Hearing before the
Senate Committee on the Judiciary

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

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Dear Senator Leahy and members of the Senate Judiciary Committee,

Thank you very much for holding this hearing and inviting me to testify about the Supreme Court's recent decision in *Citizens United v. Federal Election Commission.* My name is Jeffrey Rosen; I teach constitutional law at George Washington University and am the Legal Affairs Editor of the New Republic and a nonresident senior fellow at the Brookings Institution.

The 5-4 ruling in *Citizens United* v. *Federal Election Commission* has been strongly opposed by Americans of both parties: last month, in a Washington Post-ABC News poll, 80% of respondents said they opposed the Court's decision to allow unregulated corporate spending in general elections, with relatively little difference among Democrats (85% opposed to the ruling) and Republicans (76% opposed). [1] That's not a surprise during a time of financial crisis when the influence of money in politics—Justice Louis Brandeis called it the "curse of bigness" and "our financial oligarchy"--is the most pressing political question of the day.

You asked me to testify about the constitutional implications of the decision – and what it suggests about the Roberts Courts' attitude toward corporate

[1] http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html

interests and government regulation of the economy in the future. Unfortunately, the implications are not encouraging.

Citizens United is an activist decision by any definition of judicial activism. It is activist in its disregard of constitutional history, tradition, Supreme Court precedent, and the considered views of the President and Congress. It is precisely the kind of divisive and unnecessarily sweeping decision that Chief Justice John Roberts pledged to avoid in his confirmation hearings and after, when he said he would try to promote narrow, unanimous opinions, rather than deciding hotly contested questions by ideologically polarized, 5-4 votes. The most significant area where the Roberts Court has succeeded in achieving near unanimity is in cases affecting business interests, which tend to be decided in a pro-business direction. The broad rhetoric in *Citizens United* about the rights of corporations, combined with the apparent willingness of the 5-4 conservative majority on the Roberts Court to invalidate federal regulations that have broad bipartisan support, could lead to future confrontations between the Supreme Court and Congress on matters of economic fairness that citizens care intensely about.

Let me beginning by describing how *Citizens United* is hard to reconcile with the vision of bipartisan unity that Chief Justice John Roberts originally embraced. In 2006, at the end of his first term on the Court, Chief Justice Roberts said in several speeches and interviews that that he was concerned that his colleagues, in issuing 5-4 opinions divided along predictable lines, were acting more like law professors than members of a collegial court. His goal, he said, was to persuade his fellow justices to converge around narrow, unanimous opinions, as his greatest predecessor, John Marshall, had done. Speaking to the Georgetown University Law Center commencement in May, 2006, Chief Justice Roberts said:

[T]here are clear benefits to a greater degree of consensus on the Court. Unanimity or near unanimity promote clarity and guidance to lawyers and to the lower courts trying to figure out what the Supreme Court meant. Perhaps most importantly there are jurisprudential benefits: the broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible grounds. It's when the decision moves beyond what's necessary to decide the case that justices tend to bail out. If it's not necessary to decide more to dispose of a case, in my view it is necessary *no*t to decide

more.[2] In Felix Frankfurter's words, a narrow decisions helps ensure that we "do not embarrass the future too much."[3]

And in an interview with me for a book on the Supreme Court in July, 2006, Chief Justice Roberts talked extensively about how he hoped to achieve his vision of narrow, unanimous opinions. He expressed frustration about the focus in the media on the number of 5-4 decisions on the Court, and lamented that his colleagues were acting more like law professors than members of a collegial Court. "If the Court in Marshall's era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have," Roberts said. "That suggests that what the Court's been doing over the past thirty years has been eroding, to some extent, the capital that Marshall built up." Roberts added, "I think the Court is also ripe for a similar refocus on functioning as an institution, because if it doesn't it's going to lose its credibility and legitimacy as an institution."[4]

In particular, Chief Justice Roberts declared, he would make it his priority, as Marshall did, to discourage his colleagues from issuing separate opinions. "I think that every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they're writing separately, about the effect on the Court as an institution."[5]

Chief Justice Roberts praised justices who were willing to put the unanimity of the Court above their own ideological agendas. "A justice is not like a law professor who might say … I had a consistent theory of the first Amendment as applied to a particular area,'" he explained. [6] He said he would try to emphasize the benefits of unanimity for individual justices, in order to effect what he called the "team dynamic": "You do have to put people in a situation where they will appreciate, from their own point of view, having

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[2] *See also PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F. 3d 786, 799 (CADC 2004) (Roberts, J., concurring in part and concurring in judgment). ("[I]f it is not necessary to decide more, it is necessary not to decide more."

