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We the People? Corporate Spending in America after Citizens United

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Chairman Leahy and Members of the Senate Judiciary Committee:

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

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

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

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

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

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

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

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

Consequences of the Corporate Speech Theory

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[6] Center for Responsive Politics/OpenSecrets.org

[7] Center for Responsive Politics/OpenSecrets.org

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

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

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

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

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

Beyond Citizens United and Campaign Finance

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

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

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

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

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

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

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

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

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

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

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

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

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

Restoring the First Amendment Free Speech Rights of People

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31 *Id*. at 181.

32 326 U.S. 207.

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

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

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

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

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

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

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

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

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

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