***Citizens United* v. *Federal Election Commission*: How Congress Should Respond**

Prepared Testimony of Laurence H. Tribe*

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Mr. Chairman and Members of the Committee,

I am grateful for your invitation to testify on an issue vital to the integrity of our democracy and to government of the people, by the people, and for the people. I appear as a representative of no institution or group but simply as someone who loves this country and its Constitution, having studied, taught and written about constitutional law for over 40 years, to students as varied as President Obama, Chief Justice Roberts, and Solicitor General Kagan, each of whom has, of course, played some role in arguing, deciding, or responding publicly to, the momentous decision of the United States Supreme Court in *Citizens United*.

I should add that I appear not as someone who reflexively rejects the application of the First Amendment to corporate speech but, on the contrary, as one who has strongly supported the First Amendment claims of corporate entities like the bank in *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978), and like the non-profit advocacy group, Massachusetts Citizens for Life, in *FEC v. MCFL,* 479 U.S. 238 (1986), the two primary precedents on which the Supreme Court majority in *Citizens United* purported to rely. Indeed, I think that the statute *as applied* to Citizens United's release of the film *Hillary* in theaters, on DVD, through video-on-demand, and in promotional ads – assuming (doubtfully) that the statute should even have been construed as

* Carl M. Loeb University Professor and Professor of Constitutional Law, Harvard University Law School (title listed for identification purposes only).

*applicable* on those facts – would violate the First Amendment, making analysis of the statute's *facial* validity (and thus its validity in the context of ordinary business corporations) wholly unnecessary, as the four dissenters noted. In that regard, I would draw an important distinction for First Amendment purposes between for-profit business corporations, with respect to which I believe the statute is constitutionally supportable, and MCFL-like advocacy groups that happen to be incorporated, with respect to which I believe it is not.

Finally, I appear as someone whose initial response to *Citizens United*, see http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/, although highly critical of the majority's *methodology* in reaching out so broadly and with so little respect for Congress or for its own precedents, was more measured in assessing the likely *impact*, as a practical matter, of this latest in the Court's series of decisions dismantling the architecture of campaign finance reform. I was, for example, at least somewhat reassured by the reminder in the majority opinion that, although "26 States do not restrict independent expenditures by for-profit corporations," the "Government does not claim that these expenditures have corrupted the political process in those States." (Slip op. at 41.) But the majority's notion of what constitutes "corruption" turns out, on examination, to be so crabbed and unrealistic as to be uninformative, as the dissenting opinion persuasively demonstrates. (Slip op. at 56 – 70.) Beyond that, reassurances based on how the world looked to corporations before *Citizens United* are of necessarily limited relevance in the post-*Citizens United* world, a world in which the expectations shaped by the legal culture are bound to shift as that culture assimilates the New Politico-Corporate Order. Moreover, the stakes are vastly greater when we are speaking about elections that determine the composition of the U.S. House, the U.S. Senate, and the White House than when we focus on state and local elections alone. And the corporate resources at hand are truly staggering: The Fortune 100 companies, for instance, earned revenues of $13.1 trillion during the last election cycle. *See* Supp. Brief for Appellee in *Citizens United* at 17.

One danger is that business corporations, armed with treasuries of almost unimaginable magnitude, may choose to deploy what is essentially other people's money in strategic ways that can critically reshape the political landscape of the entire Nation. Such corporations are not necessarily limited to any particular geographical region and so could prowl the country to find a

House district or a Senatorial race in which their now unlimited expenditures might swing the balance. Democratic strategist Steve Hildebrand has been quoted as saying, "No question, if you are looking at a strategy about how you buy a Senate seat, where is the cheapest place to go? The rural states, where $5 million can buy you a Senate seat and is nothing for a company like ExxonMobil."