[3] Chief Justice John Roberts, Commencement Address, Georgetown University Law Center, May, 2009, available at: http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144.

[4] http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/5559/

[5] Id.

[6] Jeffrey Rosen, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 224 (2007).

the Court acquire more legitimacy, credibility, that they will benefit from the shared commitment to unanimity in a way that they wouldn't otherwise."[7] He said he intended to use his power to assign opinions when he is in the majority to achieve as broad a consensus as possible.[8] And while acknowledging that he had set himself a daunting task in trying to resist the polarizing of the judiciary with 5-4 decisions, he said he also viewed it as a "special opportunity" in our polarized age. "Politics are closely divided," he observed. "The same with Congress. There ought to be some sense of stability [in the Court] of the government is not going to polarize completely. It's a high priority to keep any kind of partisan divide out of the judiciary as well."[9]

I was impressed by the Chief Justice's concern about the bipartisan legitimacy of the Court and have doubt that he meant what he said when he talked repeatedly about the importance of promoting narrow, unanimous opinions. I was also encouraged by the fact that in his first term, which his colleagues had treated as something of a honeymoon, the Court decided just 13 percent of cases by a 5-4 margin, one of the lowest rates in recent history. And so I watched with interest his efforts to promote unanimity over the past three terms, where his success was more mixed. In the term that ended in 2007, the percentage of 5-4 soared to 33 percent, a ten year high, as the justices divided bitterly along ideological lines in cases involving partial birth abortion, affirmative action, and campaign finance. (The percentage of 5-4 decisions would fluctuate up and down a bit over the next two years, falling to 20% in the 2008 term and rising back to 29% in the 2008 term, which ended last June.)[10]

There has been one category of cases in which Chief Justice Roberts has managed to steer the Court toward narrow, nearly unanimous opinions: those involving business interests. About forty percent of the Court's docket is now made up of business cases, up from thirty percent in recent years, and seventy-nine percent of them are decided by margins of seven to two or better.[11] The best measure of the pro-business orientation of the Supreme Court is the success rate of Chamber of Commerce's National Chamber

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[7] Id. at 226.
[8] Id. at 227.
[9] Id. at 233.
[10] http://www.scotusblog.com/wp-content/uploads/2009/06/full-stat-pack.pdf, p. 7.
[11] Jeffrey Rosen, *Keynote Address, Santa Clara Law Review Symposium: Big Business and the Roberts Court*, 49 SANTA CLARA L. REV. 929, 932 (2009).

Litigation Center, which files briefs in cases that affect the "unified interests of American business."[12] In the 2006 term, Chief Justice Roberts's first term on the Court, The Chamber's litigation center filed briefs in fifteen cases and won thirteen of them, the highest percentage of victories in the center's thirty-year history.[13] If you leave out the environment, labor and employment cases, which tend to be more political polarized, and look at the remaining forty-six business cases before the Roberts Court in which the Chamber participated as of 2009, most of them are decided in a pro-business direction, in areas ranging form punitive damages preemption, false claims acts, securities suits, and antitrust cases.[14]

So this was the record of the Roberts Court on the eve of the *Citizens United* decision: near unanimity in many pro-business cases, and – with the exception of one important 8-1 decision avoiding a constitutional confrontation over the Voting Rights Act – bitter 5-4 ideological divisions in cases involving affirmative action, abortion, campaign finance, and religion.

