CORPORATE CONTROL OVER ELECTIONS

SUMMARY OF ISSUES SURROUNDING

CITIZENS UNITED V. FEDERAL ELECTION COMMISSION (2010)

AND ITS AFTERMATH

(A REFERENCE)

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> Issues such as healthcare, financial reform, climate change and education are like the branches of a tree, notes Professor Lawrence Lessig of Harvard Law School; they cannot be solved until the root problem is solved: corporate control of American elections. [1]

INTRODUCTION

In Congress these days, any piece of legislation that has the overwhelming support of the American people will almost certainly be defeated if it is against corporate interests. Yet any legislation that favors large corporations will slip through Congress with ease. Meanwhile, time-wasting issues such as debt ceilings are endlessly debated in Congress and overblown by the media, while people continue to lose their jobs and homes.

The Supreme Court, in a single 2010 decision, *Citizens United v. Federal Election Commission*, gave corporations and unions so much power in federal election campaigns that the rights of American citizens to have their votes count – whether Tea Party, Democrat, Republican or Libertarian – has been greatly diminished. Many members of Congress, heavily dependent on corporations, no longer represent their constituents; they represent corporations that fund them.

Citizens United (January 21, 2010) allowed corporations and unions to spend unlimited amounts of money from their general treasuries in the election process to pay for ads explicitly asking people to vote for or against specific federal candidates. These ads are called "independent expenditures" (IEs). The Supreme Court stated that giving corporations these powers would not

be corruptive or even appear to be corruptive and that disclosure of corporate political activity would prevent corruption.

While the court required that corporations be given almost complete freedom to participate in elections, it did not require that these financial transactions be publicly disclosed; it only assumed that Congress and the FEC would require disclosure. Since Congress and the FEC have been "bought" by corporations, these disclosure laws and rulings have never been updated.

Unfortunately the out-of-date existing laws on disclosure create the very loopholes through which corporations are allowed to carry on their political activities secretly. More loopholes have been opened by a combination of other flaws in the *Citizen United* decision.

Further, the delicate system of checks and balances in government (legislature, executive, judiciary), which was established by the Founding Fathers to protect democracy from tyranny, has been corrupted by this Supreme Court decision, enabling corporations to usurp power from government.

Now, the handful of people within a corporation who decide which issue or candidate to support wield influence over U.S. elections that is vastly out of proportion to their numbers. They do not even have to inform their shareholders of their political activities.

This corporate allocation of huge amounts of money towards elections is a great waste of national resources. Who ultimately pays for the hundreds of millions of dollars of corporate political activity? The American people.

In a second pivotal court case, *SpeechNow.org v. FEC (2010),* the D.C. Circuit Court of Appeals further expanded corporate control over elections, giving them the right to *receive unlimited donations*, as well as to *make unlimited "independent expenditures*."

In response to the above decisions, the FEC, which puts into effect changes in the election laws, issued two important Advisory Opinions (2010) creating "independent expenditures-only committees" (Super PACs), which are permitted to solicit unlimited sums of money from individuals, other political associations, corporations and labor unions to be used for "independent expenditures."

Super PACs are prohibited from coordinating their expenditures with candidates or political parties, and the identity of donors and donations is supposed to be publicly disclosed. However, the definition of "coordination," is unclear, and, as for the disclosure of the identity of donors, it is very easy as explained above for corporations to circumvent the disclosure requirement due to the particular wording in the out-of-date but still applicable FEC regulation.

Then came a third court decision, *Carey v. FEC (2011),* which added more ways for corporations to funnel money into election campaigns.

Other cases are coming up through the courts with the goal of extending corporate power still further, particularly in state and local elections.

In June 2011 the FEC issued a third Advisory Opinion (2011-12) making it legal for candidates to attend, speak and be featured guests at Super PAC fundraising events as long as the candidates do not solicit unlimited funds. They speak, and then they step aside to allow Super-PAC members to collect the money. Similarly, it is now legal for candidates to discuss any issue with

Super PAC staff except actual expenditures that the Super PAC intends to make. They can, for example, collaborate on fundraising strategies.

As corporations use their enormous financial "war-chests" to put their support behind their favorite issues and candidates, they are drowning out the voices of the less affluent political parties, candidates and voters, who are working together to build campaigns in the American tradition.

Corporations channel their political activities through several types of organizations, the most important of which are tax-exempt nonprofits called 501(c)(4)s, (5)s and (6)s (IRS designations). The names of the donors and donations to these nonprofits can be kept secret from the public. The 501(c)s can bundle donations into a few or a single check before either spending the money on political ads or else passing it along to Super PACs to be spent.

In either case, only the 501(c) is listed as the donor. Although the actual donors report separately to the IRS, the IRS never makes the information public. Nothing prevents a multi-national oil giant from telling its preferred candidate, but not the voters, about its contribution to a 501(c).

Patriotic-sounding organizations established by corporations can create deceptive, manipulative political ads that lead citizens to unwittingly vote for candidates who will support, not the public interest – be it health care reform, better education or job creation -- but the interests of a candidate's silent corporate backers, whether banking, insurance interests, agra-business or investors in fracking. Only after elections, if ever, might voters become aware of the source of the ads' funds.

All the regulatory agencies that were set up to prevent electoral and corporate fraud (the FEC, IRS [in its minor role], and Securities and Exchange Commission [SEC]), as well as Congress in its legislative role, have for one reason or another been largely disabled. Even the President appears to be unable to act to protect the "natural person" (human) voter. The Supreme Court and corporations act as if "corruption" has no meaning. However, for Americans, the old definition is still sacrosanct.

Foreign influence in federal elections has also become an issue, given the opportunities for non-disclosure; dangers of foreign interference will increase as companies become increasingly international. Recently, the Supreme Court dismissed a case that would have given foreigners living temporarily in the U.S. the right to contribute to election campaigns.

Finally, given the enormous input of corporate capital, would simply disclosing the source of funds make a significant difference in rebuilding American democracy? Do corporations have an unfair advantage because of their corporate form, for example the ability to generate immense amounts of cash?

What has taken place in the aftermath of *Citizens United* is the sudden and massive deregulation of corporate political activity.

How did corporations amass so much power?

The Founding Fathers so deeply distrusted corporations that they were not mentioned in the Constitution. It was left to the states to issue their charters of incorporation, on the assumption that the local level could keep a closer watch over corporations.

However, corporations gradually became stronger. During the Industrial Revolution, the Supreme Court case, *Santa Clara County v. Southern Pacific Railroad Co. (1886),* just assumed that corporations had the status of "personhood" under the Fourteenth Amendment to the Constitution, giving corporations the same rights as people.[2] This one event had huge implications in the struggle by corporations to gain power over government. It was assumed thereafter that corporations also had rights as "persons" under the First and Fifth Amendments. Most important, under the First Amendment, corporations now had the right to freedom of speech.

In 1947, corporate "Personhood" was reinforced by law. From then on, corporations gained or lost some measure of control over government, largely depending on the political leanings of the sitting members of the U.S. Supreme Court at the time.

In the aftermath of the *Citizens United (2010)* decision, corporations increased their power over elections by a quantum leap. Paul Wilson, President and CEO of Wilson Grand Communications, which is "in the persuasion business" according to its website, expressed the hubris of today's corporate leaders: "We have organizations with the ability to marshal resources and focus a machinegun fire of ads at a particular message. The candidate doesn't control the message anymore."[3] Wilson's firm worked with the conservative Super PAC American Crossroads in the 2010 cycle.

A push-back on many public fronts is growing against corporate control of elections, including the burgeoning grass roots movement for a Constitutional amendment that could, among other reforms, deny corporations "personhood," and take corporations out of elections. Such an amendment might also free the electoral system from the Supreme Court's manipulation, and establish public funding for elections.

For information on these issues, see: http://www.movetoamend.org, http://www.speechforpeople.org, http://www.getmoneyout.com, and http://www.callaconvention.org , for example.

This paper is intended to pull together some relevant scattered pieces of information as of January 2012. With the number of interests focused on this particular issue (regulators, politicians, public interest groups, businesses, and the courts), major changes for better or worse can take place at any time.

PACs, SUPER PACs, and 501(c)(4)s, (5)s and (6)s

To clearly understand how corporations wield power, it is useful to examine their methods. Corporations can choose among several types of tax-exempt, nonprofit organizations as channels for their political activities, depending on their particular intention or project. In this way, corporations avoid the much higher taxes that they would incur otherwise.

Both PACs and Super PACs (IRS Code 527 organizations) are required to disclose the identity of their donors. Their tax exempt function (primary function) is defined as: "influencing or attempting to influence the selection, nomination, election, or appointment of an individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual electors are selected,

nominated, elected, or appointed" [IRS Code 527(e)(2)]. Therefore, 527s are 100% political organizations.

A. **PACs** are the old-fashioned **"Political Action Committees"** first formed in 1944.

ESTABLISHMENT: Anyone wishing to collect money to give to a candidate or political party in the election process may create a PAC. There are two basic kinds of PACs:

1. **"SSF" PACs**. Corporations, unions, trade associations, and business leagues can create and administer PACs to which their own employees, shareholders and PAC members may voluntarily make limited contributions; but the parent organizations themselves may not give money to any PACs.

