

RENEWING DEMOCRACY AFTER CITIZENS UNITED

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Introduction

Citizens United shook all who care about American democracy. But even before the U.S. Supreme Court's radical ruling handed vast new power to corporations and their allies, it was plain: our political system is broken. The forces of the status quo are greater than anyone could have imagined. Congress is dysfunctional. Special interests have generated gridlock and blocked change. This past year showed that unless we repair our democracy, the progressive agenda will stall. Voters and their sentiments will be effectively silenced.

But *Citizens United* may be an inflection point—a moment where a Court-created constitutional crisis galvanizes a strong response. A populist mood is rumbling throughout the public. Some 80 percent of those polled oppose the Court's ruling.¹ An innovative, impassioned reply to this conservative judicial activism can help revive civic energy. We have no choice: faced with *Citizens United*, we must fight back.

To counter the looming flood of unlimited corporate political spending, we need nothing less than a long-term campaign to renew and strengthen American democracy.

- First, by establishing small donor public financing for federal elections.
- Second, by bringing millions of new voters onto the rolls through a modernized registration system—starting in 2010.
- And third, by shaping a new jurisprudence that puts voters, and not corporations, at the center of the First Amendment.

These goals reinforce one another. They would boost participation and offer a bright vision of an engaged citizenry having the loudest voice in the halls of power. They build on hopeful new breakthroughs in Internet fundraising and voter mobilization. They reflect a “charisma of ideas” that can galvanize support.

The American story has been the struggle for a wider democracy, one waged by millions of ordinary citizens. We can write the next chapter in that story.

The Challenge: Our Dysfunctional Democracy

At its core, the ongoing economic crisis is a political crisis. Money-drenched politics, too few voters, and a retreat from the rule of law all created the conditions for collapse. Now these same factors combined make it much harder to fix the problems. Special interests very nearly derailed health care reform.² Vocal pressure from energy companies led to the abandonment of “cap and trade.”³ Massive lobbying by Wall Street neutered financial reregulation. (All told, financial firms spent \$3.3 billion on federal lobbying over the past decade.⁴) Other vital goals face similar daunting odds.

Americans are disaffected and disillusioned. According to one recent poll, only 28 percent believe that the federal government “is working well or okay.”⁵ Independent voters outnumber Republicans or Democrats in many states.⁶ Rising social movements dating back at least to Ross Perot’s candidacy in the early 1990s and culminating today in the rapid rise of angry Tea Party adherents show the frustration of many Americans at a system that they believe works against them.

This disaffection is rooted in experience. Assured by their government that they were prosperous, typical American families saw real income drop even before the financial crash. Nearly all of the decade’s gains flowed to the very wealthy. Tax laws and financial deregulation played a glaringly visible role. The market collapse, startling bailouts and massive

unemployment punctuated the broader story of widening inequality.

Citizens United is, in many ways, the “last straw” for a political system that had already ground to a gridlocked halt. In his eloquent dissent in the case, Justice John Paul Stevens warned that Americans citizens “may lose faith in their capacity, as citizens, to influence public policy.”⁷

***Citizens United*: Background and Impact**

Why is this case so significant? In *Citizens United*, the Supreme Court overturned strict bans on direct corporate spending in federal elections. The decision is breathtaking in its scope: it overturns a century-old doctrine and laws upheld in 1990, and several times since. In the audacity of the Court’s reach into the political process, the ruling matches or exceeds *Bush v. Gore*. Unlike that case, *Citizens United* will affect every election for years ahead—and every policy issue, too.

The Court reached its radical result in a highly unusual process. The narrow case before it involved the arcane question of whether an informational commercial could be regulated as a campaign ad. It could have been resolved any number of ways without disturbing the constitutional order. Indeed, that is how justices are supposed to rule. Instead, on the final day of the 2009 term last June, the Court set the case for re-argument on an expedited basis, and asked for briefs in 30 days on the much broader question of whether corporations could use their treasury funds to pay for campaign ads. Already, firms could use separate political action committee funds for campaign contributions and spending, but could not directly spend sums from the corporate treasury. There was no trial record on this issue; no reason to decide this constitutional question; a rushed re-argument; and then a lengthy delay in issuing the opinion that has now radically altered the political landscape in the middle of the political season. The ban on direct corporate spending in federal elections goes back to the 1907 Tillman Act, which barred corporate contributions in federal campaigns (it was assumed to cover “independent expenditures”

too).⁸ In 1947, the Taft-Hartley law made explicit that corporations and unions could not directly spend their treasury funds on electioneering. Each time it has acted, Congress has strengthened this rule.⁹

