corporations – which are never mentioned in our Constitution, yet play an ever-expanding role in American society – has raged since the founding era. The Supreme Court's answer to this question has long been a nuanced one: corporations can sue and be sued in federal courts and they can assert certain constitutional rights, but they have never been accorded all the rights that individuals have, and have never been considered part of the political community or given rights of political participation. Only once, during the darkest days of the now-infamous *Lochner* era, from 1897 to 1937, has the Supreme Court seriously entertained the idea that corporations are entitled to the same constitutional rights enjoyed by "We the People." And even in the *Lochner* era, equal rights for corporations were limited to subjects such as contracts, property rights and taxation, and never extended to the political process.

Far from considering corporations associations of persons deserving equal treatment with living persons, corporations have been treated as uniquely powerful artificial entities – created and given special privileges to fuel economic growth – that necessarily must be subject to substantial government regulation in service of the public good. Fears that corporations would use their special privileges, including limited liability and perpetual life, to overwhelm and undercut the rights of living Americans are as old as the Republic itself, and have been voiced throughout American history by some of our greatest statesmen, including James

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Madison, Andrew Jackson, Abraham Lincoln, Theodore Roosevelt, and Franklin Delano Roosevelt.

For most of our nation's history, Supreme Court doctrine comported with the Constitution's text and history. In the words of Chief Justice Marshall in the famous *Trustees of Dartmouth College v. Woodward* case, corporations were "artificial being[s], invisible, intangible, and existing only in the contemplation of the law."[2] A corporation was a "creature of the law" that did not possess inalienable human rights, but rather "only those properties which the charter of creation confer on it."[3] Corporate interests were protected in some ways, of course – for example, corporations could assert rights under such provisions as the Constitution's Contracts Clause to limit changes to their corporate charters – but corporations could be extensively regulated to ensure that they did not abuse the special privileges and protections governments conferred on them that were not shared by individuals. This was the settled understanding both before the Civil War, and after, when the Fourteenth Amendment was added to the Constitution, requiring states to respect the fundamental rights of all Americans.

This settled understanding was thrown into question in 1886 when the Court's decision in *Santa Clara v. Southern Pacific Railroad Co.*[4] appeared to announce that corporations were "persons" within the meaning of the Fourteenth Amendment. The Supreme Court's actual opinion never reached the constitutional question in the case, but the court reporter – himself a former railroad president – took it upon himself to insert into his published notes Chief Justice Waite's oral argument statement that the Fourteenth Amendment protects corporations. Through this highly irregular move, bereft of any reasoning or explanation, the idea that

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corporations were "persons" and had the same rights as individuals – for some purposes at least – was introduced into constitutional law. In the 1920s and 1930s – as the nation was roiled by the Great Depression – many speculated that the framers of the Fourteenth Amendment had "smuggled" into the Amendment "a capitalist joker,"[5] giving corporations special rights and protections under an Amendment ratified to secure equal citizenship for living Americans, but it is now clear that this "joker" was created by the court reporter and developed by the *Lochner*-era Supreme Court.

Nothing changed immediately after *Santa Clara*, reflecting the limited nature of the Court's actual ruling. But eleven years after *Santa Clara*, in *Gulf, C. & S.F. Ry. Co v. Ellis*,[6] the Court ruled that a state law regulating railroad corporations violated the Equal Protection Clause. Citing *Santa Clara*, the Court declared it "well settled" law that "corporations are persons within the provisions of the fourteenth amendment," and, because of this, "a state has no more power to deny to corporations the equal protection of the law than it has to individual citizens."[7] For the very first time, the Supreme Court ruled that corporations have the same constitutional rights enjoyed by individuals. This ruling, combined with other important rulings that same year, ushered in the *Lochner* era, a period today almost universally condemned as one of the low points in the Supreme Court's history. For the next forty years, the Supreme Court repeatedly ignored constitutional text and history in service of its own constitutional vision in which equal corporate rights and the liberty of contract were a cornerstone of constitutional law.

In 1937, the Court recognized its errors, and the *Lochner* era's constitutional revolution came crashing to a halt, the poverty of its vision laid bare by the stock market crash of 1929 and

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the suffering brought on by the Great Depression that followed. Virtually every aspect of the *Lochner* era's protection of corporate constitutional rights was repudiated, with the Court ultimately declaring that the idea of equal rights for corporations, first recognized in *Gulf*, was "a relic of a bygone era."[8]

In the face of these losses, corporations started aggressively fighting back. In 1971, Lewis Powell – a Virginia corporate lawyer who would soon be nominated to the Supreme Court – urged the Chamber of Commerce that "political power is necessary" for corporations and "must be assiduously cultivated," and advised corporations to look to the courts for relief, noting that "the judiciary may be the most important instrument for social, economic and political change."[9] Powell's strategy came to fruition just seven years later in *First National Bank of Boston v. Bellotti*,[10] when Powell – now Justice Powell – authored a 5-4 ruling for the Court holding that limits on a corporation's ability to oppose a ballot initiative violated the First Amendment. Justice Powell had slipped the "capitalist joker" of corporate personhood back into the Court's deck, ignoring a powerful dissent by then-Justice William Rehnquist, who explained why the ruling was inconsistent with the Constitution's text and Marshall Court-era opinions.

Though deeply problematic, *Bellotti* was expressly limited to a narrow category of cases involving ballot initiatives. In 1990, in *Austin v. Michigan Chamber of Commerce*,[11] and in 2003, in *McConnell v. FEC*,[12] the Supreme Court held that the Constitution does not grant corporations the same rights to spend money to advocate the election or defeat of candidates for office as citizens have. Echoing ideas tracing all the way back to *Dartmouth College*, *Austin* and *McConnell* explained that governments have broader powers to restrict the rights of

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corporations because, with special government-conferred corporate privileges, comes greater government oversight and regulation.

Citizens United wiped these precedents off the books. The linchpin of the Court's majority opinion, written by Justice Kennedy, is that corporations are nothing more than "associations of citizens" deserving full constitutional protection, and that campaign finance laws that single out corporations for special regulation, and place limits on corporate spending on elections, violate the First Amendment.[13] "Prohibited . . . are restrictions distinguishing among different speakers, allowing speech by some but not others."[14] Justice Kennedy relentlessly played the joker, asserting time and again that a corporation is a constitutionally protected speaker, no different from living, breathing, thinking persons.

Justice Kennedy's reasoning threatens to sweep from the statute books all regulations of corporate spending on elections. *Citizens United* invalidated two specific prohibitions on corporate spending – BCRA's corporate electioneering provision, as well as the older statute prohibiting express advocacy by corporations (which the plaintiff, Citizens United, never challenged) – and put in grave danger numerous others. Under the Court's reasoning, federal statutes that prohibit corporations from contributing money to support candidates of their choice and foreign corporations from both spending money on elections and contributing to candidates are now in serious question. If, as Justice Kennedy's opinion demands, all speakers are to be treated equally under the First Amendment, then there is no reason why all corporations, whether domestic or foreign, should not have the same rights as individuals to spend money on elections or contribute to the candidates whose policies they support.

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But it is the Constitution itself that treats "We the People" fundamentally differently from corporations, particularly when it comes to fundamental rights such as freedom of speech. Indeed, the distinction between individuals and corporations has the greatest force when it comes to elections, since corporations are not citizens, cannot vote or run for office, and have never been considered part of our political community. The *Citizens United* majority ignored this text and history and revived the idea of equal rights for corporations, a position not endorsed by the Court since the dark days of the *Lochner* era.

Justice Kennedy, speaking for the majority, offered four justifications for why the Court turned its back on this text and history and treated corporate expenditures on elections the same as individual speech. But each of these reasons falls apart under scrutiny.

First and foremost, Justice Kennedy relied on the text of the First Amendment, which prohibits Congress from abridging the freedom of speech and does not limit its coverage to "people" or "citizens." But the same issue confronted Chief Justice Marshall in the Dartmouth College case – the Contracts Clause prohibits states from impairing the obligation of contracts without specifying the identity of the contracting parties – and the Court had no problem in Dartmouth College and subsequent cases in recognizing that while corporations were protected by the Contracts Clause, corporations were different from people and the government could impose special rules for corporate charters. That was precisely the outcome reached by the Court in *Austin* and overruled in *Citizens United*.

Moreover, the basis for treating corporations the same as individuals was far stronger in *Dartmouth College*: contracts, particularly corporate charters, are central to corporate activities. In contrast, political speech is uniquely human, and important First Amendment

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concerns such as autonomy and dignity make no sense as applied to corporations, which, by law, have to act in a way that maximizes the corporation's profits. Finally, even with regard to speech by humans, it has never been the law under the First Amendment that the identity of the speaker is irrelevant – and for good reason. As Justice Stevens' dissent pointed out, the Court's reasoning "would have accorded the propaganda broadcasts to our troops by 'Tokyo Rose' during World War II the same protection as speech by Allied commanders."[15]

Second, Justice Kennedy argued that corporations qualify for full constitutional protection because they are nothing more than "associations of citizens" and if citizens have rights to spend money on elections, so too must corporations. This argument, while rhetorically clever, ignores the very reasons our Constitution's text and history have always regarded corporations as fundamentally different from living, breathing persons. Corporations are not merely "associations of citizens" banding together for a common cause, and therefore properly considered part of "We the People;" they are uniquely powerful artificial entities, given special privileges such as perpetual life and limited liability to power our economic system and amass great wealth. For that reason, governments have always had more leeway to regulate corporations than individuals. The very structure of corporations belies the claim that they are best characterized as "associations of citizens" – a small cadre of directors and officers manage the corporation's affairs under a fiduciary duty to maximize profits, while the vast majority of the corporation's so-called members do nothing more than invest their money in the hope of sharing in those profits. This is not an association of individuals in any meaningful sense of the word.

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Third, Justice Kennedy argued that the identity and the unique characteristics of the corporate speaker are irrelevant because permitting unlimited corporate expenditures on elections is necessary to protect the rights of listeners – the American electorate. Corporations, of course, already spend millions of dollars through corporate PACs each election cycle to get their message out: listeners are already hearing their message.[16] Further, corporate CEOs, directors, officers and shareholders, as individuals, have an unfettered right to spend money to help elect the candidates of their choice. But most important, this argument is entirely circular. For more than 100 years, the American electorate has placed special limits on corporation campaign expenditures because of the fear that corporate spending will overwhelm the voices of "We the People" and influence our political leaders to represent corporate interests, not the voters' interests. The "listeners" have spoken again and again with these laws and provided an extraordinarily solid basis for distinguishing between corporate expenditures and individual speech. The question is whether the First Amendment permits this distinction between corporate and individual speakers. The answer to that question depends on the identity and characteristics of the speaker—and two centuries of history tell us that distinguishing between corporations and individuals is both permissible and appropriate.

Finally, Justice Kennedy latched on to the special case of media corporations to argue against limits on campaign expenditures by any corporations. Justice Kennedy argued that because media corporations are protected by the First Amendment, so too must all corporations. This is meritless. As explained by Justice Stevens in dissent, the First Amendment specifically mentions "the press" and the "[t]he press plays a unique role not only in the text, history, and structure of the First Amendment but also in facilitating public discourse."[17]

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Indeed, "the publishing business is . . . the only private business that is given explicit constitutional protection."[18] As one leading scholar of the Press Clause of the First Amendment has explained, "[f]reedom of the press – not freedom of speech – was the primary concern of the generation that wrote the Declaration of Independence, the Constitution, and the Bill of Rights. Freedom of speech was a late addition to the pantheon of rights; freedom of the press occupied a central position from the beginning."[19] As Justice Stevens concluded, the majority "raised some interesting and difficult questions about Congress' authority to regulate electioneering by the press, and about how to define what constitutes the press. *But that is not the case before us*."[20]

In sum, while the *Citizens United* majority offered reasons for its decision, none of them is persuasive or comes close to justifying the momentous changes in constitutional law ushered in by its opinion. And the consequences of the Court's ruling should not be understated. The Court's ruling could transform our electoral politics. During 2008 alone, ExxonMobil Corporation generated profits of $45 billion. With a diversion of even two percent of those profits to the political process, this one company could have outspent both presidential candidates and fundamentally changed the dynamic of the 2008 election. And while *Citizens United* dealt only with electioneering by corporations, leaving in place a ban on contributions by corporations directly to campaigns, Justices Kennedy, Thomas, and Scalia have long been critical of the fact that the Supreme Court has not given strong First Amendment protection to campaign contributions,[21] suggesting that these limits too are at risk. It doesn't take a crystal ball to see that the *Citizens United* majority has only begun the process of deregulating the use

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of money in elections, a process that undoubtedly will give corporations more and more ways to spend their money to elect candidates to do their bidding.

The Court's ruling in *Citizens United* is startlingly activist and a sharp departure from constitutional text and history. In giving the same protection to corporate speech and the political speech of "We the People," *Citizens United* is one of the most far-reaching opinions on the rights of corporations in Supreme Court history, one that the framers of the Constitution and the successive generations of Americans who have amended the Constitution and fought for laws that limit the undue influence of corporate power would have found both foreign and subversive. The inalienable, fundamental rights with which individuals are endowed by virtue of their humanity are of an entirely different nature than the state-conferred privileges and protections given to corporations to enhance their chances of economic success and business growth. The Constitution protects these rights in different ways, and equating corporate rights with individual rights can surely threaten the latter, as we will vividly see when large corporations start to tap their treasuries to overwhelm the voices of "We the People."

We have been down this road before. In the *Lochner* era, the Supreme Court turned its back on the Constitution's text and history in decisions that gave corporations the same rights as individuals. At the heart of the Court's thinking in the *Lochner* era was the rule, first announced for the Court in *Gulf*, that "a state has no more power to deny to corporations the equal protection of the law than it has to individual citizens."[22] The Supreme Court's first experimentation with equal rights for corporations did not end well for the the Court. Just about every aspect of the *Lochner*-era Court's jurisprudence has subsequently been overruled, and it remains a chapter in the Court's history that is reviled by liberals and conservatives alike.

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Yet Justice Kennedy's opinion in *Citizens United* contains the same error at the core of *Gulf*: both opinions rise and fall on the idea that corporations must be treated identically to individuals when it comes to fundamental constitutional rights.

The *Lochner* era lasted only as long as the Court continued to have five Justices willing to sign on to its insupportable ideas. When the Court changed, the *Lochner*-era precedents, and the idea that corporations had the same fundamental rights as "We the People," were quickly disowned. *Citizens United* deserves a similar fate. In extending, once again, equal rights to corporations, the *Citizens United* majority swept aside principles that date back to the earliest days of the Republic and have been reaffirmed time and again and proven to be wise and durable. Since the Founding, the idea that corporations have the same fundamental rights as "We the People" has been an anathema to our Constitution. *Austin* may have been on the books for only nineteen years, and *McConnell* for only six, but both decisions built directly off a line of some of the Court's oldest and most venerable cases about corporations and the Constitution, including *Dartmouth College* and *Earle*, and the Court had no business overruling them.

Corporations do not vote, they cannot run for office, and they are not endowed by the Creator with inalienable rights. "We the People" create corporations and we provide them with special privileges that carry with them restrictions that do not apply to living persons. These truths are self-evident, and it's past time for the Court to finally get this right, once and for all.

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[1] Annals of Congress, 1st. Cong., 3rd Sess. 1949 (1791).
[2] *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).
[3] *Id.* At 636.
[4] 118 U.S. 394 (1886).
[5] E.S. Bates, The Story of Congress 233-34 (1936).

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[6] 165 U.S. 150 (1897).
[7] *Id.* at 154.
[8] *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973).
[9] *See* Confidential Memorandum from Lewis F. Powell to Eugene B. Sydnor, *Attack on the American Free Enterprise System* (Aug. 23, 1971), at 10.
[10] 435 U.S. 765 (1978).
[11] 494 U.S. 652 (1990).
[12] 540 U.S. 93 (2003).
[13] *Citizens United v. FEC*, slip op. at 33, 38 (U.S. Jan. 21, 2010) (No. 08-205).
[14] *Id.* at 24.
[15] *Citizens United*, slip op. at 33 (Stevens, J., concurring in part and dissenting in part).
[16] *See id.* at 24 (Stevens, J., concurring in part and dissenting in part) (noting that "during the most recent election cycle, corporate and union PACS raised nearly a billion dollars").
[17] *Id.* at 84 (Stevens, J., concurring in part and dissenting in part).
[18] Potter Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631, 633 (1975); *see also* Floyd Abrams, *The Press Is Different: Reflections of Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 574-80 (1979) (setting out text and history supporting Justice Stewart's view). The conservatives' only real rejoinder – given by Justice Scalia – was that the Press Clause does not protect the institution, but merely the act of publishing. *Citizens United*, slip op. at 6 (Scalia, J., concurring). Scalia is surely right that the Press Clause protects individual editors and printers but offers no reason to think that the Clause provides no protection to the institutional press. Once again, the history is to the contrary: "the press functioned as an industrial and economic institution – as a business," Abrams, *supra*, at 575, one explicitly protected by the Constitution.
[19] David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. REV. 455, 533 (1983).
[20] *Citizens United*, slip op. at 84 (Stevens, J., concurring in part and dissenting in part).
[21] *See Randall v. Sorrell*, 548 U.S. 230, 266-67 (Thomas, J., concurring); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 405-10 (2000) (Kennedy, J., dissenting); *id.* at 410-30 (Thomas, J., dissenting).
[22] *Gulf*, 165 U.S. at 154.

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March 10, 2010

Senator Patrick Leahy
Chairman, Senate Judiciary Committee
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Senator Jeff Sessions
Ranking Member, Senate Judiciary Committee
United States Senate
335 Russell Senate Office Building
Washington, DC 20510

Senators Leahy and Sessions:

The undersigned are campaign finance scholars concerned about the popular representation of the Supreme Court's opinion in *Citizens United v. Federal Election Commission*. We write today to correct the record and offer the Committee our perspective on the place this important decision should occupy in campaign finance constitutional doctrine. We believe *Citizens United* is a welcome iteration of the First Amendment's protection of political expression. Regrettably, many commentators seek to question the decision's legitimacy, contending that it was an act of "judicial activism." However, when the decision is placed in proper context, we believe this perspective is clearly incorrect.

As you know, the expenditure ban found unconstitutional in *Citizens United* was enacted in 1947. Its legitimacy has been questioned from the beginning. Republicans placed the ban in the lengthy (and management-supported) Taft-Hartley labor reform bill at the eleventh hour in conference committee.[1] There was no substantive debate in the House about the amendment.[2] The Senate debate pitted Senator Robert Taft against several Democratic Senators, but both sides knew Taft had the necessary votes, and the package passed easily. President Truman, for his part, singled out the 1947 expenditure ban as a "dangerous intrusion on free speech, unwarranted by any demonstration of need and quite foreign to the stated purposes of this bill" in his Taft-Hartley veto message.[3]

In the wake of that law's enactment, test cases brought against unions went poorly for the United States Department of Justice. The Truman Justice Department prosecuted three separate unions for making illegal expenditures. In none of those cases did the Department prevail. In a series of corporate *contribution* investigations against Michigan auto dealers, the Department was able to

[1] See *U.S. v. UAW-CIO*, 352 U.S. 567, 582-83 (1957).
[2] 93 Cong. Rec. 3522-23 (1947).
[3] H.R. Doc. No. 80-334 (1947)

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negotiate pleas of nolo contendere. However juries acquitted the two corporations tried in court. This discouraging record, plus the fear that a test case might eventually yield a decision overturning the law, made federal prosecutors reluctant to bring more prosecutions.[4] Senator Taft apparently lost faith with the expenditure ban, and introduced legislation that would have repealed it in 1949.[5]

One— only one— published corporate prosecution comes out of this pre-Watergate period. The Justice Department prosecuted Lewis Foods for using corporate funds to run a newspaper advertisement in favor of candidates who support "constitutional principles."[6] After the first jury deadlocked, the judge in the second trial dismissed the indictment because the advertisement did not contain "active electioneering." The Ninth Circuit reversed, and on remand the company pled nolo contendere and paid a $100 fine.

With scant enforcement, and no constitutional precedent to follow, corporations and unions developed working rules in politics without official guidance.[7]

Only after Congress enacted the Federal Election Campaign Act (FECA) did decisions begin defining the constitutional constraints on laws restricting expenditures. Until 1990, every instance where the Court squarely faced limits on expenditures, it found them unconstitutional. In 1976, the Supreme Court in *Buckley v. Valeo* interpreted the term "expenditure" to include only communications expressly advocating the election or defeat of a clearly identified candidate for federal office, and found unconstitutional a limit on individual independent expenditures.[8] Then in 1978, the Court in *First Nat'l Bank of Boston v. Bellotti* held unconstitutional a state law prohibiting corporate expenditures in ballot measure campaigns.[9] In *FEC v. NCPAC*, from 1985, the Court held unconstitutional a law limiting to $1,000 independent expenditures by PACs in presidential elections.[10] Justice Brennan, writing for the Court in *Massachusetts Citizens for Life* from 1986, held unconstitutional the corporate expenditure ban as applied to a nonprofit pro-life group, and reiterated its *Buckley* holding that "expenditures" included only communications containing express advocacy.[11]

Austin v. Michigan Chamber of Commerce from 1990 falls outside the trend.[12] The Court in *Austin* professed to apply a strict standard of scrutiny to Michigan's corporate expenditure ban, but upheld that law with reasoning that fell short of the strict standard. The Court reiterated *Austin* in *McConnell v. FEC* in 2003 against a facial challenge to the Bipartisan Campaign

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[4] Herbert E. Alexander, Money in Politics 177-78 (1972) (noting dominant opinion at that time that expenditure ban probably unconstitutional). The prosecutors involved in the Michigan auto dealers matters believed that pursuing similar cases would be counterproductive. See memorandum to Alex Campbell from U.S. Attorneys Thomas Thornton and Joseph Deebs, Jan. 14, 1949 (on file with Professor Hayward).