There are, of course, business considerations that might deter any number of companies from taking full advantage of the opportunities opened up by *Citizens United.* At least when the money behind a controversial political ad can be readily traced to its corporate source – which may well require more effective disclosure laws, as I'll indicate below – those who launched it might alienate customers they can ill-afford to turn away. But, depending on the magnitude of the potential gains discounted by the improbability of achieving them with a given political communication, that might be a gamble worth taking – especially to companies strongly affected by the regulatory environment in the financial, insurance, health care, or energy sectors, among others. To be sure, none of us can be *certain* that *Citizens United* will unleash dangers this extreme, but the risks seem real enough to take very seriously.

The situation would be strikingly different if the First Amendment, rightly understood, truly put us in this awful box. Following the Constitution does sometimes entail hard choices and unpleasant consequences. But it would be passing strange if the First Amendment, so central to our system of self-government, compelled us to choose between free speech and democratic integrity. In my view, the First Amendment imposes no such dilemma. For the more closely I have studied the opinions in *Citizens United* and reflected not just on the decision's likely consequences but on its dubious reasoning, the more I have found myself agreeing with virtually every point made in the masterful dissent of Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor. I cannot improve on the concluding sentences of their painstakingly thorough 90-page dissection of the majority and concurring opinions: "At bottom, 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."

It is no secret, of course, that the only thing that changed between the Court's decision in *McConnell v. FEC,* 540 U.S. 93, 204-07 (2003), which *upheld* the McCain-Feingold ban on independent electioneering communications by corporations, and the decision in *Citizens United*, which *struck down* the identical ban, was the retirement of Justice O'Connor and the appointment of Justice Alito in her stead. I was present when Justice O'Connor reflected on that reality a week ago Tuesday at a conference at Georgetown Law School. The sorrow was evident behind the twinkle in her eye when she quipped, "Gosh, I step away for a couple of years and there's no telling what's going to happen." The majority could point to no changed circumstances in the world outside the Court to justify its radical departure from principles of *stare decisis.* Those principles of respect for precedent are principles that nobody views as absolute, but they cannot be cast aside on grounds as flimsy as those offered by the *Citizens United* majority without enormous cost to our legal institutions and indeed to the rule of law itself.

As I've said, I agree almost completely with Justice Stevens' dissenting analysis of what *did* happen in this case and of what it is likely to mean. I certainly agree with him that the "Court's . . . approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the [First] Amendment was meant to serve." (Slip op. dissent at 85.) My only reservation – and it's an important one – is with the pessimism reflected in his next sentence, in which his dissent forecast that the Court's decision "will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process."

What I hope to accomplish in my testimony today is to show that "limited measures to protect against corporate domination" in fact remain possible and worth enacting even in the constitutional universe constructed by the five majority justices in *Citizens United*. I intend to show that, despite the blow they struck against the interests of ordinary citizens and genuine self-government, they did *not* entirely foreclose meaningful avenues of legislative relief short of constitutional amendment.

## 1. Limiting Foreign Influence Over American Elections

To explore those avenues, a good place to begin is with a matter around which considerable confusion has swirled since the announcement of the Court's decision: the ability of Congress in the wake of *Citizens United* to limit the influence of foreign citizens and entities over the political process here in America. The majority opinion written by Justice Kennedy was deliberately opaque, if not entirely silent, on that question. It specifically said: "We *need not reach* the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process [because] Section 441b" – the provision under consideration in *Citizens United* – "is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders." (Slip op. at 47).

Parenthetically, it's worth noting the irony of that cautious and restrained approach to a question the Court didn't decide because it didn't *have* to decide it in order to dispose of the case before it. Such considerations of judicial modesty certainly didn't deter the justices in the Court's majority from deciding all manner of questions they had no need to reach on the facts and procedural history of the case before them, as Justice Stevens showed conclusively. *Citizens United* left no doubt that the Roberts Court is quite willing not only to overturn decades of settled precedent but also to decide a case "on a basis relinquished [in the lower courts], not included in the questions presented to [it] by the litigants, and argued [before the Court] only in response to the Court's [own] invitation." (Slip op. dissent at 4.)