That's what made *Citizens United* such an important test of Chief Justice Roberts's vision for the Court. After all, a narrow grounds for avoiding a constitutional conflict in *Citizens United* was certainly available. Just as Chief Justice Roberts had held in the voting-rights case that Congress intended to let election districts bail out of federal supervision, he could have held—even more plausibly--in *Citizens United* that Congress never intended to regulate video-on-demand or groups with minimal corporate funding. The free speech interests of the producers of the film in question, Hillary the Movie, are significant, but First Amendment values could have been protected with a far narrower opinion that avoided broad, unnecessary, and historically unsupported claims about how corporations share the same First Amendment rights as real American citizens. By ruling narrowly, the Roberts Court could have protected free speech without calling into questions decades of regulations of corporate speech in American elections. And this sensible compromise – protecting the free speech rights of small, mostly ideologically oriented corporations while regulating the speech of huge for profit corporations (which still have the option of speaking through PACS), would have been consistent with the historical pattern of regulation of corporate speech in American dating back to the Progressive era.

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[12] Jeffrey Rosen, "Supreme Court, Inc.," *New York Times Magazine*, March 16, 2008.
[13] Id. at 933.
[14] Id.

But Chief Justice Roberts choose not to avoid a constitutional conflict. He assigned the majority opinion to Justice Anthony Kennedy, who wrote an unnecessarily sweeping opinion declaring that corporations are persons with full First Amendment rights. The majority opinion is perfectly principled as an abstract discourse on the First Amendment, and indeed is supported by some civil libertarian liberals. It is a plausible, if highly abstract, reading of the text of the First Amendment, completely removed from its historical context – the kind of opinion that could have been written by Chief Justice Earl Warren. But it is a highly activist opinion, if you take any of the many definition of constitutional activism that Chief Justice Roberts had pledged to avoid. In particular, as Justice John Paul Stevens pointed out in his powerful dissent, the opinion refuses to defer to the text of the First Amendment, which distinguishes between the freedom of speech and freedom of the press, the original understanding of the Constitution, the settled traditions of the American people, as expressed for more than a century by the President and Congress, and it overturns or mischaracterizes several important Supreme Court precedents.

My colleague Doug Kendall will discuss how both the majority and concurring opinions in *Citizens United* mischaracterize constitutional text and original understanding and the longstanding traditions of the American people in suggesting that the rights of corporations are identical to those of real people. But as Justice Stevens noted, the opinion seems baseless as a matter of original understanding – "unless one evaluates the First Amendment's 'principles' or its 'purpose' at such a high level of generality that the historical understandings of the Amendment cease to be a meaningful constraint on the judicial task."[15] The text of the Constitution does not refer to corporations as persons; but it does distinguish between "the freedom of speech, or of the press," suggesting that the Framers were perfectly capable of treating newspaper corporations differently than other for profit corporations.

As the debate between Justice Scalia and Justice Stevens shows, the framers of the First Amendment did not think extensively about the rights of corporations when the Bill of Rights was ratified, because general

[15] *Citizens United v. Federal Elections Commission*, 558 U.S. ___ (2010) (Stevens, J. concurring in part and dissenting in part), Slip. Op. at 39, available at http://www.supremecourtus.gov/opinions/09pdf/08-205.pdf

incorporation statutes did not emerge until the 1800s.[16] To the degree the framers thought about corporations, they were concerned about the special privileges that might result from the grants of special charters. Moreoever, the majority in *Citizens United* ignores the powerful suspicion throughout American history of monopoly privileges and "class legislation" that favored for profit corporations. This tradition started in the Jacksonian era, was embraced by Abraham Lincoln and the Reconstruction Republicans, was extended by the trust-busting Theodore Roosevelt, and culminated in the work of Louis Brandeis during the progressive era and Franklin Roosevelt during the New Deal. All of these economic populists, both Republican and Democratic, in the nineteenth and twentieth century, would have strenuously rejected the Supreme Court's claim that Exxon should have the same free speech rights as a mom and pop proprietor.[17]

The longstanding American suspicion of corporate monopoly power is embodied in a century of federal laws that the *Citizens United* decision could be read to call into question – ranging from the Tillman Act of 1907, when Congress banned all corporate contributions to candidates on the grounds, as the Senate Report observed, that "[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure," to the Taft Harley Act of 1947, where Congress extended the prohibition on corporate support of candidates to include not only direct contributions but also independent expenditures.

