

**Testimony before the U.S. Senate Judiciary Committee's Subcommittee on the  
Constitution, Civil Rights, and Human Rights**

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Chairmen Durbin and Leahy, Ranking Member Graham, and distinguished members of the Subcommittee, thank you for this opportunity to discuss the regulation of political campaigns.

By way of overview, let me note that *Citizens United* is one of the most misunderstood high-profile cases ever, and so my testimony will review what the case actually said, briefly opine on the constitutional amendments and legislation proposed in response, and outline a better solution to our unworkable campaign finance regime.

Now, *Citizens United* is both more and less important than you might think. It's more important because, beyond whatever effect it has on the amount of corporate or union money in politics, it has revealed the instability of our current system. It's less important because it doesn't stand for half of what many people say it does.

Take for example President Obama's famous statement that the decision "reversed a century of law that I believe will open the floodgates of special interests—including foreign corporations—to spend without limit in our elections."<sup>1</sup> In that sentence, the former constitutional law professor stated four errors of constitutional law.

First, *Citizens United* didn't reverse a century of law, but 20 years at most. The president was referring to the Tillman Act of 1907, which prohibited corporate donations to candidates and parties. *Citizens United* didn't touch that issue. Instead, the overturned precedent was a 1990 case that, for the first and only time, allowed a restriction on political speech based on something other than corruption or the appearance thereof.<sup>2</sup>

Second, as far as opening the floodgates to special interests goes, it depends on how you define those terms. As you may have read in the *New York Times* magazine this weekend, there's no indication that there's a significant change in corporate spending this election cycle.<sup>3</sup> There are certainly people running Super PACs who would otherwise be supporting candidates in other ways—as bundlers or directors of regular PACs—but Super PACs aren't a function of *Citizens United* (as I'll get to shortly). And the rules affecting the wealthy individuals who do seem to be spending more—be they Sheldon Adelson on the Republican side or George Soros on the Democratic side—haven't changed at all. It's just unclear that any "floodgates" have been opened or what these special interests are that didn't exist before.

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<sup>1</sup> State of the Union 2010 (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

<sup>2</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990). For a further critique of such assertions, see Ilya Shapiro & Nicholas Mosvick, *Stare Decisis After Citizens United: When Can Courts Overturn Precedent*, 16 NEXUS: CHAPMAN'S JOURNAL OF LAW & POLICY 121, 125-26 (2011).

<sup>3</sup> Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. TIMES MAGAZINE, July 22, 2012, available at <http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html>.

Third, the rights of foreigners—corporate or natural persons—is another issue about which *Citizens United* said nothing. Indeed, just this year the Supreme Court summarily upheld the restrictions on foreign spending in U.S. political campaigns.<sup>4</sup>

Fourth and finally, there's the charge that spending on elections now has no limits. That's close to the truth in the context of independent political speech, but it's certainly not for candidates and parties, nor for their donors. Again, *Citizens United* did not rule on either individual or corporate contributions to candidates. All *Citizens United* did was remove the limits on independent associational expenditures.

More important than *Citizens United* was *SpeechNow.org v. FEC*, decided two months later in the D.C. Circuit.<sup>5</sup> That decision removed the limits on individual donations to independent expenditure groups, which led to the creation of the so-called Super PACs. Previously, we had plain-old PACs—political action committees—defined as any group receiving or spending \$1,000 or more for influencing elections, to which individuals could only donate \$5,000 per year. Now you still have to register these groups but there's no limits on how much people can donate to them. *Citizens United* merely allowed the use of general treasury funds for speech, while *SpeechNow.org* freed people to pool their money to speak in the same way one very rich person could already.

And so, if you're concerned about the amount of money spent on elections—though Americans spend more annually on chewing gum and Easter candy<sup>6</sup>—the problem is not with the big corporate players. This is another misapprehension of those who criticize *Citizens United*: Exxon, Halliburton, and all these “evil” companies (or even so-called good ones, like Apple and Google) aren't suddenly dominating the political conversation. They actually spend very little money on political advertising, partly because it's more effective to spend money on lobbying but more importantly, why would they want to alienate half of their customers? As Michael Jordan famously said when he was criticized for not speaking about politics, “Republicans buy sneakers too.”<sup>7</sup>

Fortune 500 companies are very cautious; they won't risk the kind of consumer reaction that Target faced after supporting a candidate who opposed gay marriage. All they want is a legal regime their phalanx of lawyers and accountants can manage, gladly accepting regulations that are disproportionately onerous to their more entrepreneurial competitors. Many corporations liked the pre-*Citizens United* restrictions because then they didn't have to decide whether to spend money on political ads!