Why will this matter? Isn't there a lot of money sloshing around in politics already? Consider Exxon-Mobil. In the 2008 election cycle, its political action committee (PAC) raised about \$1 million from its employees and officers,¹⁰ That year, its profits were \$45 billion.¹¹ It was illegal for Exxon to spend that money for federal candidates; now it is legal. Exxon or any other firm can spend—or threaten to spend—as much as it wants in any congressional district in the country against any congressman who supports climate change legislation, to give one example.

Some assert that *Citizens United* will not by itself lead to a change in corporate spending. Firms will not campaign overtly because doing so is controversial and risks rousing customer wrath. (Lobbying, the theory goes, is a more cost effective way to achieve the same results.) Perhaps. But why? Why wouldn't firms spend directly? Social norms are thin protection. Public aversion to giant-scale corporate spending may have an impact. Whether it does or not, shareholders ought to have a voice—and a vote—when corporate managers spend investor money for political campaign purposes.¹² Until they do, we can expect businesses to enjoy freedom to spend what they wish.

The bottom line: the Court re-ordered the priorities in our democracy. It may sharply tilt American politics, destroying the chances for both meaningful civic engagement and progressive policy success. What can we do to prevent this outcome? New laws cannot entirely undo the damage wrought by the Court, at least not yet. We may never match the new flood of funds dollar for dollar. But we do not need to. Rather, we must insist on new, bold reforms that begin to reclaim democracy in its broadest sense. Reform breeds more reform. Only bold solutions that put the voter at the center of our democracy will begin the repair—small donor public financing; voter registration modernization; and a new jurisprudence and other legal responses.

Small Donor Public Funding of Political Campaigns

To counter the crushing volume of new corporate spending, we must find a way to boost the voices and augment the roles of small donors—the millions of ordinary citizens who began to transform political fundraising in 2008. Matching funds for small contributions make it possible for candidates to run viable, competitive campaigns. This change would push campaigns toward grassroots outreach that spurs greater participation. This reform is key to restoring confidence in American democracy.

This innovative approach to reform doesn't curb speech; it boosts it. Indeed, the Supreme Court has long approved of public financing as the “more speech” solution to the troubling problems wrought by big money in politics. In the Court's words, such programs are governmental efforts, “not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”¹³

Ideally, public funding systems should be structured like that in New York City, which awards multiple matching funds for small contributions.¹⁴ For example, under New York City's current six-to-one matching system, a relatively small individual donation of \$175 provides a candidate with a total of \$1,225.¹⁵ The system encourages candidates to seek donations from a large number of voters, thus spurring broad participation. It also boosts competitiveness, especially for open seats, as several candidates often have similar amounts to spend.

The Fair Elections Now Act, introduced in the Senate by Richard Durbin (D-Ill.) and Arlen Specter (D-Pa.) and in the House of Representatives by John Larson (D-Conn.) and Walter Jones, Jr. (R-N.C.), creates similar incentives. The Act would give qualified congressional candidates the ability to run competitive campaigns based on a combination of public grants and contributions from small donors, without imposing any overall limit on campaign spending.¹⁶ (As of April 2010, over 140 House members have cosponsored the measure.) Candidates

will be able to raise unlimited amounts in small gifts. This reflects a new, innovative approach to an old challenge.

In the wake of *Citizens United*, President Obama and congressional Democrats have prepared legislation to improve disclosure and curb spending by government contractors and foreign firms. Such measures are worthy. But it would be a massive missed opportunity to solely rely on these regulatory fixes. A better response would empower voters—creating a new “public option” to enable candidates who wish to rely on small donors and public funds to build an alternative, better politics. Lawmakers should insist on their ability to vote for long-term reform before facing angry voters in November.

