Before the United States Senate Committee on the Judiciary

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

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Responses to the written questions of committee members:

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Questions from Ranking Member Sessions and Responses of Prof. Bradley A. Smith

Questions for Prof. Smith:

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

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

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

The investigation of Mr. Soros came after the election in which the alleged violation occurred, and the book had already been published and distributed. However, the chilling effect must not be overlooked, and *Citizens United* provides a pointed example of why. In 2004, the FEC had held that documentary filmmaker David Hardy could not advertise a film, "The Rights of the People," with pictures of political candidates within 30 days of a primary election (see AO 2004-15). Similarly, the FEC ruled that year that Citizens United could not broadcast a documentary movie, Celsius 41.11 (see AO 2004-30). Based on Advisory Opinions 2004-15 and 2004-30, David Bossie, President of Citizens United, has stated that was told by the FEC that if his group aired "Hillary: The Movie," it would be considered a "knowing and willful" violation of the Act, subjecting Bossie to criminal penalties including possible jail time. One can imagine the chilling effect that this might have. In other cases, the courts have repeatedly proven unable to decide cases on a timely basis. For example, in SpeechNow.org v. Federal Election Commission (a suit in which I am co-counsel), the non-profit group SpeechNow.org filed an advisory request with the FEC in November of 2007. After the FEC denied SpeechNow's request, SpeechNow filed suit in federal court in February of 2008. More than two years later, SpeechNow.org has already been forced to sit out one election cycle, and has already missed early the first 2010 primaries, waiting for a final ruling on its request.

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

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

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

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

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

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

a. Please provide a list of these states.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer: Yes, see above.

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

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

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

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

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

Answer: Laws defining corporate control typically exist for the purpose of securities regulation or for regulating and limiting conflicts of interest within management. Senator Franken was referring, I believe, to 8 Del. Code Sec. 203 (c)(4). The statute creates a rebutable presumption of "control" at 20 percent ownership. The statute, however, is for the purpose of regulating corporate takeovers, including anti-takeover and poison pill provisions, and corporations may opt out of the Chapter completely [8 Del. Code Sec. 203 (b)(1)]. But, for example, when it comes to management of the corporation, Delaware courts have held that a party who alleges control of a corporation must prove it, and that stock ownership alone, at least when it amounts to less than fifty percent, is insufficient to prove "control." [*See e.g. Kaplan v. Centex Corp.,* 284 A. 2d 119 (Del. Ch. 1971)]. Further, fiduciary duties are owed by those who "in fact" control the corporation, which is not based on a set percentage of ownership. [*See e.g. Cinerama v. Technicolor Inc.,* 663 A 2d. 1156 (Del. 1995); *Harriman v. E. I. DuPont de Nemours & Co.,* 372 F. Supp. 101 (D. Del. 1974)]. In other cases Delaware courts have interpreted "control" as two-thirds, *see Orman v. Cullman,* 794 A. 2d 5 (Del Ch. 2002).

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

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

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

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

Answer: As discussed previously, current federal law prohibits any foreign national from being involved in decisions about corporate political spending. Prior to *Citizens United,* this would have included spending in state and local races, where permitted by state law, and spending through corporate PACs, under either federal or state law. This is, in fact, a much stricter standard than proposals to use a percentage of shares, as it precludes foreign national involvement regardless of share ownership. At the same time, it provides maximum protection to the First Amendment rights of U.S. citizen shareholders. The perceived problem is that the standard is difficult to enforce. But this is frequently true in the area of the First Amendment. For example, it is extremely difficult for a public figure to prove libel under the standard of *New York Times v. Sullivan.* Moreover, given the lack of concern that this has created, with virtually no complaints or enforcement actions, and virtually no controversy, any effort to address the enforcement problem should be carefully considered, and, as always, must be narrowly tailored.

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

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

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

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

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

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

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

Written Questions from Senator Cornyn and Responses of Prof. Smith

Questions for all witnesses:

