

Government of and for the People?

Corporate Political Spending in America after Citizens United and the Urgent Need for the 28th Amendment to the U.S Constitution

Testimony of Jeffrey D. Clements*
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Introduction

Good morning Chairman Sturla, Chairwoman Josephs, and members of the Committee. Thank you for examining this extremely important topic, and for inviting me to testify today.

Two hundred and twenty years ago, Benjamin Franklin famously described to a Philadelphia resident the kind of government created in Independence Hall in the summer of 1787. He said that America now had “a republic - - if you can keep it.”

Whether we keep it or not is very much in doubt as a result of the rise of corporate power and the fabrication of corporate Constitutional rights in our generation. Today, whether we are a government of the people or a government of large corporations and the very, very few who control them is at stake once again.

My testimony this morning will focus on the Supreme Court’s 2010 *Citizens United* decision, and the alarming corruption and rapid deterioration of our system of free and fair elections and government. My testimony also will focus on the rapidly growing and necessary movement for a 28th Constitutional Amendment to reverse *Citizens United* and the incursion of newly created and unconstitutional “corporate rights” into the people’s Bill of Rights. More on these topics may be found at www.freespeechforpeople.org.

As before in times of great challenge in American history, Pennsylvania can take a leading role in protecting the American experiment in self-government by prompt passage in General Assembly of a resolution that does three things:

- (1) Condemns the decision in *Citizens United v. FEC*;
- (2) insists on the rights of Pennsylvania and its people to protect its elections and government from the corruption of corporate political spending; and
- (3) requests that Congress promptly act to send to the states for ratification the 28th Amendment to the Constitution to overturn *Citizens United* and restore the right of the people to free and fair elections and government.¹

The Supreme Court’s 5-4 decision in *Citizens United v. Federal Election Commission* ruled that the American people are forbidden to prevent the election spending of corporations of any sort - - including global corporations from Exxon to Goldman Sachs. According to the *Citizens United* decision, we are not allowed to prevent corporations from spending hundreds of millions, even billions, of dollars to define what matters, who

¹ A sample resolution is attached and at <http://www.freespeechforpeople.org/resources>

wins, and who loses our federal, state, judicial and even local elections because those corporations have the same speech rights as you and me and the rest of the American people.

As Justice Stevens and the four dissenters on the Court noted, this decision is a “radical departure” from our law of free speech under the First Amendment. It is a radical rejection of two centuries of American law seeking, as James Madison put it, to ensure that the power of corporations have “proper limitations and guards” by the people.

To read the *Citizens United* decision is to enter into a Wonderland where we are asked to pretend that powerful global corporations that can only exist because of the laws of our government are just the same as you and me and other people. Nowhere in the *Citizens United* decision does the Court define a corporation. Instead, they are called “speakers,” “voices” and, yes, even a “disadvantaged class of persons.”

Apart from the absurd aspects of a decision that hands over the hard-won rights of real Americans over to powerful legal entities created by state law in Delaware and elsewhere, the scope and consequences of the decision are staggering. It is no exaggeration to say that if *Citizens United* stands, American republican democracy falls.

A government premised on equal, sovereign human beings cannot co-exist with a government premised on unregulated election and lobbying spending by global corporations with hundreds of billions of dollars in revenues (WalMart alone had 2010 revenues of \$421 billion).

There is only one way for the states and Congress to overrule the Supreme Court when it makes such a grave Constitutional misstep: Enactment of a Constitutional Amendment to settle once and for all that corporations are not people, and that the people and our elected representatives retain the authority to decide for ourselves on the place of corporations in our democracy.

Constitutional amendment campaigns are how we answer these fundamental questions on which the nature of our republic is decided. This is not an untested approach but a basic tool of American citizenship and government. We have amended the Constitution twenty-seven times before, including at least once every decade since 1913, except for the 1940s and the 1980s.

This amendment process is how we have made our democracy one where every adult citizen or every race and gender had the same right to vote. That’s how US Senators came to be elected by the people. That’s how we eliminated barriers such as the poll tax to equal participation in elections. At least six amendments reversed erroneous Supreme Court decisions. Today, we must do the same.

A Constitutional amendment reversing *Citizens United* and the radical notion that global corporations can use the people's Bill of Rights to strike down our laws is necessary if we are to live up to Benjamin Franklin's challenge.

Citizens United and consequences

In *Citizens United*, the Supreme Court ruled that the First Amendment prevents the American people from restricting corporations from spending unlimited corporate funds to attempt to defeat or elect candidates. The *Citizens United* decision struck down as a violation of the First Amendment the federal Bipartisan Campaign Reform Act's restriction of corporate spending intended to influence election outcomes.