Campaign reform often can seem arcane and bloodless. But the long struggle to curb special interests and augment the voices of ordinary Americans is at the heart of the progressive project. Conservatives surely recognize that the rules of politics affect the outcomes of policy. Now, with *Citizens United*, we all recognize what is at stake. We must insist that small donor public funding be a central part of the nation’s agenda moving forward.

Voter Registration Modernization

A second critical way to counter the new flood of corporate funds is to bring our voter registration system into the 21st century. Voter registration modernization would add up to 65 million to the rolls, *permanently*.¹⁷ Attorney General Eric Holder said that modernizing the voter registration system would “remove the single biggest barrier to voting in the United States.”¹⁸ A state-by-state and national strategy to update our registration system will mean new voters on the rolls in November and every election to come.

Digital technology has transformed American life, yet the voter registration system remains paper-based, rife with error and duplication. This antiquated approach imposes high barriers to the franchise. Accord-

ing to MIT, in 2008 two to three million citizens could not vote because of problems with registration or voter lists.¹⁹ Nine million more were unable to register because of missed deadlines or residency rules. Indeed, the United States lags far behind other democracies. A Brennan Center study of sixteen democracies shows that in each one, the government takes on the responsibility to assure that all citizens are registered.²⁰ In Canada, for example, 93 percent of eligible voters are on the rolls.

The system proposed by the Brennan Center and backed by a bipartisan coalition would vastly expand the registration rolls, while curbing possible fraud and abuse. The states would automatically and permanently register all eligible citizens. Fortunately, already-existing state databases could easily be the basis for compiling a complete and accurate list of eligible adult voters. Under the Help America Vote Act (HAVA) of 2002, states already have computerized voter lists, and under the National Voter Registration Act (NVRA) of 1993, state motor vehicle and social service agencies are required to offer voter registration services to the people they serve and ensure that voters are registered by transferring the data to election officials in each state. The next step is to make such outreach paperless and permanent.

In the modernized system envisioned by the Brennan Center's proposal, registration would be permanent—voters would not fall off the rolls simply by moving. In fact, eight states already have permanent registration, and this reform works well.²¹ Unaccountable “backroom” purges of voter lists would be curbed. And if a voter finds herself off the rolls before or on Election Day, failsafe mechanisms, such as Election Day Registration, would offer voters the chance to correct the record.

A growing bipartisan effort supports such an approach, which offers the possibility of moving past bitter debates over disenfranchisement and false accusations of voter fraud. The chief counsels of the McCain and Obama campaigns joined forces to urge such a change. A Committee to Modernize Voter Registration has enlisted officials and experts from both parties.²² Senator Charles Schumer (D-NY) has pledged to

introduce legislation and enact it in 2010.

Meanwhile, voter registration modernization has made strong, perhaps surprising, progress in the states. In the last two years: Delaware and Kansas did away with paper voter registration forms at Departments of Motor Vehicles, joining seven other states that send voter information electronically to registrars. New laws in California, Indiana, Nevada, North Carolina, and Utah will soon let voters register online, as they already can in Arizona, Kansas, Colorado, Louisiana, Oregon, and Washington. A bipartisan commission convened by the governor of Utah, Republican Jon Huntsman, Jr., unanimously recommended that the state adopt the full panoply of voter registration reforms. In Ohio, long a hotbed of voting controversies, a sweeping election reform bill is now moving through the legislature, though lately it has stalled. Even before this recent wave of reform, eight states have made registration permanent even if voters move. Another eight states allow voters to register and update their records through Election Day.²³

These changes have boosted registration rates. The number of DMV registrations in Washington and Kansas doubled after the system was automated, and increased seven-fold in South Dakota. At the same time, more automation means lower costs, fewer errors, and less opportunity for fraud. Since implementing a fully automated registration system online and at DMVs, Arizona's Maricopa County alone saved over \$230,000 in 2008. The county also found that paper voter registration forms had more than quadruple the error rates of electronic registrations.²⁴

These reforms would take effect, in most cases, during this election year. They will protect the right to vote in 2010. And they would *permanently* expand the voter rolls. This would free up philanthropic resources now devoted, year after year, to voter registration drives.

Voter registration modernization, like small donor public funding, is a transformative reform. These policies do not seek to cleanse money from politics or somehow purify a necessarily messy system. Rather, they

share a watchword: citizen participation. Together, they offer the prospect of a new kind of politics, rooted in the organized, active engagement of ordinary citizens.