2. **"Nonconnected" PACS** are those that are neither connected to, nor sponsored by, corporations, unions, trade associations or business leagues, and they are usually ideological or represent a special interest (for example the National Rifle Association). They may collect limited amounts of money from the general public to give directly to political parties and to candidates for campaigns.

a) **Hybrid PACs**. As a result of the *Carey v. FEC (2011)* (See p. 13: "Critical Events," II, C), any "nonconnected" PAC is permitted to establish an additional bank account, completely separate from its other PAC accounts, that acts as a Super PAC (within the PAC) with the privileges and restrictions of a Super PAC (see below: B. "Super PACs"). This specialty nonconnected PAC is known as a "Hybrid PAC."

In brief, the separate account may take in unlimited contributions from individuals, political committees, corporations and unions to spend only on "independent expenditures" (IEs) -- political ads for the purpose of electing or defeating candidates. This nonconnected PAC is then known as a Hybrid PAC by the FEC. Only this bank account can act as a Super PAC. In this way the nonconnected PAC avoids the complexity of establishing a separate Super PAC. Note that while corporations are not allowed to contribute money to a PAC, they may contribute to these particular separate Hybrid PAC bank accounts within nonconnected PACs.

b) **Leadership PACs**. Growing in popularity, these nonconnected PACs are established by a candidate to collect money to support *other* candidates. In this way, a network of allies and supporters can be built up. These have the same restrictions as other PACs.

LAW: IRS Code, Section 527. Its only purpose is political activity.

USE: PACs collect funds, which they use to influence elections, and (unlike Super PACs) they can contribute directly to candidates and to political parties in election campaigns.

DISCLOSURE: Donors' names and donations are reported to the FEC and are made public.

TAXES: Tax exempt under IRS Code, Section 527, but contributions are not tax deductible for federal income tax purposes.

CONTRIBUTIONS: 1. There are legal limits on contributions to a PAC by individuals, other PACs, and political parties. 2. A Hybrid PAC may accept unlimited contributions only to its special account for "independent expenditures."

REGISTRATION AND REPORTING: With the FEC.

B. Super PACs ("Independent Expenditures-Only Committees") were first established in 2010.[4] The long name refers to the regulation that Super PACs are forbidden to contribute directly to candidates or to political parties; it does not limit their political activity in any other way.

ESTABLISHMENT: Almost anyone, including corporations and 501(c)s, can establish and administer a Super PAC.

LAW: Created by FEC Advisory Opinions 2010-09 and 2010-11 in response to *Citizens United* (2010). Though Super PACs are governed by the IRS Code 527, they operate primarily under the Federal Election Campaign Act and FEC regulations.

USE: To *raise* unlimited sums of money from people, corporations, labor unions, and political committees and to *spend* unlimited sums on "independent expenditures," (IEs) and on "electioneering communications (ECs). ECs have become obsolete because independent expenditures are much more comprehensive and less restrictive. For a definition of ECs, see the Glossary.

Independent expenditures (IEs) are ads – internet, radio, TV, mailings, billboards, etc. – explicitly telling voters to "Vote for A," or "Vote against B." The expenditure may not be made in cooperation or consultation with, or at the request or suggestion of a candidate, or a political party.[5] A Super PAC may either make these IEs itself, or pass the money on to other kinds of groups such as 501(c)s (see below) when it has particular reasons to do so. (IEs are sometimes called express advocacy communications.)

The press repeatedly and mistakenly reports that Super PACs have to be "independent of candidates," but they do not. They simply must refrain from making "coordinated expenditures" under specific regulations that define what constitutes "coordination," a poorly defined term. They may, however, discuss general strategy.

DISCLOSURE: Donors' names and donations are required to be reported to the FEC and are made public. However, when a Super PAC receives money from a 501(c) (which may have received its donations from anonymous sources), it reports only the 501(c) as the donor. This does not prevent the 501(c) from letting a *candidate* know the name of the corporation that made the original contribution, so that the candidate has this information, but not the voters . See "Non-Disclosure and Corruption" for a discussion of Super-PAC disclosure complexities.

TAXES: There are taxes on the political activities, but the receipts are spent so quickly that taxes are insignificant. Contributions are not deductible for federal income tax purposes.

CONTRIBUTIONS: No legal limits on contributions to or from Super PACs. Super PACs may *not* contribute directly to candidates, parties or to PACs. Super PACs may work together with 501(c)s.

REGISTRATION AND REPORTING: with the FEC. More than 200 Super PACs have been registered with the FEC; though most are conservative, some are listed as liberal. (Citizens United, a 501(c)(4) nonprofit corporation, registered its new Super PAC, Citizens United Super PAC LLC, on June 10, 2011.)[6]

The New York Times reported that "Candidate Super PACs" are a new form, not created or run by the candidate, but with the sole purpose of electing a particular candidate. "The abuse of these PACs brazenly violates both *Citizens United* and previous federal election

law….Complaints that have been filed with the F.E.C. about super PACs are being ignored because the three Republicans on the six-member board are opposed to campaign finance laws."[7]

C. The IRS first established **501(c)(4), (5) and (6) corporations and associations** in the early 1900's, giving them the primary purpose of promoting the common good of the community. Lobbying and public education on relevant issues are considered tax-exempt purposes of these organizations.

The following are the required primary tax-exempt purposes of politically active 501(c)s.

. (c)(4)s promote social welfare.

. (c)(5)s improve labor and agricultural products and occupations.

. (c)(6)s improve conditions for business leagues and chambers of commerce.

ESTABLISHMENT: Almost anyone can establish a 501(c) organization.

USE: 1. Even before *Citizens United*, 501(c)(4)s, (5)s, and (6)s could make IEs (ads saying "vote for A" or "against B".) However, *Citizens United* allowed corporations to make IEs through 501(c)s for the first time using unlimited amounts of money out of their general funds without telling their shareholders. It is legal as long as the corporation does not coordinate the expenditures with candidates or political parties, and as long as IEs are not the organization's primary task, since it is not a tax-exempt function.

2. 501(c)s are also allowed to make "electioneering communications," (ECs) [8] as long as this is not their primary activity. However, ECs are obsolete now.

3. Unlimited amounts of money may be spent by 501(c)s on their primary activities, including related "issue advocacy" and on non-partisan activities such as voter registration, get-out-the-vote campaigns, voter guides and candidate debates. They may use "lobbying" and "education" to promote their primary activities.

CONTRIBUTIONS, DISCLOSURE: [9] 501(c)(4), (5), and (6) organizations can accept and spend unlimited contributions but may not contribute directly to candidates.

When a 501(c) makes an independent expenditure, that expenditure is reported to and regulated by the FEC rather than the IRS, but the 501(c) still does not have to reveal the identity of its donors. Instead, it can report its own name to the FEC as the donor. For its "primary purpose activities," this 501(c) is regulated by the IRS (see also "Confusion of Oversight").

A 501(c) may itself spend money on ads in campaigns, or it can bundle a lot of legally anonymous donations together to pass on to Super PACs, which report to the FEC only the patriotic name of the 501(c) organization as the donor.

The U.S. Chamber of Commerce [a 501(c)(6)] is a perfect organization through which to channel secret political contributions. It is huge, has a complex structure, and performs many tasks in every state and abroad. Tracing the division of exempt- and non-exempt activities in so complex an organization is difficult.

TAXES: The IRS taxes political activities, but since the money taken in is quickly spent, taxes are insignificant. Political activities are not tax deductible.

REGISTRATION AND REPORTING: Normally registration with the IRS. IEs must be reported to the FEC, but unless donations are "earmarked," donors do not have to be reported. Donors report their donations to the IRS, which never makes this information public.

Cory G. Kalanick[10] discusses several post-*Citizens United* problems with 501(c)(4)s in politics. Among them are the following:

1. Allows rich donors to circumvent the traditional contribution limits. Not only is this "antithetical to the purpose of social welfare nonprofits," but a single very rich donor running attack ads just before elections requires the opposition to find a hundred donors to "give the maximum just to adequately respond." This author would add that the system could be over-weighting the rich in elections.

2. "Lack of disclosure requirements is likely the chief draw of donors to social welfare nonprofits. Yet this lack of disclosure leaves citizens in the dark as to the funding sources of advertisements – as well as their motivations."

3. Those who control secret outside money, having nobody to answer to, tend to create extremely "ugly" attack ads.

4. "The use of nonprofits can and does result in coordination with political parties and candidates, or at least the appearance of coordination. This makes a mockery out of attempts by these groups to claim that their activities are 'independent expenditures.'"

5. "The use of nonprofits can and does result in corruption, or at least the appearance of corruption. Wealthy donors are motivated to contribute large sums of money to buy access to elected officials, and anonymous donors hope to 'purchase the votes that will make them richer.'"

Kalanick also presents a good discussion comparing the uses of both 501(c)s and 527s.

Why do Super PACs exist at all if such a large proportion of campaign funding is channeled ("laundered" some call it) through 501(c) organizations where the money is hidden? For some major contributors, political giving is an opportunity for publicity; Super PACs serve that purpose. Many fundraisers ask donors if they wish to have their contributions remain anonymous. If they do, their donations go into 501(c) organizations. However, if donors want their names made public, the money goes to PACs or Super PACs (527s).

This is a system in which a corporation can give small amounts through a Super PAC for ads for a candidate whom its clients and shareholders prefer, but simultaneously give a very large secret contribution through a 501(c) channel to a candidate not supported by its clients or shareholders.

The 501(c)s are permitted to use only half their funds for "express advocacy" (also called "independent expenditures" -- ads explicitly for or against candidates), though their primary purpose can be carried out through related lobbying or through educating voters. Super PACs are required to use all contributions for political purposes, but unlike 501(c)s, they have to disclose the donors that earmark their contributions, so these two types of groups have come to form close ties in the political arena.

CRITICAL EVENTS IN THE GROWTH OF CORPORATE POWER OVER ELECTIONS

Corporate power has grown slowly over time, through changing laws and court cases. The latest chapter is represented by the almost total deregulation of corporate activity in the electoral process.

I. How corporations gained the status of "personhood."

A. After a long interesting history, corporations finally succeeded in gaining the status of "personhood" in 1886, during the Industrial Revolution.[11] The Supreme Court, influenced by the powerful railroad industry, simply assumed in its decision, *Santa Clara County v. Southern Pacific Railroad Co. (118 U.S. 394-396)* that corporations were "persons" under the Fourteenth Amendment to the U.S. Constitution.

This case set precedents for corporate rights to protection under not only the Fourteenth Amendment but also the First and Fifth Amendments as well.[12] Most important, now that corporations were treated as "persons" under the First Amendment, they had rights of free speech.

B. The corporate status of "personhood" was confirmed by Congress in "Rules of Construction," Title 1 U.S. Code, Ch. 1 (enacted July 30, 1947). It reads as follows:

"In determining the meaning of any Act of Congress, unless the context indicates otherwise.... the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;"[13]

There is wide public consensus that the "personhood" status, as given to corporations by the Supreme Court and Congress (and interpreted and reinterpreted by courts over time), has allowed them to override the voice of the American people, replacing popular democracy with the will of large, often multi-national corporations.

C. After 1886, corporations gained or lost power in elections, largely depending on the political leanings of the Supreme Court and Congress.

Buckley v. Valeo (1976) might be a relevant case to cite. The Supreme Court "set the precedent that restricting money spent on elections is a restriction on speech, and therefore a violation of the First Amendment."[14] Although limits were upheld for contributions from individuals and political committees to campaigns, the decision permitted candidates themselves to spend unlimited personal funds on their own campaigns.

Corporations were not the subject of this case, but the logic of the decision was later used in *Citizens United (2010)* to give corporations the power to control elections. As will be discussed in the next section, the court in *Buckley v. Valeo* also distorted the traditional meaning of "corruption," which has been adopted by the Supreme Court in its recent decisions, and subsequently by corporations.

II. Two critical 2010 court cases and another in 2011 have led to the almost total deregulation of corporate political activity.

A. The case *Citizens United v. Federal Elections Commission* 130 Supreme Court 876 (January 21, 2010) [15] was brought by Citizens United (CU), a rightwing 501(c)(4) corporation that produces political documentaries.

1. Provisions of *Citizens United (2010)* decision:

a. Corporations are permitted to spend unlimited sums of money from their treasury funds for political advertisements that expressly advocate the election or defeat of clearly identified candidates (IEs). They may not be made in cooperation, consultation or concert with, or at the request or suggestion of, any candidate or political party. [16] This restriction on coordination was expected to prevent corruption, but unfortunately the term "coordination" is difficult to define.

Among the problems of maintaining independence, R. Sam Garrett of the Congressional Research Service (CRS) notes "the reported migration of some candidate campaign staff members to super PACS that have stated their support for these candidates."[17]

b. Corporations are permitted for the first time to spend funds from their general treasury on broadcast, cable and satellite communications (ECs). These communications ads may mention specific candidates,[18] but may not say "vote for A or against B," and are aired near the time of primaries and elections.[19] As previously mentioned, ECs are obsolete.

c. Corporations are prohibited from making direct contributions to candidates, political parties or to PACs.

d. The Court in an 8-1 Majority Opinion agreed that requiring disclaimers and disclosures for political ads is Constitutional. The Opinion emphasized the importance of disclosure as the companion to the expansion of corporate political activity.[20]

The Majority Opinion: "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." [21] (See p. 18, "Non-Disclosure and Corruption.")

e. *Citizens United v. FEC* automatically affected or invalidated a number of local, state, and federal laws.

2. Origins and Controversy

In a 5-4 decision, the Supreme Court found unconstitutional provisions of the Federal Election Campaign Act and also part of the Bipartisan Campaign Reform Act of 2002 (BCRA) known as the "McCain-Feingold Bill." [22] In *Citizens United (CU)*, the court, applying the logic of *Buckley v. Valeo (1976)* (money equals speech), decided that corporations in election campaigns should have the same rights of free speech as individuals, under the First Amendment.

Buckley, noted Kurt Hohenstein, "defined corruption as quid pro quo – 'get for giving' – meaning Congress could only regulate the kind of corruption that had occurred if a campaign contributor received political favors from the candidate. This definition has since shaped and limited efforts at campaign finance reform…."[23] This means that the definition of corruption is so narrow that it includes only illegal, direct gifts to a candidate.

The *CU* court agreed with *Buckley* that, although the government had an interest in preventing the corruptive contributions of large amounts of money directly to candidates from outside sources, the court did not believe that allowing corporations to spend unlimited amounts on election ads would lead to corruption or to the appearance of corruption.[24]

Quoting from the New York Times (May 3, 2010), "Ever since…*Buckley v. Valeo*, election law has relied on what many people think is an artificial distinction. The government may regulate contributions from individuals to politicians, *Buckley* said, but it cannot stop those same people from spending money independently to help elect those same politicians.

"Why not? Contributions directly to politicians can give rise to corruption or its appearance, the court said, but independent spending is free speech. A $2,500 contribution to a politician is illegal; a $25 million ad campaign to elect the same politician is not.

"Citizens United extended this logic to corporations. Corporate contributions to candidates are still banned, but corporations may now spend freely in candidate elections."[25] This $25 million can now legally be spent by corporations secretly.

Prior to the *Citizens United v. FEC* case, although Citizens United (CU) itself was not a PAC, it did have a PAC. During the case, when CU was reminded that it could run its political ads from its own PAC, the corporation argued that, because its PAC was not allowed to accept corporate money and, instead, had to raise money from humans, the organization's rights of free speech were being infringed upon. CU won this part of the case.

The Supreme Court argued that "distinguishing wealthy individuals from corporations based on the latter's special advantages of, for example, limited liability, does not suffice to allow laws prohibiting speech"[26] or unlimited corporate financial participation in elections.

Further, the Supreme Court held that corporate "independent expenditures [political ads]…do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy."[27]

As the Majority Opinion wrote, "…independent expenditures do not lead to, or create the appearance of *quid pro quo* corruption. In fact there is only scant evidence that independent expenditures even ingratiate."[28]

In the *Citizens United* Majority Opinion, Kennedy sited his own Majority Opinion from an earlier case, *McConnell*, 540 U.S., at 297: [Author's underlines below are to draw attention to Kennedy's assumption that it is legitimate in a democracy for elected representatives to be influenced in their policy by large contributors as well as by voters, an assumption that might have seemed like corruption to the Founding Fathers and to most Americans today.]

"Favoritism and influence are not…avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness."[29]

3. The Supreme Court's *Citizen United (2010)* Dissenting Opinion was written by Justice John Paul Stevens (joined by Justices Ginsburg, Breyer and Sotomayor). It argued that the Court

routinely gives different groups (for example, prisoners, the military) different levels of rights under the First Amendment.

To quote Stevens' Opinion on the Court's decision, "...the Court's opinion is…a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics."[30]

Laws in at least thirty-five states could be in conflict with the *Citizens United v. FEC* decision. Arizona's "Clean Elections Act" (1998) was the first state law to be challenged in the U.S. Supreme Court after *Citizens United* – in June 2011.[31] The Arizona Act had given candidates public funds to match the amount given other candidates by private corporations. While the Supreme Court did say that public funding is constitutional, it held that the state's use of matching funds unconstitutionally burdened privately funded candidates' free speech and did not meet a compelling state interest.

In the fall of 2011, the U.S. Eighth Circuit Court of Appeals was to hear oral arguments related to Minnesota's Disclosure laws, and Montana's Corrupt Practices Act was to be challenged. In December 2011, the Montana Supreme Court upheld the ban on corporate political expenditures in state elections.[32] This is an important case to watch.

B. *SpeechNow.org v. Federal Election Commission* is the second relevant court decision (D.C. Circuit Court of Appeals, 2010 (599 F.3d 686)).[33] SpeechNow is a political organization operating under IRS Code 527.

1. Provisions

This decision, which expanded corporate rights to pursue political activities, legalized unlimited "independent campaign contributions."

However, the court denied SpeechNow's argument that reporting and disclosure requirements are unconstitutional under the First Amendment. Note that SpeechNow then appealed this part of the decision to the Supreme Court, which on November 1, 2010 refused to hear the case, accepting the lower court's decision.[34]

2. Origins and Controversy

The logic used in *Citizens United (2010)* was also applied in the DC *SpeechNow.org* case. Both courts held that there is no anti-corruption reason to limit contributions to independent groups such as SpeechNow.

In short, if independent expenditures cannot corrupt candidates, and the money given to groups that make independent expenditures cannot corrupt candidates, then there is no Constitutional justification for limits on such contributions.

The court held, however, that financial information must be disclosed to the FEC and that expenditures could not be coordinated with candidates.[35]

The prohibition against "coordination" of expenditures with candidates was intended to prevent corruption. In light of the high degree of interaction between corporations and candidates still

allowable under the law, the Court's majority was either disingenuous or naïve in its belief that such modest constraint would prevent corruption.

To put a fine point on this, so long as the corporation does not discuss its ad-buy with a candidate/office-holder, the corporation's CEO can still request a meeting with the candidate/office-holder to discuss a pending piece of legislation. Doing so would be lobbying by the CEO, not coordination of a specific expenditure.

The implication of these two court decisions was to permit corporations, unions, individuals and independent groups to make unlimited contributions to organizations for political ads, and given the current state of regulatory agencies, to further free corporations from government scrutiny.

C. A third recent case resulting in more deregulation, *Rear Admiral (Ret.) James J. Carey et al., v. FEC,* allows nonconnected PACs to set up a system already described above under the heading "Hybrid PACs." The case was decided by the U.S. District Court of D.C., August 19, 2011.

Nonconnected Hybrid PACs may now establish a separate bank account to receive unlimited contributions from individuals, corporations and unions for the purpose of making "independent expenditures."

It should be emphasized that this ever-increasing complexity in the rules has left the public greatly confused. The more the confusion, the easier it is for corporations to intensify their control, and the more difficult it is for an overworked and underfunded opposition to stand up to them.

III. The Federal Election Commission issued three relevant Advisory Opinions to put Citizens United into Effect.

A. First, there is a critical point of the law that is rarely clarified. It relates to the ease with which corporations and donors to political corporations can **hide their political activities.** In a 5-to-4 vote, *Citizens United* required that certain laws be overturned, such as those limiting the amount of money corporations can spend on political activity. However, regarding the issue of disclosure, the court did not require corporations to disclose their donors; they said only that disclosure is Constitutional (in the 8-to-1 vote). The court left it to Congress and the FEC to assure disclosure.

Until new laws for disclosure are enacted, corporations and unions making independent expenditures can use the **pre-*Citizens United*** FEC regulations that still apply regarding "disclosure."[36] **Only those donors who ask to have their donations used specifically for IEs or ECs have to be disclosed.**

If donors do not specify that they want their money to be designated for an IE or EC, then donations can be made anonymously. To avoid having to report donors, organizations making political ads become incorporated, and accept only "non-earmarked" contributions; this gives them money to use freely and secretly in their political planning.

In a "Statement of Reason" (August, 2010) regarding a separate case, the three Republican FEC commissioners interpreted the regulations narrowly, pronouncing that unless donors specify a particular ad they want to support, that money need not be disclosed. This becomes complex, as campaign ads may be created long after contributions are collected.[37]

While the two Democratic FEC commissioners responded with counter-arguments on September 16, 2010, the damage had already been done.[38]

As will be discussed later (p. 19), Rep. Chris Van Hollen (D – MD) is challenging these regulations in the courts.

B. The Advisory Opinions:

In July 2010, the FEC issued two Advisory Opinions (AOs) in order to put the decisions *Citizens United (2010)* and *SpeechNow.org* into effect.[39] In these Opinions, certain restrictions that had been in place for many years were lifted. AOs do not have the force of law; they are guidance.

1. The FEC issued AO (2010-09) in response to a request by a 501(c)(4) organization – the conservative Club for Growth, Inc. It was in this Opinion that 501(c)(4) organizations were permitted to establish and administer separate "independent expenditures-only committees" **(Super PACs)** to "solicit unlimited contributions solely from individuals in the general public, including contributions given for specific independent expenditures."[40] Club for Growth subsequently established its Super PAC, Club for Growth Action.

2. The second FEC AO (2010-11) stipulated that Super PACs may solicit unlimited contributions, not only from individuals, but also from political committees, corporations and labor organizations for the purpose of making "independent expenditures." Super PAC activities are, however, still subject to FEC registration and reporting requirements,[41] and the FEC publicly discloses organization disbursements and the identities of donors if they receive reports on them. Independent expenditures must be made independently of any candidate, candidate's authorized committee or political party.

The FEC was responding, in this case, to a request from Commonsense Ten, a registered nonconnected political committee.

3. In a third AO (2011-12), the FEC in June 2011 established limits on the amount of money that candidates, political officials and party leaders can solicit for Super PACs. However, the unanimous ruling allows them to appear at Super PAC fundraisers as long as they do not participate in soliciting unlimited independent expenditures.[42] It is difficult not to question whether this AO is not an invitation to corruption.

The above court decisions and regulations have given corporations, including multi-nationals, but not candidates or political parties, the legal right to create complex structures through which to channel unlimited contributions into the American electoral system. Much of it is hidden from public view.

According to the Los Angeles Times (April 23, 2011), few large corporations have been disclosing their political contributions.[43]

IV. Foreign Influence in Elections.

A Congressional Research Service Report includes a good discussion of the failure of Congress thus far to grapple with the issues of foreign influence in elections. "Preventing foreign influence [in] U.S. elections has apparently never been recognized as a legitimate state interest in the same way that national security was recognized.... However, it seems plausible that a court would treat it as such given that determining who can participate in the political process is arguably an inherent aspect of sovereignty.…"[44]

Confusion arises with respect to defining the percent of foreign ownership allowed in corporations active in election campaigns. "There does not appear to be any bright-line rule as to what percentage of foreign ownership suffices for categorizing a corporation as 'foreign' for statutory purposes."[45]

In addition, the Republican commissioners on the FEC do not want to consider this issue and therefore have blocked relevant rulemaking.

The Supreme Court (January 9, 2012) in four words: "The judgment is affirmed," [46] dismissed the case *Bluman et.al. v. FEC*, which had sought to lift the ban preventing foreign nationals temporarily living in the U.S. from financially influencing elections.

CONFUSION OF OVERSIGHT

Given the sophisticated infrastructure that corporations have built for controlling elections, the government must have an equally sophisticated regulatory system. However, this is not the case. At present, the infrastructure appears to be either almost nonfunctional or is, in fact, further inflating corporate power. Much of this problem has already become obvious in this report.

Some existing laws are not being enforced; law-breakers, according to public sources, go unpunished. The line between what is legal and what is not is deliberately being erased. "Watchdog" groups, lawyers, former bureaucrats and legislators are quite actively pursuing justice, but with frustrating results thus far.

Corporations continue their push for total deregulation. As noted earlier, SpeechNow.org (an IRS Code 527) failed in its recent appeal to the Supreme Court to free Super PACs from all disclosure and reporting requirements.

I. The Federal Election Commission.

The FEC was established in 1975 to implement and enforce the Federal Election Campaign Act. Composed of six commissioners, usually split equally along party lines, the FEC has difficulty acting on serious issues. In the aftermath of *Citizens United (2010)*, the FEC's response has actually reinforced or expanded corporate power over the electoral system beyond that intended by the decision.

The terms of five of the six members of the FEC had expired by April 29, 2011. To replace the commissioners, both the Democrats and Republicans are supposed to submit nominees to the President, who chooses three from each party. However, the Republicans are refusing to submit their nominations, and have put obstructions in the way of allowing President Obama to make appointments even during Congressional recess.[47]

Eight government reform groups have written a letter to President Obama asking him to appoint the five members of the commission.[48] Meanwhile the former commissioners continue as if they were official.

The FEC has failed in its role of establishing "rules" to put into effect changes in the federal election laws. In December 2011 it issued a Draft Notice of Proposed Rule Making covering some less important changes.[49]

The fact that the FEC has failed to issue rules (or even Advisory Opinions) requiring the disclosure of all donors to political campaign ads has created a major loophole that allows for anonymity of both donors and donations.[50]

II. The Internal Revenue Service.

Regarding organizations, the IRS is interested only in tax matters. It determines if a nonprofit has spent too much on non-primary (non-exempt) activities.

Political activity, which is taxed, is not permitted to be the primary activity of tax-exempt nonprofit organizations. Unfortunately, there is rarely a "bright line" separating political activity from the "good of the community," even though the IRS has established general guidelines.[51]

As part of their primary purpose, 501(c)s may spend unlimited amounts of money educating and lobbying on related issues, and this may either border on political activity or seem to.

Given the potential lack of clear boundaries between "lobbying," "educating," and various forms of "political campaign activity," and also given the confusion among regulators, "watchdog" organizations claim that laws are not being enforced.

The Campaign Legal Center and Democracy 21, for example, have challenged the IRS for not enforcing the tax laws on four 501(c)(4)s that have been allowed to disregard the distinction between primary and non-primary functions.[52]

The New York Times reports that "Neither the [IRS], which has jurisdiction over nonprofits, nor the [FEC], which regulates the financing of federal races, appears likely to examine [the political activity of 501(c)s] closely, according to campaign finance watchdogs, lawyers who specialize in the field and current and former federal officials.

"…[The IRS] has had little incentive to police the groups because the revenue-collecting potential is small, and because its main function is not to oversee the integrity of elections." Furthermore the IRS is under-funded and under-staffed."[53]

According to Paul S. Ryan, FEC Program Director & Associate Legal Counsel at Campaign Legal Center "The IRS has a duty to issue a clear set of regulations that state what type and level of campaign activity 501(c)(4) groups may engage in and maintain their tax-exempt status. What we have seen in recent years is a proliferation of c4 political front groups that abuse their privileged tax exempt status to evade campaign finance disclosure laws. What was once a small trickle of abuse by these organizations is now a gusher."[54]

Since historically the IRS has the right to audit nonprofit accounts but seldom does so, now that they have shown an interest, Super PACs and other powerful groups have applied political pressure to prevent scrutiny.

In early May 2011, the IRS began to look into the question of whether it should tax five politically active organizations registered under section 501(c) of the IRS tax code.[55]

The IRS received great pressure from those organizations it was trying to examine.[56] Subsequently, the IRS published a guideline in July 2011 stating that it was suspending its effort to enforce this provision, leaving it to Congress to change the law.[57]

"A group of four anonymous political donors," according to The New York Times (August 7, 2011), "is accusing the agency [IRS] of playing politics on behalf of those Republicans and

demanding that it make a decision immediately about whether the gift tax applies to donations to advocacy groups or not." [58]

III. Securities and Exchange Commission.

It is an SEC rule (set prior to the *Citizens United* case) that permits corporations to finance political activities out of their general funds without informing the shareholders in any way.

However, on March 25, 2011, at the request of a major corporate Home Depot shareholder, the SEC required that HD give more transparency regarding its political electioneering contribution policies to its shareholders and allow them to have an advisory say on that policy.[59] It was the first time the SEC had allowed this, and it may signal a change in SEC policy.[60]

In August 2011, a group of ten corporate law professors petitioned the SEC to require that shareholders be informed about most corporate political contributions.[61] Some large companies have voluntarily agreed to be transparent about their political contributions.

Even if the SEC did require corporations to disclose to shareholders their political contributions as many have urged, would it really make much difference in alleviating public fears of corruption? Many people own funds, not stocks directly. A very large proportion of the population owns no securities at all.

IV. Executive Order of the President.

The Obama administration was planning to draft an Executive Order requiring federal contractors to disclose contributions made to nonprofit organizations, trade associations and to political organizations; however, the order has not yet been issued. President Obama has been under great political pressure not to act.

The President has also been blocked by the Republicans from making appointments for the five expired positions on the FEC.

V. Congress.[62]

A number of bills have been introduced into Congress in an effort to reverse the effects of the *Citizens United (2010)*. However, as the CRS reported, "Thus far [as of July 2011] during the 112th Congress, there have been no major changes in law directly related to recent changes in campaign finance policy."[63] Two bills were introduced in November 2011, both resolutions for Constitutional amendments that would take corporations out of the election process.

The Disclose Act, [64] which did not pass, would have required corporations and unions to identify their top donors in ads, and CEOs to appear in their political ads. Federal contractors would have been required to disclose all their political donations, and foreign influences in American elections would have been barred. Corporations would have had to disclose political expenditures made in elections. Unfortunately, although the bill passed the House, it failed to pass the Senate. There is talk on-line (June, 2011 postings) that a bill similar to the Disclose Act may soon be reintroduced.

More than fifty law professors, elected officials, and former elected officials in a letter to Congress, called for a Constitutional amendment to restore control of elections to the people, to reverse the *Citizens United* decision, and to rethink what provisions would be necessary in the Constitution to better protect democracy (October 4, 2010).[65]

Activist groups such as The Campaign Legal Center and Democracy 21 are strongly pressuring the FEC, IRS, Department of Justice and Congress on these issues.

NON-DISCLOSURE AND CORRUPTION

The laws are so lenient on corporate political activity now that the line between corruption and lawful electioneering has become fuzzy. Corruption[66] is a major theme of the above report and a "hot" topic in the press, in public advocacy pieces and in legal journals. Footnoted here are several of many good analyses of non-disclosure and corruption, in a readable form.[67]

A New York Times article reports: "The conservative nonprofit Americans for Prosperity [AFP] unleashed a volley of ads aimed at Democrats in [the 2010] midterm elections, but it recently reported to the IRS that it was not active in political campaign activities." On its tax form for the IRS it reported no political activity, yet reported to the FEC that it had spent $1.3 million on radio and TV political ads, leaving the donor column blank on the FEC reporting form.[68]

"[A spokeswoman for AFP claimed that the] ads are not political activity because they don't explicitly urge voters to support or oppose the targeted candidates. But that is a generous interpretation based on narrow [FEC] definitions, not the broader 'smell test' employed by the IRS, says Lloyd Mayer, associate dean of the Notre Dame Law School."[69]

The article continues, shedding light on the conflict between the IRS and FEC disclosure and reporting rules that allow corporations to ignore disclosure requirements. As long as political activity is not a 501(c)'s primary activity, the organization can "run political [ads] naming candidates, criticizing their positions and urging voters to elect or oust them." By reporting to the IRS that it had not participated in political activity, AFP could allow its donors to remain anonymous even from the IRS, so that, except for the disclosure of the final disbursement, perhaps the transaction could never be traced in any investigation.

The Federal Election Commission (FEC) is the principal regulatory and enforcement agency for the *Citizens United (2010)* decision. Yet in an official statement (June 17, 2011) regarding disclosure, FEC Commissioner Ellen Weintraub wrote: "…here we sit, almost eighteen months after *Citizens United* was announced, mired in gridlock…over whether the Commission is willing to hear from the public on a part of the case that my colleagues would prefer to pretend is not there[, disclosure]. …Disclosure, which I have always considered one of the core missions of the FEC…has become, like the villain in a children's novel, the topic that may not be named."[70]

Justice Kennedy wrote in the Majority Opinion for *Citizens United*: "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." [71] Clearly Justice Kennedy did not anticipate the problem with disclosure that Weintraub describes above.

Corporations are trying to change the definition of "corruption." Even the tax-payer-supported Congressional Research Service is suggesting that Congress reconsider the meaning of the term, in response to recent changes in the laws, when in fact, the American public still embraces the traditional definition of the term. This is one reason why the public is beginning to speak out against the power of corporations.

The Congressional Research Service, which suggests issues for consideration by Congress, wrote in 2011: "… defining corruption and transparency may be in flux now that decades-old prohibitions against corporate and union spending, and unlimited contributions to some PACs, have been invalidated. As Congress considers how or whether to respond, a preliminary question is whether the previous and remaining elements of the campaign finance regulatory structure are still valid and what changes might be necessary."[72]

One way a corporation can conceal information from the public about its political activities is by setting dates for periodic regulatory reporting well after elections, and there are also ways of confusing the reports themselves. It would be an overwhelming task for voters to figure out, after an election who had paid for any of the hundreds of ads to which they were exposed.[73]

To circumvent disclosure, corporations may accept only "non-earmarked" contributions, which do not have to be disclosed and can be used freely for purposes determined by the organization, though such purposes may not be in the interests of the donors.[74] They are taking advantage of the Republican FEC commissioners' very narrow interpretation of the regulations that require disclosure of only the donations "earmarked" for specific ads.[75]

"As a nonprofit organization, the [U.S. Chamber of Commerce] need not disclose its donors in its public tax filings, and because it says no donations are earmarked for specific ads aimed at a candidate, it does not invoke federal elections rules requiring disclosure."[76] The Chamber of Commerce compounds its secrecy (as a 501(c)(6) and a recipient of only "non-earmarked" contributions), giving it the freedom to use other peoples' money for its own political ends.

Representative Chris Van Hollen (D-MD) petitioned the FEC (April 2011)[77] to revise the rules and regulations relating to the disclosure of independent expenditures. The lawyers argue that the regulations, as written, violate the very Federal Election Campaign Act (FECA) that the FEC is supposed to be putting into effect. Van Hollen points out the "wholesale and widespread absence of donor disclosure by groups making independent expenditures to influence the 2010 congressional elections…"[78] On December 15, 2011, the FEC "considered but did not approve" a "Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications" in response to this petition.[79]

Van Hollen has also challenged this regulation in the US District Court, D.C. (April 2011) [80] regarding electioneering communications, and the court is hearing oral arguments in mid-January 2012.[81] It would compel the FEC to publicly disclose the identity of all electioneering communications donors and donations. The importance of this case should not be under-estimated since this is one of the major loopholes through which corporations are hiding their political activities.

The conservative Supreme Court which voted 8-1 in *Citizens United* in favor of disclosure may receive this case on appeal.

Despite mounting calls for greater transparency," write Noam Levey and K. Geiger in the LA Times, "only a few of the country's 75 leading energy, healthcare and financial services corporations fully disclose political spending, according to a review of company records and state and federal campaign finance reports." [82]

"*Citizens United* created an environment in which it is perfectly legal for a shell non-profit corporation to engage in election-related spending on behalf of a hidden interest."[83] Organizations create and dissolve anonymous shell corporations at will. For example, a Super

PAC -- Restore Our Future (established by three former Romney aids) -- supporting Mitt Romney, received a check for $1 million from a company called W Spann LLC. The company was founded in March 2011, made the contribution to the Super PAC in April and dissolved in July, according to MSNBC, "leaving no paper trail as to who its owners were – or even where it was located."[84]

As reported by the Washington Post, the company owner, who had retired from a company cofounded by Romney, with an office in the same building, later came forward in order to head off an investigation.[85] The Incorporation Transparency and Law Enforcement Assistance Act to force shell companies to register information about their true ownership was introduced into congress in 2011 and now is in committee.[86]

Boston.com quoted Paul S. Ryan of Campaign Legal Center: "This case deserves a good hard look from the FEC and the Department of Justice. If violations are found, they should be prosecuted vigorously in order to deter future straw-contributor schemes that make a mockery of our campaign finance disclosure laws."[87]

To reiterate, although much energy is being spent trying to force corporations to disclose their participation in the political process, if laws were passed requiring full disclosure, would they be enough to protect American democracy?

Fred Wertheimer, President of Democracy 21 observed: "We're in very dangerous territory. There's one word to describe what's going on in the campaign finance area: The word is 'obscene'. And it's going to result in scandal and corruption and, eventually, opportunities for reform."[88]

WE THE PEOPLE – PUBLIC OPINION

A large majority of Americans support the elimination of corporations altogether from the election process and agree that corporations should not have the status of "personhood." Voters' reactions range from great anger to apathy as they grow increasingly discouraged with government.

I. Polls

A. A Washington Post-ABC News Poll in 2010 found that more than 70% of the population (crossing both party and demographic lines) opposed the recent Supreme Court decision giving corporations more power.

B. In 2011, 79% of voters, surveyed by the Hart Research Associates, supported "passage of a Constitutional amendment to overturn the Supreme Court's decision in the *Citizens United* case [to] make [it] clear that corporations do not have the same rights as people." Eighty-seven percent Democrats, 82% Independents, and 68% Republicans supported passage of such an amendment.

A book coming out in early 2012 may be useful: *Corporations Are Not People: Why they Have More Rights Than You Do and What You Can Do About It*, by Jeffrey Clements (Berrett-Koehler Publishers).

CONSTITUTIONAL AMENDMENT – A POSSIBLE ACTION

While lawyers point to a number of mistakes and illegalities in the *Citizens United (2010)* case, unfortunately, there is no way to sue the Supreme Court on the basis of disapproval of its opinion. Furthermore, Congress cannot legally reverse the *Citizens United* decision even if it wants to, because the Supreme Court ruled this case on "constitutional grounds" rather than on "on narrow grounds."

Two possible ways to completely reverse the decision are laid out in a December 2011 letter from the Massachusetts Legislative Joint Committee on the Judiciary: 1. "Bring another case before the Supreme Court and hope that the Court decides to reverse itself, or 2. amend the Constitution."[89] The letter claims progress is being made on both fronts.

S. Davis notes in the Harvard Law Review, "In the end, the Court has painted itself, Congress, and the FEC into a corner." He can find no satisfying solution way to re-establish an equilibrium in the election campaign system between the small weak groups which the government successfully regulates, and the powerful groups with unlimited funding over which the government has almost no control.[90]

While some scholars, such as Davis above, are thinking about correcting laws, regulations, enforcement, or disclosure rules, other concerned citizens from many disciplines agree that, difficult as the process is, a Constitutional amendment is the only effective means of restoring control over government to the American People.

Among the options, an amendment could bar corporations from participating in the American election process, and end the unwarranted power that nine Supreme Court justices have wielded to devalue the votes of "human persons." It could deny "personhood" and other First Amendment rights to corporations, deny that money equals speech, require that elections be paid for only with public funds, establish campaign finance limits, and require the disclosure of all political contributions and expenditures. Protection of freedom of speech for the press would need to be addressed in any amendment.

Historically, proposals for Constitutional amendments originate at the local level. Town councils in a number of states have already passed resolutions calling for a Constitutional amendment to rid federal elections of corporate control. Bills calling for a Constitutional amendment have been introduced into state legislatures and into Congress itself.

I. Constitutional Amendment – process The Constitution can be amended in two ways.

A. A proposal in Congress for an amendment that is supported by a two-thirds majority vote in both houses. The amendment must then be ratified by the legislatures or conventions of three-quarters of the states.

B. A proposal of an amendment in a Constitutional convention called for by two-thirds of the state legislatures. The convention's proposed amendment must then be ratified by the legislatures or conventions of three-quarters of the states, and Congress may set a reasonable time limit (maybe seven years) for such ratification

C. A Constitutional amendment can be brought before the state legislature by "ballot initiative" in many states, but the process can be complex.

While no amendment has ever been passed by a Constitutional convention called for by state legislatures, what actually can happen is that enough states demand a change, so that Congress itself is pressured to pass the demanded amendment. Therefore, it is worth putting effort into getting states to pressure Congress.

GLOSSARY

"Electioneering communications" (ECs) are Any broadcast cable or satellite communication that 1. refers to a clearly identified candidate, but does not call for the election or defeat of that candidate, 2. is made within 30 days of a primary and 60 days of a general election, 3. targets the relevant electorate. These types of ads are largely irrelevant now that "independent expenditures" can explicitly target candidates through any form of communication.

"Express advocacy" communications" are ads that uses phrases like "Vote for candidate A" or "Vote against candidate B," or "C for Congress." They are an integral part of "independent expenditures."

"Independent expenditures" (IEs) are used for "express advocacy communications" that explicitly instruct voters how to vote ("Vote for A" or "Vote against B") in a federal election campaign. Such expenditures may not be coordinated with candidates or political parties. "Earmarked" IEs must be reported to the FEC.

"Issue advocacy" is considered a tax exempt function of 501(c)(4)s, (5)s and (6)s and includes lobbying and education (for the common good). It includes such non-partisan activities as voter registration, get-out-the-vote campaigns, voter guides and candidate debates.

Quid pro quo corruption is money exchanged for political outcomes or for votes.

Soft Money – Money in politics not subject to FEC restrictions.

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[1] Lessig is Director of the E. J. Safra Foundation Center for Ethics at Harvard; he is author of *Republic Lost: How Money Corrupts Congress – and a Plan to Stop it.*

[2] For a most interesting history, see: "Santa Clara Blues: Corporate Personhood v. Democracy, by William Meyers: http://reclaimdemocracy.org/pdf/primers/santa_clara_blues.pdf See also: http://reclaimdemocracy.org/personhood/santa_clara_vs_southern_pacific.html

[3] See: Democracy 21, "Campaigns and Elections: Enter the Era of Super PACs" by Josh Boak, September 8, 2011. http://www.democracy21.org/index.asp?Type=B_PR&SEC=%7BAC81D4FF-0476-4E28-B9B1-7619D271A334%7D&DE=%7B4D71E5B9-D271-439B-ADB6-EB3C34472836%7D

[4] See: http://www.bracewellgiuliani.com/index.cfm/fa/news.advisory/item/c416e13d-8da2-485b-ac39-0c0ae2df6270/FEC_Backs_Unlimited_Use_of_Soft_Money_by_Independent_Expenditure_Committees_DISCLOSE_Act_Stalls_in_Senate.cfm . See also: http://www.fec.gov/press/press2010/20100723Digest.shtml

[5] See: http://www.fec.gov/pages/brochures/indexp.shtml#IE

[6] See: http://www.fec.gov/press/press2011/ieoc_alpha.shtml See also: http://images.nictusa.com/cgi-bin/fecimg/?C00497420 for an index of communications between Citizens United and the FEC.

[7] See: http://www.nytimes.com/2011/11/13/opinion/sunday/the-campaign-jungle.html?_r=1 . See also: http://www.nytimes.com/2011/08/28/us/politics/28donate.html?_r=1&pagewanted=print

[8] See: http://www.fec.gov/pages/brochures/electioneering.shtml#Disclosure_Requirements

[9] See: "501(C)(4) Groups Funding Political Ads Are Violating the Tax Law," by Donald B. Tobin: http://taxprof.typepad.com/taxprof_blog/2010/10/tobin-use-of-501c4.html

[10] See: "Blowing up the Pipes: the Use of (c)(4) to Dismantle Campaign Reform" by Cory G. Kalanick, Minnesota Law Review.org. [Vol. 95: 2254] pp. 2267-2268: http://www.minnesotalawreview.org/wp-content/uploads/2011/06/Kalanick_PDF.pdf

[11] For a most interesting history, see: : "Santa Clara Blues: Corporate Personhood v. Democracy, by William Meyers: http://reclaimdemocracy.org/pdf/primers/santa_clara_blues.pdf Also see: http://reclaimdemocracy.org/personhood/santa_clara_vs_southern_pacific.html

[12] "The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws." See: http://supreme.justia.com/us/118/394/case.html 118 U.S. p. 394-395.

[13] See: http://uscode.house.gov//download/pls/01C1.txt "USC Sec. 1, Title 1 – General Provisions, Chapter 1 – Rules of Construction, Section 1 – Words denoting number, gender, and so forth, Statute – In determining the meaning of any Act of Congress, unless the context indicates otherwise…the words…."

[14] See: http://www.pbs.org/moyers/journal/02052010/profile2.html See also: http://www.newrules.org/governance/rules/campaign-finance-reform/campaign-finance-reform-buckley-v-valeo .

[15] See summary: http://www.fec.gov/law/litigation_CCA_C.shtml

[16] See: http://www.fec.gov/pages/brochures/indexp.shtml#IE See also: Congressional Research Service Report to Congress, February 1, 2010. "Campaign Finance Policy After Citizens United: Issues and Options for Congress," p. 2. http://assets.opencrs.com/rpts/R41054_20100201.pdf

[17] CRS Report, "Super PACs" in Federal Elections: Overview and Issues for Congress," December 2, 2011, p. 23, by R. Sam Garrett: http://www.fas.org/sgp/crs/misc/R42042.pdf

[18] Defined by the FEC as any broadcast, cable or satellite communication, disbursed shortly before an election that clearly refers to a candidate for federal office, and targets the relevant electorate. See: www.fec.gov/pages/brochures/electioneering.shtml

[19] See CRS Report, "Campaign Finance Policy After *Citizens United v. FEC*: Issues and Options for Congress," p. 2: http://www.fas.org/sgp/crs/misc/R41096.pdf

[20] See: "The Second Part of the *Citizens United* Decision," by Meredith McGehee, November 18, 2010, The Campaign Legal Center. http://www.clcblog.org/index.php?option=com_content&view=article&id=406&Itemid=1

[21] See p. 55 of the *Citizens United* (2010) Majority Opinion [IV, B]: http://www.supremecourt.gov/opinions/09pdf/08-205.pdf

[22] For Campaign Finance Laws, see: 2 (FECA) codified at 2 U.S.C. Section 441B, (BCRA). See: http://www.fec.gov/law/feca/feca.pdf

[23] See: "Coined Corruption" by Kurt Hohenstein [Northern Illinois University Press] http://www.niu.edu/NIUPRess/scripts/book/bookResults.asp?ID=437

[24] Citizens United (2010) Majority Opinion, pp. 40-41 [III, G, 2] http://www.supremecourt.gov/opinions/09pdf/08-205.pdf

[25] See: http://www.nytimes.com/2010/05/04/us/politics/04bar.html

[26] See p. 5 of the *Citizens United* (2010) Syllabus [2(c)(1)]: http://www.supremecourt.gov/opinions/09pdf/08-205.pdf

[27] See pp. 5-6 of the *Citizens United* (2010) Syllabus [2(c)(2)]: http://www.supremecourt.gov/opinions/09pdf/08-205.pdf

[28] See p. 45 of the *Citizens United* (2010) Majority Opinion [III, B, 2]: http://www.supremecourt.gov/opinions/09pdf/08-205.pdf

[29] See pp. 43-44 of the *Citizens United* (2010) Majority Opinion [III, B, 2]: http://www.supremecourt.gov/opinions/09pdf/08-205.pdf

[30] For the dissenting opinion see: http://yubanet.com/usa/Justice-Stevens-Dissenting-Opinion-in-Citizens-United-v-Federal-Election-Commission_printer.php

[31] See: http://www.nytimes.com/2011/06/28/us/politics/28campaign.html

[32] December 30, 2011 "Montana Supreme Court Upholds State's Century-old Ban on Corporate Money in Elections," http://freespeechforpeople.org/node/292

[33] See FEC summary of the case in http://www.fec.gov/law/litigation/speechnow.shtml#summary

[34] See: Campaign Legal Center, "Supreme Court Rejects Latest Attempt to Undermine Disclosure" http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1178:11-1-2010-supreme-court-rejects-latest-attempt-to-undermine-disclosure-denies-cert-in-speechnoworg-v-fec-&catid=63&Itemid=61 See also: New York Times listing: http://www.nytimes.com/2010/11/02/us/02scotus.html

[35] For more detail, see: http://lawprofessors.typepad.com/conlaw/2010/03/the-reach-of-citizens-united.html

[36] FEC Regulation CFR 11, Section 109.10(e)(1)(vi) "How do political committees and other persons report independent expenditures?" (e)(1) "*Contents of verified reports and statement.* If a signed report or statement is submitted, [it] shall include: (vi) "The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure" : http://www.fec.gov/law/cfr/11_cfr.pdf See also: Code of Federal Regulations, Title 11, Chapter I, Section 104.20(c)(9) "Reporting electioneering communications" (2 USC 434(f)) "Statements of electioneering communications filed under paragraph (b) of this section shall disclose the following information: If a disbursement were made by a corporation or labor organization pursuant to 11CFR 114.15, the name and address of each person who make the donation aggregating $1000 or more to the corporation or labor organization…, *which was made for the purpose of furthering electioneering communications."* (Author's italics): http://edocket.access.gpo.gov/cfr_2011/janqtr/11cfr104.20.htm

[37] See the statement: http://eqs.nictusa.com/eqsdocsMUR/10044274536.pdf See also: "*Citizen United* and the 'Effective Disclosure' System that Wasn't," by Paul Ryan, January 11, Campaign Legal Center: http://www.clcblog.org/index.php?option=com_content&view=article&id=412:citizens-united-and-the-effective-disclosure-system-that-wasnt-1-24-11 ; See also: "Fading Disclosure," Public Citizen, particularly p. 5: http://www.citizen.org/documents/Disclosure-report-final.pdf

[38] See: http://www.fec.gov/members/weintraub/murs/mur6002sor.pdf

[39] "AOs do not have the force of regulation or law. …some may argue that OAs cannot, in and of themselves, create broad guidance about super PACs or other topics." See "'Super PACs' in Federal Elections: Overview and Issues for Congress: by R. Sam Garrett, December 2, 2011, p. 8: http://www.fas.org/sgp/crs/misc/R42042.pdf

[40] See: http://saos.nictusa.com/aodocs/AO%202010-09.pdf

[41] See: http://www.bracewellgiuliani.com/index.cfm/fa/news.advisory/item/c416e13d-8da2-485b-ac39-0c0ae2df6270/FEC_Backs_Unlimited_Use_of_Soft_Money_by_Independent_Expenditure_Committees_DISCLOSE_Act_Stalls_in_Senate.cfm . See also: http://www.fec.gov/press/press2010/20100723Digest.shtml

[42] See: http://articles.latimes.com/print/2011/jul/23/opinion/la-ed-superpacs-20110723

[43] See: Noam Levey and Kim Geiger, "Much Corporate Political Spending Stays Hidden," LA Times, April 23, 2011. See: http://articles.latimes.com/2011/apr/23/nation/la-na-money-politics-survey-20110424

[44] See: Congressional Research Service Report, August 10, 2010 "Legislative Options After *Citizens United v FEC*: Constitutional and Legal Issues," p. 11. http://www.fas.org/sgp/crs/misc/R41096.pdf

[45] Congressional Research Service Report, August 10, 2010 "Legislative Options After *Citizens United v FEC*: Constitutional and Legal Issues," p. 11. The Report (p. 8-18) has a good discussion of the failure of Congress to grapple with the issues of foreign influence in elections, including the question of defining "foreign ownership" of a corporation. http://www.fas.org/sgp/crs/misc/R41096.pdf

[46] See: http://www.supremecourt.gov/orders/courtorders/010912zor.pdf

[47] See: http://www.thewashingtoncurrent.com/2011/08/while-on-summer-recess-congress-blocks.html

[48] See: http://www.citizen.org/documents/LETTER-TO-OBAMA-FEC-COMMISSIONERS-20110315.pdf

[49] See: http://www.fec.gov/agenda/2011/mtgdoc_1173.pdf

[50] For insightful discussions of this entire problem, see: "Election 2010: The Loophole Created by 11C.F.R. Section 104.20(c)(9) and *Citizens United* and the Ineffectiveness of the Campaign-Finance-Law Framework in Iowa," Brian P. Flaherty, [Iowa Law Review, Vol. 97:239-274]: http://www.uiowa.edu/~ilr/issues/ILR_97-1_Flaherty.pdf ; "Fading Disclosure," by T. Lincoln and C. Holman of Public Citizen's Congress Watch Division (2010): http://www.scribd.com/doc/37489464/Fading-Disclosure-Increasing-Number-of-Electioneering-Groups-Keep-Donors-Identities-Secret

