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Amend the Constitution To Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform

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INTRODUCTION

The just completed 2010 elections show how truly broken our national campaign finance system really is. The integrity of our elections, and ultimately our governance, depends on a vigorous debate in which American citizens truly have a voice. Unfortunately, our elections no longer focus on the needs and interests of individual voters, but are instead shaped by multi-million dollar ad campaigns funded by special interest groups with seemingly limitless resources.

The power to control the political dialogue of campaigns is useful to these special interests because of the resulting power that is gained in the legislative process. This is the real danger of unrestricted campaign expenditures—that elected officials legislate on behalf of corporations, unions, and other powerful organizations instead of their constituents. The American people are well aware of this problem. In a recent poll, nearly eighty percent of Americans agreed that members of Congress are controlled by special interest money to the exclusion of their constituents.[1] Although I believe that members of Congress are honest and highly dedicated public servants, I agree that our campaign finance system

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1. GREENBERG QUINLAN ROSNER RESEARCH, STRONG CAMPAIGN FINANCE REFORM: GOOD POLICY, GOOD POLITICS 1-2 (2010), *available at* http://www.greenbergresearch.com/articles/2425/5613_Campaign%20Finance%20Memo_Final.pdf.

unacceptably allows special interests to corrupt both our elections and legislative process.

The Supreme Court's controversial decision in *Citizens United v. FEC*[2] has sparked a renewed focus on campaign finance reform, but, in fact, the Court laid the groundwork for a broken system many years ago. When the Court held in *Buckley v. Valeo*[3] that restricting independent campaign expenditures violates the First Amendment right to free speech, it conflated money with speech and ensured that our nation's policymakers will often be elected based on their ability to raise money or the size of their personal fortunes, rather than the quality of their ideas or dedication to public service. *Citizens United* made an already bad situation worse. The Court's interpretation of the First Amendment in *Citizens United* ignores longstanding precedent, is fundamentally misguided, and is condemned by an overwhelming majority of American citizens.[4] *Citizens United* put the First Amendment rights of corporations and other large organizations on par with those of individual citizens, opening the door to an unregulated influx of special interest campaign dollars.[5] This vast new source of funding will undoubtedly add new risks of corruption to our political process, as even the potential use of this money will make politicians further beholden to special interests rather than to their constituents.[6]

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2. 130 S. Ct. 876 (2010) (striking down the two provisions of 2 U.S.C. § 441(b) (2006) that prohibited corporations from using their general treasury funds for the purpose of independent campaign expenditures and "electioneering communications").

3. 424 U.S. 1, 51 (1976) (striking down 18 U.S.C. § 608(e)(1), a provision of the Federal Elections Campaign Act of 1971, Pub. L. No. 92-255, 86 Stat. 3 (1972), *amended by* Pub. L. No. 93-443, 88 Stat. 1268 (1974), which set limits on independent expenditures).

4. *See, e.g.*, Poll by ABC News/Washington Post Feb. 4-8, 2010, ABC NEWS (Feb. 8, 2010), http://abcnews.go.com/images/PollingUnit/1102a6Trend.pdf (finding that eighty percent of Americans were opposed, of which sixty-five percent were "strongly opposed," to allowing "corporations and unions [to] spend as much money as they want to help political candidates win elections," and that seventy-two percent would support congressional efforts to reinstate corporate and union spending limits on election campaigns).

5. *See Citizens United*, 130 S. Ct. at 913 (holding that there is "no basis for allowing the Government to limit corporate independent expenditures" or "the use of corporate treasury funds for express advocacy").

6. In a recent article, Monica Youn of New York University's Brennan Center for Justice used Exxon-Mobil as an example of this dramatic increase in potential corporate campaign spending. She noted that in the 2008 election cycle, Exxon-Mobil raised $700,000 through individual contributions for use by its Political Action Committee, but that after the *Citizens United* decision, Exxon-Mobil would be able to make independent political expenditures from their $80 billion profit in 2008. MONICA YOUN, AM. CONST. SOC'Y, *CITIZENS UNITED*: THE AFTERMATH 3 (2010), http://www.acslaw.org/node/16287. For Exxon-Mobil in 2008, *Citizens*

The current campaign finance system also has a degenerative effect on the day-to-day functions of Congress. With each election the cost of campaigns ratchets up, creating an endless campaign cycle in which elected officials spend far too much time engaged in fundraising rather than doing the work the American people elect them to do. As the pressure to raise money increases, incumbents dedicate more and more of their time in office to fundraising, and the incentive to accept large contributions intensifies. When elected officials become dependent on the largesse of special interests, our representative democracy is distorted, and the integrity of the legislative process is endangered.