In addition to refusing to defer to the original understanding and longstanding traditions of Americans, the *Citizens United* decision is also troubling in its treatment of Supreme Court precedents. On this score, it's worth noting how unusual it is for the Court to overrule its own precedents. The Marshall Court didn't overturn a single constitutional precedent; and the Taney Court only one. The Hughes Court, which challenged Franklin D. Roosevelt during the New Deal and then retreated, overturned 25 precedents. The Warren Court, although criticized for activism, overturned

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[16] Id. at 36.

[17] *See Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-549 (1933) (Brandeis, J., dissenting (on fears of the "evils of business corporations.")

32, which was less than the Burger Court, which overturned 76. And the Rehnquist Court overturned 39 precedents.[18]

Some originalist judges, such as Justice Thomas and, to a lesser degree, Justice Scalia, see nothing wrong with overturning precedents that clash with the original understanding of the constitution: on the Rehnquist Court, Justice Thomas voted to overrule more precedents per year than any other justice, followed by Scalia and then Rehnquist and Kennedy. [19] But Chief Justice Roberts in his confirmation hearings took a very different approach. He described himself a "bottom up" rather than a "top down" judge, a perspective said included a respect for stare decisis. Extending the metaphor of judicial modesty, he compared judges to umpires.

In his first terms on the Court, Chief Justice Roberts was criticized by both his liberal and conservative colleagues for chipping away at precedents incrementally rather than overturning them openly, but nevertheless joining opinions that held the exact opposite of what the Court had held only a few years early. In *Federal Election Commission v. Wisconsin Right to Life*, for Example, a 5-4 majority struck down a provision of the Bipartisan Campaign Reform Act (BCRA) that limited expenditures by corporations, a provision that the Court had upheld only four years earlier in McConnell v. FEC. But Roberts refused to overrule McConnell openly, leading Justice Scalia to object:

> [T]he principal opinion's attempt at distinguishing McConnell is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules McConnell without saying so. See post, at 24–25 (Souter, J., dissenting). This faux judicial restraint is judicial obfuscation.[20]

In *Citizens United*, Roberts seemed to vindicate Scalia's charge. "Relying largely on individual dissenting opinions, the majority blazes through our precedents," Justice Stevens declared, "overruling or disavowing a body of case law including FEC v. Wisconsin Right to Life, Inc., 551 U. S. 449 (2007) (WRTL), McConnell v. FEC, 540 U. S. 93 (2003), FEC v.

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[18] Michael J. Gerhardt, THE POWER OF PRECEDENT 11-12 (2008).
[19] Id. at 12.
[20] *Wisconsin Right to Life v. Federal Election Commission*, 551 U.S. ___ 2007 (Scalia, J., concurring in part and concurring in the judgment), slip op. at 17 & n. 7, available at http://www.supremecourtus.gov/opinions/06pdf/06-969.pdf

Beaumont, 539 U. S. 146 (2003), FEC v. Massachusetts Citizens for Life, Inc., 479 U. S. 238 (1986) (MCFL), NRWC, 459 U. S. 197, and CalMedical Assn. v. FEC, 453 U. S. 182 (1981)."[21]

Even more troubling, in the eyes of the dissenters, was the fact that the majority did not characterize these precedents candidly. For example, Justice Stevens said the majority had mischaracterized *Buckley v. Valeo*, the landmark campaign finance decision, in suggesting that it was only concerned about quid pro quo corruption rather than less explicit forms of undue influence on the electoral system. (Congress had come to the opposite conclusion in extensive fact-finding that the majority ignored.) And the majority also mischaracterized earlier opinions in claiming that the Supreme Court has always protected corporate speech as vigorously as the speech of real people. "The only relevant thing that has changed," Stevens wrote, "is the composition of this Court."[22]