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

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

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

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

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

Figure I

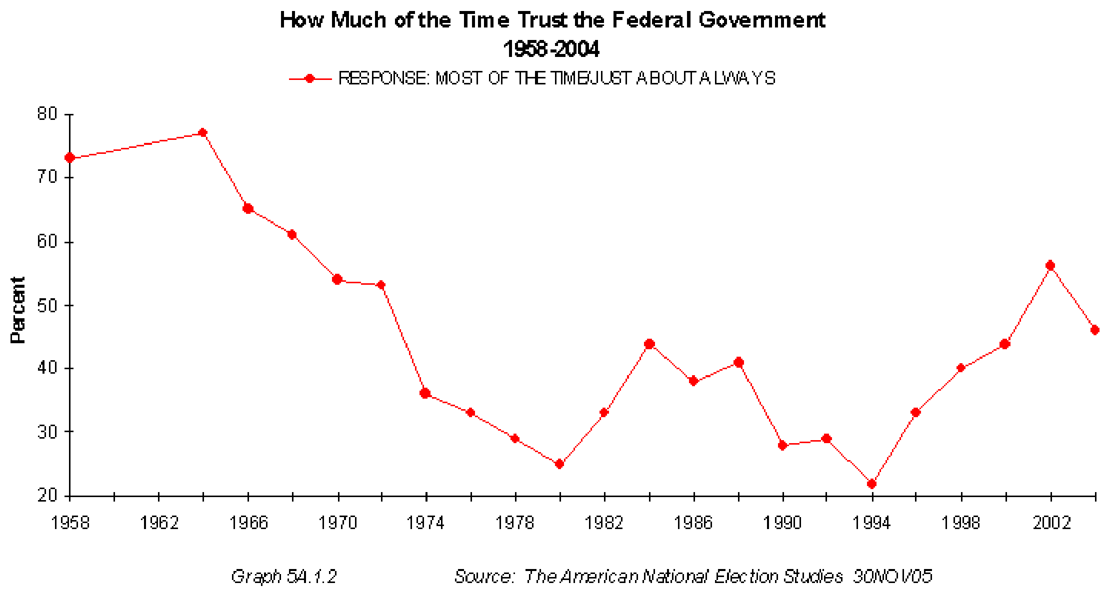
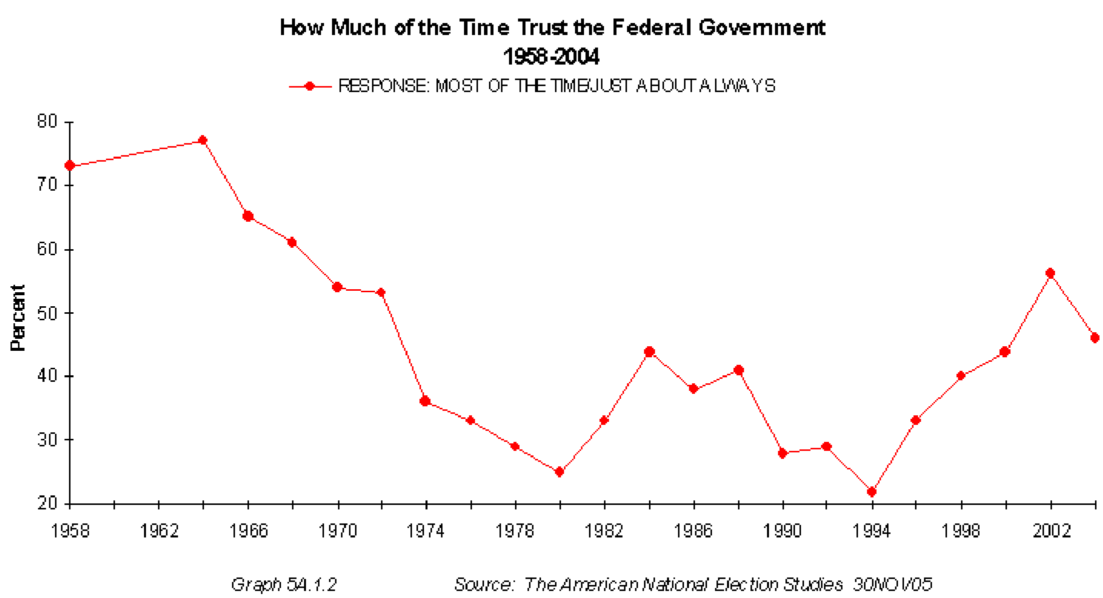


Chart from: http://www.electionstudies.org/nesguide/graphs/g5a_5_1.htm.

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

Figure II:



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

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

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

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

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

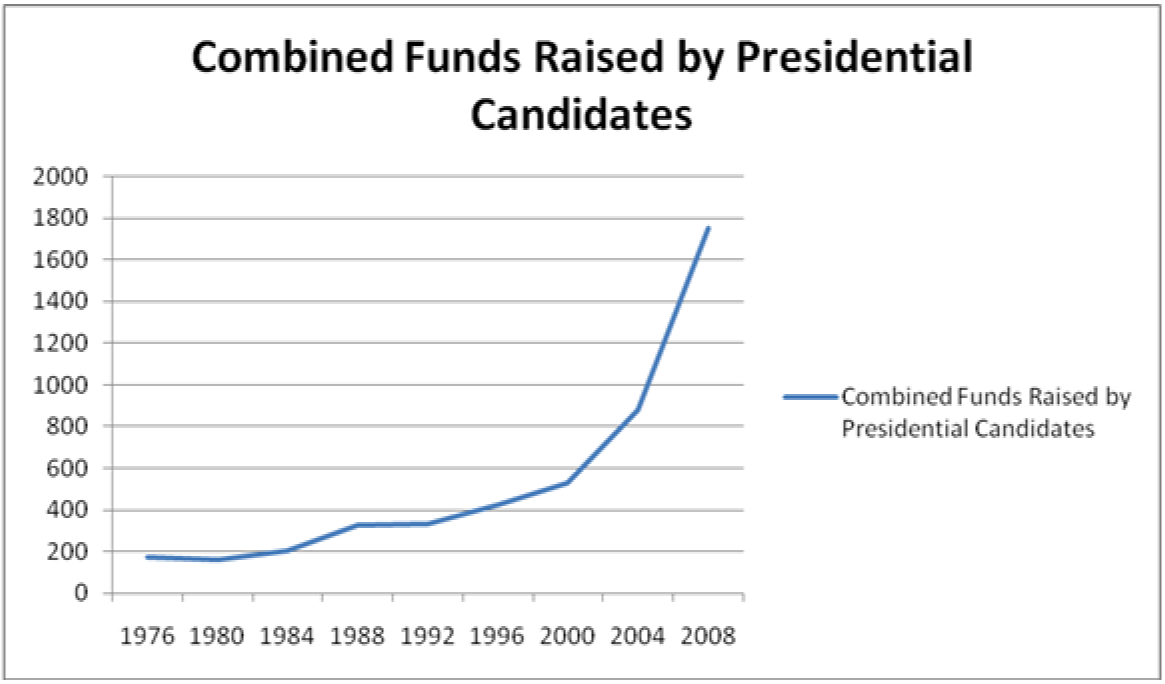
2. The provisions of the 2002 Campaign Finance Reform Act that the Court struck down equally banned electioneering communications by corporations and unions. Do you believe that any new restrictions placed on corporate speech should also apply to unions?