[51] See: http://www.irs.gov/pub/irs-pdf/p4221nc.pdf

[52] See: http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1473:september-28-2011-challenge-to-tax-exempt-status-of-crossroads-gps-priorities-usa-american-action-network-and-americans-elect-issued-by-campaign-legal-center-and-democracy-21-&catid=63:legal-center-press-releases&Itemid=61

[53] See: "Donor Names Remain Secret as Rules Shift," by Michael Luo and Stephanie Strom, NY Times, Politics, September 2010. http://www.nytimes.com/2010/09/21/us/politics/21money.html?pagewanted=all

[54] See: http://www.democracy21.org/index.asp?Type=B_PR&SEC=%7B91FCB139-CC82-4DDD-AE4E-3A81E6427C7F%7D&DE=%7BD68E818D-632A-4F25-B4E3-979BD1139FA4%7D

[55] See: New York Times, "I.R.S. Moves to Tax Gifts to Groups Active in Politics," see: http://www.nytimes.com/2011/05/13/business/13gift.html

[56] Wall Street Journal, Washington Wire, July 7, 2011, "IRS Suspends Probes of Gifts to Political Advocacy Groups." See: http://blogs.wsj.com/washwire/2011/07/07/irs-suspends-probes-of-gifts-to-political-advocacy-groups/

[57] See: http://www.irs.gov/newsroom/article/0,,id=241592,00.html

[58] See "Politics and Government Blog of the Times," by Stephanie Strom, dated August 7, 2011: http://thecaucus.blogs.nytimes.com/2011/08/07/i-r-s-handling-of-donations-draws-ire-of-both-parties/?ref=campaignfinance

[59] See: http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf

[60] See: "SEC Takes A Shot at Citizens United": http://electionlawblog.org/archives/019515.html

[61] For the petition see: http://blogs.law.harvard.edu/corpgov/files/2011/08/SEC-Petition.pdf . For a discussion of the petition, see: http://blogs.wsj.com/washwire/2011/08/05/law-professors-ask-sec-to-require-disclosure-of-campaign-donations/tab/print/

[62] "Fixing Congress," See p. 6-9, by US Rep. Jim Cooper is a good discussion: http://cooper.house.gov/images/stories/here.pdf

[63] See: R. Sam Garrett, "The State of Campaign Finance Policy: Recent Developments and Issues for Congress," p. 10. The CRS does research on issues and offers alternatives for Congress to think about. http://www.fas.org/sgp/crs/misc/R41542.pdf

[64] See bill: http://www.opencongress.org/bill/111-s3628/show

[65] For copy of the letter – on Free Speech for People letterhead, see: http://freespeechforpeople.org/sites/default/files/finalfsfppfaw.pdf

[66] For a detailed discussion of "corruption" and *Citizens United* (2010) see: "On Political Corruption," by Samuel Issacharoff, Harvard Law Review [Vol. 124:118]: http://www.harvardlawreview.org/media/pdf/vol_12401issacharoff.pdf

[67] See for example, "Why Our Democracy Needs Disclosure," by CLC, August 18, 2011: http://www.clcblog.org/index.php?option=com_content&view=article&id=428:why-our-democracy-needs-disclosure-8-18-11 ; "Blowing Up the Pipes: The Use of (c)(4) to Dismantle Campaign Finance Reform," Cory G. Kalanick [Minnesota Law Review, 95:2254]: http://www.minnesotalawreview.org/wp-content/uploads/2011/06/Kalanick_PDF.pdf ; "Election 2010: The Loophole Created by 11C.F.R. Section 104.20(c)(9) and *Citizens United* and the Ineffectiveness of the Campaign-Finance-Law Framework in Iowa," Brian P. Flaherty, [Iowa Law Review, Vol. 97:239-274]: http://www.uiowa.edu/~ilr/issues/ILR_97-1_Flaherty.pdf ; "The Appearance of Corruption: Super PACs in the Wake of the *Citizens United* Decision.," by Gary Miller: http://womenandthelaw.wikispaces.com/file/view/Miller+Paper.pdf ; "Restoring Electoral Equilibrium in the Wake of Constitutionalized Campaign Finance," by S generally Davis, ;[Harvard Law Review, Vol. 124:1528]; "Guide to the Current Rules for Federal Elections," Campaign Legal Center: http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1187%3Aa-guide-to-the-current-rules-for-federal-elections&catid=48%3Amain&Itemid=59 . All the Congressional Research Service Reports referred to in this piece discuss the problem of non-disclosure and possible corruption.

[68] See: http://www.nytimes.com/cwire/2011/10/12/12climatewire-as-anti-climate-groups-activities-rise-so-do-14988.html?pagewanted=all

[69] See: http://www.nytimes.com/cwire/2011/10/12/12climatewire-as-anti-climate-groups-activities-rise-so-do-14988.html?pagewanted=all

[70] See p.1 in: http://www.fec.gov/members/weintraub/nprm/statement20110617.pdf

[71] See: p. 55 of Majority "Opinion of the Court" Delivered by Justice Kennedy: 558 U.S. _____2010, Section IV, Part B at: http://www.supremecourt.gov/opinions/09pdf/08-205.pdf ; see also: http://www.clcblog.org/index.php?option=com_content&view=article&id=428:why-our-democracy-needs-disclosure-8-18-11

[72] See: "State of Campaign Finance Policy: Recent Developments and Issues for Congress," July 18, 2011, by R. Sam Garrett, p. 12. http://www.fas.org/sgp/crs/misc/R41542.pdf

[73] See: Congressional Research Service, "The State of Campaign Finance Policy: Recent Developments and Issues for Congress, R. Sam Garrett, July 18, 2011, pp. 18-19. http://www.fas.org/sgp/crs/misc/R41542.pdf

[74] See: "Election 2010: The Loophole Created by 11C.F.R., Section 104.20(c)(9) and Citizens United and the Ineffectiveness of the Campaign-Finance-Law Framework in Iowa,: by Brian P. Flaherty , [Iowa Law Review, Vol. 97:239-274]: http://www.uiowa.edu/~ilr/issues/ILR_97-1_Flaherty.pdf

[75] See: http://www.nytimes.com/cwire/2011/10/12/12climatewire-as-anti-climate-groups-activities-rise-so-do-14988.html?pagewanted=all

[76] See: http://www.nytimes.com/2010/10/22/us/politics/22chamber.html

[77] See "Petition for Rulemaking": http://www.fec.gov/pdf/nprm/citizensunited/van_hollen.pdf

[78] See p. 5 in "Petition for Rulemaking": http://www.fec.gov/pdf/nprm/citizensunited/van_hollen.pdf See also: Commissioner Weintraub's response: http://www.fec.gov/members/weintraub/statements/ELW_CU_Statement_12-16-11.pdf

[79] See: "Draft Notice of Rule Making on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations: Draft A" http://www.fec.gov/agenda/2011/mtgdoc_1102.pdf

[80] See: "Court Cases; Van Hollen v. FEC": http://www.fec.gov/pdf/record/2011/jun11.pdf See also: Chris Van Hollen v. FEC, US District Court for D.C. http://www.courthousenews.com/2011/04/22/FEC.pdf

[81] See : http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1315%3Avan-hollen-v-fec&catid=72&Itemid=54

[82] S See: Noam Levey and Kim Geiger, "Much Corporate Political Spending Stays Hidden," LA Times, April 23, 2011. See: http://articles.latimes.com/2011/apr/23/nation/la-na-money-politics-survey-20110424

[83] See: http://sunlightfoundation.com/policy/documents/hidden-money-2010-elections/

[84] See: http://www.msnbc.msn.com/id/44046063/ns/politics/t/mystery-million-dollar-romney-donor-revealed/

[85] See: http://www.washingtonpost.com/politics/romney-controversy-should-end-now-that-pac-donor-has-identified-himself/2011/08/08/gIQAUIwh2I_story.html

[86] See: http://www.govtrack.us/congress/bill.xpd?bill=h112-3416

[87] Ryan is FEC Program Director and Associate Legal Counsel at Campaign Legal Center See: http://articles.boston.com/2011-08-06/news/29859264_1_campaign-finance-election-laws-paul-s-ryan

[88] See: http://www.propublica.org/blog/item/super-pacs-propublicas-guide-to-the-new-world-of-campaign-finance

[89] See: http://www.mass.gov/ago/docs/testimonies/citizens-united-letter-to-judiciary-12-7-11.pdf

[90] "Restoring Electoral Equilibrium in the Wake of Constitutionalized Campaign Finance" [Vol. 124:1528], by S generally Davis; see p. 1545: http://www.harvardlawreview.org/media/pdf/vol124_restoring_electoral_equilibrium.pdf

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