Toward a New Constitutional Vision

Democracy is being lost in the courts. The *Citizens United* decision was not a bolt out of the blue. It was the culmination of a decades-long drive by conservatives to enshrine a new vision of corporate First Amendment rights, and tilt constitutional doctrine against ordinary citizens. The Roberts Court has heard four campaign finance cases; in all four, it ruled to strike down existing campaign finance law. This burst of activism portends further deregulation. We must respond, then, in the courts and the realm of ideas.

First, we must defend existing campaign finance laws from ongoing legal assault. An armada of constitutional challenges to state and federal reforms is advancing rapidly toward the Supreme Court.²⁵ Conservatives, sensing a perhaps temporary five vote majority for radical deregulation, have filed myriad suits. These challenges include attacks on:

- disclosure statutes;²⁶
- public financing systems;²⁷
- “pay-to-play” restrictions on government contractors and lobbyists;²⁸
- and “soft money” restrictions on gifts to political parties and PACs.²⁹

Of note, these challenges are backed by the same forces that propelled *Citizens United*: the U.S. Chamber of Commerce; the National Right to Life Committee; and the Republican National Committee. Progressives must organize a similarly robust legal defense.

Beyond this emergency defense, it is vital to build a new jurisprudence—a decade-long drive for a new constitutional vision that can guide courts and uphold a strong, self-governing democracy.

In *Citizens United*, the Roberts Court awarded corporations a constitutional right to monopolize political discourse. The five justice majority ignored any countervailing interest on the part of the electorate. Our goal must be to develop a different vision of the First Amendment and its place in the constitutional order. In fact, American constitutional jurisprudence long includes a strong tradition of deliberative democracy—recognizing that the overriding purpose of the First Amendment is to promote an informed, empowered, and participatory electorate. Courts sought to maintain a balance between the rights of candidates, parties, and special interests to advance their own views, and the rights of the electorate to participate in public discourse and to receive information from a variety of speakers.³⁰ As the Court has long recognized, “constitutionally protected interests lie on both sides of the legal equation.”³¹

Just as conservative legal thinkers waged a multi-decade campaign for a new constitutional vision, the response requires a similarly ambitious effort. Our drive will also take years. The first step occurred at a Brennan Center conference in March 2010, when top legal thinkers—what *The New York Times* called “a group of A-list first amendment scholars”³²—explored these issues. Further steps should include books, law review articles and fellowships. These scholars can be a powerful new force in ongoing litigation, as well. Together we will build a major intellectual movement that forges a new constitutional jurisprudence—one that puts “We the People” back in the center of the First Amendment law.

The Brennan Center’s Role

The response to *Citizens United* and the wider dysfunction of our democracy must be bold and broad. It requires a multi-year, multi-issue, multi-organizational effort. We must embrace a wide array of communities and constituencies – all of whom now recognize that they have a stake in deep systemic reform. Beginning with a mobilization of opinion

leaders, this effort over time can and should build into deep, participatory grass-roots effort that mirrors the democracy we seek in the way we seek it.

In this drive for a renewed democracy, the Brennan Center plays a central, critical role.

We were co-lead counsel in the U.S. Supreme Court in the landmark *McConnell v. FEC* case that upheld the McCain-Feingold law in 2002. We protected the voting rights of at least 500,000 citizens in 2008 through our lawsuits, studies and public education. Our Task Force was a major spur to the abandonment of electronic voting with no paper trail throughout the country. Our voter protection work was featured in a *TIME Magazine* cover story.³³ The *Boston Globe* called us “indispensable.”³⁴

Now, in the wake of *Citizens United*, we are redoubling our efforts.

In campaign finance, we lead the legal and jurisprudential response, organizing the defense of existing laws ... litigating the defense of public funding in Connecticut and elsewhere ... and launching innovative strategies to organize and train government lawyers and pro bono law firms. With Moritz Law School at Ohio State University, we are creating a private online database that will both track litigation as it develops across the country and centralize information about how to effectively counter these challenges. We serve as constitutional counsel to the coalition working to pass small donor public financing in Congress.