Why would Chief Justice Roberts have said he wanted to promote narrow, unanimous opinions while insisting on broad protection for the rights of corporations even though narrower grounds were available? Perhaps he thought he could produce a unanimous court by convincing his liberal colleagues to come around to his side, rather than by meeting them halfway. In the most revealing passage in his concurrence in *Citizens United*, he wrote that "we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right."[23] But the great practitioners of judicial restraint had a very different perspective. "A Constitution is not intended to embody a particular economic theory," Oliver Wendell Holmes wrote in his most famous dissent, in *Lochner* v. *New York*. "It is made for people of fundamentally differing views."[24] Holmes always deferred to the president and Congress in the face of uncertainty. He would never have presumed that he knew the "right" answer in a case where people of good faith could plausibly disagree.

Why should the public care that the Roberts Court now seems willing to impose ideologically divided, constitutionally polarizing opinions rather than narrow, unanimous ones? As Chief Justice Roberts himself recognized,

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[21] *Citizens United v. FEC* (opinion of Stevens, J.), Slip. Op. at 3.
[22] Id. at 23.
[23] *Citizens United v. FEC*, Roberts, C.J., concurring, Slip. Op. at 4.
[24] *Lochner v. New York*, 198 U.S. 45, 75-6 (1905) (Holmes, J., dissenting.)

this is a highly polarized age, and when the Court imposes bold decisions on a divided nation on the basis of slim majorities, it risks a political backlash. Is the Court, therefore, on the verge of repeating the error it made in the 1930s? Then, another 5-4 conservative majority precipitated a presidential backlash by striking down parts of FDR's New Deal.

One lesson from the 1930s is that it takes only a handful of flamboyant acts of judicial activism for the Court to be tarred in the public imagination as partisan, even if the justices themselves think they are being moderate and judicious. Although vilified today for their conservative activism, both the Progressive and New Deal-era Courts had nuanced records, upholding more progressive laws than they struck down. As Barry Cushman of the University of Virginia notes, of the 20 cases involving maximum working hours that the Court decided during the Progressive era, there were only two in which the Court struck down the regulations. But those two are the ones that everyone remembers. And, during the New Deal era, Cushman adds, we remember the cases striking down the National Industrial Recovery Act and the first Agricultural Adjustment Act, forgetting that the Court upheld the centerpiece of FDR's monetary policy and, by a vote of 8-1, the Tennessee Valley Authority.

It may be hard to imagine a full-scale assault by the Roberts Court on Obama's regulatory agenda because, with the exception of Justice Thomas, the conservatives on today's Court tend to be pro-business conservatives, rather than libertarian conservatives, and are therefore unlikely to strike down government spending programs (like the Troubled Asset Relief Program) that help U.S. business. But it's not hard to imagine the five conservative justices reversing other economically progressive regulations on the basis of contested constitutional arguments. Later this term, for example, the Court may follow *Citizens United* with another activist decision, striking down the Public Company Accounting Oversight Board (nicknamed "Peek-a-Boo"), which was created to regulate accounting firm auditors in the wake of the Enron and Arthur Andersen scandals. If the Court strikes down Peek-a-Boo, even if the decision is narrow enough not to call into question the constitutionality of the Federal Reserve, it may turn rumbling against the Court's activism into full-blown outrage.

It's impossible, at the moment, to tell whether the reaction to *Citizens United* will be the beginning of a torrential backlash or will fade into the ether. But the Roberts Court is now entering politically hazardous territory. I continue

to admire Chief Justice Roberts's original bipartisan vision of unanimity and consensus and still hope that he has enough political savvy and historical perspective to recognize and avoid the shoals ahead. But the success or failure of his tenure will turn on his ability to align his promises of restraint with the reality of his performance. At this moment in our economic history, the American people are concerned about the influence of corporations in our political life, and this Committee should be concerned, too, when bipartisan legislation is struck down by activist judges on the basis of questionable constitutional arguments imposed by ideologically polarized, 5-4 majorities. We have seen narrow conservative majorities strike down progressive economic regulations in the name of corporate rights before -- and it always ends badly for the Court.