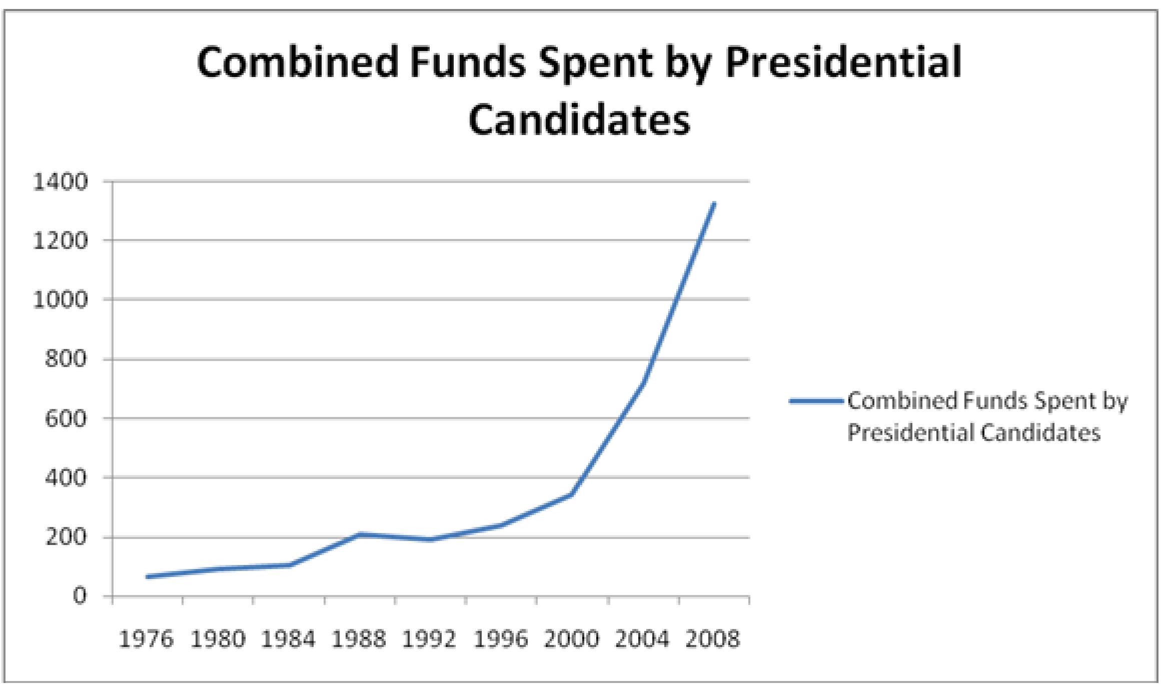
Answer: Since the passage of the Smith-Connolly Act of 1943 and the Taft-Hartley Act of 1947 (a portion of which was overturned in *Citizens United*), it has been congressional policy to treat unions and corporations in a parallel manner. Obviously, not every restriction on a union is applicable to a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

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

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

Exhibit A





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

Written Questions from Senator Hatch and Responses of Prof. Smith

Questions for Prof. Smith:

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

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

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

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

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

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

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

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

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

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

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

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

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

Questions for all witnesses:

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

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

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

There may be good reasons for dropping this longstanding parallel treatment, but there is no doubt it would be a dramatic change in the law, in many respects as dramatic as *Citizens United* itself. Further, for those who truly are concerned about large scale spending, we might again look to the states. California, the nation's largest state, has allowed both corporations and unions to make unlimited expenditures in political races. The California Fair Political Practices Commission recently published a report documenting the ten largest makers of independent expenditures in political races from 2001 to 2006. In order, they were:

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

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