[5] See Joseph Rauh, Legality of Union Political Expenditures, 34 S. Cal. L. Rev. 152, 159 n. 32 (citing S. 249, 81st Cong. 1st Sess. (1949)). Taft drafted the Republican substitute to the Truman Administration's repeal of Taft-Hartley that omitted the expenditure ban. It passed the Senate 51-42. Senate Votes Taft Labor Bill In a Blow to Administration, N.Y. Times, July 1, 1949 at A1.

[6] See *United States v. Lewis Foods*, 366 F.2d 710 (1966).

[7] Alexander Heard, The Costs of Democracy 131-32 (1960).

[8] 414 U.S. 1, 43-44 (1976).

[9] 435 U.S. 765 (1978).

[10] 470 U.S. 480 (1985).

[11] 479 U.S. 238 (1986).

[12] 494 U.S. 652 (1990)

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Reform Act without much elaboration, but when faced with an as-applied challenge, reined in *McConnell* in *Wisconsin Right to Life v. FEC*.[13] Notably, the parties in *WRTL* did not challenge the expenditure ban squarely in that case, leaving the question open in *Citizens United*.

The Court in overruling *Austin* in *Citizens United* should be applauded for bringing coherence and consistency to an area of constitutional law that had lacked both. In short, *Citizens United* was not an "illegitimate" or "activist" decision. *Citizens United* falls safely within the scope and tone the Court's interpretation of the constitutional protection afforded independent political expression.

Citizens United should dispel any lingering doubts that the Supreme Court might not protect political speech with the same vigor it applies to restrictions on speech in the arts, education, or popular culture. We should welcome this clarification. It is now the task of Congress, based on experience and sound logic, to respond appropriately if aspects of the political system endanger the integrity of Congress or its members. Only when such issues emerge will there be any way to evaluate the threat, the government's interest, and which of the many means available—campaign finance laws, ethics rules, tax incentives, or others—might work best to meet that threat. Acting prematurely will likely create pernicious unintended consequences, and will not withstand the Court's strict scrutiny of these laws.

Respectfully submitted,

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**Affiliations are provided for identification purposes only, and the views contained should not be construed to reflect the views of the affiliated institutions*

[13] See *McConnell*, 540 U.S. 93 (2003); *Wisconsin Right to Life*, 127 S. Ct. 2652 (2007).

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Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing on
"We the People? Corporate Spending In American Elections after Citizens United"
March 10, 2010

Today's hearing is another in a series we have held that focus on how recent activist decisions by narrow majorities on the Supreme Court affect the lives of hard-working Americans. In a case called *Citizens United v. Federal Election Commission*, five justices acted to overturn a century of law designed to protect our elections from corporate spending. They ruled that corporations are no longer prohibited from direct spending on political campaigns, and extended to corporations the same First Amendment rights in the political process that are guaranteed by the Constitution to individual Americans.

The *Citizens United* decision turns the idea of Government of, by and for the people on its head. It creates new rights for Wall Street at the expense of the people on Main Street. It threatens to allow unprecedented influence from foreign corporations into our elections. Americans concerned about fair elections have rightfully recoiled.

Our Constitution begins with the words, "We the People of the United States." In designing the Constitution, States ratifying it, adopting the Bill of Rights and creating our democracy, we spoke of, thought of, and guaranteed fundamental rights to the American people, not corporations.

There are reasons for that. Corporations are not the same as individual Americans. Corporations do not have the same rights, the same morals or the same interests. Corporations cannot vote in our democracy.

Corporations are artificial legal constructs to facilitate business. The difference is common sense and rooted in core American values. The great Chief Justice John Marshall wrote in 1819 that, "A corporation is an artificial being . . . the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . . ."

In previous hearings, we have highlighted a troubling pattern in the Supreme Court's recent rulings making it more difficult for corporations to be held accountable for their misconduct. These cases include *Stoneridge*, *Ledbetter*, *Riegel*, *Circuit City* and *Gross*, just to name a few. Those cases involve the Court's misinterpretation of *statutory* law. This case is an example of the Supreme Court continuing its pattern of favoring corporate interests by granting corporations unprecedented *constitutional* rights. Corporate interests find five ready allies at the Supreme Court.

Teddy Roosevelt proposed the first campaign finance reforms limiting the role of corporations in the political process. Those reforms were preserved and extended through another century of legal developments that followed. Eight years ago, it was these same values that informed bipartisan efforts in Congress, on behalf of the American people, to enact the landmark McCain-Feingold Act. That legislation strengthened the laws protecting the interests of all Americans by

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ensuring a fair electoral process where individual Americans could have a role in the political process, regardless of wealth.

Six years ago, in *McConnell v. Federal Election Commission*, the Supreme Court upheld the key provisions of the McCain-Feingold Act against a First Amendment challenge. Now, a thin majority of the Supreme Court, made possible by President Bush's appointment of Justice Samuel Alito, reversed course on the very same question. In so doing, the conservative activist majority discarded not only the *McConnell* decision, but ran roughshod over longstanding precedent, and took it upon itself to effectively redraft our campaign finance laws. As Justice Stevens noted in dissent, "The only relevant thing that has changed since . . . McConnell is the composition of the Court." The Constitution has not changed. Nowhere does our Constitution even mention corporations.

This brand of conservative judicial activism is a threat to the rule of law. It undermined the efforts of Americans' elected representatives in Congress to keep powerful, corporate megaphones from drowning out the voices and interests of individual Americans. Rather than abiding by the limitations that Congress has developed to ensure a multitude of voices in the marketplace of election contests, the narrow majority on the Supreme Court decided that the biggest corporations should be unleashed, and can be the loudest and most dominant.

At the core of the First Amendment is the right of individual Americans to participate in the political process – to speak and, crucially, to be heard. That is what the campaign finance laws were designed to ensure – that Americans can be heard and fairly participate in elections. Five justices overruled congressional efforts to keep powerful, moneyed interests from swamping individuals' voices and interests. They showed no deference to Congress, and little to the precedents of the Supreme Court.

Vermont is a small state. It is easy to imagine corporate interests flooding the airwaves with election ads and transforming even local elections there. It would not take more than a tiny fraction of corporate money to outspend all of our local candidates combined. If a local city council or zoning board is considering an issue of corporate interest, why would the corporate interests not try to drown out the view of Vermont's hard-working citizens? I know that the people of Vermont, like all Americans, take seriously their civic duty to choose wisely on Election Day. Vermonters cherish their critical role in the democratic process and are staunch believers in the First Amendment. Vermont refused to ratify the Constitution until the adoption of the Bill of Rights in 1791. The rights of Vermonters and all Americans to speak to each other and to be heard should not be undercut by corporate spending. I fear that is exactly what will happen unless both sides of the aisle join with President Obama to try to restore the ability of every American to be heard and effectively participate in free and fair elections.

When the *Citizens United* decision was handed down, I said that it was the most partisan decision since *Bush v. Gore*. As in *Bush v. Gore*, the conservative activists on the Supreme Court unnecessarily went beyond the proper judicial role to substitute their preferences for the law. But *Citizens United* is broader and more damaging, because rather than intervening to decide a single election, the Court intervened to affect all future elections. The impact will reach local zoning board elections, state judicial elections, as well as national contests. Regrettably,

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this decision is only the latest example of the willingness of a narrow conservative activist majority of the Supreme Court to render decisions from the bench to suit their own ideological agenda. For all the talk about "judicial modesty" and "judicial restraint" from the nominees of President Bush at their confirmation hearings, we have seen a Supreme Court these last four years that has been anything but modest and restrained.

I am concerned that the *Citizens United* decision risks opening the floodgates of corporate influence in American elections. In these tough economic times, I believe individual Americans should not have their voices drowned out by unfettered corporate interests. I am also concerned that this decision will invite foreign corporate influence into our elections. We are in unchartered territory, but how the court came to its conclusion and the impact this case will have on our democracy deserves our attention here today.

I welcome our witnesses to the Committee today and look forward to their testimony.

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ORGANIZATION FOR INTERNATIONAL INVESTMENT
INTERNATIONAL BUSINESS INVESTING IN AMERICA

Organization for International Investment ("OFII")
Written Statement for the Record of the Senate Judiciary Committee Hearing on

"We the People? Corporate Spending in American Elections after Citizens United"

March 10, 2010

The Organization for International Investment ("OFII") supports the Committee's goal of restricting foreign influence in United States elections. Nevertheless, we are troubled by the tenor of the debate around foreign influence triggered by the Supreme Court's historic decision in *Citizens United v. FEC* and object to attempts to address such influence by mischaracterizing U.S. subsidiaries of companies headquartered abroad and the important role they play in the American economy. That approach both unfairly maligns the millions of Americans employed by companies which insource jobs in the U.S., and fails to address other business situations which could provide even greater and more direct opportunities for foreign influence. In short, we urge the Committee to focus its efforts on preventing actual foreign influence in American elections, without making unwarranted distinctions between similarly-situated multinational corporations in light of the realities of today's global economy.

I. Nature of Insourcing Companies in the United States

As illustrated in the attached membership list, and by the facts below, the U.S. operations of companies based abroad, or "insourcing" companies, play a major role in our nation's economy, providing critically important jobs (and the associated tax base) in communities across the country.

Some salient facts about insourcing companies:

- U.S. subsidiaries employ 5.5 million Americans — 4.6% of total U.S. private sector employment;
- U.S. subsidiaries account for 6% of total U.S. GDP;
- U.S. subsidiaries support an annual payroll of $403.6 billion — with average compensation per worker of $73,124, which is 34.7 percent higher than compensation at all U.S. companies;
- U.S. subsidiaries heavily invest in the American manufacturing sector; with 29 percent of the jobs at U.S. subsidiaries in manufacturing industries;
- U.S. subsidiaries manufacture in America to export goods around the world — accounting for nearly 18.5 percent of all U.S. exports, or $215.6 billion;
- U.S. subsidiaries have a larger percentage of workers covered by a union collective-bargaining agreement than other U.S. companies — 12.4% of employees at U.S. subsidiaries compared to just 8.2% at other U.S. firms.

In New York, insourcing companies employ 389,300 Americans, more than 5% of state's private-sector workforce. These include 53,500 manufacturing jobs, over 9 % of the New York's total manufacturing workforce. U.S. subsidiaries employ 34,600 Utahans – an increase of 13.8% over five years – and nearly 30% of these jobs are in manufacturing industries. Manufacturing companies tend

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to have a strong "multiplier" effect on the economy—stimulating a substantial amount of activity and jobs in other sectors through their demand for inputs from other suppliers. Insourcing companies also employ 572,500 Californians, 73,600 Alabamians, 243,100 Illinoisans, and 91,000 Kentuckians alongside millions of other Americans nationwide.

The significant contributions insourcing companies bring to the U.S. economy are a direct result of the U.S.'s open investment environment, which treats these companies and the Americans they employ on a level playing field with their domestic competitors. At a time when too many American jobs are at risk, Congress should take particular care not to unfairly distort this playing field, thereby disincentivizing insourcing companies and the billions of dollars they invest in our nation, our economy, and our workers.

II. Current law has already addressed any risk of foreign influence through US subsidiaries for decades

Too much of the recent attention to this issue has disregarded the separate legal restriction on expenditures by foreign nationals that was not at issue in *Citizens United*, and which therefore remains fully in effect despite the scope of that decision. That statute, now codified at 2 U.S.C. §441e, in fact has been policed rather aggressively by the Federal Election Commission throughout the Commission's existence. Some of the FEC's largest enforcement matters have involved the foreign national prohibition, even in recent years when many other issues have triggered deep ideological differences among the Commissioners about the implementation of campaign finance law.

Furthermore, since the foreign national prohibition also covers state and local elections, the FEC has had the opportunity to promulgate regulations and flesh out a long line of Advisory Opinions precisely addressing the question of contributions or expenditures from U.S. subsidiaries in those states and localities where such corporate expenditures were not prohibited. The first of the FEC's relevant advisory opinions was issued in 1977, shortly after the Commission was founded, and the most recent such opinion was issued last year. In short, these opinions establish two related principles which have restricted foreign influence in those non-federal elections for decades without serious controversy.

First, these advisory opinions made clear that any corporation must prevent any foreign nationals from taking part in the decision-making process around corporate political expenditures. This is not necessarily disqualifying for a typical U.S. subsidiary, which can empower a subset of its board, made up only of U.S. citizens or permanent residents, to oversee the company's political activities. Second, the company must ensure that only U.S.-derived revenue is used to fund the company's contributions or expenditures. This is not only a paperwork requirement despite the fungibility of corporate treasuries, since any domestic subsidiary which generates no revenue from U.S. operations cannot make contributions or expenditures in the U.S. at all.

Indeed, if domestic subsidiaries actually did present a serious risk of bringing foreign political influence into American elections, it would not be unreasonable to expect that influence to have manifested itself in the decades since the FEC's first opinions on this topic in the late 1970's. In fact, Congress itself implicitly acknowledged the appropriateness of the FEC's approach to political activities of U.S. subsidiaries, since even while broadening the scope of the foreign national prohibition in the Bipartisan Campaign Reform Act in 2002, it made no direct change to the rules on domestic subsidiaries.

Accordingly, we urge the Committee to note the success of the approach adopted by the FEC in

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1977 and left in place by Congress in 2002. For decades, this approach has effectively balanced Congress' interest in ensuring that American elections are conducted by and among Americans against the rights of the millions of American workers employed in domestic subsidiaries, and it deserves the Committee's close attention.

III. *Citizens United* makes clear that any expenditure prohibition will be held to strict scrutiny, and accordingly must be narrowly tailored

As an expenditure prohibition, any new law which would broaden the scope of 441e to apply categorically to all U.S. subsidiaries clearly would be subject to strict scrutiny under the Supreme Court's standards as most recently articulated in *Citizens United* and *Wisconsin Right to Life*. As noted above, OFII raises no issue with the nature of Congress' interest in preventing foreign influence in U.S. elections, but we urge the Committee to appreciate the critical importance of narrowly tailoring whatever remedy or remedies it chooses to address that interest.

First, any broad prohibition on expenditures by US subsidiaries would have to be premised on a hypothetical level of foreign control over American political activities that is already illegal and, whether consequential to that prohibition or not, simply shouldn't be presumed to exist between a U.S. subsidiary and its foreign parent. We suggest that any such prohibition on expenditures by U.S. subsidiaries *per se* would be plainly overbroad, particularly in the absence of an appropriate legislative record indicating that such domestic companies actually have served as conduits for foreign influence on American elections.

Second, applying such a prohibition to U.S. subsidiaries alone, without similarly addressing other multinational corporations, would be simultaneously under-inclusive, since it would omit the wide range of other business arrangements which raise at least the same degree of concern over potential foreign influence. In today's global economy, U.S. headquartered companies have business locations and manufacturing operations all over the world, they have foreign nationals in senior executive positions and they often contract with a broad range of foreign governments. Consequently, a U.S.-headquartered parent corporation that is highly subsidized by a profitable overseas subsidiary, for example, or a U.S. joint venture partner that is deeply leveraged into a foreign investment could be beholden to foreign interests as a matter of pragmatism to an even greater degree than a U.S. subsidiary might be as a matter of corporate structure. Especially given the Court's new focus on the equal speech rights of all speakers, any new legislation in this area would be difficult to defend as narrowly tailored if it does not also address these situations.

We also urge the Committee to follow Justice Kennedy's invitation in *Citizens United* to view disclosure as a less restrictive alternative to broad prohibitions. Requiring all corporations to confirm their compliance with existing law, for example (by certifying that no foreign funds were used in any expenditures funded by that corporation and that no foreign nationals were involved) would serve the same goals as a categorical prohibition singling out U.S. subsidiaries without imposing the profound burdens of a prior restraint against political expenditures on people and companies who in fact pose little or no risk of bringing foreign influence into American elections.

IV. Conclusion

OFII neither endorses nor opposes the *Citizens United* decision as such, nor do we take a position regarding the free speech rights of corporations generally. Rather, we offer testimony today to strongly oppose any effort to discriminate against insourcing companies based on the flawed premise

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that U.S. subsidiaries are "foreign" rather than "American." Insourcing companies have the same obligations and rights as any other American company. Moreover, their contributions to the U.S. economy and workers should ensure that they are not treated as second class corporations. And, most importantly, millions of insourcing workers are American citizens, voters and taxpayers -- whose political rights and patriotism should not be called into question.

We suggest that if the Committee seeks to address the risk of foreign influence on U.S. elections it should do so by imposing broadly-applicable rules for all multinational corporations, or for any corporations which employ foreign nationals or do business outside the United States. This would recognize the realities of corporate ownership and management and would strengthen the argument that any new legislation in this regard was narrowly tailored to address the Congress' compelling interest in protecting the integrity of American elections.

We appreciate the opportunity to share these perspectives with the Committee and would be happy to address any questions or provide additional information to the Committee as it considers these critical issues.

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Hearing before the
Senate Committee on the Judiciary

"We the People? Corporate Spending in American Elections after *Citizens United*"

Wednesday, March 10, 2010

By Jeffrey Rosen

Professor of Law
George Washington University
Legal Affairs Editor
The New Republic

Dear Senator Leahy and members of the Senate Judiciary Committee,

Thank you very much for holding this hearing and inviting me to testify about the Supreme Court's recent decision in *Citizens United v. Federal Election Commission.* My name is Jeffrey Rosen; I teach constitutional law at George Washington University and am the Legal Affairs Editor of the New Republic and a nonresident senior fellow at the Brookings Institution.

The 5-4 ruling in *Citizens United* v. *Federal Election Commission* has been strongly opposed by Americans of both parties: last month, in a Washington Post-ABC News poll, 80% of respondents said they opposed the Court's decision to allow unregulated corporate spending in general elections, with relatively little difference among Democrats (85% opposed to the ruling) and Republicans (76% opposed). [1] That's not a surprise during a time of financial crisis when the influence of money in politics—Justice Louis Brandeis called it the "curse of bigness" and "our financial oligarchy"--is the most pressing political question of the day.

You asked me to testify about the constitutional implications of the decision – and what it suggests about the Roberts Courts' attitude toward corporate

[1] http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html

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interests and government regulation of the economy in the future. Unfortunately, the implications are not encouraging.

Citizens United is an activist decision by any definition of judicial activism. It is activist in its disregard of constitutional history, tradition, Supreme Court precedent, and the considered views of the President and Congress. It is precisely the kind of divisive and unnecessarily sweeping decision that Chief Justice John Roberts pledged to avoid in his confirmation hearings and after, when he said he would try to promote narrow, unanimous opinions, rather than deciding hotly contested questions by ideologically polarized, 5-4 votes. The most significant area where the Roberts Court has succeeded in achieving near unanimity is in cases affecting business interests, which tend to be decided in a pro-business direction. The broad rhetoric in *Citizens United* about the rights of corporations, combined with the apparent willingness of the 5-4 conservative majority on the Roberts Court to invalidate federal regulations that have broad bipartisan support, could lead to future confrontations between the Supreme Court and Congress on matters of economic fairness that citizens care intensely about.

Let me beginning by describing how *Citizens United* is hard to reconcile with the vision of bipartisan unity that Chief Justice John Roberts originally embraced. In 2006, at the end of his first term on the Court, Chief Justice Roberts said in several speeches and interviews that that he was concerned that his colleagues, in issuing 5-4 opinions divided along predictable lines, were acting more like law professors than members of a collegial court. His goal, he said, was to persuade his fellow justices to converge around narrow, unanimous opinions, as his greatest predecessor, John Marshall, had done. Speaking to the Georgetown University Law Center commencement in May, 2006, Chief Justice Roberts said:

[T]here are clear benefits to a greater degree of consensus on the Court. Unanimity or near unanimity promote clarity and guidance to lawyers and to the lower courts trying to figure out what the Supreme Court meant. Perhaps most importantly there are jurisprudential benefits: the broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible grounds. It's when the decision moves beyond what's necessary to decide the case that justices tend to bail out. If it's not necessary to decide more to dispose of a case, in my view it is necessary *not* to decide

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more.[2] In Felix Frankfurter's words, a narrow decisions helps ensure that we "do not embarrass the future too much."[3]

And in an interview with me for a book on the Supreme Court in July, 2006, Chief Justice Roberts talked extensively about how he hoped to achieve his vision of narrow, unanimous opinions. He expressed frustration about the focus in the media on the number of 5-4 decisions on the Court, and lamented that his colleagues were acting more like law professors than members of a collegial Court. "If the Court in Marshall's era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have," Roberts said. "That suggests that what the Court's been doing over the past thirty years has been eroding, to some extent, the capital that Marshall built up." Roberts added, "I think the Court is also ripe for a similar refocus on functioning as an institution, because if it doesn't it's going to lose its credibility and legitimacy as an institution."[4]

In particular, Chief Justice Roberts declared, he would make it his priority, as Marshall did, to discourage his colleagues from issuing separate opinions. "I think that every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they're writing separately, about the effect on the Court as an institution."[5]

Chief Justice Roberts praised justices who were willing to put the unanimity of the Court above their own ideological agendas. "A justice is not like a law professor who might say … I had a consistent theory of the first Amendment as applied to a particular area,'" he explained. [6] He said he would try to emphasize the benefits of unanimity for individual justices, in order to effect what he called the "team dynamic": "You do have to put people in a situation where they will appreciate, from their own point of view, having

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[2] *See also PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F. 3d 786, 799 (CADC 2004) (Roberts, J., concurring in part and concurring in judgment). ("[I]f it is not necessary to decide more, it is necessary not to decide more."

[3] Chief Justice John Roberts, Commencement Address, Georgetown University Law Center, May, 2009, available at: http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144.

[4] http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/5559/

[5] Id.

[6] Jeffrey Rosen, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 224 (2007).