Members of Congress and the Administration are working on legislation to limit the damage of the *Citizens United* decision.[7] Although I commend and join in these efforts, I fear this legislation may not be as effective as intended. The *Citizens United* decision is a constitutional interpretation that cannot be fully addressed through legislation. The only long-term solution is a constitutional amendment granting Congress the authority to enact comprehensive reforms to restore the voice of individual Americans in our elections. Amending the Constitution is, appropriately, a difficult process that should only be used in extraordinary occasions. In this Essay I argue that now is one of those occasions.

Part I of this Essay discusses the *Citizens United* decision, including the process the Supreme Court used in the *Citizens United* case, the standard of corruption that the Court adopts, the Court's understanding of various forms of campaign financing, and its conclusions as to corporate political involvement. Part II discusses the negative effect that the current campaign finance system has on the day-to-day functions of Congress. Part III argues that a constitutional amendment is the only way to address the risk of corruption that *Citizens United* has added to our already broken campaign finance system and allow the comprehensive reforms that will restore integrity to our political system.

I. *Citizens United*: Making a Bad Situation Worse

The *Citizens United* decision focused on the constitutionality of two provisions of the Federal Election Campaign Act (FECA): the long accepted prohibition on corporations using their general treasury funds to make independent campaign expenditures,[8] and section 203 of the Bipartisan Campaign Reform

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United would have produced a 100,000-fold increase in available funds for political expenditures. *Id.*

7. *E.g.*, Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, S. 3628, H.R. 5175, 111th Cong. (2010).

8. "Independent expenditures" refers to expenditures on communications that expressly advocate for the election or defeat of a federal candidate but that may not be coordinated with either the candidate or party committee. Trevor Potter, *The Current State of Campaign Finance Law*, *in* The New Campaign Finance Sourcebook 54 (Anthony Corrado et al. eds., 2005).

Act of 2002 (BCRA, or McCain-Feingold),[9] which amended FECA, prohibiting corporations from making "electioneering communications"[10] that refer to a clearly identifiable federal candidate within sixty days of a general election or within thirty days of a primary election.[11] In *Citizens United* the Court decided that these two FECA provisions were not necessary to prevent political corruption, and the risk of corruption could not justify a restriction on corporate political speech under the First Amendment.[12]

The following Sections detail my impressions, as an elected official, of the *Citizens United* decision itself and the issues involved. Section I.A is a critique of the process the Court used in deciding *Citizens United*. Section I.B is a discussion of the Court's continued search for the proper standard of corruption in the realm of campaign finance. Section I.C compares the corruptive danger from independent expenditures to other forms of campaign financing. In Section I.D, I discuss the impact of the *Citizens United* decision on the issue of corporate involvement in the political process.

A. No Judicial Record and Little Deference to Congress

In considering the important issues involved in *Citizens United*, the Supreme Court did little to develop an adequate judicial record as to the corruptive danger of independent campaign expenditures.[13] Further, the Court disregarded the experience of Congress that led to the adoption of BCRA's corporate electioneering time restrictions and the prohibition on making political expenditures from general treasury funds.[14] Balancing the needs of a functioning

9. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81-116.

10. Potter, *supra* note 8, at 56 ("Electioneering communications are defined as broadcast, cable, or satellite communications referring to a clearly identified candidate for federal office, airing within sixty days of the candidate's general election or thirty days of the candidate's primary election, and targeting the candidate's electorate.").

11. *See* Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (holding that "*Austin* is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures. As the Government appears to concede, overruling *Austin* 'effectively invalidate[s] not only BCRA section 203, but also 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy.'" (referring to Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990)) (citing Brief of Appellee at 33 n.12, Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (No. 08-205)).

12. *Id.*

13. *See id.* at 933 (Stevens, J., dissenting) (arguing that "the Court [decided *Citizens United*] on the basis of pure speculation" and that "[i]n this case, the record is not simply incomplete or unsatisfactory; it is nonexistent").