Only six years before *Citizens United*, the Supreme Court had ruled that the exact same federal law restricting election spending by corporations and unions does not violate the First Amendment. *McConnell v. FEC*. Similarly, in 1990, the Court agreed that state law restrictions on corporate political expenditures did not violate the First Amendment. The reason was simple: Corporations are not people. *Austin v. Michigan Chamber of Commerce*.

As the Court said in the 1990 *Austin* case upholding the right of Michigan and its people to decide how to regulate corporate political spending:

State law grants corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets . . . These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'²

Similarly, in the 2003 *McConnell v. FEC* case upholding similar restrictions in the McCain-Feingold law, the Court pointed to "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form . . ."³

Yet only six years later, in *Citizens United* the Court says that is all wrong. What changed? A new majority made possible by the death of Chief Justice Rehnquist and retirement of Justice Sandra Day O'Connor and the appointment of Chief Justice Roberts and Justice Alito. With a new Justice or two, what had been right now was wrong. What

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

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

had been sensible regulation of corporations to try to keep elections clean and fair for more than a century now was unconstitutional. The *Austin* case was wrong. The *McConnell* case was wrong. The American people, Congress, and states such as Pennsylvania all were wrong by trying to keep the money and power of large, powerful corporations focused on business and the economy rather than on controlling our elections and government. That's not how Constitutional law is supposed to work.

As I mentioned, Justice John Paul Stevens' dissent rightly calls the majority opinion a "radical departure from what has been settled First Amendment law." The consequences are already being felt. Consider what *Citizens United* unleashes in our democracy:

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

It would take only a slight diversion of corporate profits into our political system to utterly dominate the outcomes.

In the first post-*Citizens United* election, the 2010 mid-term elections, at least hundreds of millions of dollars of un-sourced, undisclosed money flowed into election campaigns across the country. Politicians who had not done corporate bidding, whether on health care, energy or financial reform were bombarded with negative ads. Coal companies plotted to defeat what they called “anti-coal” Senators and elect “friends of coal” in their place. More than \$4 billion was spent, a record.

Despite the saturation of the airwaves with political advertisements, and despite the grave problems the nation faces, sixty percent of eligible voters did not bother to vote. Perhaps they are growing tired of being played.

Citizens United's unleashing of corporate money in elections is not confined to federal elections. For years, section 1633 of the Pennsylvania Election code banned political campaign expenditures by corporations. According the Pennsylvania Secretary of State, *Citizens United* has invalidated that law. Some states, such as Kentucky, had corporate spending bans embedded in their state constitutions. The five Justices who decided *Citizens United* wiped out those longstanding state Constitutional protections as well.

As a result, money and the mysterious independent expenditure campaigns funded by who knows what, are defining state elections, and not just legislative elections. As former Supreme Court Justice Sandra Day O'Connor has stated so forcefully, application of this

“corporations are people and money is speech” delusion to judicial elections imperils the very idea of fair and equal justice in America. And according to a recent report by Justice at Stake, the Brennan Center for Justice, and the Institute for Money in State Politics, Pennsylvania saw the second most costly judicial elections in the country in 2010, with 5.4 million spent on one Supreme Court seat alone.

This notion that corporations have Constitutional rights that trump the people’s laws is not only a question of campaign finance or money in politics. *Citizens United* is an extreme extension, or the end game, if you will, of a transformation of our Constitution into a tool for corporations to strike down inconvenient state and federal laws. Environmental laws, public health laws, financial regulation, energy laws, and many more have been struck down by courts at the behest of corporations claiming that their business plans are “speech” that cannot be regulated.

Reaction and responses to Citizens United

The only silver lining in this tale has been the reaction of the American people. Across the political spectrum, Americans know that our system is broken, dominated by pay-to-play elections and corporate control of most policy outcomes. We are demanding fundamental change, not tinkering.

The vast majority of Americans, regardless of political party, support a Constitutional amendment to reverse the Supreme Court’s creation of corporate “rights.”⁴ Strong opposition to *Citizens United*’s holding of corporate speech rights cuts across all partisan lines: 81% of Independents, 76% of Republicans, and 85% of Democrats oppose the decision, and 72% of the people support reinstating the very limits that the Court struck down.⁵

Close to two million people have signed petitions demanding that Congress and the States enact the 28th Amendment to overturn *Citizens United*. Free Speech for People and its allies are working together to organize and move resolutions forward across the country.⁶

Nearly a thousand business leaders have joined together as Businesses for Democracy, working with Free Speech for People and the American Sustainable Business Council for for the 28th Amendment. Scores of law professors, former state Attorneys General and other leading attorneys have called on Congress to move toward a Constitutional amendment on this issue. The dean of American Constitutional scholars, Harvard Professor Laurence Tribe, recently joined Free Speech for People in working with

⁴ <http://freespeechforpeople.org/sites/default/files/FSFP%20Nationwide%20Voter%20Survey-1.pdf>

⁵ February 2010 Washington Post-ABC News poll.