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the Court acquire more legitimacy, credibility, that they will benefit from the shared commitment to unanimity in a way that they wouldn't otherwise."[7] He said he intended to use his power to assign opinions when he is in the majority to achieve as broad a consensus as possible.[8] And while acknowledging that he had set himself a daunting task in trying to resist the polarizing of the judiciary with 5-4 decisions, he said he also viewed it as a "special opportunity" in our polarized age. "Politics are closely divided," he observed. "The same with Congress. There ought to be some sense of stability [in the Court] of the government is not going to polarize completely. It's a high priority to keep any kind of partisan divide out of the judiciary as well."[9]

I was impressed by the Chief Justice's concern about the bipartisan legitimacy of the Court and have doubt that he meant what he said when he talked repeatedly about the importance of promoting narrow, unanimous opinions. I was also encouraged by the fact that in his first term, which his colleagues had treated as something of a honeymoon, the Court decided just 13 percent of cases by a 5-4 margin, one of the lowest rates in recent history. And so I watched with interest his efforts to promote unanimity over the past three terms, where his success was more mixed. In the term that ended in 2007, the percentage of 5-4 soared to 33 percent, a ten year high, as the justices divided bitterly along ideological lines in cases involving partial birth abortion, affirmative action, and campaign finance. (The percentage of 5-4 decisions would fluctuate up and down a bit over the next two years, falling to 20% in the 2008 term and rising back to 29% in the 2008 term, which ended last June.)[10]

There has been one category of cases in which Chief Justice Roberts has managed to steer the Court toward narrow, nearly unanimous opinions: those involving business interests. About forty percent of the Court's docket is now made up of business cases, up from thirty percent in recent years, and seventy-nine percent of them are decided by margins of seven to two or better.[11] The best measure of the pro-business orientation of the Supreme Court is the success rate of Chamber of Commerce's National Chamber

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[7] Id. at 226.
[8] Id. at 227.
[9] Id. at 233.
[10] http://www.scotusblog.com/wp-content/uploads/2009/06/full-stat-pack.pdf, p. 7.
[11] Jeffrey Rosen, *Keynote Address, Santa Clara Law Review Symposium: Big Business and the Roberts Court*, 49 SANTA CLARA L. REV. 929, 932 (2009).

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Litigation Center, which files briefs in cases that affect the "unified interests of American business."[12] In the 2006 term, Chief Justice Roberts's first term on the Court, The Chamber's litigation center filed briefs in fifteen cases and won thirteen of them, the highest percentage of victories in the center's thirty-year history.[13] If you leave out the environment, labor and employment cases, which tend to be more political polarized, and look at the remaining forty-six business cases before the Roberts Court in which the Chamber participated as of 2009, most of them are decided in a pro-business direction, in areas ranging form punitive damages preemption, false claims acts, securities suits, and antitrust cases.[14]

So this was the record of the Roberts Court on the eve of the *Citizens United* decision: near unanimity in many pro-business cases, and – with the exception of one important 8-1 decision avoiding a constitutional confrontation over the Voting Rights Act – bitter 5-4 ideological divisions in cases involving affirmative action, abortion, campaign finance, and religion.

That's what made *Citizens United* such an important test of Chief Justice Roberts's vision for the Court. After all, a narrow grounds for avoiding a constitutional conflict in *Citizens United* was certainly available. Just as Chief Justice Roberts had held in the voting-rights case that Congress intended to let election districts bail out of federal supervision, he could have held—even more plausibly--in *Citizens United* that Congress never intended to regulate video-on-demand or groups with minimal corporate funding. The free speech interests of the producers of the film in question, Hillary the Movie, are significant, but First Amendment values could have been protected with a far narrower opinion that avoided broad, unnecessary, and historically unsupported claims about how corporations share the same First Amendment rights as real American citizens. By ruling narrowly, the Roberts Court could have protected free speech without calling into questions decades of regulations of corporate speech in American elections. And this sensible compromise – protecting the free speech rights of small, mostly ideologically oriented corporations while regulating the speech of huge for profit corporations (which still have the option of speaking through PACS), would have been consistent with the historical pattern of regulation of corporate speech in American dating back to the Progressive era.

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[12] Jeffrey Rosen, "Supreme Court, Inc.," *New York Times Magazine*, March 16, 2008.
[13] Id. at 933.
[14] Id.

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But Chief Justice Roberts choose not to avoid a constitutional conflict. He assigned the majority opinion to Justice Anthony Kennedy, who wrote an unnecessarily sweeping opinion declaring that corporations are persons with full First Amendment rights. The majority opinion is perfectly principled as an abstract discourse on the First Amendment, and indeed is supported by some civil libertarian liberals. It is a plausible, if highly abstract, reading of the text of the First Amendment, completely removed from its historical context – the kind of opinion that could have been written by Chief Justice Earl Warren. But it is a highly activist opinion, if you take any of the many definition of constitutional activism that Chief Justice Roberts had pledged to avoid. In particular, as Justice John Paul Stevens pointed out in his powerful dissent, the opinion refuses to defer to the text of the First Amendment, which distinguishes between the freedom of speech and freedom of the press, the original understanding of the Constitution, the settled traditions of the American people, as expressed for more than a century by the President and Congress, and it overturns or mischaracterizes several important Supreme Court precedents.

My colleague Doug Kendall will discuss how both the majority and concurring opinions in *Citizens United* mischaracterize constitutional text and original understanding and the longstanding traditions of the American people in suggesting that the rights of corporations are identical to those of real people. But as Justice Stevens noted, the opinion seems baseless as a matter of original understanding – "unless one evaluates the First Amendment's 'principles' or its 'purpose' at such a high level of generality that the historical understandings of the Amendment cease to be a meaningful constraint on the judicial task."[15] The text of the Constitution does not refer to corporations as persons; but it does distinguish between "the freedom of speech, or of the press," suggesting that the Framers were perfectly capable of treating newspaper corporations differently than other for profit corporations.

As the debate between Justice Scalia and Justice Stevens shows, the framers of the First Amendment did not think extensively about the rights of corporations when the Bill of Rights was ratified, because general

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[15] *Citizens United v. Federal Elections Commission*, 558 U.S. ___ (2010) (Stevens, J. concurring in part and dissenting in part), Slip. Op. at 39, available at http://www.supremecourtus.gov/opinions/09pdf/08-205.pdf

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incorporation statutes did not emerge until the 1800s.[16] To the degree the framers thought about corporations, they were concerned about the special privileges that might result from the grants of special charters. Moreoever, the majority in *Citizens United* ignores the powerful suspicion throughout American history of monopoly privileges and "class legislation" that favored for profit corporations. This tradition started in the Jacksonian era, was embraced by Abraham Lincoln and the Reconstruction Republicans, was extended by the trust-busting Theodore Roosevelt, and culminated in the work of Louis Brandeis during the progressive era and Franklin Roosevelt during the New Deal. All of these economic populists, both Republican and Democratic, in the nineteenth and twentieth century, would have strenuously rejected the Supreme Court's claim that Exxon should have the same free speech rights as a mom and pop proprietor.[17]

The longstanding American suspicion of corporate monopoly power is embodied in a century of federal laws that the *Citizens United* decision could be read to call into question – ranging from the Tillman Act of 1907, when Congress banned all corporate contributions to candidates on the grounds, as the Senate Report observed, that "[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure," to the Taft Harley Act of 1947, where Congress extended the prohibition on corporate support of candidates to include not only direct contributions but also independent expenditures.

In addition to refusing to defer to the original understanding and longstanding traditions of Americans, the *Citizens United* decision is also troubling in its treatment of Supreme Court precedents. On this score, it's worth noting how unusual it is for the Court to overrule its own precedents. The Marshall Court didn't overturn a single constitutional precedent; and the Taney Court only one. The Hughes Court, which challenged Franklin D. Roosevelt during the New Deal and then retreated, overturned 25 precedents. The Warren Court, although criticized for activism, overturned

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[16] Id. at 36.

[17] *See Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-549 (1933) (Brandeis, J., dissenting (on fears of the "evils of business corporations.")

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32, which was less than the Burger Court, which overturned 76. And the Rehnquist Court overturned 39 precedents.[18]

Some originalist judges, such as Justice Thomas and, to a lesser degree, Justice Scalia, see nothing wrong with overturning precedents that clash with the original understanding of the constitution: on the Rehnquist Court, Justice Thomas voted to overrule more precedents per year than any other justice, followed by Scalia and then Rehnquist and Kennedy. [19] But Chief Justice Roberts in his confirmation hearings took a very different approach. He described himself a "bottom up" rather than a "top down" judge, a perspective said included a respect for stare decisis. Extending the metaphor of judicial modesty, he compared judges to umpires.

In his first terms on the Court, Chief Justice Roberts was criticized by both his liberal and conservative colleagues for chipping away at precedents incrementally rather than overturning them openly, but nevertheless joining opinions that held the exact opposite of what the Court had held only a few years early. In *Federal Election Commission v. Wisconsin Right to Life*, for Example, a 5-4 majority struck down a provision of the Bipartisan Campaign Reform Act (BCRA) that limited expenditures by corporations, a provision that the Court had upheld only four years earlier in McConnell v. FEC. But Roberts refused to overrule McConnell openly, leading Justice Scalia to object:

> [T]he principal opinion's attempt at distinguishing McConnell is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules McConnell without saying so. See post, at 24–25 (Souter, J., dissenting). This faux judicial restraint is judicial obfuscation.[20]

In *Citizens United*, Roberts seemed to vindicate Scalia's charge. "Relying largely on individual dissenting opinions, the majority blazes through our precedents," Justice Stevens declared, "overruling or disavowing a body of case law including FEC v. Wisconsin Right to Life, Inc., 551 U. S. 449 (2007) (WRTL), McConnell v. FEC, 540 U. S. 93 (2003), FEC v.

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[18] Michael J. Gerhardt, THE POWER OF PRECEDENT 11-12 (2008).
[19] Id. at 12.
[20] *Wisconsin Right to Life v. Federal Election Commission*, 551 U.S. ___ 2007 (Scalia, J., concurring in part and concurring in the judgment), slip op. at 17 & n. 7, available at http://www.supremecourtus.gov/opinions/06pdf/06-969.pdf

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Beaumont, 539 U. S. 146 (2003), FEC v. Massachusetts Citizens for Life, Inc., 479 U. S. 238 (1986) (MCFL), NRWC, 459 U. S. 197, and CalMedical Assn. v. FEC, 453 U. S. 182 (1981)."[21]

Even more troubling, in the eyes of the dissenters, was the fact that the majority did not characterize these precedents candidly. For example, Justice Stevens said the majority had mischaracterized *Buckley v. Valeo*, the landmark campaign finance decision, in suggesting that it was only concerned about quid pro quo corruption rather than less explicit forms of undue influence on the electoral system. (Congress had come to the opposite conclusion in extensive fact-finding that the majority ignored.) And the majority also mischaracterized earlier opinions in claiming that the Supreme Court has always protected corporate speech as vigorously as the speech of real people. "The only relevant thing that has changed," Stevens wrote, "is the composition of this Court."[22]

Why would Chief Justice Roberts have said he wanted to promote narrow, unanimous opinions while insisting on broad protection for the rights of corporations even though narrower grounds were available? Perhaps he thought he could produce a unanimous court by convincing his liberal colleagues to come around to his side, rather than by meeting them halfway. In the most revealing passage in his concurrence in *Citizens United*, he wrote that "we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right."[23] But the great practitioners of judicial restraint had a very different perspective. "A Constitution is not intended to embody a particular economic theory," Oliver Wendell Holmes wrote in his most famous dissent, in *Lochner* v. *New York*. "It is made for people of fundamentally differing views."[24] Holmes always deferred to the president and Congress in the face of uncertainty. He would never have presumed that he knew the "right" answer in a case where people of good faith could plausibly disagree.

Why should the public care that the Roberts Court now seems willing to impose ideologically divided, constitutionally polarizing opinions rather than narrow, unanimous ones? As Chief Justice Roberts himself recognized,

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[21] *Citizens United v. FEC* (opinion of Stevens, J.), Slip. Op. at 3.
[22] Id. at 23.
[23] *Citizens United v. FEC*, Roberts, C.J., concurring, Slip. Op. at 4.
[24] *Lochner v. New York*, 198 U.S. 45, 75-6 (1905) (Holmes, J., dissenting.)

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this is a highly polarized age, and when the Court imposes bold decisions on a divided nation on the basis of slim majorities, it risks a political backlash. Is the Court, therefore, on the verge of repeating the error it made in the 1930s? Then, another 5-4 conservative majority precipitated a presidential backlash by striking down parts of FDR's New Deal.

One lesson from the 1930s is that it takes only a handful of flamboyant acts of judicial activism for the Court to be tarred in the public imagination as partisan, even if the justices themselves think they are being moderate and judicious. Although vilified today for their conservative activism, both the Progressive and New Deal-era Courts had nuanced records, upholding more progressive laws than they struck down. As Barry Cushman of the University of Virginia notes, of the 20 cases involving maximum working hours that the Court decided during the Progressive era, there were only two in which the Court struck down the regulations. But those two are the ones that everyone remembers. And, during the New Deal era, Cushman adds, we remember the cases striking down the National Industrial Recovery Act and the first Agricultural Adjustment Act, forgetting that the Court upheld the centerpiece of FDR's monetary policy and, by a vote of 8-1, the Tennessee Valley Authority.

It may be hard to imagine a full-scale assault by the Roberts Court on Obama's regulatory agenda because, with the exception of Justice Thomas, the conservatives on today's Court tend to be pro-business conservatives, rather than libertarian conservatives, and are therefore unlikely to strike down government spending programs (like the Troubled Asset Relief Program) that help U.S. business. But it's not hard to imagine the five conservative justices reversing other economically progressive regulations on the basis of contested constitutional arguments. Later this term, for example, the Court may follow *Citizens United* with another activist decision, striking down the Public Company Accounting Oversight Board (nicknamed "Peek-a-Boo"), which was created to regulate accounting firm auditors in the wake of the Enron and Arthur Andersen scandals. If the Court strikes down Peek-a-Boo, even if the decision is narrow enough not to call into question the constitutionality of the Federal Reserve, it may turn rumbling against the Court's activism into full-blown outrage.

It's impossible, at the moment, to tell whether the reaction to *Citizens United* will be the beginning of a torrential backlash or will fade into the ether. But the Roberts Court is now entering politically hazardous territory. I continue

VerDate Nov 24 2008 12:05 Oct 13, 2010 Jkt 058420 PO 00000 Frm 00142 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\58420.TXT SJUD1 PsN: CMORC

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to admire Chief Justice Roberts's original bipartisan vision of unanimity and consensus and still hope that he has enough political savvy and historical perspective to recognize and avoid the shoals ahead. But the success or failure of his tenure will turn on his ability to align his promises of restraint with the reality of his performance. At this moment in our economic history, the American people are concerned about the influence of corporations in our political life, and this Committee should be concerned, too, when bipartisan legislation is struck down by activist judges on the basis of questionable constitutional arguments imposed by ideologically polarized, 5-4 majorities. We have seen narrow conservative majorities strike down progressive economic regulations in the name of corporate rights before -- and it always ends badly for the Court.

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Before the United States Senate Committee on the Judiciary

"We the People? Corporate Spending in American Elections after Citizens United"

Wednesday, March 10, 2010; 10 a.m.

226 Dirksen Senate Office Building

Testimony of:

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I'd like to thank Chairman Leahy, Ranking Member Sessions, and the rest of the committee for the opportunity to testify today on behalf of the Center for Competitive Politics.

Although I want to briefly note that the Court's decision in *Citizens United* is one of the most clearly correct decisions of the Court's term, the focus of my comments will be on why Congress need not 'fix' this sound decision, and on some of the constitutional and policy problems with the framework for legislative action released by Senator Charles Schumer and Congressman Chris Van Hollen last month.

***1. Citizens United* was decided correctly.**

Clearly, the Supreme Court's decision in *Citizens United* is correct. To understand why, one must only review what the position of the government was in that case. It was the position of the United States government that under the First Amendment to the Constitution, Congress and state legislatures have the power to prevent a corporate publisher, such as Simon & Schuster, Random House, or the Free Press, from publishing, or a corporate bookseller, such as Borders Books, from distributing a 500-page book containing even one sentence advocating for or against the election of a political candidate. Clearly that is wrong. It was the position of the United States that the government has the authority, consistent with the First Amendment, to prohibit the distribution of political books over Amazon's Kindle or Barnes & Noble's Nook. Clearly such a holding would not be supported by the majority of the American people, or comport with their understanding of the First Amendment. It was the position of the government that, despite the First Amendment, it could prevent a union from hiring an author to write a book, perhaps something like, "Why Working Americans Should Support the Obama Agenda." I would be interested to know if any of the majority members of this panel really believe that this could be a correct interpretation of the First Amendment. And of course, it was the position of the U.S. government that it could prevent a non-profit group such as Citizens United—and thus presumptively a for-profit corporation such as Tri-Star, or Cinemark Theatres—from producing or distributing a political documentary, such as *Fahrenheit 9/11* or *All the*

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President's Men. I will leave it to members of this panel to state here today if they think that this is a correct reading of the First Amendment.

It has been suggested that the Court could have reached its decision on more narrow grounds, yet it is worth noting that neither the government, nor any of the dissenters, nor the *amici* who weighed in on the side of the government, actually endorsed any such grounds for reversing the lower courts, suggesting that they agree that the government has the power to censor political speech as outlined by the government in the case, and that they don't really believe that other, more narrow grounds were really available to the majority.

When we look at the position of the government, we see that *Citizens United* was indeed an easy case, and the only thing that should alarm anyone is that four members of the Supreme Court, and a great many elected politicians, seem to believe that indeed the government does have the power to prevent Barnes & Noble, or Amazon, or Random House, or Tri-Star, or the UAW, or Citizens United from engaging in such basic political speech. I hope that nobody on this panel is willing to step forward today to defend this extreme position adopted by the Supreme Court minority.

2. There is no justification for the hysteria over *Citizens United* or for a rush to 'fix' the Court's holding

Much ink has been spilled about the public's reaction to *Citizens United*. *The Washington Post* and 'reform' organizations have published polls purporting to show that as many as 80 percent of Americans oppose the Supreme Court's decision and that a majority favors swift congressional action to thwart the Court's clear ruling.

Nonsense. People are not protesting in the streets en masse over this landmark decision. Those polls used inaccurate and misleading questions to elicit these bogus results. As Matt Sundquist noted in a March 5th post on *SCOTUSblog*, the preeminent Supreme Court chronicler, "both surveys used imprecise language to make defective claims. That the surveys may have misinformed their respondents is a cause for

VerDate Nov 24 2008 12:05 Oct 13, 2010 Jkt 058420 PO 00000 Frm 00146 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\58420.TXT SJUD1 PsN: CMORC

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concern..."[1] The reform organizations' poll is also biased because it first "primed the pump," if you will, with a series of loaded questions asking voters about campaign finance and special interest groups.

The Center for Competitive Politics (CCP)—the organization I chair—commissioned a poll earlier this month that did not use such "pump priming" questions, and that asked voters specifically if they agreed with what the Court actually held, rather than a vague characterization about overturning laws. Despite a month of ridiculously harsh criticism by the press, the reform lobby, and by incumbent politicians (including the President's comments at the State of the Union), our results, which are attached to this prepared testimony, found that an absolute majority of respondents (51 percent) supported the Supreme Court's decision when asked about the actual case and its result, against just 17 percent who disagreed. Furthermore, a strong majority of respondents—63 percent—rejected giving government "the power to limit how much some people speak about politics in order to enhance the voice of others." Only 16 percent supported giving Congress that authority. Indeed, we found that nearly twice as many respondents—30 percent—would favor censoring the institutional press than would favor muffling Citizens United. So our First Amendment liberties are not always as secure as we'd like to think. Those who are trying to undermine the Court's legitimacy, and the legitimacy of its ruling in *Citizens United* are, it seems to me, playing with fire, attempting to rouse citizen opposition to our most basic First Amendment liberties.

Fortunately, a majority of Americans still supports the Court's fundamental holding—that the First Amendment doesn't just protect the individual pamphleteer; it protects all individuals and associations from government censorship and restriction of political speech. Unless Congress seeks to narrowly update disclosure provisions for independent expenditures—which the Court deemed constitutionally permissible—there is no need to "fix" the Court's well-reasoned ruling, which was an important step to restoring political speech to the primacy it deserves under the First Amendment.

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[1] SCOTUSblog, "Imprecise language and Citizens United polling," March 5, 2010; http://www.scotusblog.com/2010/03/imprecise-language-and-citizens-united-polling/

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Even Lawrence Lessig, a professor at Harvard Law School and a prominent critic of the Court's opinion, said: "The package the Democrats are proposing is filled with ideas that either won't work or that, if they worked, would only invite the Supreme Court to strike again."[2]

I emphasize again: the government's position in *Citizens United* was that under the Constitution, it had the power to ban the distribution of books through Kindle; to prohibit political movies from being distributed by video-on-demand technology; to prevent Simon & Schuster from publishing, or Barnes & Noble from selling, a 500-page book with even one sentence of candidate advocacy; or to prevent a union from hiring a writer to author a book about the benefits of the Obama agenda for working Americans. For all the outrage about this opinion, no one has seriously defended that position.

3. **Twenty-eight states have had these independent expenditure freedoms for decades with no evidence of corruption or problems with campaigns as a result**

Before *Citizens United*, 26 states allowed unlimited corporate spending in elections (and two more allowed limited corporate spending), and these states—representing over sixty percent of the nation's population—were not overwhelmed by corporate or union spending in state elections.