14. *See, e.g.*, David B. Magleby, *The Importance of the Record in* McConnell v. FEC, 3 ELECTION L.J. 285, 285, 288-89 (2004) (noting that BCRA itself was the product of

government with the protections afforded by the Constitution is a delicate business, to be conducted with the utmost care. For over a century, Congress has crafted campaign finance regulations in an attempt to balance these two important interests.[15] Each of these reforms had been enacted in response to a clear threat of corruption, and while the Court did not rubber stamp the constitutionality of these reforms before *Citizens United*, it maintained a record of carefully balancing the important interests at stake.[16]

Yet, in *Citizens United*, Justice Kennedy, writing for the majority, based on seemingly nothing more than his own intuition, concludes that: "The corporate independent expenditures at issue in this case . . . would not interfere with government functions."[17] This is a bold conclusion, considering the extent of the congressional inquiry that went into enacting the BCRA and long history of corruption associated with special interest campaign expenditures.

As Justice Stevens accurately assesses in his dissent, "Congress . . . had concluded, over many decades, that their core functions of administering elections and passing legislation cannot operate effectively without some narrow restrictions on corporate electioneering paid for by general treasury funds."[18] Likewise, in *Austin v. Michigan Chamber of Commerce*, Justice Thurgood Marshall, writing for the Court, held that Congress had a compelling interest in limiting corporate political expenditures in order to prevent the "corrosive and distorting effects of immense aggregations of wealth . . . accumulated with the help of the corporate form," with "little or no correlation to the public's support for the corporation's political ideas."[19] These conclusions, while struck down by the *Citizens United* Court, are no less true today. The Court's decision to overlook the experience of a co-equal branch of government, as well as its own precedent, is appalling. As Justice Stevens argues in his dissent from *Citizens United*:

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seven years of congressional investigation including hearings held by the Senate Governmental Affairs Committee, chaired by Senator Fred Thompson (R-TN), in 1997 and 1998, and that the over 100,000 page-long judicial record in *McConnell v. FEC*, 540 U.S. 93 (2003), which, in examining the necessity of BCRA's reforms, included much of this legislative history).

15. *See* Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK, *supra* note 8, at 7, 47 (providing a history of U.S. campaign finance reforms starting with the progressive reformers' enactment of the Tillman Act in 1907 that attempted to curb corporate direct campaign contributions in the early 20th century, through the 2002 McCain-Feingold bill's restraints on soft money and issue advertising).

16. *See supra* note 14.

17. 130 S. Ct. at 899.

18. *Id.* at 946 n.46 (Stevens, J., dissenting).

19. 494 U.S. 652, 660 (1990).

> For those who believe *Austin* was correctly decided—as the Federal Government and the States have long believed, as the majority of Justices to have served on the Court since *Austin* have believed, and as we continue to believe—there is nothing "destabilizing" about the prospect of its continued application. It is gutting campaign finance laws across the country, as the Court does today, that [is] destabilizing.[20]

B. Corruption? The Court's Overly Narrow Definition

While doing little to develop a record as to the danger of corruption associated with independent expenditures by special interests and disregarding the conclusions of Congress on the issue, the Court's standard of corruption is also overly narrow. *Citizens United* represents another chapter in the Supreme Court's extensive debate over political corruption and the type of corruption that necessitates a restriction on corporate and union political expenditures.[21] In 2003, Justice Kennedy argued in his *McConnell v. FEC* dissent that "only a single definition of corruption has been found to identify political corruption successfully and to distinguish good political responsiveness from bad—that is *quid pro quo*,"[22] or explicit bribery. Seven years later, the Court composition has changed, and a majority of the Justices in *Citizens United* accepted Justice Kennedy's strict quid pro quo standard of corruption.[23] This is an unreasonably narrow definition.

Recent scholarly work by Professor Samuel Issacharoff highlights the disconnect between the Court's quid pro quo definition of corruption and the corruption that should be sufficient to uphold campaign finance regulations.[24] Professor Issacharoff suggests that "[w]hile the influence of the [wealthy contributors] may be a concern, and while the prospect of [quid pro quo] corruption is a serious issue . . . perhaps the more serious problem" is the "incentives [that] are offered to elected officials while in office."[25] These incentives motivate "go-

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20. *Citizens United*, 130 S. Ct. at 939 n.18 (Stevens, J., dissenting).

21. *Compare, e.g.*, McConnell v. FEC, 540 U.S. 93, 143 (2003) (noting that corruption extends beyond explicit cash-for-votes agreements to "'undue influence on an officeholder's judgment'" (quoting FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 441 (2001))), *and* Buckley v. Valeo, 424 U.S. 1, 25 (1976) (upholding campaign finance regulations because there was a "sufficiently important" government interest in "the prevention of corruption and the appearance of corruption"), *with McConnell*, 540 U.S. at 296-98 (Kennedy, J., dissenting) (arguing that quid pro quo is the only definition of corruption that should support campaign finance regulations).