At the same time, we lead national efforts to press for voter registration modernization. Our proposal has won endorsement from *The New York Times*, *Roll Call*, and the *Washington Post*.³⁵ Our ten studies form the basis for congressional and state efforts. An example: We chaired the state of Ohio’s task force on elections, which assessed how that pivotal state fared and crafted the reform package now moving through the legislature.

Conclusion: Democracy Renewed

Plainly, *Citizens United* marks a turning. As flawed as our democracy has been, the current Supreme Court majority pushed the system into new, untried and vastly troubling territory. But the Court's thrust may spark a counter-reaction. Millions were startled by the outspoken annoyance voiced by Chief Justice Roberts and Justice Alito at the President's opposition to the decision. A substantial consensus is emerging about the decision's overreaching nature, its likely harmful consequences, and the urgent need for innovative solutions. We cannot focus on immediate victories alone, but must adopt a long-range strategy – one as ambitious as the drive that led to *Citizens United*. We must resist the “silos” that split issues and divide constituencies. Rather, we should embark on a multi-year strategy to restructure the ways our elections are funded; to repair and modernize our registration systems to encourage millions of new voters; to defend existing laws and to shift jurisprudence in a better direction.

If we do, we can transform a misguided decision into momentum for a new era of democratic renewal and long-term change.

Endnotes

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- 3 See John M. Broder, *'Cap and Trade' Loses Its Standing as Energy Policy of Choice*, N.Y. TIMES, Mar. 25, 2010.
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- 8 See Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and The Competition For Corporate Charters*, 69 U. CHI. L. REV. (Summer 2002).
- 9 See Richard Parloff, *Why the Outcry over Citizens United*, FORTUNE MAG., Feb. 12, 2010.
- 10 See Open Secrets, Exxon Mobil, <http://www.opensecrets.org/pacs/lookup2.php?cycle=2008&strID=C00121368> (last visited Apr. 14, 2010).
- 11 See EXXON-MOBIL 2008 CORPORATE CITIZENSHIP REPORT (2008), available at http://www.exxonmobil.com/Corporate/Imports/ccr2008/community_ccr.aspx.
- 12 The Brennan Center for Justice is actively supporting federal and state proposals that would reform corporate governance rules so that corporations seeking to spend money on politics would have to obtain approval from shareholders, and report on such spending to shareholders. The Brennan Center proposal, published in *Corporate Campaign Spending: Giving Shareholders a Voice* by Ciara Torres-Spelliscy, is modeled on British law. This important reform of corporate law may be included in soon-to-be introduced legislation to repair some of the damage from the *Citizens United* decision.
- 13 *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976). Lower courts, agreeing that public financing furthers First Amendment values, have also consistently upheld such systems against constitutional challenge. See *North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427 (4th Cir. 2008), cert. denied by *Duke v. Leake*, 129 S.Ct. 490 (2008) (affirming denial of preliminary injunction against North Carolina's public financing system for appellate judicial elections); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's Clean Election Act); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Min-

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²² See The Committee to Modernize Voter Registration, <http://www.modernizeregistration.org> (last visited Apr. 14, 2010).

²³ See WENDY WEISER, CHRISTOPHER PONOROFF & NHU-Y NGO, *supra* note 22.

²⁴ *Id.*

²⁵ See David Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. TIMES, Jan. 25, 2010, <http://www.nytimes.com/2010/01/25/us/politics/25bopp.html?scp=1&sq=james%20bopp&st=cse>.

²⁶ *Doe v. Reed*, 586 F. 3d 671 (9th Cir. 2009), cert. granted, 130 S. Ct. 1133, 2010 WL 144074 (2010) (No. 09-559).

²⁷ See *Green Party v. Garfield*, 648 F. Supp. 2d 298 (D. Conn. Aug. 27, 2009), argued (2d Cir. Jan. 13, 2010); *McComish v. Brewer*, No. CV-08-1550 (D. Ariz. Jan. 20, 2010), appeal docketed (9th Cir. Jan. 26, 2010); *Wisconsin Right to Life v. Brennan*, 09-cv-764 (W.D. Wi. 2009); *Koschnick v. Doyle*, 09-cv-767 (W.D. Wi. 2009).

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²⁹ *Republican National Committee v. Federal Election Commission*, No. 08-1953, 2010 WL 1140721, (D.D.C. Mar. 26, 2010).

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