Moreover, they include the top five rated states in *Governing* Magazine's ranking of the best governed states (Utah, Virginia, Washington, Delaware and Georgia). Furthermore, prior to McCain-Feingold, corporations could fund "issue ads," hard-hitting ads that discussed candidates and issues but stopped short of asking citizens to vote in any particular way. In defending McCain-Feingold in the courts, "reformers" argued stridently that these "issue ads" were no different in effect from the "express advocacy" ads the *Citizens United* Court ruled corporations have a right to make, and the Court had expressly adopted that view in *McConnell v. Federal Election Commission.*[3]

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[2] Mother Jones, "Cure for Campaign Finance Ruling?" Feb. 11, 2010; http://motherjones.com/mojo/2010/02/dems-reveal-response-citizens-united-decision

[3] *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)

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If that is true, then the change in the law is merely, as a practical matter, back to the status quo of the 1980s and 1990s. While some people many not like that change, it is difficult to argue that elections improved, or special interest influence declined, during the seven year reign of McCain-Feingold. Indeed, CCP's March poll on campaign finance issues asked whether McCain-Feingold, which "placed new restrictions on corporate and union political spending and contributions to political parties, with the goal of reducing special interest influence," succeeded. Most people disagreed—by a 3-to-1 margin. Forty-four percent of likely voters thought the legislation failed while just 14 percent thought it succeeded; 32 percent weren't sure. In fact, polling shows that confidence in government was much higher during the 1990s— the peak of the "soft money" boom—than it has been at any time since McCain-Feingold was passed to "restore confidence" in government.[4]

Examining the independent expenditure evidence in these states even more closely, there's no reason to believe that corporate expenditures have posed a corruption problem. For example, the California Fair Political Practices Commission examined the top ten funders of state independent expenditure committees from 2001-2006 and found that little corporate money was involved.[5]

The top ten contributors were two Native American tribes, two individuals, five labor unions and an association of plaintiffs' attorneys. Unions spent $17 million, tribes spent $9.6 million, two individuals with personal connections to candidates spent $9.6 million and consumer lawyers spent $1.7 million. Ordinary business corporations did not even make the list.

4. The Van Hollen-Schumer framework has serious constitutional and policy flaws

As Sen. Schumer and Rep. Van Hollen continue to craft a bill to circumvent the Supreme Court's ruling in *Citizens United*, the Center for Competitive Politics analyzed their preliminary legislative framework

[4] "The Fallacy of Campaign Finance Reform," by John Samples, published in 2006; p. 114
[5] California Fair Political Practices Commission, "Independent Expenditures: The Giant Gorilla in Campaign Finance," June 2008; p. 22, Chart #2. California is a state that allows unlimited corporate political expenditures.

VerDate Nov 24 2008 12:05 Oct 13, 2010 Jkt 058420 PO 00000 Frm 00149 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\58420.TXT SJUD1 PsN: CMORC

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and concluded that it bears a striking resemblance to provisions of McCain-Feingold, some of which were ruled unconstitutional as recently as 2008 in *Davis v. FEC* and this year in *Citizens United:*

New restrictions on corporate and union speech

(i.) A ban on independent expenditures by U.S. subsidiaries and government contractors?

With partisan tensions running high in Washington, it's easy to scapegoat pariah multinationals like AIG and Toyota. The Court's language in *Citizens United*, though, rejects such efforts to silence unpopular voices in the corporate form. "We find no basis for the proposition that, in the context of political speech, the government may impose restrictions on certain disfavored speakers," Justice Anthony Kennedy wrote for the majority.[6] A provision to ban companies with more than 20 percent "foreign" ownership would only restrict the rights of U.S. nationals to associate for political involvement because of a non-controlling foreign shareholder.

Of course, no one seriously believes that the ban on corporate spending was enacted to prevent foreign corporations from engaging in spending, nor did the government defend the statute on that basis. Yet even if we take that argument in good faith, it makes little sense.

First, a separate and broad provision of the law bans all foreign nationals from participating financially in any U.S. election, from dog catcher to president.[7] While it is true U.S. subsidiaries of foreign owned corporations could spend money in an election (just as they were able to do in twenty-eight states before *Citizens United*), to do so the subsidiary must be U.S. incorporated, U.S. headquartered, and must make expenditures from funds earned in the United States. A foreign corporation could not simply funnel money into the company to then make expenditures. Furthermore, no foreign national can be involved, directly or indirectly, in any way, in decisions to spend, or on how to spend, any funds for political purposes.

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[6] *Citizens United v. Federal Election Commission*, 558 U. S. ____ (2010), p. 25
[7] 2 U.S.C. § 441c and 11 C.F.R. § 115.5

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Second, to address hypotheticals about foreign entities bankrolling our elections, as President Obama claimed in his State of the Union address, it would be a violation of the law for a Saudi prince or Venezuelan dictator Hugo Chavez to suggest to U.S. citizens making decisions in "foreign-controlled" U.S. subsidiaries that those corporations spend money in an election.

Third, these U.S. subsidiaries are already able to spend unlimited sums lobbying Congress, promoting or opposing state ballot measures, or running issue ads that were allowed even under McCain-Feingold. Additionally, these U.S. subsidiaries already have, and have long had, the right to create and pay the expenses for corporate Political Action Committees (PACs), which can not only spend on political races without limit, but can contribute directly to candidates.

In McCain-Feingold, Congress banned speech paid for by corporations in unions that dared mention a candidate's name near an election. *Citizens United* struck that provision down. In the Van Hollen-Schumer framework, a de facto ban on corporate speech is proposed by banning corporations that contract with the government—no minimum contract amount was specified in the framework—from exercising their First Amendment rights to speak out in elections.

In order to satisfy Equal Protection and Due Process concerns, such provisions would also need to apply to public employee unions, doctors, and other groups and individuals who rely on government funding or assistance.

Even if Congress were prepared to prohibit all of these classes of people from speaking out in elections, restrictions on the political expenditures of government contractors, U.S. subsidiaries and other corporations pose constitutional problems. Both of these provisions—restricting government contactors or U.S. subsidiaries and companies with more than 20 percent "foreign" ownership— appear to violate the Unconstitutional Conditions Doctrine, which bars the government from imposing a condition on the grant of a benefit which requires the relinquishing of a constitutional right. The Doctrine also holds that the

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government cannot do indirectly what it cannot do directly—in this case, restrict corporate political expenditures after the *Citizens United* Court explicitly allowed such speech.

The Supreme Court ruled in *Pickering v. Board of Education*[8] that a school may not fire a teacher for exercising his First Amendment right to free political speech. The decision created a balancing test, protecting the First Amendment rights of government agents when they are act on their own behalf and not for their official duties.

In *Frost v. Railroad Comm'n*[9], the Court cited a previous case to support its holding that the government could not require a corporation to give up its constitutional rights in order to operate:

> For, conceding the right of a state to exclude foreign corporations, we must no [sic] overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, *that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the federal Constitution.* [emphasis added]

The federal government has since prohibited direct contributions from—and independent expenditures by—foreign nationals.[10] The government has also banned direct contributions[11] by federal contractors, but the government has not banned independent expenditures by these corporations, perhaps because to do so would violate the Unconstitutional Conditions Doctrine. The Supreme Court held in *Citizens United* that independent expenditures, unlike direct contributions to candidates, do not pose a threat of corruption that would allow the government to regulate such speech:

> [T]his Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy.[12]

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[8] *Pickering v. Board of Education*, 391 U.S. 563 (1968); A later case, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), clarified that First Amendment protections of public employees or agents of the government is not absolute if they are acting in their official capacity but the *Pickering* balancing test still applied.
[9] *Frost v. Railroad Commission of State of California*, 271 U.S. 583 (1926)
[10] 2 U.S.C. §§ 441e(a)(1)(A),(C)
[11] 2 U.S.C. § 441c and 11 C.F.R. § 115.5
[12] *Citizens United v. Federal Election Commission*, 558 U. S. ____ (2010), p. 5-6

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The government provides benefits to all sorts of people and groups—public employee unions, doctors, teachers, welfare and food stamp recipients, Social Security recipients and many others. The government cannot condition these benefits on relinquishing First Amendment rights.

At the very least, Congress must compile a record supporting a compelling government interest in order to justify to a court why independent expenditures—whether by government contractors or U.S. subsidiaries—must now be regulated in contrast to the Supreme Court's explicit ruling in *Citizens United*.

(ii.) Restrictions on corporate expenditures by redefining shareholder governance?

Some congressional leaders, spurred on by self-styled reform groups, have demanded "shareholder protection laws" with onerous and impossible requirements, like forcing shareholders (even mutual-fund holders) to approve each individual expenditure that their companies make on politics—including Web ads, mail, e-mail, and other forms of communication, on top of television ads. A hearing on this topic is scheduled tomorrow [March 11] before a House Financial Services subcommittee.[13]

Shareholders, though, already have corporate governance procedures if they are unhappy with management. They may vote directors out or introduce shareholder resolutions. But they are not required to approve each corporate charitable donation (say, to the Sierra Club or a local church), production decision (say, one that will reduce profits slightly but also reduce the company's carbon footprint), or commercial advertisement (even those with political overtones, such as Audi's "Green Police" ad run during the Super Bowl). Many of these activities are controversial and opposed by some shareholders. Corporations have for years donated to charitable organizations that are often quite controversial, such as Planned Parenthood, or even the Boy Scouts, yet Congress has not felt the need to intercede. This suggests what in fact we know to be true about at least some of those urging such a response to *Citizens United*—they are in fact less

[13] House Financial Services Committee, Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, "Corporate Governance after Citizens United," accessed March 7, 2010; http://www.house.gov/apps/list/hearing/financialsvcs_dem/hrcm_030410.shtml

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concerned about protecting minority shareholders than silencing majority shareholders. The *Citizens United* ruling merely gives shareholders the choice to engage in political speech if they wish, in the same fashion as other corporate decisions—rather than stifling them with a blanket ban.

The new rallying cry seems to be a combination of simultaneously attacking shareholder rights while claiming to defend them. The attack on shareholders' rights comes in the form of claims, voiced by Justice Stevens in his dissent, by Justice Ginsburg at oral argument, and by numerous liberal commentators, that corporations really have no rights, since they are "creatures of the state."

Yet for well over one hundred years, it has been recognized that corporations possess constitutional rights as "persons." Few, for example, would endorse the proposition that a corporation could have its property seized (i.e., the property of the natural persons who are its shareholders) without due process. While corporations do not have the ability to exercise, as corporations, all constitutional rights, they have long been recognized as able to assert constitutional rights where doing so is necessary to preserve the rights of the corporate members or shareholders. Thus, when a corporation asserts a right to speak, it is really the members of the corporation asserting a right to associate and to speak as a group. That is why corporations possess First Amendment speech rights (as opposed to the Fifth Amendment right against self-incrimination, or the right to vote, which are only exercised on an individual basis, not through association in the group).

At the same time that the *Citizens United* dissenters launch their assault on shareholder rights, they claim to be defending the rights of shareholders. This odd position seems to be the result of schizophrenic beliefs about a subsidiary issue. The desire to "do something," as we have seen, comes about precisely from the belief that corporations, when engaging in political participation, will focus solely on turning a profit for their shareholders, as Justice Stevens said in his *Citizens United* dissent. This is the *quid pro quo* rationale that has long undergirded campaign finance restrictions, since *Buckley v. Valeo*, and even the "corrosion" rationale behind the now overruled *Austin v. Michigan Chamber of Commerce*: corporations will attempt to

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influence public policy solely to gain undue favors that enrich their shareholders. Yet now, we are told that corporate spending must be limited to protect those same shareholders from corporations "squandering their property in federal elections."[14] Thus, corporate spending on politics must be limited because corporate managers (unlike other wealthy individuals such as George Soros?) will promote policies in the interest of the corporation, but must be restricted from doing so because they are simultaneously "squandering" corporate resources. The two propositions cannot not work in tandem.

If shareholder rights are indeed at issue, then the problem really arises when managers spend corporate funds in ways not intended to boost corporate profits. This is why critics attack *Citizens United* as allowing corporate managers to "spend other people's money." But even if this is true, this is a question not of campaign finance law, but of corporate law.

What is really under attack here is the business judgment rule. But if the business judgment rule is the problem, corporate political spending is the least of our worries. Even before McCain-Feingold, Fortune 500 companies spent roughly ten times as much money on lobbying as on campaign expenditures. Must shareholders approve all lobbying in advance? (And, from the public interest side, is it better if corporations seek to exercise influence by lobbying lawmakers rather than lobbying the public, through campaign spending?). Furthermore, these companies give away roughly ten times as much money as they spend on lobbying. These donations can go not only to such causes as United Way or the local opera, which many shareholders might not like, but to controversial "political" charities, including groups such as the Brennan Center for Justice (which has long received corporate contributions to support its crusade for campaign finance "reform," without ever expressing concern for whether the shareholders were in agreement with its agenda), Planned Parenthood, and even the Boy Scouts, once non-controversial but now a lightning rod for gay rights organizations (which, themselves, are sometimes controversial recipients of corporate charity). Many corporations voluntarily support affirmative action, even though many shareholders disagree with

[14] SCOTUSblog, "What Should Congress Do About Citizens United?" Jan. 24, 2010; http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united

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such policies. The managers do this under the business judgment rule. Similarly, managers may decide to increase pollution within legal limits in order to boost profits, though some shareholders would prefer they do not—or they may decide to make a voluntary reduction in pollution at some cost in profitability, even though some shareholders would prefer that they do not. Or corporations may run product ads suggesting that competitors are not treating their customers fairly, leading some shareholders to fear that the long-term effects of such ads will be to turn public opinion in favor of industry-wide regulation that will harm the corporation's own profitability. But these types of decisions are all made under the business judgment rule.

Corporate law scholars have long wrestled with the scope of the business judgment rule—indeed, it may be fair to say that there is no more vexing issue in corporate law than the question of how to have efficient corporate governance while preventing officers and managers from betraying their duties to shareholders. But that is precisely why it would be a huge mistake to make a radical assault on long considered issues of corporate law due to a short term populist panic about corporate political spending, which is a miniscule portion of what any for-profit corporation does.

The lack of wisdom in these proposals is illustrated by the fact that there is no evidence that any substantial percentage of decisions on corporate political spending is in fact opposed by shareholder majorities. It seems more likely that the opposite is true. These proposals are clearly intended to make it much harder, if not impossible, for the shareholder majority to support its own best interests (which, again, the reformers seem to presume is contrary to the policy preferences of the reformers), in the name of shareholder rights. It is hard to defend any of this as a potential victory for shareholder rights, rather than an effort to silence voices that the silencers seem to assume they will not like.

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(iii.) *Requiring corporations, unions and advocacy groups to create separate segregated accounts for political expenditures?*

The Van Hollen-Schumer framework "would require corporations, labor unions, and organizations organized under 501(c) 4, 5, or 6 laws—as well as 527 organizations—to, for the first time, establish separate 'political broadcast spending' accounts to receive and disperse political expenditures."[15]

Yet, the majority opinion suggests a strong prejudice against requiring the establishment of separate, segregated accounts for political expenditures before a group may speak. Consider Justice Kennedy's comments regarding PACs in the *Citizens United* majority opinion[16]:

> A PAC is a separate association from the corporation. So the PAC exemption from §441b's expenditure ban, §441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with §441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations ... PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs ... PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.

Any further regulations Congress imposes on corporations, unions and other groups seeking to exercise their First Amendment right to fund independent expenditures should not simply add to the layers of complicated regulations that already apply to such speech. For example, the Federal Election Commission categorizes political speech into 33 different types and recognizes 71 kinds of "speakers."[17] Campaign finance statutes and regulations span over 800 pages and FEC explanations of these regulations run more than 1,200 pages. The First Amendment's explanation of how Congress should regulate political speech, of course, has 10 words: "Congress shall make no law ... abridging the freedom of speech."

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[15] Election Law Blog, "SUMMARY OF CITIZENS UNITED LEGISLATION; Introduced by Senator Charles E. Schumer & Congressman Chris Van Hollen," accessed March 7, 2010; http://electionlawblog.org/archives/schumer-vanhollen.pdf
[16] *Citizens United v. Federal Election Commission*, 558 U. S. ____ (2010), p. 21-22
[17] *The Washington Post*, George Will, "Congress choked political speech," Jan. 30, 2010

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'Stand By Your Ad'

The 'Stand By Your Ad' (SBYA) provisions in the Van Hollen-Schumer framework are modeled after the McCain-Feingold provision requiring federal candidates to appear in their ads to 'approve' the message. Even some prominent "reform" advocates, such as Professor Rick Hasen of Loyola Law School, argued that this provision was likely unconstitutional.[18] Former political consultant—and current Obama advisor—David Axelrod called the provision "absurd" and "just one more example of reform gone amok."[19] Nonetheless, the Supreme Court upheld this silly provision in *McConnell v. Federal Election Commission.* [20] (Does anyone really think that "Stand By Your Ad" has had any effect on improving campaigns?).

Still, that provision dealt only with candidates, and a provision compelling the speech of independent groups may face a tougher constitutional obstacle—especially when sponsors of the BCRA provision openly admitted that it attempted to chill certain political speech. The provision's sponsor, Sen. Ron Wyden, claimed it would discourage negative ads. Yet SBYA has failed miserably to curb negative campaigning—not that such restrictions would be a sound governmental interest anyway, especially when incumbents are writing laws to restrict independent groups and not just candidates.

It's far from clear that Congress should even endeavor to restrict negative ads; they are not only a mainstay of campaigning, they are an important way in which voters learn about candidates, as Vanderbilt Professor John Geer demonstrated in his landmark study of negative ads from 1960 to 1996[21]. Independent groups, unions, small business and candidates must point out the shortcomings, silly statements, or unpopular positions of incumbents or candidates they oppose because they will not do so. The voter benefits from that information.

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[18] Election Law Blog, "Is BCRA's "Stand by Your Ad" Provision Constitutional?" Nov. 13, 2003; http://electionlawblog.org/archives/000246.html

[19] *New York Times*, "Fine Print Is Given Full Voice in Campaign Ads," Nov. 6, 2003; http://www.nytimes.com/2003/11/08/us/fine-print-is-given-full-voice-in-campaign-ads.html

[20] *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)

[21] "In Defense of Negativity: Attack Ads in Presidential Campaigns," by John Geer, published in 2006; http://www.press.uchicago.edu/presssite/metadata.epl?mode=synopsis&isbn=9780226285009

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But even if one still dislikes negative ads, it's pretty hard to argue that the "Stand By Your Ad" provision has reduced negativity. In 2008, researchers at the University of Wisconsin found that more than 60 percent of Barack Obama's ads, and almost 80 percent of ads for John McCain, were negative.[22]

"Stand By Your Ad" also adds to the cost of political ads and reduces relevant information conveyed to voters. In the Van Hollen-Schumer framework, lawmakers seek to force corporate heads—and, presumably, union leaders and other nonprofit officials—to appear in political ads, thereby discouraging them from criticizing incumbents and candidates.

Moreover, what would be gained? The theory behind the original candidate SBYA provision was that candidates would be less negative if they were closely associated with their ads. Almost certainly this has not worked in practice. What reason is there to think that having a CEO appear onscreen to "claim" the ad make any difference? For one thing, there are almost certainly no more than a handful of corporate executives who would be recognizable to any meaningful segment of the population. Consumers do not "vote" against corporate executives —if they don't like what the corporation is doing, they vote against the corporation by not buying its product. But corporate ads must already state the name of the corporate sponsor.

Again, at a bare minimum, Congress must compile a factual record to show why the written disclaimer on broadcast advertisements is not sufficient to satisfy the public interest of who is funding the ads and why it is necessary to compel corporate and union heads to spend 10 to 15 percent of their advertising time to personally explain that, yes, they approved the ad of their organization. I doubt that this can be done with a straight face.

[22] Advertising Age, "Study: Obama Gains on McCain in Negative-Ad Race," Oct. 31, 2008; http://adage.com/campaigntrail/post?article_id=132167

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Constitutionality of 'Lowest Unit Rate'

In McCain-Feingold, Congress included a provision easing contribution limits for candidates facing self-funded opponents. In the 2008 case, *Davis v. Federal Election Commission*, the Supreme Court struck down this provision as an unconstitutional speech-leveling scheme.[23]

Nevertheless, in a Feb. 11 press conference touting the legislative framework, Sen. Schumer explained that Congress could constitutionally require broadcast stations to give candidates and parties the "lowest unit rate" if they're subject to ads run by corporations or unions. (Candidates already enjoy the "lowest unit charge" to book preemptable ads. This provision could conceivably allow candidates to buy non-preemptable ads in any time slot at the lowest rate.)

"We have found this to be very, very effective in terms of the so-called Millionaires' Amendment, and we're applying the same type of rules here," Schumer said. "And that is constitutional."[24]

This proposal is an example of why campaign finance legislation written by members of Congress almost never avoids self-dealing. "Lowest Unit Rate" marginalizes the speech of outside groups and favors candidates—especially incumbents. So, for example, a Senator could buy ads bashing "big banks" or "Company X" at the lowest unit rate, but a banking association or that company would have to pay the highest rate to respond to the ad. This poses obvious constitutional concerns. *Davis* invalidated the "Millionaires' Amendment" of McCain-Feingold, which allowed candidates higher contribution limits when facing an opponent spending a large amount of his or her own money. If Congress cannot do that, it seems clear that it also cannot punish outside groups for political spending that criticizes Members of Congress or congressional candidates. Nor can it effectively punish the opposing candidate in the race (by giving his opponent non-pre-emptable lowest unit rate ads) for speech by a corporation or union made independently of that candidate.

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[23] *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008)
[24] C-SPAN video library, "Campaign spending rules," Feb. 11, 2010; http://www.c-spanvideo.org/program/id/219503

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Coordination' standard could regulate and restrict First Amendment-protected grassroots legislative advocacy

At Federal Election Commission hearings March 2-3[25], Commissioners heard testimony from several witnesses regarding its pending coordination rulemaking, including comments on a regulatory proposal identical to the one proposed by the Van Hollen-Schumer framework: "For all federal elections, at any time before the 90- or 120-day window opens, it would ban coordination of ads between a corporation or union and the candidate when they promote, support, attack or oppose a candidate."

Witnesses from across the political spectrum—representing unions, business groups, party committees and liberal advocacy groups—criticized the "promote, support, attack or oppose" (PASO) coordination standard as vague and overbroad. Of the panel's 11 witnesses, only two defended the onerous standard while eight criticized it (one witness did not address it). In particular, Michael Trister, counsel for the Alliance for Justice—a coalition of liberal-leaning nonprofit groups— noted that "reform" organizations acknowledged in FEC comments in 2002 that a PASO standard would sweep in legislative advocacy by 501(c)3 and other nonprofit groups and urged the Commission not to adopt such a standard for that reason.

Those witnesses who did not support the PASO standard urged a standard similar to the so-called WRTL test, which would ban the coordination of ads "if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Chief Justice Roberts articulated that standard in *Federal Election Commission v. Wisconsin Right to Life*.[26]

Any legislation Congress considers should adopt the WRTL standard for coordination in order to fully protect the First Amendment rights of grassroots groups lobbying Congress on legislation.

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[25] Federal Election Commission, "FEC Holds Public Hearing on Coordinated Communications," March 4, 2010; http://www.fec.gov/press/press2010/20100304Hearing.shtml

[26] *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)

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5. Conclusion: the First Amendment does not need a 'fix'

Citizens United was clearly decided correctly. Moreover, it does not lead the nation into uncharted waters— quite the contrary, a majority of the nation's population was already living under the rule of *Citizens United* when it came to state races. The panicky legislative proposals to "fix" the decision are unlikely to be popular with the public, and more importantly, they tread on constitutional rights and are unlikely even to address the "problem" they claim to "fix." The obvious partisan motivation of many proponents of such "fixes" is likely to increase public cynicism of Congress.

The First Amendment, frankly, does not need a "fix."

Thank you again Chairman Leahy, Ranking Member Sessions and committee members for allowing me to testify today before the Senate Judiciary Committee on this important topic. I have attached to my testimony recent articles I've published on *Citizens United*, a poll the Center for Competitive Politics conducted on the decision and the Center's campaign finance policy recommendations:

Appendix A: "Poll on *Citizens United* shows broad support for free political speech, opposition to speech regulation"; poll conducted March 1-2 on behalf of the Center for Competitive Politics

Appendix B: "After Citizens United: A Moderate, Modern Agenda for Campaign Finance Reform," policy recommendations by the Center for Competitive Politics

Appendix C: "The Case for Corporate Political Spending," commentary published Feb. 27, 2010 in the Wall Street Journal Online

Appendix D: "*Citizens United*, Shareholder Rights, and Free Speech: Restoring the Primacy of Politics to the First Amendment, Parts I and II," commentary published Feb. 2, 2010 in SCOTUSblog

Appendix E: "The Myth of Campaign Finance Reform," commentary published in the Winter 2010 issue of National Affairs magazine

Appendix F: "The Citizens United Fallout," commentary published Jan. 25, 2010 in City Journal

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March 4, 2010

POLL ON *CITIZENS UNITED* SHOWS BROAD SUPPORT FOR FREE POLITICAL SPEECH, OPPOSITION TO SPEECH REGULATION

Victory Enterprises surveyed 600 likely voters—respondents identified as likely voters in the Nov. 2010 general election for federal, state and local candidates—from March 1-2. The poll, commissioned by the Center for Competitive Politics, has a +/-4.0 percent margin of error with a 95 percent confidence interval.

SCRIPT and TOPLINE RESULTS

The U.S. Supreme Court recently ruled that incorporated entities—businesses, unions, and nonprofit advocacy groups—have a First Amendment right to spend money from their general treasuries to fund independent advertisements urging people to vote for or against candidates for public office. The case involved a nonprofit group called Citizens United that wanted to promote and distribute a movie it had produced that was critical of a presidential candidate.

Q1. Are you aware of or have you followed the recent *Citizens United* case, related to corporate and union spending in elections, decided by the Supreme Court last month?

Yes	133	22.2%
No	358	59.7%
Not Sure/Undecided	77	12.8%
Refused	32	5.3%

Q2. Do you believe that the government should have been able to prevent Citizens United, an incorporated nonprofit advocacy group, from airing ads promoting its movie?

Yes	105	17.5%
No	307	51.2%
Not Sure/Undecided	162	27.0%
Refused	26	4.3%

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Q3. Do you believe that the government should have been able to prevent Citizens United, an incorporated nonprofit advocacy group, from making its movie available through video-on-demand technology?

Yes	114	19.0%
No	307	51.2%
Not Sure/Undecided	145	24.2%
Refused	34	5.7%

Q4. Do you think that the government should have the power to limit how much some people speak about politics in order to enhance the voices of others?

Yes	99	16.5%
No	378	63.0%
Not Sure/Undecided	86	14.3%
Refused	37	6.2%

Q5. Do you believe that newspapers, television, and other media have substantial influence on political campaigns?

Yes	352	58.7%
No	139	23.2%
Not Sure/Undecided	68	11.3%
Refused	41	6.8%

Q6. Do you support or oppose government-imposed restrictions on newspapers, television, and other media in order to equalize political influence?

Strongly Support	70	11.7%
Somewhat Support	111	18.5%
TOTAL SUPPORT	**181**	**30.2%**
Strongly Oppose	206	34.3%
Somewhat Oppose	101	16.8%
TOTAL OPPOSE	**307**	**51.1%**
Not Sure/Undecided	88	14.7%
Refused	24	4.0%

This poll surveyed 600 likely voters—respondents identified as likely voters in the Nov. 2010 general election for federal, state and local candidates—from March 1-2. It has a +/-4.0 percent margin of error with a 95 percent confidence interval.

Q7. Do you support or oppose giving the federal government the ability to censor the production and distribution of political books and movies that are produced and distributed by corporations, including publishers like HarperCollins and movie studios like Warner Brothers?

Strongly Support	61	10.2%
Somewhat Support	86	14.3%
TOTAL SUPPORT	**147**	**24.5%**
Strongly Oppose	234	39.0%
Somewhat Oppose	99	16.5%
TOTAL OPPOSE	**333**	**55.5%**
Not Sure/Undecided	92	15.3%
Refused	28	4.7%

Q8. And do you support or oppose allowing the federal government to impose criminal or civil penalties against individual citizens or corporations for spending money to engage in political speech?

Strongly Support	74	12.3%
Somewhat Support	96	16.0%
TOTAL SUPPORT	**170**	**28.3%**
Strongly Oppose	220	36.7%
Somewhat Oppose	78	13.0%
TOTAL OPPOSE	**298**	**49.7%**
Not Sure/Undecided	106	17.7%
Refused	26	4.3%

Q9. In 2002 Congress passed the Bipartisan Campaign Reform Act, also known as "McCain-Feingold." The law placed new restrictions on corporate and union political spending and contributions to political parties, with the goal of reducing special interest influence.

Do you believe that McCain-Feingold has been successful in reducing special interest influence?

Yes	85	14.2%
No	265	44.2%
Not Sure/Undecided	194	32.3%
Refused	56	9.3%

This poll surveyed 600 likely voters—respondents identified as likely voters in the Nov. 2010 general election for federal, state and local candidates—from March 1-2. It has a +/-4.0 percent margin of error with a 95 percent confidence interval.

Now I'd like to ask you a few hypothetical questions that relate to the Supreme Court's ruling.

Q10. Suppose the state legislature in your state proposed a budget that cuts millions of dollars from education and requires terminating several thousand teachers. Do you support or oppose permitting the state teachers union to pay for and run radio and television ads that support state legislative candidates who oppose the cuts?

Strongly Support	158	26.3%
Somewhat Support	110	18.3%
TOTAL SUPPORT	**268**	**44.6%**
Strongly Oppose	154	25.7%
Somewhat Oppose	55	9.2%
TOTAL OPPOSE	**209**	**34.9%**
Not Sure/Undecided	88	14.7%
Refused	35	5.8%

Q11. Now suppose Congress introduced legislation to increase the payroll tax, and a trade association of small business owners predict it will increase business costs and lead to employee layoffs. Do you support or oppose allowing the trade association to pay for and run radio and television ads to criticize candidates who support the tax?

Strongly Support	126	21.0%
Somewhat Support	109	18.2%
TOTAL SUPPORT	**235**	**39.2%**
Strongly Oppose	169	28.2%
Somewhat Oppose	60	10.0%
TOTAL OPPOSE	**229**	**38.2%**
Not Sure/Undecided	94	15.7%
Refused	42	7.0%

This poll surveyed 600 likely voters—respondents identified as likely voters in the Nov. 2010 general election for federal, state and local candidates—from March 1-2. It has a +/-4.0 percent margin of error with a 95 percent confidence interval.

Q12. Now suppose the President proposed an energy bill that most environmental groups support. Do you support or oppose allowing the Sierra Club and other national environmental groups to pay for and run radio and television ads urging citizens to vote for members of Congress who support the President's energy bill?

Strongly Support	152	25.3%
Somewhat Support	119	19.8%
TOTAL SUPPORT	**271**	**45.1%**
Strongly Oppose	128	21.3%
Somewhat Oppose	58	9.7%
TOTAL OPPOSE	**186**	**31.0%**
Not Sure/Undecided	97	16.2%
Refused	46	7.7%

Q13. Now suppose your state legislature is considering a bill raising taxes on restaurants. Do you support or oppose allowing these businesses to pay for and run radio and television ads urging state residents to oppose candidates who support higher taxes on restaurants?

Strongly Support	145	24.2%
Somewhat Support	111	18.5%
TOTAL SUPPORT	**256**	**42.7%**
Strongly Oppose	140	23.3%
Somewhat Oppose	61	10.2%
TOTAL OPPOSE	**201**	**33.5%**
Not Sure/Undecided	97	16.2%
Refused	46	7.7%

This poll surveyed 600 likely voters—respondents identified as likely voters in the Nov. 2010 general election for federal, state and local candidates—from March 1-2. It has a +/-4.0 percent margin of error with a 95 percent confidence interval.

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After Citizens United

A Moderate, Modern Agenda for Campaign Finance Reform

Prepared by the

Center for Competitive Politics

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Introduction

On Jan. 21, 2010, the U.S. Supreme Court handed down its ruling in *Citizens United v. Federal Election Commission*, dramatically altering the campaign finance landscape for federal candidates. Previously silenced, incorporated businesses and unions as well as many advocacy organizations and trade associations will be able to spend money directly from their general treasuries advocating the election or defeat of federal candidates.

While the full impact of this ruling will be unknown for several years, there is little doubt that the ruling in *Citizens United* places candidates and political parties at a distinct disadvantage to incorporated entities that wish to spend independently. While candidates and political committees remain limited in their ability to raise funds to communicate their message, incorporated entities face no such limit.

This unlevel playing field was noted by Supreme Court Justice Breyer during oral arguments, when he observed that "...the country [would be] in a situation where corporations and trade unions can spend as much as they want... but political parties couldn't... [and] therefore, the group that is charged with responsibility of building a platform that will appeal to a majority of Americans is limited, but the groups that have particular interests, like corporations or trade unions, can spend as much as they want..."

In *After Citizens United: A Moderate, Modern Agenda for Campaign Reform,* the Center for Competitive Politics proposes a modest agenda of six proposals that will help to put candidates and parties closer to a level playing field with individuals and corporations engaged in independent expenditures.

We believe these modest steps towards reform can attract broad, bipartisan support because they do not dramatically alter the current system. Many simply update decades-old laws that have failed to keep up with the times, while others allow more Americans to contribute and to give to more candidates.

It is our hope at the Center for Competitive Politics that this reform agenda will not only lead to more modern system of campaign finance regulation that shows greater respect for the First Amendment, but that it will also spur elected officials and the public to re-examine the fundamental premises on which current regulations and restrictions on political speech rest. We are confident that such a re-examination will lead to a better understanding of the First Amendment, and ultimately to further liberalization of speech regulations.

Brad Smith, Chairman Sean Parnell, President

1. Remove Limits on Coordinated Party Spending

Under *Buckley v. Valeo*, individuals and organizations have a right to engage in unlimited spending if they do so independent of a candidate's campaign. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission* ("Colorado I"), the Supreme Court clarified that this right extends to political parties. And, of course, in *Citizens United* the Court has now held that incorporated entities including businesses, unions, and trade associations have the right to draw on an unlimited amount of funds for independent expenditures.

At the same time, the law still limits how much political parties can spend in coordination with their candidates, a limitation upheld by the Supreme Court in *Federal Election Commission v. Colorado Republican Federal Campaign Committee* ("Colorado II").

The odd result of these cases is to drive a wedge between parties and candidates. Parties can spend unlimited sums to help their candidates, but only if they do so independently of the candidates — that is, without sharing information on the candidate's strengths and weaknesses, strategies, plans, polling data, and so forth. Prior to McCain-Feingold, this dichotomy might have made some type of sense, in that parties could accept and spend "soft" money — unregulated funds — to support candidates so long as they avoided "express advocacy" in spending their dollars. Therefore, "soft money" could be spent independently and hard money could be spent in coordination with the candidate.

Since McCain-Feingold, however, national political parties are prohibited from accepting any unregulated contributions. Thus, all party spending is "hard" — regulated and limited, money. There would seem to be no purpose in any longer limiting the ability of political parties to spend unlimited "hard" money in coordination with a campaign. Eliminating this barrier is unlikely to lead to any added spending — it would merely allow parties and candidates to do what parties and candidates ought to do: work together to gain election, and to spend money on the races they deem most important.

Beyond removing a needless barrier that raises the costs of campaigning, allowing parties and candidates to work together may actually increase accountability and confidence in the system. For example, in 2006, when some observers called on Tennessee Republican Senate candidate Bob Corker to denounce certain ads about his opponent being run by the National Republican Senatorial Committee, Corker had to say — truthfully — that he had nothing to do with the ads (nor could he have under the coordination restrictions).

Because most citizens simply do not believe that a candidate cannot somehow instruct his party on advertising, cynicism among the voting public increases when they are correctly told candidates cannot legally ask their own party to stop running a specific ad.

2. Restore Tax Credits for Small Contributions

Prior to the federal tax reform of 1986, taxpayers received a tax credit for political contributions up to $50, or $100 on a joint return. Adjusted for 1978 dollars (the last time Congress adjusted the amounts) it would today be approximately $165, or $330 on a joint return.

Restoring the tax credit at these levels would increase the pool of small donations available to candidates, which would make it easier to raise funds and reduce time spent fundraising. In addition, a tax credit might encourage more people to become involved in the political process and could do far more than contribution limits to restore faith in government.

3. Adjust Contribution Limits for Inflation, Including the Aggregate Limits

The McCain-Feingold bill doubled individual limits on giving to candidates and indexed them for inflation. This increase, however, accounted for barely half of the loss in value of contributions since the limits were first enacted in 1974. Moreover, other limits were not increased at all.

Had all contribution limits been increased with inflation since their enactment in 1974, by the time McCain-Feingold was passed in 2002 the limit for an individual to contribute to a campaign would have been approximately $3,650. The limit for PACs, both what an individual can contribute to a PAC and what the PAC can contribute to a candidate, would have been approximately $18,250.

Similarly, the aggregate limit for an individual in a two year election cycle would have been in excess of $180,000, up from the $50,000 allowed at that time by the law. McCain-Feingold partially redressed the problem, raising the aggregate limit over a two year election cycle to $95,000 and adjusting it for inflation, but this made up a bit less than half the deficit that had been created by the simple lapse of time.

Individual contributions to political parties show a similar story. Originally set at $20,000 per year, the limits were modestly raised and indexed for inflation in 2002. The annual limit on contributions to political parties is currently only $30,400, while it would be closer to $87,760 had it been indexed to inflation in 1974.

Much of the "soft money" problem that served as the justification for McCain-Feingold was, in reality, a hard money problem, created by contribution limits that were unadjusted for inflation, let alone population growth. By adjusting the contribution limits for inflation to match the original amounts set in 1974, much of the political funding that was first called "soft money" and that has since flowed to 527 and 501(c)4 groups to escape the low limits would instead flow back into candidates and political parties.

Restoring the original buying power of the 1974 contribution limits would also have the effect of reducing the demands on candidate time for fundraising while also providing a boost to lesser-known candidates who would be helped by higher limits. It is worth noting that in 2004, a previously little-known state senator from Illinois was able to build an effective campaign organization in his race for U.S. Senate in part because of the higher contribution limits he operated under thanks to the so-called "Millionaires Amendment" (since struck down by the U.S. Supreme Court in *Davis v. Federal Election Commission*). Four years later, of course, that relatively unknown state senator was elected President of the United States.

Higher contribution limits also address what many regard as the problem of self-funding candidates. While a candidate's wealth does not increase relative to contribution limits, the ability of non-wealthy opponents to raise funds to remain competitive would significantly increase.

4. Permit Independent Solicitation and Facilitation of Contribution to PACs

Congress should allow new groups making use of new technologies more leeway than they already enjoy under the Federal Election Campaign Act to empower existing PACs and small donors.

Currently, connected PACs are permitted to solicit contributions from a restricted class of potential donors, such as corporate executives, union members, or donors to a citizen group. Although they may not solicit contributions outside of their restricted class, they are permitted to accept them if someone wishes to donate.

ActBlue is a non-connected political committee that was formed to enable individuals, local groups, and national organizations to raise funds for Democratic candidates of their choice. ActBlue—which has its counterparts on the Republican side of the political spectrum—serves primarily as a conduit for contributions earmarked for Democratic candidates and political party committees. ActBlue lists Democratic candidates' campaign committees on its website, and it solicits contributions designated for those committees on its website's blog and fundraising pages. Viewers may make a contribution designated for a listed campaign committee through ActBlue's website.

ActBlue has in the past sought permission from the Federal Election Commission to solicit funds for the separate segregated funds (PACs) of corporations, labor unions, and associations. This request was largely denied by the Federal Election Commission, although the statutory language does not specifically bar what ActBlue wished to do.

PACs represent an opportunity for citizens to join together and associate themselves with their fellow citizens on specific interests and issues, and to speak with one voice through direct

contributions as well as through independent or coordinated expenditures. Expanding the potential sources of contributions for PACs without upsetting the prohibition on the use of corporate or union treasury funds to solicit beyond the restricted class would add yet another strong voice to the political process.

To strengthen the ability of PACs to compete with unlimited independent expenditures, Congress should clarify the laws regarding separate segregated funds and solicitation of restricted classes by allowing registered political committees that serve as conduits for other political committees to solicit contributions on behalf of the separate segregated funds of corporations, labor unions, and other associations.

5. Adjust Disclosure Thresholds for Inflation

Disclosure, according to the Supreme Court, helps to prevent corruption or its appearance by shedding sunlight on the money supporting candidates. It also can provide voters with helpful voting cues. The donations of interest groups and knowledgeable contributors may send signals to voters at large as to which candidates are worthy of support. And disclosure does not directly limit one's ability to speak. For these reasons, disclosure of contributions and expenditures is one part of the law on which most observers agree.

Disclosure is not, however, without its costs. Foremost among them is invasion of privacy. There are many reasons why people might wish to give anonymously. Some persons, for example, would not want their contributions to the Log Cabin Republicans, an organization of gay Republicans, to be disclosed publicly. Others will prefer to give anonymously in order to avoid retaliations by vengeful politicians. As John McCain himself argued in urging his colleagues to pass the McCain-Feingold law, many people will choose not to speak — and especially not to criticize incumbent lawmakers — if faced with disclosure.

Assuming that some disclosure of campaign contributions is worth these costs, we must still consider the level of disclosure. The Federal Election Campaign Act's (FECA) thresholds for reporting individual donors and independent expenditures have not been adjusted since 1979. As a result, these thresholds, low when enacted, are ridiculously low now: $200 and $250, respectively. It is absurd to believe that donations and expenditures of $200 to $250 pose a danger of corruption and undue influence in the political process. If these numbers had merely kept up with inflation, the threshold on disclosure of individual contributions would now be approximately $600, and the limit on the disclosure of independent expenditures would now be approximately $750.

Beyond the costs in privacy, mandatory disclosure at low levels may actually decrease whatever utility disclosure generally has. These small donations fill page after page in the reports of any

major campaign, making it more difficult and time-consuming to find large donors that may in fact provide "voting cues" to the broader public.

The extensive reporting of small contributions also increases the administrative burden on campaigns of reporting. This both raises the costs of campaigning and places the heaviest burden on small, grassroots campaigns, and on campaigns that rely more on small donors — curious results for the "reform" community to support.

Finally, raising the disclosure threshold may increase the number of Americans willing to contribute more than $200 to candidates, or even contribute at all, once they know their contribution will not become public knowledge and potentially subject them to retaliation.

Adjusting disclosure limits for inflation, as has already been partially done for contributions, would be a modest measure that would pose no danger of corruption and that would have a salutary effect on the system and the privacy rights of individuals, and potentially increase the funds available to candidates who must compete against unlimited independent expenditures in the post-*Citizens United* world.

6. Abolish the Prohibition on Corporate and Union Contributions

Today's corporate world is far different than it was in 1907 when the Tillman Act was enacted into law. It is difficult to see how banning contributions by advocacy groups — whether major organizations formed specifically to promote certain national issues, such as NARAL Pro-Choice America or the National Rifle Association — unleashes "great aggregations of wealth" into our politics. It is even more difficult to see how banning contributions from community groups, regional chambers of commerce, local unions, and local businesses does so.

Lifting the outright ban on corporate contributions does not mean permitting unlimited contributions. Corporate contributions could have the same limits imposed as individual or PAC contributions currently do, including aggregate caps and provisions to ensure that corporate subsidiaries aren't able to evade the cap. The advantages of doing this would be many.

First, operating a PAC is expensive. Many corporations and small trade associations spend as much money operating their PACs as those PACs actually spend on politics. But there are definite economies of scale, so that the expense of complying with PAC regulation tends to favor larger enterprises. Indeed, for many small corporations, the cost of maintaining a PAC and soliciting contributions is not worth the benefit. The same, of course, applies to unions — the repeal would favor small union locals. Current complex reporting requirements could be replaced by a simple statement of contributions at a reasonable point before any election.

The egalitarian effect here would not only come in contributions. Indeed, primarily it would come in the ability of smaller corporations and unions to host candidates and allow candidates to meet with employees and members. Present law blankets such activity, once common, with a web of restrictions and prohibitions. However, a corporation with a large PAC can pay for such activities through the PAC and thereby avoid this added regulation. Smaller businesses cannot. Not only would abolishing the PAC requirement favor smaller businesses, unions, and advocacy groups, it would promote more opportunities for direct worker-candidate interaction.

The Tillman Act also failed to foresee the rise of subchapter-S corporations (S-corp), which are in many cases, and perhaps in most, small businesses owned by a single individual or family. Owners of S-corps often send contributions to candidates from their company accounts, thinking of themselves as small-business owners and not corporations. This causes campaigns to have to return the contribution and explain to would-be contributors that they need to send a personal check instead, which typically means the business owner transfers money from their business account to their personal account, then writes the check using essentially the same funds. Allowing corporate contributions would end the confusion and hassle associated with S-corps.

Another advantage of abolishing the PAC requirement would come in streamlined enforcement. The complete ban on corporate and union contributions means that a violation occurs when the first dollar is spent. The FEC has detailed rules that prohibit, for example, corporate lobbyists from even touching personal checks written to candidates by corporate executives, or that make it illegal for a secretary in a corporation or union office to type a note from an officer to a colleague, urging the latter to make a contribution. These regulations could be largely scrapped, and the minor complaints that come with them flushed out of the system, simply by allowing some minimal level of corporate and union expenditure.

It will be said in some quarters that allowing corporations to spend funds for political activity directly from corporate treasuries is unfair to shareholders, but this argument does not hold water. Corporations are free to use shareholder funds now for any number of things, including activities with political overtones that many shareholders may oppose. This includes lobbying, something nearly all large corporations and many smaller engage in.

For example, a corporation may support the Boy Scouts, which some oppose because of their stance on homosexuality; or it may support Planned Parenthood, which some oppose because of its advocacy of abortion rights. These matters are traditional questions of corporate governance. They are not the province of campaign finance laws.

It should also be noted that replacing the ban on corporate and union contributions with reasonable limits would be harmonious with the *Buckley v. Valeo* admonition that the legitimate

constitutional purpose of limitations is to prevent corruption. It is hard to believe that a contribution from the treasury of a small business is any more "corrupting" than a contribution from a corporate PAC or from the CEO of a Fortune 500 company.

Over 30 states currently allow some corporate contributions. These states include Utah and Virginia, which allow unlimited corporate contributions, and were recently named among the best-governed states in America by the Pew-funded *Governing Magazine*. There is no evidence that states that allow corporate contributions in state races are more "corrupt" or less well governed than other states.

Finally, in an era in which incorporated entities are now free to engage in unlimited independent advocacy, allowing direct contributions would provide businesses, unions, advocacy groups, and trade associations an alternate option to support or oppose specific candidates. Rather than engaging in independent expenditures or contribute to a 527 or 501(c) organization, an incorporated entity might instead chose to contribute directly to a candidate or political party. This would be particularly beneficial for smaller entities, which might not have the funds or sophistication to mount an effective independent expenditure campaign.

Conclusion

Candidates for federal office in 2010 and beyond face a dramatically different campaign environment than that of 2008. Incorporated entities, including for-profit companies, unions, trade and professional associations, and advocacy groups are now free to conduct unlimited independent expenditure campaigns urging the election or defeat of specific candidates.

This new freedom for independent groups comes at a time when candidates, political parties, and PACs are limited to a greater extent than ever before in their own fundraising. Our proposals aim to modernize elements of the campaign finance system while removing some of the limits that put candidates, parties, and PACs at a disadvantage, while not fundamentally altering the general regulatory system that Congress has set in place over the last 35 years.

The six reforms offered here offer the best hope for candidates hoping to compete in the new campaign environment. Because of the modest nature of these reforms, we believe that bipartisan support in Congress and even the support of many in the pro-regulation community can be had for some if not all of these proposals. Restoring and enhancing the ability of candidates to effectively communicate their message to voters in a post-*Citizens United* world will improve our election process, and help to sustain the competitive balance vital to our democratic republic.

Summary for Policymakers

1) Remove Limits on Coordinated Party Spending
   a. Since all party spending is hard money, or regulated money, there is no purpose in limiting party expenditures in coordination with a campaign.
   b. This will allow parties and candidates to do what they ought to do – work together to gain election, and also increase accountability.

2) Restore Tax Credits for Small Contributions
   a. Restoring tax credits on small contributions would dramatically increase the pool of small donations available to candidates, making it easier to raise funds and reduce time spent fundraising.
   b. It would encourage more citizens to become involved in the political process and could do more than contribution limits in restoring faith in government.

3) Increase Contribution Limits, Including Aggregate Contribution Limits
   a. Increasing contribution limits would reduce the need for large donors to give to 527 and 501(c)3 organizations.
   b. It would free up candidate time from fundraising, because fewer large donors would need to be solicited.

4) Permit Independent Solicitation and Facilitation of Contributions to PACs
   a. Enabling more contributions to PACs beyond their restricted class would permit for more participation by citizens in the political process, allowing them to contribute regulated dollars directly to causes they support.
   b. Promotes more opportunities for direct interaction between workers and candidates.

5) Increase Disclosure Threshold
   a. Adjusting the threshold for disclosure for inflation back to 1979 would respect donor privacy and allow the focus to be on large contributions.
   b. Campaigns would shed the administrative burden of disclosing contributions that are in no way corrupting, lifting the burden on campaigns and grassroots groups that rely on small donations.

6) Abolish the Prohibition on Corporate and Union Contributions
   a. Repealing the corporate and union ban in favor of allowing direct corporate and union contributions, subject to limits, would reduce the need to fund independent expenditures or give to 527 and 501(c) organizations.
   b. Promotes more opportunities for direct interaction between workers and candidates.
   c. Streamlines enforcement by weeding out minor complaints from the system while allowing people to focus on larger donations.

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The Center for Competitive Politics (CCP) is a 501(c)(3) nonprofit organization based in Alexandria, Va. CCP's mission, through legal briefs, studies, historical and constitutional analyses, and media communication is to promote and defend citizens' First Amendment political rights of speech, assembly, and petition, and to educate the public on the actual effects of money in politics and the benefits of a more free and competitive election and political process. Contributions to CCP are tax deductible to the extent allowed by law.

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The Case for Corporate Political Spending

By BRADLEY SMITH

The U.S. Supreme Court's Jan. 21 decision in Citizens United v. Federal Election Commission struck down government prohibitions on the ability of corporations to spend money to support the election or defeat of a candidate. Dissenting from the court's opinion, Justice John Paul Stevens declared that the decision "undermines the integrity of electoral institutions around the nation." Some critics proclaimed it "the death of democracy." In response to the ruling, Sen. Chris Dodd (D., Conn.) announced plans this week to try to amend the Constitution to deal with the decision; Sen. Charles Schumer (D., N.Y.) and Rep. Chris Van Hollen (D., Md.) have proposed a package of changes aimed at placing such onerous and complex regulations on corporate spending that companies will be effectively unable to exercise what the court has held are constitutional rights.

Given the reaction, you can be forgiven if you did not know that even before the decision in Citizens United, 28 states, with 60% of the nation's population, already allowed corporations to make political expenditures in state elections, including Virginia, Oregon and Washington.

But isn't it true that Americans already spend too much on political campaigns? Well, the answer to that depends, of course, on what is "too much." In the two-year election cycle ending in Nov. 2008, campaign spending for all federal offices is estimated at approximately $5.3 billion. Is that too much?

The amount was just over one-third of what American spent on bottled water in 2007 alone; it is a bit more than one-quarter of what was spent on ice cream in 2008, and less than one-sixth of the $33 billion spent on weight-loss products in 2007. It was about 20% less than a single company, Procter & Gamble, spent on product advertising in the same period. And what about the Obama-McCain presidential race, the most expensive ever? The $2.4 billion spent on that race is close to what Verizon spent advertising its brand in 2008. Perhaps it simply costs more to explain to Americans the benefits of Verizon than the qualifications of candidates and their positions on complex political issues.

But political spending is higher than it used to be, right? Well, yes and no. In raw dollars, federal campaign spending rose by roughly 450% between 1988 and 2008. Adjusting the numbers for inflation, however, and we find that the growth drops to 141%; adjust for inflation and growth in GDP, the increase is just 23% over 20 years.

Campaign spending as a percentage of GDP remained essentially unchanged between the 1947 passage of the Taft-Hartley Act (the statute prohibiting all corporate spending in elections that was struck down in the Citizens United case) and 2008. In the cycle ending in Nov. 2008, spending on American election campaigns was equal to approximately 0.3% of GDP. By contrast, Indonesians spent over 1% of their GDP in election campaigns ending in April 2009. Nations that are much poorer than the U.S., such as Venezuela, have historically spent more money per capita on elections than we do.

But won't Citizens United open the floodgates to more corporate spending on elections? Again, the answer is yes

and no. More money will probably be spent, but it is highly doubtful that there will be a "torrent" of corporate cash.

The 28 states that already allow corporate campaign expenditures for state races (including governor, state legislature and attorney general) are not awash in corporate political spending. And while corporations have been prohibited from making political expenditures since 1947, prior to 2003 they could spend unlimited sums on "issue ads," which could excoriate or praise candidates so long as they stopped short of explicitly urging listeners to vote for or against those candidates. Campaign finance reformers claimed that these ads were the "functional equivalent" of campaign ads. The limits on these "issue ads" enacted as part of the McCain-Feingold Act in 2002 reduced this type of corporate spending, but it certainly did not stop the growth of total campaign spending, as parties, candidates and political operatives found other ways to raise and spend funds. Few people would argue that the added restrictions of McCain-Feingold have noticeably changed our campaigns.

Corporations have also been allowed to operate Political Action Committees, or PACs, for several decades. These PACs, funded by contributions from corporate officers, managers, shareholders and their families, can contribute up to $10,000 per election cycle directly to candidates, or spend unlimited amounts promoting candidates on their own. Yet only about 60% of Fortune 500 firms maintain a PAC. (The smallest of these 500 companies, asset management firm Legg Mason, has revenues of over $4.5 billion annually, so all of them can afford PACs, and all of them are large enough to be heavily touched by federal regulation and tax and spending policy.) Moreover, fewer than 5% of PAC contributions actually reach the $10,000 per election cycle limit. Even within the pre-Citizens United limits, corporate PACs had room to increase their direct contributions to candidates by 40 times the amount that they were already giving—and after that, they could have still used their PACs for more corporate spending on top of that. But they did not.

Furthermore, under the law, a corporation can pay all of the legal, accounting, compliance and administrative costs of a PAC out of its general treasury. Yet in recent years just over half of all contributions to corporate PACs have been used to pay for these administrative expenses. If large corporations wanted to free up more PAC money for actual political expenses, before Citizens United they could have immediately freed up some $300 million simply by paying their PAC administrative costs from their general treasuries. They did not.

In fact, in California, which allows unlimited corporate expenditures, the 10 largest reported funders of independent expenditure committees between 2001 and 2006 did not include a single corporation. Rather, the list consists of unions, Indian tribes and two individuals, the long-time business partner of one of the candidates, and the partner's daughter.

After Citizens United, there will likely be a modest uptick in overall corporate spending, but mostly by small- and mid-sized corporations. The substantial costs of operating a PAC under complex legal rules, and the limits on the number of people eligible to contribute to the PAC, make PACs ineffective for most small- and mid-sized businesses. And because it takes time to organize and fund a PAC, companies that don't establish a PAC well in advance of an election are left out in the cold if they later choose to participate in the election. The upshot of this is that the court's decision is unlikely to benefit America's largest companies as much as smaller businesses.

But perhaps this is all moot. Despite all the concerns about corporate domination of American politics, there is little evidence that corporate contributions "buy" special favors from the government. In a 2003 paper, political scientists Stephen Ansolabehere of MIT (now at Harvard), John de Figueiredo of UCLA and James Snyder of MIT noted that corporate political spending, even in the pre-McCain-Feingold era of "soft money" and "issue ads," was far lower than one would expect if such spending really bought legislative favors.

For example, the researchers found that even though the U.S. government spent $134 billion on defense procurement contracts, military suppliers spent just $10.6 million on electoral politics. Agribusinesses spent $3.3 million on electoral politics, while the government spent over $22 billion on agricultural loans and price supports. Oil and gas companies spent $33.6 million on politics, despite government subsidies of $1.7 billion.

At first glance, some will find this disturbing—look how much business can buy for relatively small amounts of

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political spending. But Prof. Ansolabehere and his colleagues point out that the opposite is true. If these corporate political expenditures were really "investments," the return is so enormous that we would expect far more money to be spent on electoral activity. For example, every $192,000 in political expenditures by the sugar industry appears to result in $5 billion in sugar subsidies. But if this "investment" were really yielding such returns, surely firms would devote more resources to it.

Of course, corporations are influential players in our political life, and it is appropriate that they should be: Large corporations are usually, almost by definition, among the largest employers where they are located; they pay substantial taxes; and they have millions of shareholders. Small corporations tend to be the leading producers of job growth. But if corporations are dominating politics, that is almost certainly not obvious to the typical small business owner, who faces a seemingly endless web of regulations. If large corporations are dominating politics through campaign spending, it seems hard to explain how these corporations ever allowed McCain-Feingold to pass in the first place. Corporations are affected by political regulation and ought to have the right to try to persuade the electorate that their interests matter.

Meanwhile, there are undoubtedly thousands of corporate CEOs out there who wish that increasing profitability required little more than throwing around a few campaign contributions and watching the astronomical returns roll in. Sadly for them, the story is not so simple.

Bradley Smith, a former chairman of the Federal Election Commission, is a professor of law at Capital University in Columbus, Ohio, and chairman of the Center for Competitive Politics.

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SUPREME COURT OF THE UNITED STATES BLOG
SCOTUS

Citizens United, Shareholder Rights, and Free Speech: Restoring the Primacy of Politics to the First Amendment, Part I

Commentary on the decision and reactions to it

Tuesday, February 2, 2010 1:57 p.m.

The following is an opinion piece on the decision in Citizens United v. Federal Election Commission *by Bradley A. Smith, Josiah H. Blackmore II/Shirley M. Nault Designated Professor of Law at Capital University Law School and chairman of the Center for Competitive Politics. Professor Smith is a former chairman of the Federal Election Commission. The post is divided into halves; the second part will follow shortly.*

Last month's Supreme Court decision in *Citizens United v. Federal Election Commission* is an important step to restoring political speech to the primacy it deserves under the First Amendment.

For years now, both outside observers such as I and members of the Court, most notably Justices Scalia and Thomas, have pointed out that the Court has been giving greater protection to such non-political speech as internet pornography, nude dancing, and the transmission of stolen communications than it has to core political speech. These charges, whether made in judicial opinions, such as Justice Thomas's dissent in *Nixon v. Shrink Missouri Government PAC*, or in public commentary have gone unanswered. It is, of course, relatively easier to defend the First Amendment when the consequences of doing so seem unlikely to upset one's own life or to have a broad impact (see, e.g., *East Hartford Education Association v. Board of Education,* upholding the right of a teacher not to wear a tie in the classroom), than it is when upholding the First Amendment may have major consequences for one's own cherished political beliefs. And let us make no mistake—there is a reason that the political left has been howling about *Citizens United*, and it is the belief that corporate political speech will benefit causes with which they disagree (see quotes from Democratic Senators and President Obama in recent newspaper stories here, here, and here).

In fact, the Supreme Court had to rule in favor of *Citizens United*, and what is remarkable is not that it did, but that four Justices dissented. Remember, the government's position in the case was that under the Constitution, it had the power to ban the distribution of books through Kindle; to prohibit political movies from being distributed by video on demand technology; to prevent Simon & Schuster from publishing, or Barnes & Noble from selling, a 500-page book with even one sentence of candidate advocacy; or to prevent a union from hiring a writer to author a book about the benefits to working Americans of the Obama agenda. For all the outrage about this opinion, I have yet to hear anybody seriously defend that result. The fact that not one of the dissenters could find a middle ground on which to concur in the judgment suggests that the majority was correct – this case was all or nothing. Far from being activist, the majority reached the only logical conclusion. The dissenters were the activists here, prepared to enforce an interpretation of the First Amendment wholly foreign to most Americans.

58420.141

In his critique of the decision here at SCOTUSblog, Professor Tribe avoids the hysteria that has taken over much of the left. While there is no doubt that this decision is important and will result in more public political speech (which I believe is a good thing), Professor Tribe notes that fears of an "overwhelming flood" of corporate political spending are overblown. Professor Tribe correctly points out that before Citizens United, twenty-six states already allowed unlimited corporate spending in elections (and two more allowed limited corporate spending), and these states, representing over sixty percent of the nation's population, were not overwhelmed by corporate or union spending in state elections. Moreover, they include the top five rated states in Governing Magazine's rating of the best governed states (Utah, Virginia, Washington, Delaware and Georgia). Furthermore, prior to the McCain-Feingold Act of 2002, corporations could fund "issue ads," hard-hitting ads that discussed candidates and issues but stopped short of asking citizens to vote in any particular way. In defending McCain-Feingold in the courts, reformers had argued vociferously that these "issue ads" were no different in effect from the "express advocacy" ads the Citizens United Court ruled corporations have a right to make, and the Court had expressly adopted that view in *McConnell v. FEC*. If that is true, then the change in the law is merely, as a practical matter, back to the status quo of the 1980s and 1990s. While many people do not like that change, it is difficult to argue that elections improved, or special interest influence declined, during the seven year reign of McCain-Feingold.

Nevertheless, Professor Tribe joins the chorus of those who seem to assume that Congress must "do something" about *Citizens United*. And here, the arguments have taken a curious twist.

The new rallying cry seems to be a combination of simultaneously attacking shareholder rights while claiming to defend them. The attack on shareholders' rights comes in the form of claims, voiced by Justice Stevens in his interminably long dissent, by Justice Sotomayor at oral argument, and by numerous liberal commentators, that corporations really have no rights, since they are "creatures of the state." In dissent, Stevens pulled a quote from the great Chief Justice John Marshall, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it" (*Dartmouth College v. Woodward*). Never mind that Justice Marshall found that the corporation did have constitutional rights – Stevens uses Marshall to argue that it does not.

Here again, Stevens reveals the radical, activist position of the dissenters. For well over one hundred years, it has been recognized that corporations possess constitutional rights as "persons." Few of us, for example, would endorse the proposition that a corporation could have its property seized (i.e., the property of the natural persons who are its shareholders) without due process. While corporations do not have the ability to exercise, as corporations, all Constitutional rights, they have long been recognized as able to assert constitutional rights where doing so is necessary to preserve the rights of the corporate members or shareholders. Thus, where a corporation asserts a right to speak, it is really the members of the corporation asserting a right to associate and to speak as a group. That is why corporations possess First Amendment speech rights (as opposed to the Fifth Amendment right against self-incrimination, or the right to vote, which are only exercised on an individual basis, not through association in the group).

If Stevens and the others who joined his opinion are serious in thinking that corporations have no rights other than those granted (at whim, apparently) by the state, they are perhaps the most radical group of justices we have ever seen, prepared to overturn hundreds of precedents from the nation's earliest days to the present.

58420.142

Citizens United, Shareholder Rights, and Free Speech: Restoring the Primacy of Politics to the First Amendment, Part II

Shareholder rights and foreign corporations

Tuesday, February 2, 2010 2:01 p.m.

The following is the conclusion of an opinion piece on the decision in Citizens United v. Federal Election Commission *by Professor Bradley A. Smith. The piece starts in the post below, here.*

At the same time that the *Citizens United v. FEC* dissenters launch their remarkable assault on shareholder rights, they claim to be defending the rights of shareholders. This schizophrenic position seems to be the result of schizophrenic beliefs about a subsidiary issue. The desire to "do something," as we have seen, comes about precisely from the belief that corporations, when engaging in political participation, will focus solely on turning a profit for their shareholders, as Justice Stevens said in the *Citizens* dissent. This is the *quid pro quo* rationale that has long undergirded campaign finance restrictions, since *Buckley v. Valeo,* and even the "corrosion" rationale behind the now overruled *Austin v. Michigan Chamber of Commerce*: corporations will attempt to influence public policy solely to gain undue favors that enrich their shareholders. Yet now, we are told that corporate spending must be limited to protect those same shareholders from, in Professor Tribe's words, corporations "squandering their property in federal elections." Thus, corporate spending on politics must be limited because managers (unlike other individuals?) will promote policies solely to maximize profits to the corporation, but must be restricted because in doing so they are "squandering" corporate resources. The two propositions do not work in tandem.

If shareholder rights are really at issue, then the problem really arises when managers spend corporate funds in ways not intended to boost corporate profits. This is why critics attack *Citizens United* as allowing corporate managers to "spend other people's money." But even if this is true, this is a question not of campaign finance law, but of corporate law. What is really under attack here is the business judgment rule. If the business judgment rule is the problem, corporate political spending is the least of our worries. Even before McCain-Feingold, Fortune 500 companies spent roughly ten times as much money on lobbying as on campaign expenditures. Must shareholders approve all lobbying in advance? (And, from the public interest side, is it better if corporations seek to exercise influence by lobbying lawmakers rather than lobbying the public, through campaign spending?). Furthermore, these companies give away roughly ten times as much money as they spend on lobbying. These donations can go not only to such causes as United Way or the local opera, which many shareholders might not like, but to controversial "political" charities, including groups such as the Brennan Center for Justice (which has long received corporate contributions to support its crusade for campaign finance reform, without ever expressing concern for whether the shareholders were in agreement with its agenda), Planned Parenthood, and even the Boy Scouts, once non-controversial but now a lightning rod for gay rights organizations (which, themselves, are sometimes controversial recipients of corporate charity). Many corporations voluntarily support affirmative action, even though many shareholders disagree with such policies. The managers do this under the business judgment rule. Similarly, managers may decide to increase pollution within legal limits in order to boost profits, though some shareholders would prefer they do not – or they may decide to make a voluntary reduction in pollution at some cost in profitability, even though some shareholders would prefer that they do not. Or corporations may run product ads

58420.143

suggesting that competitors are not treating their customers fairly, leading some shareholders to fear that the long-term effects of such ads will be to turn public opinion in favor of industry-wide regulation that will harm the corporation's own profitability. But these types of decisions are all made under the business judgment rule.

Corporate law scholars have long wrestled with the scope of the business judgment rule – indeed, it may be fair to say that there is no more vexing issue in corporate law than the question of how to have efficient corporate governance while preventing officers and managers from betraying their duties to shareholders. But that is precisely why it would be a huge mistake to make a radical assault on long considered issues of corporate law due to a short term populist panic about corporate political spending, which is a miniscule portion of what any for-profit corporation does.

Meanwhile, the various specific solutions posed also indicate a certain schizophrenia. Professor Tribe, having argued that shareholders must be protected from resources being "squandered" on political ads, seeks added disclosure on corporate ads. He argues that "the impact of a campaign ad, whether in the form of a thirty-second spot or an extended production, would be cut down to size if it had to be (accurately) presented as a self-interested attempt by big pharma or by a cigarette or oil company or a bank holding company or hedge fund to influence the outcome of a candidate election for the benefit of the sponsoring company's bottom line rather than masquerading behind a veil of public-spiritedness." But if the concern is really for shareholders, shouldn't we want the corporate spending to be done as effectively as possible, with as much impact as possible? Why would we limit that? (And as an aside, since when do most politicians, or individual voters, forthrightly declare that they simply want more stuff from the government, rather than hiding behind the "public interest"?)

Professor Tribe says that the idea is not "to suppress political speech," but in fact that is exactly the idea. He makes a series of proposals specifically designed to suppress political speech. For example, he wants all corporate political ads to feature the name of the corporation's CEO and the percentage of its treasury spent on the ad. But of what benefit would any of that be to the listening public? The apparent goal is simply to discourage speech. Moreover, he proposes making corporate executives personally liable for treble damages and attorneys' fees as a "deterrence" to spending corporate dollars on political activity. The basis of such claims would be a "federal cause of action for corporate waste." This would either be toothless, simply relying on the manager's claims of good faith, or would result in hindsight second guessing by prosecutors, minority shareholders, and juries as to whether the corporation could show specific *quid pro quo* benefits from its political involvement – exactly the thing that campaign finance reformers have long argued should be prevented, not required, when corporations engage in politics.

The lack of wisdom in these proposals is illustrated by the fact that there is no evidence that any substantial percentage of decisions on corporate political spending is in fact opposed by shareholder majorities. It seems more likely that the opposite is true. These proposals are clearly intended to make it much harder, if not impossible, for the shareholder majority to support its own best interests (which, again, the reformers seem to presume is contrary to the policy preferences of the reformers), in the name of shareholder rights. It is hard to defend any of this as a victory for shareholder rights, rather than an effort to silence voices that the silencers seem to assume they will not like.

58420.144

In summary, lacking a rationale for the corporate speech ban that can withstand even rational basis First Amendment analysis, opponents of corporate political speech are making a series of contradictory arguments, both underinclusive and overinclusive in their scope, in the name of shareholder rights, with the specific intent of hindering corporate speech by majority shareholders.

Finally and unfortunately, at this stage no discussion of *Citizens United* can be complete without addressing the question of foreign corporations engaging in political spending. Of course, no one seriously believes that the ban on corporate spending was enacted to prevent foreign corporations from engaging in spending, as opposed to all corporations, nor did the government defend the statute on that basis, but even if we take that argument in good faith, it makes little sense. First, a separate and very broad provision of the law clearly bans all foreign nationals from participating financially in any U.S. election, from dog catcher to president. It is true that U.S. subsidiaries of foreign owned corporations could spend money in an election (just as they were able to do in twenty-eight states before *Citizens United)*, but even to do that the subsidiary must be U.S. incorporated and U.S. headquartered, and must make expenditures from funds earned in the United States. So a foreign corporation could not simply run money into the company to then make expenditures. Furthermore, no foreign national can be involved, directly or indirectly, in any way, in decisions to spend, or on how to spend, any funds for political purposes. So to address one hypothetical I have heard, it would be a violation of the law for a Saudi billionaire to suggest to the U.S. citizens making decisions that the U.S. subsidiary spend money in an election. And finally, note that these U.S. subsidiaries are already eligible to spend unlimited sums on lobbying Congress or on promoting or opposing state ballot measures. Additionally, these U.S. subsidiaries already have, and have long had, the right to create and pay the expenses for corporate Political Action Committees, which can not only spend on political races without limit, but can contribute directly to candidates. The horror stories about foreign corporations simply illustrate, again, how weak are the both the First Amendment and broader Constitutional arguments against the Court's ruling in *Citizens United.*

Citizens United is important not because it will lead to a flood of corporate and union spending in political races, but because it re-establishes a core principle of First Amendment law, which is that the government cannot be in the business of discriminating against U.S. citizens engaged in political activity simply because of the organizational form of their engagement. But even if it should lead to a flood of corporate spending, the alternative endorsed by the government and the dissenting justices on the Supreme Court — an America where the government could ban political books and movies — is clearly far worse.

58420.145

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The Myth of Campaign Finance Reform

Bradley A. Smith

MARCH 24, 2009, MAY GO DOWN as a turning point in the history of the campaign-finance reform debate in America. On that day, in the course of oral argument before the Supreme Court in the case of *Citizens United v. Federal Election Commission*, United States deputy solicitor general Malcolm Stewart inadvertently revealed just how extreme our campaign-finance system has become.

The case addressed the question of whether federal campaign-finance law limits the right of the activist group Citizens United to distribute a hackneyed political documentary entitled *Hillary: The Movie*. The details involved an arcane provision of the law, and most observers expected a limited decision that would make little news and not much practical difference in how campaigns are run. But in the course of the argument, Justice Samuel Alito interrupted Stewart and inquired: "What's your answer to [the] point that there isn't any constitutional difference between the distribution of this movie on video [on] demand and providing access on the internet, providing DVDs, either through a commercial service or maybe in a public library, [or] providing the same thing in a book? Would the Constitution permit the restriction of all of those as well?" Stewart, an experienced litigator who had represented the government in campaign-finance cases at the Supreme Court before, responded that the provisions of McCain-Feingold could in fact be constitutionally applied to limit all those forms of speech. The law, he contended, would even require banning a book that made the same points as the Citizens United video.

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There was an audible gasp in the courtroom. Then Justice Alito spoke, it seemed, for the entire audience: "That's pretty incredible." By the time Stewart's turn at the podium was over, he had told Justice Anthony Kennedy that the government could restrict the distribution of books through Amazon's digital book reader, Kindle; responded to Justice David Souter that the government could prevent a union from hiring a writer to author a political book; and conceded to Chief Justice John Roberts that a corporate publisher could be prohibited from publishing a 500-page book if it contained even one line of candidate advocacy.

In June, the Court issued a surprising order. Rather than deciding *Citizens United*, the justices asked the parties to reargue the case, specifically to consider whether or not the Court should overrule two prior decisions on which Stewart had relied: *Austin v. Michigan Chamber of Commerce*, a 1990 case upholding a Michigan statute that prohibited any corporate spending for or against a political candidate, and *McConnell v. Federal Election Commission*, the 2003 decision that upheld the constitutionality of the 2002 McCain-Feingold law. The Citizens United case was reargued on September 9, and a decision is pending. But however the Court rules, the debate over campaign-finance laws appears to have suffered a shock.

To anyone following the evolution of the campaign-finance reform movement, it should have been obvious that book-banning was a straightforward implication of the McCain-Feingold law (and the long line of statutes and cases that preceded it). The century-old effort to constrict the ways our elections are funded has, from the outset, put itself at odds with our constitutional tradition. It seeks to undermine not only the protections of political expression in the First Amendment, but also the limits on government in the Constitution itself—as well as the understanding of human nature, factions and interests, and political liberty that moved the document's framers.

By putting the point so bluntly before the Supreme Court, Malcolm Stewart may have inadvertently set off a series of events that could, in time, erode the claim to moral high ground upon which the campaign-finance reform movement has always relied. At the very least, his frankness invites us to consider the origins and consequences of that movement—and the implications of its efforts for some cherished American freedoms.

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THE MISCHIEFS OF FACTION

Concerns about the political influence of the wealthy have never been far from the surface of American political life. The effort to restrict political spending—with the twin goals of preventing corruption and promoting political equality—began in earnest in the late 19th century. But in order to understand that movement and the intense debate it spawned, it is necessary to look back even further—to the founding of the American republic.

Figuring out how to keep special interests under control was a dilemma at the core of the Constitutional Convention. James Madison's most original contribution to political thought may well be his effort, in the Federalist Papers, to demonstrate how the new Constitution would ensure that private interests could not seize control of the government and use its power for their private benefit. Federalist No. 10 in particular addressed the tendency toward, and the dangers of, a government controlled by what Madison termed "factions."

In that essay, Madison recognized that there will always be individuals and interests seeking to use the government to their own ends. His entire approach to government, after all, was based on the notion, expressed in Federalist No. 51, that government is "but the greatest of all reflections on human nature"—and that by nature, men are not angels. Because partiality, the ultimate cause of faction, was "sown into the nature of man," Madison argued in No. 10, the causes of faction could not be controlled in a free republic—at least not without "destroying the liberty that is essential to its existence." This, he quickly added, would be a cure "worse than the disease." Madison's approach to the problem was therefore not to limit the emergence of factions, but to control their ill effects and, where possible, even to harness them for good.

To achieve this end, the Constitution relied on three primary devices. One was the separation of powers within the federal government. In three of the Federalist Papers—Nos. 47, 48, and 49—Madison elaborated at length on how the separation of powers would protect liberty and, by implication, prevent "factions" (what we would call special interests) from gaining control of the government. The other two devices, federalism and the idea of enumerated powers, were to work in tandem. The creation of separate spheres of action for the various state and federal governments—and the sheer size of the republic—would make

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it difficult for factions to gain control of the levers of power. "[T]he society itself will be broken into so many parts, interests, and classes of citizens," wrote Madison in Federalist No. 51, "that the rights of individuals, or of the minority, will be in little danger." Because the federal government would concern itself only with matters of "great and aggregate interests"—such as national defense, foreign policy, and regulation of commerce between the states—factions would be limited to minor squabbles of local concern, where they could do relatively little harm. The idea, then, was not to limit the freedom of factions, but to divide and limit the power of government itself so that factional interests could not dominate American politics. And the very fact of the multiplicity and diversity of factions would be a limit on the power of governing majorities.

Of course, a fourth bulwark was soon added: the Bill of Rights, and in particular the First Amendment. The First Amendment was in part a reflection of Lockean principles of natural rights. In Cato's Letters—which constitutional historian Clinton Rossiter has called "the most popular, quotable, esteemed source of political ideas in the colonial period"—John Trenchard and Thomas Gordon wrote that freedom of speech was "the right of every man." But the First Amendment guarantees of free speech, assembly, and press were not seen purely as protections against government encroachment on natural rights. Rather, as political scientist John Samples notes, the founders believed that "the liberty to speak would force government officials to be open and accountable." During the crisis over the Alien and Sedition Acts in the early years of the new republic, Madison himself noted that the "right of freely examining public characters and measures, and of communication...is the only effectual guardian of every other right." As Samples argues, these founders realized that for "knowledge to inform politics and decision making, it must be publicly available. If the government suppresses freedom of speech, it prevents such knowledge from becoming public." Thus, freedom of speech was seen as both an individual liberty and a means of advancing the public interest.

Despite these protections, spending on political campaigns was often a source of concern in antebellum America, especially after the rapid expansion of the franchise and the rise of mass campaigns for the presidency and other offices. In 1832, the Bank of the United States spent approximately $42,000—the equivalent of about a million dollars

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today, in inflation-adjusted terms—to try to defeat Andrew Jackson, who was seeking to revoke the bank's charter. With the growth of industry in the aftermath of the Civil War, political spending began to rise rapidly—and corporations became an important source of campaign funding. It has been estimated that by the campaign of 1888, the national Republican Party and its state affiliates were receiving 40 to 50% of their campaign funds from corporations (which benefited from high tariffs supported by the GOP). Democrats, though usually poorer, had their own financial titans—such as banker August Belmont and later his son, August Belmont, Jr., who could be counted on for at least $100,000 (nearly $2 million in inflation-adjusted terms) in just about every campaign in the last half of the 19th century.

But even as money was becoming more important to campaigns, the Constitution's limits on government power (which, in the view of the framers, would also limit the power of factions to manipulate public policy) began to fall out of favor in some important quarters. Beginning in the late 19th century, the influential Progressive movement launched a sharp critique of the founders' notions of enumerated powers and limited government, and even federalism and the separation of powers. Progressive theorists such as Herbert Croly and Columbia University law professor Walter Hamilton railed against the constraints that the Constitution placed on government power. Hamilton argued that the Constitution was "outworn" and "hopelessly out of place." Croly argued for the need to "overthrow" the "monarchy of the Constitution." Eltweed Pomeroy—a New Jersey glue manufacturer who became prominent as an author and the leader of the National Direct Legislation League—argued that "representative government is a failure," and sought ways to bypass the checks and balances of the constitutional system. In short, the Progressives' goal was a more energetic, less restrained government, which they believed was necessary to meet the demands of a modern industrial society.

It was in this context of hostility to federalism, checks and balances, and limited government that the modern drive to restrict political speech emerged. It started not as an effort to protect our constitutional arrangements from factions that would overpower them, but rather an effort to overcome our constitutional limits on the power of government. It was also intended to overcome the loud, messy, unpredictable democratic process, so as to empower a more "elevated" vision of government.

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At the 1894 New York state constitutional convention, the progressive Republican icon Elihu Root called for a prohibition on corporate political giving. "The idea," said Root, "is to prevent... the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests against those of the public." Root explained that he was concerned about "the giving of $50,000 or $100,000," amounts equal to roughly $1.2 or $2.4 million today. His effort ultimately failed to change the laws in New York—but it did effectively launch the modern movement to limit campaign contributions and speech.

THE PARTY OF SELF-INTEREST

At the same time that Root's speech gave rise to a movement, it also pointed to one of that movement's fundamental weaknesses. Legal historian Allison Hayward of George Mason University Law School argues that Root's real objective was less to secure passage of his proposal than to score partisan points against the Democrats (whose leaders were then being grilled for accepting bribes from the Sugar Trust). Thus, the movement was born less from noble ideals of good government than from ignoble motives of partisan gain.

This has remained a fundamental dilemma for the "reform" movement, as the century-old effort to restrict and regulate campaign spending has come to be known. If the problem is that venal legislators are betraying the public trust in exchange for campaign contributions, why would we expect them not to be equally motivated by base impulses when passing campaign-finance legislation? Wouldn't the ability to control political speech empower the faction that wields it, rather than constraining the power of all factions? A review of the evidence suggests this concern is well founded.

After Republican William McKinley won the presidential election of 1896 with corporate support organized by the legendary political strategist Mark Hanna, the Democratic-controlled legislatures of Missouri, Tennessee, and Florida (three states that had voted for McKinley's opponent, William Jennings Bryan), as well as the legislature in Bryan's home state of Nebraska, passed bills prohibiting corporate spending and contributions in state races. Even if one accepts that the authors of

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these state bans were sincere in their belief that limiting the speech of McKinley and his allies was in the public interest, it is still easy to recognize the danger of regulators' mistaking their partisan advantage for the public good.

The first federal law in this arena, passed in 1907, was also a ban on corporate contributions to campaigns. The law was dubbed the Tillman Act, after its sponsor, South Carolina senator "Pitchfork Ben" Tillman. Tillman wrote and said little of his motives for sponsoring the ban on corporate contributions, but he hated President Theodore Roosevelt and appears to have wanted to embarrass the president (who had relied heavily on corporate funding in his 1904 election campaign). Tillman's racial politics also clearly contributed to his interest in controlling corporate spending: Many corporations opposed the racial segregation that was at the core of Tillman's political agenda. Corporations did not want to pay for two sets of rail cars, double up on restrooms and fountains, or build separate entrances for customers of different races. They also wanted to take advantage of inexpensive black labor, while Tillman sought to keep blacks out of the work force (except as indebted farm laborers).

Corporations supported Republicans, and Tillman—a Democrat, like most post-war Southern whites—often bragged of his role in perpetrating voter fraud and intimidation in the presidential election of 1876 in order to overthrow South Carolina's Republican reconstruction government. It is clear, then, that Tillman was no "good government" reformer; and far from being born of lofty ideals, federal campaign-finance regulations were, from their inception, tied to questionable efforts to gain partisan advantage.

Within a few years of the Tillman Act, in 1911, came "publication" laws requiring disclosure of campaign contributors and limits on campaign expenditures. These were followed by the Federal Corrupt Practices Act of 1925, aimed at tightening the Tillman Act's limits on corporate donations. In 1943, the Smith-Connally Act prohibited contributions to candidates by labor unions. In 1947, Congress extended the ban on corporate and union contributions to cover "expenditures" made directly to vendors in behalf of campaigns, rather than contributed to candidates or parties.

While these laws influenced the way in which groups and individuals participated in politics, they did little to stem the overall flow of money into campaigns, due to weak enforcement mechanisms and various

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loopholes that could readily be exploited. The Federal Election Campaign Act, passed in 1972 and substantially amended in 1974, sought to address these problems by creating the most comprehensive set of regulations in history and an independent agency, the Federal Election Commission, to enforce the law.

The FECA maintained the ban on corporate and union contributions and expenditures, instituted a detailed system of reporting on contributions and expenditures, and placed limits on contributions and expenditures by individuals, including any expenditure "relative to" a federal candidate. Individual contributions to candidates were limited to $1,000 (a limit that has since been raised to $2,400), and contributions to Political Action Committees were capped at $5,000. PACs, in turn, were limited to contributing $5,000 to candidates. The law also limited total giving in an election cycle (no person may give more than $115,500 over two years to candidates and PACs combined), and placed a host of limits on the sizes of various other contributions.

The Supreme Court pulled back some of these limits in the 1976 case *Buckley v. Valeo*, holding that FECA's limits on expenditures made independently of a candidate violated the First Amendment. The decision further confined regulation so that it covered only expenditures that "expressly advocated" the election or defeat of a candidate, using specific words such as "vote for" or "vote against." This allowed for heavy spending on "issue ads" that might criticize or praise a candidate but stop short of expressly urging a vote one way or the other.

The 2002 McCain-Feingold law attempted to cut off this spending, which became known as "soft money." Among its many provisions, McCain-Feingold prohibited political parties from accepting any unregulated contributions, and prohibited corporate or union spending on any cable, broadcast, or satellite communication that mentioned a candidate within 30 days of a primary or 60 days of a general election. The law applied to non-profit membership corporations, such as the Sierra Club or the National Rifle Association, as well as to for-profit corporations. This is the law that Citizens United is alleged to have violated.

Even this account understates the complexity of the law. In an amicus brief filed in the Citizens United case, eight former FEC commissioners note that the FEC has now promulgated regulations for 33 specific types of political speech, and for 71 different types of "speakers." The statute and accompanying FEC regulations total more than 800 pages; the

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FEC has published more than 1,200 pages in the *Federal Register* explaining its decisions; and it has issued more than 1,700 advisory opinions since its creation in 1976.

Considered in detail, each step in the effort to limit campaign spending turns out to advantage the party that sought it. If its own numbers are insufficient to pass the legislation (as was the case with McCain-Feingold in 2002), then it seeks to broaden its base by adding incumbent-protection sweeteners to attract enough members of the opposing party to create a bipartisan majority. John Samples notes that McCain-Feingold drew most of its support from Democrats—who, he argues, saw long-term electoral disaster in the growing Republican fundraising edge, which was increasing after Republicans won the presidency in 2000. But to gain a legislative majority, the minority Democrats had to gain Republican votes; Samples finds that the Republicans who supported McCain-Feingold were, by and large, those most in danger of losing their seats. For them, the incumbent-benefit protections of the law made it irresistible.

Samples makes the Madisonian observation that "politicians use political power to further their own goals rather than the public interest.... Campaign finance laws might be, in other words, a form of corruption." Noting that "scholars date the largest decline in congressional electoral competition from 1970" and that the Federal Election Campaign Act—the foundation of modern campaign-finance law—was passed in 1972, Samples points out that "the decline in electoral competition and the new era of campaign finance regulation are virtually conterminous."

This is no accident. Since the passage of the FECA, the average incumbent spending advantage over challengers in U.S. House races has soared from approximately 1.5-to-1 to nearly 4-to-1. Incumbents begin each cycle with higher name recognition and a database of past contributors, making it easier to raise more money through small contributions from more people. They also typically make the decision to run earlier than challengers do—since a challenger often waits to see if the incumbent will run before making his choice—so they have more time to raise small contributions. And because campaign-finance regulations essentially require that candidates fill their coffers in small increments, the law clearly advantages the incumbents who passed it.

The effect of campaign-finance regulations has therefore been to help the people who passed them and to strengthen special interests, rather

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than to cleanse American politics of the influence of self-interested factions. Even the well-meaning reformers, it appears, have failed at their stated goals.

