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Before the United States Senate Committee on the Judiciary

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

Wednesday, March 10, 2010

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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