Be that as it may, the Court affirmatively chose to leave unanswered the burning question whether its otherwise wide-ranging holding would reach far enough to sweep away legislative measures designed to limit foreign infiltration into American elections, federal and state. Strongly suggesting that the holding could indeed reach that far was the logic of the majority's entire analysis, an analysis that proceeded from a freshly minted principle that legislatures may never limit speech based on the speaker's identity. That is a principle that Justice Stevens decisively demolished (Slip op. dissent at 28-34), but it's a principle without which the majority's reasoning falls of its own weight. Assuming the Court means to proceed coherently, it's difficult to see exactly how it could explain a decision upholding legislation that excludes

from participation in American political campaigns ads (whether positive or negative) distinguished solely on the basis that they were composed, produced, disseminated, or financed by entities subject to significant influence from abroad – legislation that by definition would limit speech based on the identity of who is responsible for that speech.

On the other hand, if as Oliver Wendell Holmes famously observed, "the life of the law is not logic but experience," then the dry logic that drove the Court's decision in *Citizens United* might well give way to other considerations. Four members of the *Citizens United* majority – all but Justice Thomas – joined with all four dissenters in upholding McCain-Feingold's disclaimer and disclosure provisions, provisions that, as Justice Stevens observed, presuppose the "insight that the identity of speakers is a proper subject of regulatory concern." (Slip op. dissent at 30 n.47.) In nonetheless purporting to leave open the authority of Congress to limit electioneering speech based on the foreign identity of those influencing it, the majority pointedly referenced the statute already on the books in 2 U.S.C. § 441e(a)(1) providing that foreign nationals may not directly or indirectly make contributions or independent expenditures in connection with a U.S. election. And, at least hinting that its decision might have been different if the speech of corporations dominated or strongly influenced by non-citizens was at stake, the majority went out of its way – as I observed above – to note that the statute it struck down was "not limited to corporations or associations that were *created in foreign countries* or *funded predominately by foreign shareholders*." (Slip op. at 47(italics added)). Indeed, the majority twice underscored the central place of the citizen/foreigner distinction in its holding: At the heart of the opinion was this sentence: "If the First Amendment has any force, it prohibits Congress from fining or jailing *citizens,* or *associations of citizens,* for simply engaging in political speech." (Slip op. 33 (italics added).) And the majority underscored the point by noting that it was striking down legislation under which "certain disfavored associations of *citizens* – those that have taken on the corporate form – are penalized for engaging in [otherwise protected] political speech." (Slip op. 40 (italics added).)

Although dissenters sometimes exaggerate the reach of a majority opinion in an effort to dislodge votes or pave the way for future overruling by arguing that the sky is falling, Justice Stevens and his three dissenting colleagues in *Citizens United* carefully avoided reading the

majority opinion as requiring Congress to leave foreign-influenced corporations alone. On the contrary, the dissent went out of its way to treat the majority's explicit decision to leave the matter open as an "acknowledge[ment] that Congress might be allowed to take measures aimed at 'preventing foreign individuals or associations from influencing our Nation's political process.'" (Slip op. dissent at 33 n.51.). Treating that acknowledgement as tantamount to a "confess[ion] that [its] categorical approach to speaker identity is untenable," *id.,* the dissent went on to reinforce its supposition that one or more justices in the majority would vote with the four dissenters to *uphold* a ban on campaign expenditures by foreign-influenced corporations. The dissent stressed how inconsistent any contrary result would be with the premises of the Constitution's Framers, obsessed as they were with the influence of those without any real stake in America's welfare. That was an obsession reflected in our Constitution's explicit ban on the acceptance of any foreign "present, Emolument, Office, or Title . . . without the Consent of the Congress" by anyone "holding any Office of Profit or Trust under [the United States]." Article I, § 9, Cl. 8. It is one thing to affirm that aliens are entitled to fundamental human rights, including the protections of habeas corpus, *see Boumediene v. Bush,* 128 S.Ct. 2229 (2008), and quite another to abandon more than two centuries of history by protecting the "right" of aliens to use the assets amassed in a corporate form to influence the outcome of American elections.