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<sup>4</sup> *Bluman v. FEC*, 132 S. Ct. 1087 (2012).

<sup>5</sup> *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

<sup>6</sup> George Will, *How States Are Restricting Political Speech*, WASH. POST, Feb. 3, 2012 (presidential campaigns spend roughly the same as what Americans do on Easter candy), [http://www.washingtonpost.com/opinions/states-are-cracking-down-on-political-speech-with-burdensome-laws/2012/01/31/gIQAPe6ziQ\\_story.html](http://www.washingtonpost.com/opinions/states-are-cracking-down-on-political-speech-with-burdensome-laws/2012/01/31/gIQAPe6ziQ_story.html); George Will, *A Campaign-Finance Bill That Doesn't Pass Muster*, WASHINGTON POST, Apr. 27, 2011, (Obama may raise \$1 billion in private contributions for the 2012 race, half of what Americans spend on Easter candy), [http://www.washingtonpost.com/opinions/a-campaign-finance-bill-that-doesnt-pass-muster/2011/04/26/AFXpSq0E\\_story.html](http://www.washingtonpost.com/opinions/a-campaign-finance-bill-that-doesnt-pass-muster/2011/04/26/AFXpSq0E_story.html); George Will, *The Democratic Vision of Big Brother*, WASH. POST, Oct. 17, 2010 (election spending for every U.S. office during two-year cycle is less than Americans spend on candy in two Halloween seasons) <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/15/AR2010101504201.html>.

<sup>7</sup> Jordan made the statement in response to questions about why he wouldn't endorse the black Democratic candidate, Harvey Gantt, in the 1990 North Carolina Senate race against Republican Jesse Helms. *See, e.g.*, Kurt Badenhausen, *The Business of Michael Jordan Is Booming*, FORBES, Sept. 22, 2011, <http://www.forbes.com/sites/kurtbadenhausen/2011/09/22/the-business-of-michael-jordan-is-booming/>.

On the other hand, groups composed of individuals and smaller players now get to speak: your National Federations of Independent Business and Sierra Clubs, your NRAs and Planned Parenthoods. They can't lobby as much as the big boys on K Street, but they definitely enrich the public discourse and keep government honest. So even if we accept "leveling the playing field" as a proper basis for campaign regulation, *Citizens United's* freeing up of associational speech levels that playing field in many ways. As Ira Glasser, the ACLU's former executive director, put it, "if regulating unevenness of speech by regulating the unevenness of wealth is the goal, then why include small business corporations . . . but not Warren Buffett?"<sup>8</sup>

Moreover, it's a good thing that the First Amendment protects political speech regardless of the nature of the speaker: People don't lose their rights when they get together and associate, whether it be in unions, non-profit advocacy groups, private clubs, for-profit corporations, or any other form.<sup>9</sup> But the ruling does create the odd situation whereby independent political speech is mostly unbridled while candidates and parties are heavily regulated.<sup>10</sup> That's not necessarily a bad thing—parties aren't privileged under the Constitution—but it does create a weird dynamic.

Now, I've reviewed the various proposals introduced in this Congress to remedy this scenario, as well as some of *Citizen United's* other perceived ills. They're too numerous to detail here, but they have certain commonalities: limiting spending or donations, prohibiting political speech through the corporate form, removing First Amendment protections from all but natural American persons, expanding public financing of campaigns, etc. The idea is that if we could only get private money out of politics, elections will be cleaner and the government more accountable to the people.

The underlying problem, however, is not the under-regulation of independent speech but the attempt to manage political speech in the first place. Political money is a moving target that, like water, will flow somewhere. If it's not to candidates, it's to parties, and if not there, then to independent groups or unincorporated individuals acting together. Because what the government does matters and people want to speak about the issues that concern them. To the extent that "money in politics" is a problem, the solution isn't to try to reduce the money—that's a utopian goal—but to reduce the scope of political activity the money tries to influence. Shrink the size of government and its intrusions in people's lives and you'll shrink the amount people will spend trying to get their piece of the pie or, more likely, trying to avert ruinous public policies.