⁶ <http://freespeechforpeople.org/get-involved>; <http://www.united4thepeople.org>

Congresswoman Donna Edwards and others in the House on a Constitutional amendment to reverse *Citizens United*.

Just this week, eight U.S. Senators introduced an Amendment resolution in the Senate to enable the states and Congress to limit corporate and other spending and contributions in elections. Several of these Senators had joined former Pennsylvania Senator Arlen Specter in the last Congress in offering a similar Constitutional amendment. Now, other Senators, such as Montana's Max Baucus, also are moving forward with similar Constitutional amendment resolutions. More information on these developments can be found at www.freespeechforpeople.org.

Why are people demanding a Constitutional amendment? What about disclosure, shareholder approval, publicly funded elections and other reforms?

Nearly two years ago, when *Citizens United* was decided, many believed that a Constitutional amendment was "extreme" or "impractical" or "unrealistic." We would have disclosure. We would have shareholder approval. We could still keep foreign money out of our elections. Congress did nothing, and even voted down limited disclosure laws. We now have none of those safeguards.

As just one example, Professor Tribe did not support a Constitutional amendment a year ago, believing that legislative avenues of reform were available. He was far from cavalier about the consequences of *Citizens United*, of course. Indeed, in testimony to Congress, he warned of the grave danger of a "New Politico-Corporate Order." <http://judiciary.house.gov/hearings/pdf/Tribe100203.pdf>. Yet, he urged Congress to work on "meaningful avenues of legislative relief short of a Constitutional amendment."

It turns out that it already was too late. A government responsive to the people was already dying.

The Senate—publicly and without shame—voted down even the limited Disclose Act, which would have taken the most minimal step of requiring some disclosure of the source of corporate money in elections. In killing disclosure, Congress showed that even the most extreme anti-human and pro-corporate positions that everyone had assumed no politician could possibly support - - secret corporate money in elections, for example - - now was a perfectly logical position. Why not, when corporate front groups such as "American Crossroads" had \$250 million to put to use on their behalf when it came time to face the voters?

We need legislative reforms, yet we will not achieve them without taking on the underlying fundamental principle that is at stake. The fate in *Citizens United* of the relatively modest reform of the McCain-Feingold law makes clear that meaningful progress cannot be achieved without removing the fabricated unconstitutional corporate rights doctrine first. Just as previous amendments to our Constitution answered

fundamental questions about the structure of our democracy, thus allowing other needed legislative reform, the 28th Amendment is needed to make possible a renewal of American democracy today.

As more and more Americans know, it is time to face the fact that we must do the heavy lifting of enacting the 28th Amendment to guarantee free, fair elections and government of the people, not government of the corporations.

What can Pennsylvania do?

Just as Pennsylvania has been a leader at every crossroads of the American republic, the keystone state can lead this effort again.

The road to a Constitutional amendment to renew our democracy moves through the states. As with previous amendments, we need state legislatures to pass resolutions calling on Congress to pursue enactment of an Amendment and sent it to the states for ratification.

Last March, thirty members of the Pennsylvania House of Representatives introduced House Resolution 653, calling for Congress to call a Convention to consider a Constitutional amendment to reverse *Citizens United*. We commend this leadership and hope that the General Assembly will continue to make progress on moving an appropriate resolution forward.

In that regard, it is worth noting that these State resolutions need not include the potentially controversial call for a Constitutional Convention, nor need such a resolution even specify precise Amendment language. Indeed, it may well be better for states such as Pennsylvania to call on Congress to begin the work of drafting an Amendment, holding hearings to consider different language, and moving forward the necessary national conversation to win a 28th Amendment. Prompt enactment of an Amendment resolution by the Pennsylvania General Assembly and other state legislatures is critical to that effort.

Conclusion

Citizens United and the current domination of elections and politics by corporations raise a fundamental question about who we are as a people, and as a nation: Will we be a government of the people? Or will we be a government of the corporations? With work toward the 28th Amendment and needed reform of our pay-to-play election system we can make sure that government of the people will not perish after all.

Thank you again for your consideration.

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ATTACHMENT:

Sample Resolution