So imagine, for example, congressional legislation that would expand upon the existing § 441e by prohibiting all political advertising, including but not limited to electioneering communications, produced or substantially funded by any corporation more than some minimal percentage (say, 5%) of whose equity is held by foreign nationals, as in the legislation that Rep. John Hall of New York has introduced (H.R. 4517, "Freedom From Foreign-Based Manipulation in American Elections Act of 2010"), or by any entity incorporated outside the U.S. or controlled by a foreign government – a restriction that would obviously reach a broad swath of the largest corporate players in the political game. What would be the likely outcome, before the Supreme Court as currently composed, of a First Amendment challenge to such legislation, assuming that Congress were to take care to build a factual record focused on the way in which foreign interests have come to influence elections in the United States? Even the day after *Citizens United* was decided, I would have guessed, both from what the dissent said about the matter and

from the majority's references to U.S. citizens, that such legislation would probably, even if not unanimously, be upheld.

Today, the basis for such a guess is considerably strengthened. I have in mind the awkward moment during the recent State of the Union Address when Justice Alito visibly mouthed the words "Not true." I'm not particularly interested in the debate over whether the President overstepped when he criticized the Court to its face or whether the Justice overstepped when he evinced a response. No doubt the Justice assumed the cameras were trained elsewhere; he wasn't asking the global TV audience to read his lips. Rather, I'm focusing on *what it is that Justice Alito was (perhaps inadvertently) revealing that he regarded as untrue.* Maybe he was just disagreeing with President Obama's observation that the Court had "reversed a century of law" in its *Citizens United* ruling. Much more likely, however, given the context and the timing, was that Justice Alito regarded the President as mistaken in predicting that the Court's holding would stand in the way of laws aimed at excluding foreign influence from American elections.

On *that* question, Justice Alito is surely the expert – not because he knows his Constitution better than the President, no slouch when it comes to that subject, but because Justice Alito knows what Justice Alito thinks better than anyone else could possibly know it. Add his vote to that of the four dissenters, and you get at least five votes to protect against the evil the President forecast when he spoke of American elections being "bankrolled by . . . foreign entities" rather than being "decided by the American people."

It's commonly said that, in our republic, politics should stop at the water's edge. That has been taken to mean that we should act as "one Nation indivisible" when we speak overseas. But it might be turned around to mean in addition that forces and finances from overseas shouldn't be permitted to influence our elections – any more than foreigners, even those who reside here, are permitted to vote in those elections. So Congress should take Justice Alito at his quietly but distinctly spoken word and should proceed at once to enact legislation having the design and purpose of guarding against such foreign influence. Such a law could take as its starting point the text of §441e and the current FEC regulation prohibiting foreign nationals from participating in the formal "decision-making process" of anyone's "election-related activities," 11 CFR 110.20(i), although it would obviously have to be broader in reach. That would seem to

be a perfect place for Congress to begin limiting the deleterious impact of the change the Court wrought and to take up President Obama's concluding call on "Democrats and Republicans to pass a bill that helps correct some of these problems."

### 2. Authorizing States to Protect *Their* Elections From Out-of-State Influence

But Congress should not stop there. For one thing, as Justice Stevens observed in his dissent, the problems created by the Court's opinion extend to *state* as well as federal elections. Twenty-six of the 50 states don't restrict "independent expenditures by for-profit corporations." (Slip op. at 41). The other 24 states do, and any of the 50 states might well wish to address the growing problem of corporate influence in *judicial* elections in particular. Some 39 states hold such elections and, according to a group called "Justice at Stake Campaign," state supreme court candidates alone raised over $205 million between 2000 and 2009, more than twice as much as in the preceding decade. In the recent case of *Caperton v. Massey Coal Co.,* 556 U.S. ___ (2009), a 5-4 majority of the Court "accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of *quid pro quo* corruption." (Slip op. dissent at 68.) "At a time when concerns about the conduct of [state] judicial elections have reached a fever pitch," Justice Stevens warned, the majority's ruling in *Citizens United* "unleashes the floodgates of corporate and union general treasury spending in these races." (Slip op. dissent at 70). It's possible, as he noted, that motions to recuse under *Caperton* "will catch some of the worst abuses," *id.,* but "[t]his will be small comfort to those States that, after [*Citizens United*], may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems." *Id.*