22. 540 U.S. at 297 (Kennedy, J., dissenting).

23. 130 S. Ct. at 909-10.

24. Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 1 (2010).

25. *Id.* at 8.

vernmental officials to bend their official functions to accommodate discrete constituencies."[26] Professor Issacharoff refers to this analysis as an "outputs" focus on corruption, a concept closely related to what political scientists call clientelism.[27] The Supreme Court did in fact recognize this danger in *McConnell v. FEC* when it noted its concern that "officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."[28] While discussing the *Citizens United* case, Senator John McCain (R-AZ) illustrated the danger of this type of corruption:

> During the Senate Commerce Committee's consideration of the 1996 Telecommunications Act, every company affected by the legislation had purchased a seat at the table with soft money. Consequently, the bill attempted to protect them all, a goal that is obviously incompatible with competition. Consumers, who only give us their votes, had no seat at the table, and the lower prices that competition produces never materialized. Cable rates went up. Phone rates went up. And huge broadcasting giants received billions of dollars in digital spectrum, property that belonged to the American people, for free.[29]

The *Citizens United* Court, however, seems to treat political responsiveness to special interests as equally legitimate to responsiveness to constituents. Justice Kennedy wrote in his *McConnell* dissent that "[i]t 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."[30] Certainly, the responsiveness of elected officials to their constituents is a fundamental part of our democracy. Unfortunately, Justice Kennedy and the other members of the *Citizens United* majority do not differentiate between responsiveness to constituents and responsiveness to special interests with deep pockets. Whether it is called "corruption," "clientelism," or "legislative capture," when elected officials are responsive to special interests to the exclusion, or detriment, of their own constituents, the true promise of representative democracy is lost. This type of systemic corruption should have been recognized by the Court as sufficient in upholding limits on corporate independent expenditures in *Citizens United*.

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26. *Id.* at 12.

27. *Id.* at 8-9 (describing clientelism as a "patron-client relationship in which political support (votes, attendance at rallies, money) is exchanged for privileged access to public goods"). Professor Issacharoff notes that "[f]or all democracies, there are aspects of clientelism in any responsiveness to constituent interests," but that "[a] pathology ensues when political decisions are made to allow important sectional supporters 'to gain privileged access to public resources' for profit." *Id.* (quoting Luis Roninger, *Political Clientelism, Democracy, and Market Economy*, 36 COMP. POL. 353, 358 (2004)).

28. McConnell v. FEC, 540 U.S. 93, 153 (2003).

29. 155 CONG. REC. S10,624 (daily ed. Oct. 21, 2009) (statement of Sen. McCain).

30. *McConnell*, 540 U.S. at 297 (Kennedy, J., dissenting).

C. *A Difference of Form, Rather than Substance*

In addition to an overly narrow definition of corruption, the Supreme Court also overstates the varying degree of corruptive danger among various forms of campaign expenditures.[31] Over the last century, many campaign finance reforms have been implemented. What becomes clear over time is that whenever regulations are imposed on one form of special interest campaign funding, a loophole is soon identified and exploited to get the money back into the system—if not through direct donations, then through "soft money"[32] or "issue ads."[33] Now, after *Citizens United*, the money will be in the form of "independent expenditures."[34] The money will come from the same special interests but will have a different label. California's experience with independent expenditures is a telling example. When California, which allowed independent expenditures, voted to implement limits on direct contributions to candidates in 2001, the amount spent by special interest groups on independent expenditures in legislative elections increased by 6,144 percent.[35]

Even Justice Scalia, part of the majority in *Citizens United*, has agreed that the differences between the corruptive influences of these various forms of campaign spending are negligible. At oral argument in the 2001 case *FEC v. Colorado Republican Federal Campaign Commission*, Justice Scalia stated:

> I can understand why there's . . . corruption if the donor gives the candidate money and there's a quid pro quo . . . . But you allow indi-

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31. Citizens United v. FEC, 130 S. Ct. 876, 908 (2010) (adopting the conclusion in *Buckley* that independent expenditures, unlike direct contributions lack "prearrangement and coordination" with a "candidate or his agent" and thus "alleviates the danger" (quoting Buckley v. Valeo, 424 U.S. 1, 47 (1976))).

32. "Soft money" refers to funds accepted by state and national party committees for purposes other than the support of federal candidates. