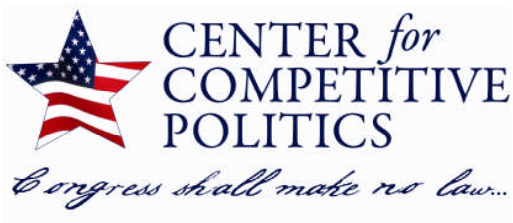

Before the United States Senate Committee on the Judiciary

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

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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*

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

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.

[1] SCOTUSblog, "Imprecise language and Citizens United polling," March 5, 2010; http://www.scotusblog.com/2010/03/imprecise-language-and-citizens-united-polling/

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]

[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)

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.

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.

[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

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

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

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

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

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

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.

(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

'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

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

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

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.

[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)

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

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%

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.

VICTORY ENTERPRISES

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.

VICTORY ENTERPRISES

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.

VICTORY ENTERPRISES

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?

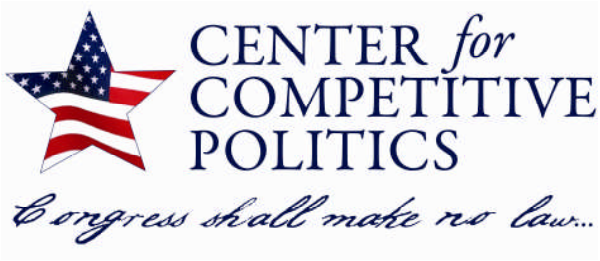
Strongly Support	152	25.3%
Somewhat Support	119	19.8%
TOTAL SUPPORT	**271**	**45.1%**
Strongly Oppose	128	21.3%
Somewhat Oppose	58	9.7%
TOTAL OPPOSE	**186**	**31.0%**
Not Sure/Undecided	97	16.2%
Refused	46	7.7%

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.

VICTORY ENTERPRISES



After Citizens United

A Moderate, Modern Agenda for Campaign Finance Reform

Prepared by the

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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 Committe*e ("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.

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

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.

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SUPREME COURT OF THE UNITED STATES BLOG
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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.

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.

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

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.

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.

NATIONAL AFFAIRS

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.

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

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

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.

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

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

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

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

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

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

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.

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

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

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

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

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.

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,

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.

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