It's not entirely clear to me, however, that *Citizens United* goes quite that far in tying legislative hands. Suppose that a State were to conclude that, in structuring its own judiciary, it wishes to retain elections as a means of ensuring greater *judicial accountability to the State's own citizens and residents*. Many have come to doubt the consistency of that goal with the equally important, and perhaps even more important, goal of ensuring judicial independence. But imagine a State that is unconvinced of the arguments Justice O'Connor and others have made for abandoning competitive head-to-head elections as a means of choosing state and local

judges and moving instead toward merit selection, perhaps supplemented by retention elections. Such a State might nonetheless be concerned to limit the category of those who may affect judicial selection – as well as the selection of all others for public office – to those eligible to vote in that State, a category that would exclude, at the very least, corporations domiciled in other states or largely owned by out-of-state residents.

As Justice Stevens noted in his *Citizens United* dissent, "[i]n state elections, even domestic corporations may be 'foreign'-controlled in the sense that they are incorporated in another jurisdiction and primarily owned and operated by out-of-state residents." (Slip op. dissent at 75 n.70.) If a State were to act on that view by barring electioneering expenditures by out-of-state corporations, whether "foreign" in the sense of §441e or "foreign" only in the sense of being external to the State, a good argument could be made that it would not be the First Amendment that would stand in its way but the Commerce Clause and its correlative principle that States may not, without the consent of Congress, discriminate against or unduly burden out-of-state businesses and residents. If indeed that would be the constitutional objection, then Congress might take a leaf from the book of insurance regulation, where federal law ever since the McCarran-Ferguson Act of 1945 has permitted States to exclude out-of-state interference and competition. *See* 15 U.S.C. § 1011 et seq. *See Prudential Co. v. Benjamin,* 328 U.S. 408 (1946) (upholding congressional power to authorize such state action). In the health care field, many have come to think that this federal legislative permission to Balkanize the country has been unwise and is part of the problem rather than the solution. But what's good for health insurance may not be so good for electoral democracy. Thus I think Congress should at least consider including, in its legislation protecting U.S. elections from foreign influence, a provision permitting states to protect their own elections, judicial and otherwise, from the influence of out-of-state corporate (and perhaps non-corporate) money.

### 3. <u>Barring Corporate Electioneering By Government Contractors</u>

Another important corporate category that virtually invites congressional regulation under the Commerce Clause in the electoral context, both with respect to federal elections and perhaps also with respect to state elections, is the category of corporations (and indeed individuals) doing business with government, whether through formal contractual arrangements

or in other ways that make the "pay to play" concern a particularly salient one. Again drawing on the Stevens dissent not as a source of critique of the *Citizens United* holding, with which we are all stuck for the foreseeable future, but as a source of ideas for permissible legislative responses, I would call attention to his point that "some corporations have affirmatively urged Congress to place limits on their electioneering communications" because they "fear that officeholders will shake them down for supportive ads, that they will have to spend increasing sums on elections in an ever-escalating arms race with their competitors, and that public trust in business will be eroded." (Slip op. dissent at 78.)

What can be done after *Citizens United* about a "system that effectively forces corporations to use their shareholders' money both to maintain access to, and to avoid retribution from, elected officials?" *Id.* One promising answer was suggested in *The Washington Post* on January 26 by Yale Law Professors Bruce Ackerman and Ian Ayres. They cited a 2008 Government Accountability Office study finding that nearly 75% of the 100 largest publicly traded firms are federal contractors. If one were to include *state* contractors in the picture, the percentage would obviously be higher still. Ackerman and Ayres point out that federal contractors already are not permitted to "directly or indirectly . . . make any contribution of money or other things of value" to "any political party, committee, or candidate," a provision arguably barring "Big Pharma from launching a media campaign in favor of a candidate who supports its special deals, thereby 'indirectly providing' the candidate something 'of value.'" But, as Ackerman and Ayres note, the statute as currently written "doesn't cover the case in which contractors threaten to spend millions to oppose senators and representatives who refuse their excessive demands." As the Yale professors argue, "[t]he same anti-corruption rationale that may prohibit contractors from spending millions in favor of candidates requires a statutory prohibition on a negative advertising blitz."