While we await that shrinkage—my Cato colleagues have some suggestions if you're interested—we do have to address the core flaw in our modern campaign finance regime. That flaw is not a stubborn First Amendment that grants more protection to political speech here than anywhere in the world. Instead, the original sin, if you will, was committed by the Supreme Court, not in *Citizens United* but in the 1976 case of *Buckley v. Valeo*.<sup>11</sup> By rewriting the Watergate-era Federal Election Campaign Act<sup>12</sup> to

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<sup>8</sup> Ira Glasser, *Understanding the Citizens United Ruling*, HUFFINGTON POST, Feb. 3, 2010, [http://www.huffingtonpost.com/ira-glasser/understanding-the-emcitiz\\_b\\_447342.html](http://www.huffingtonpost.com/ira-glasser/understanding-the-emcitiz_b_447342.html).

<sup>9</sup> See, e.g., Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. MARSHALL L. REV. 701, 707-08 (2011).

<sup>10</sup> See discussion of Comedy Central's satire of the present system in Ilya Shapiro, *Stephen Colbert Is Right to Lampoon Our Campaign Finance System (And So Can You!)*, 6 ST. THOMAS J.L. & PUB. POL'Y \_\_\_, \_\_ (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2102747](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102747).

<sup>11</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

eliminate limits on campaign spending while keeping caps on contributions to candidates, *Buckley* upset Congress's finely balanced global reform.

By refusing to strike down FECA altogether, just excising its expenditure limits, the Court produced a system where candidates face an unlimited demand for campaign funds but a tapered supply. That's why legislators spend all their time fundraising. Some would say that's a feature not a bug—because, of course, the government that governs least, govern best—but nevertheless these rules have inflated both the priority of fundraising efforts. Moreover, the regulations have pushed money away from candidates and toward advocacy groups—undermining the worthy goal of accountable government.

The solution is rather obvious: Liberalize rather than further restrict the campaign finance regime. Get rid of limits on contributions to candidates—by individuals, not corporations—and then have disclosures for those who donate some amount big enough for the interest in preventing the appearance of quid pro quo corruption to outweigh the potential for harassment. Then the big boys who want to be real players in the political market will have to put their reputations on the line, but not the average person donating a few hundred bucks—or even the lawyer donating \$2,500—and being exposed to boycotts and vigilantes. Let the voters weigh what a donation from this or that plutocrat means to them, rather than—and I say this with all due respect—allowing incumbent politicians to write the rules to benefit themselves.

In sum, we now have a system that's unbalanced, unstable, and unworkable—and we haven't seen the last of campaign finance cases before the Supreme Court or attempts at legislative reforms. At some point, however, there will be enough incumbents who feel that they're losing message control to such an extent that they'll allow fairer political markets. It's already happening: Earlier this month, the Democratic governor of Illinois signed a law that allows state candidates to receive unlimited campaign contributions if their race includes significant independent spending.<sup>13</sup> This deregulation is a mere act of political self-preservation, but that's fine. Once more incumbents realize that they can't prevent communities of people from organizing to express their views, they'll want to capture more of those dollars. Stephen Colbert would then have to focus on other laws to lampoon, but I'm confident that he can do that and we'll be better off on all counts.

Ultimately, the way to “take back our democracy”—to invoke the name of this hearing—is not to further restrict political speech but to rethink the basic premise of existing regulations.

Thank you again for having me. I welcome your questions.<sup>14</sup>

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<sup>12</sup> As amended by the Federal Election Campaign Act Amendments of 1974, P.L. No. 93-443.

<sup>13</sup> See, e.g., *Free(er) Speech for Illinois*, WALL ST. J., July 12, 2012, available at [http://professional.wsj.com/article/SB10001424052702303740704577522760702640068.html?mod=djemEditorialPage\\_h&mg=reno64-wsj](http://professional.wsj.com/article/SB10001424052702303740704577522760702640068.html?mod=djemEditorialPage_h&mg=reno64-wsj).

<sup>14</sup> In addition to these prepared remarks, I've submitted to the hearing record the three law review articles I've written regarding post-*Citizens United* campaign finance, which were the basis for my presentation. Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. MARSHALL L. REV. 701 (2011), also available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1873158](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873158); Ilya Shapiro & Nicholas Mosvick, *Stare Decisis After Citizens United: When Can Courts Overturn Precedent*, 16 NEXUS: CHAPMAN'S JOURNAL OF LAW & POLICY 121 (2011), also available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1760127](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1760127); Ilya Shapiro, *Stephen Colbert Is Right to Lampoon Our Campaign Finance System (And So Can You!)*, 6 ST. THOMAS J.L. & PUB. POL'Y — (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2102747](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102747).