A FAILURE IN PRACTICE

Campaign-finance reform has not managed either to promote political equality or prevent corruption. And data show that one reason campaign-finance regulations are of little value in attacking corruption is that contributions simply don't corrupt politicians. In a 2003 article in the *Journal of Economic Perspectives*, three MIT scholars—Stephen Ansolabehere, James Snyder, Jr., and John de Figueiredo—surveyed nearly 40 peer-reviewed studies published between 1976 and 2002. "[I]n three out of four instances," they found, "campaign contributions had no statistically significant effects on legislation or had the 'wrong' sign—suggesting that more contributions lead to less support." Given the difficulty of publishing "non-results" in academic journals, the authors suggested in another paper, "the true incidence of papers written showing campaign contributions influence votes is even smaller." Ansolabehere and his colleagues then performed their own detailed study, which also found that "legislators' votes depend almost entirely on their own beliefs and the preferences of their voters and their party," and that "contributions have no detectable effects on legislative behavior."

Truly corrupt legislators will, after all, be lured by the prospect of personal financial benefits, not merely holding office (since most legislators, at least at the congressional level, could make more money doing other things). Those on the recent who's-who list of corrupt politicians were all brought down by their love of money: Louisiana Democratic congressman William Jefferson was caught with $90,000 in bribe money stashed in his freezer; Ohio's Bob Ney enjoyed an all-expenses-paid golf outing in Scotland on the dime of disgraced lobbyist Jack Abramoff, and accepted thousands of dollars in gambling chips from a foreign businessman; California's Duke Cunningham solicited bribes and bought, among other things, a yacht; and Illinois governor Rod Blagojevich sought lucrative positions on corporate boards for himself and his wife. These politicians were corrupted by money and gifts given directly to them, not by funds provided to pay for pamphlets and ads.

Most legislators run for office because they have strong political beliefs, and they are surrounded most of their days by aides and

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constituents with similarly strong beliefs. On reflection, far from being counterintuitive, it seems only logical that legislators would not want to betray their political principles—or those of the electorate—for a campaign contribution. After all, votes—not dollars—are what ultimately get put into ballot boxes. And it would make little sense to anger one's constituents for a contribution that can only be used to try to win those constituents back.

By insisting that campaign contributions corrupt members of Congress and the legislative process despite the repeated failure of dozens of systematic studies to find any evidence of such corruption, reform advocates ask us to set aside important speech rights without proving the need for doing so. Their assumption that the sheer scope of campaign spending somehow proves that our system is corrupted simply has no basis in evidence—and fails entirely to keep political spending in perspective. Total political spending in the U.S. in 2008—for state, local, and federal races—amounted to approximately $4.5 billion. By comparison, the nation's largest single commercial advertiser, Proctor & Gamble, spent about $5 billion on advertising in the same year.

The second widely stated goal of "reform" is to promote political equality. Reformers argue that some people and organizations have more money to spend on political activity than others do, and that it is unfair to allow this discrepancy to give the wealthy a major advantage. But inequality is not unique to money: Some people have more time to devote to political activity, while others gain political influence because they have a special flair for organizing, speaking, or writing. It is not clear how political equality is enhanced when a Harvard law student can spend his summer volunteering on a campaign while a small-business owner must spend his working.

In the political arena, money is a means by which those who lack talents or other resources with direct political value are able to participate in politics beyond voting. It thus increases the number of people who are able to exert some form of political influence. Limitations on monetary contributions therefore elevate those with more free time—such as retirees and students—over those (like most working people) who have less time, but more money. Such regulation also favors people skilled in political advertising over those skilled in growing corn or building homes; it favors skilled writers over skilled plumbers; it favors those, such as athletes and entertainers, whose celebrity gives them a public

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megaphone over people like stockbrokers and investors, who lack a public platform for their views. And this is before we arrive at the influence of media and other elites. Under the rules established by the "reform" regime, editorial-page editors, columnists, and talk-show hosts may endorse candidates—but others may not pay to take out an ad of equal size or length to explicitly endorse their candidates.

Easing the restrictions on campaign contributions would not constrain any of these other forms of political support. Rather, allowing more contributions simply permits more people to participate in the system—thus diffusing influence, rather than concentrating it. Campaign-finance reform, then, actually *undermines* the effort to promote equal access to the political arena.

Campaign-finance reform hasn't succeeded in achieving various secondary goals often attributed to it, either. For example, the McCain-Feingold law included the "Stand by Your Ad" provision, which now requires candidates for federal office to state in each ad: "I'm So-and-So, and I approved this message." The idea was that forcing candidates to take direct responsibility for what they say would reduce negative advertising. Of course, it's worth questioning whether negative advertising *should* be reduced: As Bruce Felknor, the former head of the Fair Political Practices Committee, observed as far back as the 1970s, "without attention-grabbing, cogent, memorable negative campaigning almost no challenger can hope to win unless the incumbent has been found guilty of a heinous crime." But even leaving this question aside, the provision has failed miserably to curb negative campaigning. In 2008, for example, researchers at the University of Wisconsin found that more than 60% of Barack Obama's ads, and more than 70% of ads for John McCain—that great crusader for restoring integrity to our politics—were negative. Meanwhile, the required statement takes up almost 10% of every costly 30-second ad—reducing a candidate's ability to say anything of substance to voters.

Some also argue that reform will reduce the amount of time elected officials must spend fundraising, thus allowing them to devote more time to their official responsibilities. It turns out, though, that the campaign-finance regulations themselves are the primary reason for the extensive time spent fundraising. Raising large amounts of money in small contributions is much more time-consuming than raising fewer large contributions.

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Given these circumstances, it is almost impossible to argue that campaign-finance reform has improved government. *Governing* magazine—in connection with the (pro-campaign finance reform) Pew Charitable Trusts—regularly ranks state governments on the quality of their management. In both of *Governing*'s last two studies, in 2005 and 2008, Utah and Virginia were ranked the best-governed states in the nation. Utah and Virginia also tied for first place in the first *Governing* survey, from 1999, and Utah ranked first in the second study in 2001. What do these two states have in common? Among other things, they appear on the short list of states that have no limits on campaign spending and contributions. Meanwhile, states such as Arizona and Maine—which have enacted full taxpayer financing of their state races—score unimpressive marks. In terms of management, *Governing* ranked Arizona in the middle of the pack, tied for 14th with 17 other states. Maine was ranked next to last—ahead of only New Hampshire. This alone does not prove an inverse relationship between campaign-finance laws and good governance, of course, but it does help to show the absence of a direct relationship. At the very least, campaign-finance restrictions do not seem to improve government.

As campaign-finance reform has failed to achieve its goals, it has also exacted serious costs. Studies have shown that political spending helps voters to learn about candidates, to locate them on the ideological spectrum, and to be better informed about issues and contests. Reducing the amount that may be spent, and constraining the ways it may be used, can thus hurt the quality of political discourse. More important, the laws involve serious restrictions on the exercise of fundamental rights.

RESTRICTING RIGHTS

For years, advocates of campaign-finance regulation have worked to establish a reputation as plucky underdogs: the nation's moral conscience, fighting the good fight against powerful special interests. They did this even as the leading reform groups spent some $200 million in the 1990s and early in this decade to pass the McCain-Feingold bill. In addition to liberal donors like the Pew Charitable Trusts, the Carnegie Foundation, and the Joyce Foundation, the groups' financial backers included several large corporations and firms, among them Bear Stearns, Philip Morris, and Enron. Yet somehow the reformers successfully branded their opponents as the purveyors and defenders of

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a corrupt system, bent on protecting it for personal gain. This gambit won the reformers some moral authority, which they wielded to great effect — making deep inroads with Congress, the press, and the public.

This is why the unexpected turn in the oral argument of the Citizens United case caused such a stir (and such concern among campaign-finance-reform advocates). Americans, like most free people, react with visceral disgust to the notion of banning books. It is seen as a fundamental violation of the freedom of speech and the open exchange of ideas. To equate campaign-finance reform with book-banning is to threaten the moral high ground of the case for campaign-finance limits. Ceding that high ground would be very costly for reformers, since their efforts have produced so little in the way of demonstrable results.

But there is simply no question that restricting the freedoms guaranteed in the Bill of Rights — no less than side-stepping the limits on government power established by the Constitution itself — is inseparable from the movement's goals. Restrictions on campaign contributions and spending affect core First Amendment freedoms of speech, press, and assembly. While the Supreme Court has quite correctly never held that "money is speech," it has recognized, equally correctly, that limiting political spending serves to limit speech (by restricting citizens' ability to deliver their political messages). In fact, only one of the 19 Supreme Court justices to serve in the past 30 years — John Paul Stevens — has ever argued that political campaign and expenditure limits should not be treated as First Amendment concerns. Those who doubt that basic constitutional rights are at stake should imagine how they would react if the Supreme Court were to interpret the free exercise clause as allowing the faithful to hold their religious beliefs, but not to spend money to rent a church hall, purchase hymnals, or engage in church missions. Presumably, the move would be seen as much more than a mere regulation of property.

These limits on expression do not affect only wealthy donors or prominent candidates. On the contrary: Groups without a broad base of support are the ones that rely most heavily on large donors to make their voices heard. Almost by definition, political minorities, newcomers, and outcasts will find it harder to reach enough people to raise the money they need through many small contributions. Their base of support is simply too narrow. One can analogize the process to that of raising capital in financial markets: If no investor could put more than $5,000

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into a company, large-scale IPOs would become a thing of the past. Established companies might be able to raise large amounts of capital from tens of thousands of small investors, but capital-intensive start-ups would be doomed.

So it is with political entrepreneurs, who would get nowhere without large donors. In the 1990s, for example, large-scale spending by Ross Perot gave voice to millions of Americans who were concerned that the major parties were failing to address the national deficit. Perot's spending did not "drown out" ordinary citizens, but rather helped them to be heard. In 2004, early contributions from a few big donors to the Swift Boat Veterans for Truth allowed the group to get its message on the air at a time when the national media were ignoring it. Once the group's first ads were seen by the public, the organization was bombarded with hundreds of thousands of small donations—and of course millions more supported or were influenced by the group's message. Similarly, large contributions by George Soros to MoveOn.org gave the organization the ability to contact millions of Americans and develop one of the most phenomenal grassroots political machines in American history.

Not surprisingly, it is often upon the most authentically grassroots candidacies and campaigns that the burden of regulation weighs heaviest. For example, in 2006, a group of neighbors in the unincorporated community of Parker North, Colorado, joined together to fight annexation into the neighboring city of Parker. Because they printed yard signs, made copies of a flyer, and formed an e-mail discussion group, they were charged with operating as an unregistered political committee. Three years later, their case remains entangled in the courts. And when Mac Warren ran for Congress in Texas in 2000, he spent just $40,000 on his campaign—roughly half of it his own money. All of his campaign materials contained the name and address of his campaign committee. But two pieces of literature failed to contain the required notice that the literature was paid for by the committee—and for that omission, Warren's long-shot campaign was fined $1,000 by the Federal Election Commission.

WORSE THAN THE DISEASE

As Madison understood, some people will always try to use government for their private aims. But with the Madisonian restraints on government rent-seeking largely discarded, campaign-finance regulation

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becomes a futile and misguided effort—one that, as Madison argued, is not only bound to fail, but also bound to make matters worse.

A classic example is the Tillman Act and its ban on corporate contributions. The law was easily evaded, it turns out, by having corporations make "expenditures" independently of campaigns, or by having executives make personal contributions reimbursed by their companies. And when the Tillman Act was extended to include unions in 1947, unions and corporations formed the first political action committees to collect contributions from members, shareholders, and managers to use for political purposes.

Later, when the Federal Election Campaign Act imposed dramatic contribution limits, parties and donors discovered "soft money"—unregulated contributions that could not be used directly for candidate advocacy, but could be used for "party-building" activities. Such party-building activities soon came to include "issue ads"—thinly veiled attacks on the opposition, or praise for one's own candidates—that stopped just short of urging people to vote for or against a candidate (instead typically ending with "Call Congressman John Doe, and tell him to support a better minimum wage for America's workers"). When the McCain-Feingold bill banned soft money, the parties—especially the Democrats—effectively farmed out many of their traditional functions to activist groups such as ACORN and MoveOn. When McCain-Feingold sought to restrain interest-group "issue ads" by prohibiting ads that mention a candidate from appearing within 60 days of an election, groups responded by running ads just outside the 60-day window. The National Rifle Association responded by launching its own satellite radio station to take advantage of the law's exception for broadcasters. Citizens United began to make movies.

Preventing this type of "circumvention" of the law has been a fixation of the "reform community" from the outset. Yet each effort has led to laws more restrictive of basic rights, more convoluted, and more detached from Madison's insights. Each effort also appears to be self-defeating, since the circumvention argument knows no bounds. As Madison would have appreciated, every time we close off one avenue of political participation, politically active Americans will turn to the next most effective legal means of carrying on their activity. That next most effective means will then become the loophole that must be closed.

This is how the Citizens United case found its way to the Supreme Court. When the case was reargued in September, solicitor general Elena

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Kagan—taking poor Malcolm Stewart's place at the podium—assured the Court that the government had never taken action against a book, and presumably never would. But in fact, after the election of 2004, the Federal Election Commission had conducted a two-year investigation of George Soros for failing to report as campaign expenditures the costs of distributing an anti-Bush book. The agency ultimately voted not to prosecute, but its authority to do so was never in question. And Kagan did not back away from the government's position that it had the authority to ban books should they, at some point, become a problem.

As the Supreme Court ponders whether campaign-finance restrictions assault Americans' First Amendment rights, academic champions of such "reform" efforts are laying the groundwork for yet more regulation. Legal scholars such as Harvard's Mark Tushnet, Ohio State's Ned Foley, and Loyola Law School's Richard Hasen—publisher of the "Election Law Blog"—have all argued that true reform will require open censorship of the press in order to assure political equality. Yale law professor Owen Fiss has argued that "we may sometimes find it necessary to 'restrict the speech of some elements of our society in order to enhance the relative voice of others,' and that unless the [Supreme] Court allows, and sometimes even requires the state to do so, we as a people will never truly be free."

Until *Citizens United*, such Orwellian newspeak was largely buried in obscure academic journals. Malcolm Stewart's sin was to state openly the implications of campaign-finance reform—and, in doing so, to strip away the veneer of "good government" and moral authority so carefully cultivated by reform advocates (and so important to their power). As a result, Stewart might have launched the beginning of the end for America's failed experiment to limit factions by destroying the liberty that allows for them in the first place. When the Supreme Court decides the case, it will have the opportunity to reassert the wisdom of Madison's deep insight into human nature—and to protect those liberties that, while they may make factions possible, also define the republic designed to contain them.

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Bradley A. Smith

The *Citizens United* Fallout

Democrats plan to redouble their efforts to stifle corporate free speech.

25 January 2010

The White House, still reeling from last week's populist backlash in Massachusetts, issued a call to arms following Thursday's 5–4 Supreme Court decision in *Citizens United* v. *Federal Election Commission (FEC)* that the government cannot censor the voices of people associated in corporations, unions, and nonprofit advocacy groups. The ruling allows such organizations to make advertisements that advocate for or against candidates. "The Supreme Court has given a green light to a new stampede of special interest money in our politics," President Barack Obama said in a statement. "It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."

Other Democrats echoed the president. Senator Chuck Schumer, just a regular guy from New York, warned that the Court had "predetermined the winners of next November's elections. It won't be Republicans. It won't be Democrats. It will be corporate America." No matter that Schumer is the top Senate recipient of contributions from political action committees (PACs) and employees associated with the real estate, securities, finance, and insurance industries, according to the Center for Responsive Politics; this decision threatens democracy, he seems to feel.

In truth, the Court's ruling will have little impact on the typical Fortune 500 company, which can already afford to spend millions of dollars on lobbying and on building PACs with enough employees to fund them and campaign-finance lawyers to operate them. These corporations, especially massively unpopular Wall Street institutions, are unlikely to make independent expenditures directly from their treasuries in the 2010 campaign cycle because the ads, whose funding must be disclosed, could enrage an already restive public, unhappy with the status quo in Washington.

What *Citizens United* actually does is empower small and midsize corporations—and every incorporated mom-and-pop falafel joint, local firefighters' union, and environmental group—to make its voice heard in campaigns without hiring an army of lawyers or asking the FEC how it may speak.

Who could be afraid of more political free speech, one might ask. But it's clear that incumbent politicians, shocked by the apparent tectonic shift in politics of late, are keen to maintain a chokehold on such speech. Democratic congressman Leonard Boswell of Iowa, for instance, introduced a resolution Thursday to begin the process of amending the First Amendment to ban corporations from engaging in free speech. The speech teetotalers also introduced several bills that would prevent corporations from actually spending money on independent speech: Democrat Alan Grayson of Florida even introduced legislation imposing a 500 percent excise tax on corporate political expenditures and prohibiting any company from trading on a stock exchange unless it abided by the pre–*Citizens United* provisions.

Other congressional leaders, spurred on by self-styled reform groups like U.S. PIRG, have demanded "shareholder protection laws" with onerous and impossible requirements, like forcing shareholders (even mutual-fund holders) to approve *each individual expenditure* that their companies make on politics —including Web ads, mail, e-mail, and other forms of communication, on top of television ads. Shareholders,

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though, already have corporate-governance procedures if they are unhappy with management. They can vote it out or introduce shareholder resolutions. But they are not required to approve each corporate charitable donation (say, to the opera or to the Boy Scouts), production decision (say, one that will reduce profits slightly but also reduce the company's carbon footprint), or commercial ad. The *Citizens United* ruling merely gives them the choice to engage in political speech if they wish, in the same fashion as other corporate decisions, rather than stifling them with a blanket ban.

Another piece of legislation "reformers" are buzzing about on Capitol Hill is the misnamed "Fair Elections Now Act," which would compel taxpayers to fund congressional campaigns. President Obama will have a hard time, though, getting Americans to understand why he rejected public financing in his presidential run, raised nearly $750 million in private funds, and yet now insists that everyone else ought to accept government campaign funding for the good of the "public interest."

With partisan tensions running high in Washington, it's an easy political shot to scapegoat pariah multinationals like AIG. The Court's language, though, rejects such efforts to silence unpopular voices in the corporate form. "We find no basis for the proposition that, in the context of political speech, the government may impose restrictions on certain disfavored speakers," Justice Anthony Kennedy wrote for the majority.

Instead of attempting to throw a futile legislative wrench into *Citizens United*, Congress should lift some arbitrary restrictions on candidates and political parties. Contribution limits should be raised, coordination between candidates and parties should be allowed in order to respond to independent speech, and the tax credit for contributions should be restored in order to incentivize small donors.

Americans have a long tradition of evaluating political messages and making their own decisions. To suggest that citizens can be led like lemmings by the noise of campaign ads treats voters like fools. It's time for Congress to realize that in a free and democratic process, it cannot silence speech with which it disagrees.

Bradley A. Smith is the Blackmore/Nault Designated Professor of Law at Capital University Law School, the chairman of the Center for Competitive Politics, and a former chairman of the Federal Election Commission.

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POLITICO

Corporate justice at our expense

By: Sen. Sheldon Whitehouse
March 10, 2010

The Supreme Court's recent slim majority decision in Citizens United has opened floodgates that long prevented corporate cash from drowning out the voices of American citizens in election campaigns. Those who care about the integrity of the American political process view this decision with concern and astonishment.

The Senate Judiciary Committee will hold a hearing about this misguided decision Wednesday. The ruling continues an increasingly clear pattern of the court's activist conservative bloc. First, decisions are by a narrow 5-4 majority. Second, decisions overrule well-established law and well-settled precedent. Third, the outcome favors corporations, the rich and the powerful.

The Constitution has long been understood to allow Congress to protect elections from the corrupting influence of corporate cash. As President Barack Obama has observed, the principle embodied in the 1907 Tillman Act — that inanimate business corporations, creatures of our laws, are not free to spend unlimited dollars to influence election campaigns — has been an established cornerstone of our political system for more than 100 years.

The five-justice conservative bloc of the Supreme Court tossed that principle aside, baldly denying any risk of election corruption, despite numerous congressional findings to the contrary. As my colleague Sen. Chuck Schumer (D-N.Y.) has said: "The Supreme Court [has] predetermined the winners of next November's elections. It won't be Republicans. It won't be Democrats. It will be corporate America."

I look forward to working with Schumer to limit the harmful effects of the Citizens United opinion: to prevent foreign corporations from influencing U.S. elections; to ban pay-to-play spending by government contractors; to strengthen disclosure laws that ensure voters know who is funding the ads they see; and to enhance corporate disclosure of election spending.

There are certain to be well-bankrolled interests opposing these reforms. But it is worth the fight.

Unfortunately, the activist, corporate-leaning pattern of the Supreme Court's conservative bloc makes it likely that it will hand down more decisions favoring corporate and powerful interests.

In retrospect, we could have seen the Citizens United decision coming when the same five justices decided the 2007 Wisconsin Right to Life case, creating a gaping exception to the ban on corporate election expenditures.

Beyond election law, the conservative bloc's preference for the interests of corporations to the detriment of actual American citizens was revealed in the terrible Ledbetter decision. This threw a victim of employment discrimination out of court because she did not know in time about pay discrimination that had been hidden from her. Fortunately, Congress corrected that error; it was the first bill that Obama signed into law.

However, other recent decisions by the Roberts court that hurt American citizens remain

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uncorrected. The Leegin case overruled the near-century-old doctrine that vertical price restraints by corporations were illegal per se under antitrust laws. That may seem like a technical issue, but it could have real advantages for corporations and harm for consumers: less competition and higher prices.

And consider the Iqbal decision, making it harder for victims of discrimination or other illegal conduct to get the evidence they need to prove their claims against employers. Again, it is a seemingly technical issue but one under which employees will lose.

Elections are the lifeblood of democracy. The U.S. Constitution is established by and for "We the People of the United States." Humans are clearly different from artificial corporations. And nothing in the Constitution gives CEOs the right to amplify their voices over all of ours through the corporations they control.

The activist conservative bloc, currently driving the court to the right, does not seem to appreciate this foundational, common-sense principle of our republic — at least not when corporate interests are concerned.

The court should return to its proper role of providing justice to all Americans, not just the privileged few.

Democratic Sen. Sheldon Whitehouse, the junior senator from Rhode Island, is a former U.S. attorney.

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