Although the professors don't spell out the affirmative basis of congressional authority to shield those who contract with government in this way, it is important to note that the power Congress would be exercising is not just the power to attach strings to its spending under Article I, §8, Cl.1, but the considerably broader power to regulate commerce under Article I, §8, Cl.8. The significance of that point is twofold. First, it shows that Congress has just as much power to

protect businesses that contract with *state* and *local* authorities under this rationale as it has to protect businesses that contract with *federal* authorities. And second, restrictions imposed in order to protect the integrity and voluntariness of commercial transactions are not burdened by requirements of nexus and proportionality that limit the ability of Congress to attach strings to federal spending in order to do indirectly what it could not do directly.

The existing contractor statute, Ackerman and Ayres report, "has never been seriously challenged." Of course, post-*Citizens United*, it would be – as would the broadened statute they recommend, and the even broader statute (extended to *all* government contracts, not just *federal* contracts) that I recommend. But there is sound reason to suppose that the Court as currently composed would uphold such a statute against a First Amendment attack, doing so on the analogy of the Supreme Court decisions upholding the Hatch Act of 1939, 53 Stat. 1147, which prohibited federal *employees* from expressly endorsing candidates in political advertisements, broadcasts, "campaign literature, or similar material" and from playing an active role in political campaigns. *U.S. Civil Service Commission v. Letter Carriers,* 413 U.S. 548 (1973); *United Public Workers v. Mitchell,* 330 U.S. 75 (1947). The rationale accepted by the Court in those cases was that such prohibitions, although nominally restricting their liberty, actually *protected* the employees in question from being pressured into speaking on behalf of candidates or causes they did not wish to support (or against candidates or causes they did not wish to oppose).

The government interest at stake there – as in the proposals advanced by Professors Ackerman and Ayer and in the still broader measure I would favor – is the long-recognized interest in protecting those who participate in commerce from being coerced into speech with which they may not agree as a condition of engaging in the contractual or other commercial arrangements they wish to undertake. It is similar to the interest the Supreme Court has insisted on protecting, *see Abood v. Detroit Bd. of Educ.,* 431 U.S. 209 (1977) (requiring return of portion of mandatory fee used by union to subsidize political and ideological activity to which individual objects), in the context of unions, which *Citizens United* frees from the same McCain-Feingold restraints that had restricted corporations prior to that decision. *See also U.S. v. United Foods,* 533 U.S. 405 (2001) (striking down rule compelling producers to pay fees to support advertising campaign they had not agreed to fund as part of regulatory scheme). To be sure, this

interest (as vindicated in *Abood* and *United Foods*) has a "freedom of personal conscience" dimension that is absent when money is being extracted from a corporation, but it would be one irony too far for the Court that decided *Citizens United*, carrying the equation of corporations with human individuals to an extreme, to treat these precedents as inapposite on the ground that corporations are too impersonal to have a legally cognizable interest in protection from being pressured into going along ideologically to get along economically. That is indeed a cognizable interest – an interest in "unfettered commerce" – and it is one that applies to *all* employees and contractors, corporate and otherwise, regardless of the level of government with which they do business. This is clearly a broad avenue of possible regulation that merits careful exploration by Congress and fact-finding that would support the governmental interest behind any new restrictions on corporate or union political expenditures.

### 4. Improving the Protection of Unconsenting Shareholders

As applied to business corporations, the core problem addressed by "pay-to-play" regulation of the sort considered above is, of course, the problem posed when for-profit corporations are in effect compelled to use their shareholders' money for causes that neither they nor their shareholders might actually support. But even where corporate *management* fully supports the causes for which the board of directors or others running the business opt to make independent electioneering expenditures, the problem of coerced and potentially dissenting *shareholders* remains. The *Citizens United* majority recognized that problem – how could it not? – but responded by insisting that there is "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'" (Slip op. at 46 (internal source omitted).) The dissent made short shrift of that argument, noting how ineffectual have been "the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty." (Slip op. dissent at 87.) Moreover, as the dissent noted, "[m]ost American households that own stock do so through intermediaries such as mutual funds and pension plans, . . , which makes it more difficult both to monitor and to alter particular holdings." *Id.* at 88.

That the majority was unconvinced obviously makes it an uphill battle to build a congressional response on this platform, but Congress may take some comfort from the "little evidence" remark and may proceed to build a stronger evidentiary record. Or, and with greater

promise of success, Congress may build on the universal recognition that existing shareholder remedies are of limited value by requiring shareholder *pre*-approval of some categories of electioneering expenses and/or creating a new federal cause of action for dissenting shareholders of publicly traded for-profit companies, arming those who sue under this new cause of action with both procedural and substantive tools that can reduce the dangers that unwilling shareholders will be compelled to subsidize speech with which they disagree.

The new federal cause of action could be structured to (1) give dissenting shareholders greater incentive to bring meritorious suits by providing that, if a court is persuaded that a challenged corporate electioneering expenditure (not only during the narrow time windows specified in McCain-Feingold but at any time) clearly was not justified by the corporation's business interests, the officers responsible for making the expenditure would (a) not only have to restore to the corporation's coffers an amount equal to the improper expenditure (b) but also be personally liable to the victorious shareholders in an amount equal to double or treble what they would be obliged to return to the treasury, and to pay as well the attorneys' fees incurred by the winning shareholders and possibly statutory damages to boot. To deter purely vexatious litigation, those bringing manifestly meritless suits could be appropriately sanctioned. As I conceive it, the new law should (2) relax the degree of deference afforded to boards and managers by the "business judgment rule," at least in cases where electioneering expenditures are made (either directly or through a contribution to an electioneering entity) from the corporation's treasury without the specific prior assent of a majority of the voting shares. The new law could, as well, (3) shift the burden of proof of business purpose from the shareholders to the corporation whenever such expenditures are made without an explicit and public affirmation by the corporation's CEO that making those expenditures from the corporation's general treasury funds *rather than from a political PAC* advances the business purposes of the corporation, an affirmation that would also serve to notify the viewers of the corporate electioneering communication that what they are seeing reflects a self-interested business decision rather than some public-spirited informational offering.

### 5. Strengthening Disclaimer and Disclosure Requirements

With the sole exception of Justice Thomas, who deemed insufficient the prospect of as-applied challenges to disclosure and disclaimer rules in circumstances where a substantial risk of harassment can be shown, the Court was unanimous in stressing the importance of corporate transparency in candidate elections and in affirming the facial constitutionality of congressional measures mandating full disclosure of the identity of the corporate funding sources of communications making express reference to candidates for federal office. Simply by way of illustration, Rep. Leonard Boswell's proposed "Corporate Propaganda Sunshine Act," H.R. 4432, would require publicly-traded companies to disclose in filings with the SEC money used to influence public opinion rather than to promote their products and services.

Such disclosure requirements must be crafted in order simultaneously to achieve transparency and yet respect the First Amendment rights of individuals to speak anonymously even in the context of election campaigns. Among the kinds of disclosure requirements I would be inclined to favor would be rules designed to prevent circumvention of existing disclosure laws through the creation of "shell" corporations into which for-profit companies might funnel campaign expenditures – think, for example, of domestic oil companies hiding behind a "Citizens for Better Energy Options" organization, or British or European pharmaceutical companies hiding behind a "Better Health Through Science" front group. I would also favor "stand-by-your-ad" obligations for the corporate officers, including the CEO, of for-profit corporations responsible for directly or indirectly funding, producing, or disseminating particular electioneering communications. Thus, in addition to making the absence of a specific public certification by the CEO that strictly business considerations justified funding the communication from the corporate treasury (rather than from a PAC) serve as the *trigger to shift the burden of proof* from complaining shareholders to management, I would *mandate* such a certification as a matter of SEC regulation of the corporation involved.

### 6. Tightening Anti-Coordination Rules

I found somewhat ominous the observation by the *Citizens United* majority that"Citizens United has not made direct contributions to candidates, and it has not suggested that the Court

should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny." (Slip op. at 43.) Whoa! Some justices have from time to time hinted that the functional equivalence, from their First Amendment perspective, of direct contributions and truly independent expenditures might lead them to strike down limits on the former rather than uphold limits on the latter. For now, at least, I would proceed on the premise that this view will not gain ascendancy in the foreseeable future and that the willingness to uphold various contribution limits (and, in the context of corporate contributions, the willingness to uphold flat prohibitions) as consistent with the First Amendment will persist. On that premise, we should be safe in regarding *Citizens United* as tying the legislature's hands only with respect to truly independent corporate expenditures and in assuming that expenditures "coordinated" with candidates for public office may still be treated as the equivalent of donations and thus restricted.

My understanding is that the FEC's rules for determining *which* expenditures are coordinated as opposed to independent are ambiguous and loophole-ridden to the point of being barely worthy of the label "rules." Congress should not wait until the FEC is a fully staffed and effectively functioning body before itself specifically codifying criteria for determining what counts as an "independent" expenditure. And those criteria, once enacted into law, should almost certainly include a requirement that the CEO of any corporation substantially funding a supposedly independent ad or other communication mentioning a candidate (with or without the "magic words" urging a vote for or against that candidate) swear on pain of perjury that no coordination has taken place.

## 7. Public Financing Possibilities

Finally, of course, it remains possible in theory to redesign the election system as a whole in ways calculated to offset the influence of large contributors and big spenders, corporate as well as individual. The underlying idea of all such redesign is to reduce the imbalance not by restricting or capping Big Money but by balancing it with Little Money, fighting fire with fire, battling the speech of corporate and moneyed interests with more speech by ordinary citizens. Most notable among the public financing initiatives is the "Fair Elections Now Act" (S. 752 and H.R. 1826) introduced by Senators Durbin (D-Ill.) and Specter (D-Pa.) in the Senate and by Reps. Larson (D-Conn.) and Jones (R-N.C.) in the House. The Act would make candidates for

federal office eligible for public funding if they raised enough donations below $100 each and agreed not to accept large contributions or to permit coordinated expenditures from any source. The public funding would include a base operating budget and continued matching of small contributions from the Fair Elections Fund at a rate of $4 in public money for every $1 privately raised.

Other legislation pending in Congress (H.R. 726, the "Citizen Involvement in Campaigns Act"), would be paid for by a refundable federal tax credit that citizens could use to make their own contributions to federal candidates. Professors Bruce Ackerman and David Wu of Yale Law School made a similar proposal in The Wall Street Journal on January 27, 2010 ("How to Counter Corporate Speech"). However promising any of these possibilities might be – and their political viability seems to me very much in doubt – it would be extremely difficult for them to raise enough public money to offset the problem posed by genuinely independent corporate (and union) expenditures of the sort unleashed, with or without "magic words" urging a vote for or against a candidate, by the *Citizens United* ruling.

Public funding of campaigns, whatever its promise, thus is not an antidote to the flood of corporate speech that some fear the Court's latest decision might unleash unless Congress acts and acts promptly. And the need for expeditious action should be underscored: It is at least theoretically possible that, unless Congress responds effectively to *Citizens United* before the November 2010 elections in one or more of the ways suggested here, large business interests, including those based abroad or funded with money from overseas, will so affect the outcome of the forthcoming campaigns for the House and Senate that the lawmakers sworn in next January will have been preselected with a view to their opposition to these very reforms. Should that occur, it will then be too late to make the changes needed to hold back the potential corporate flood.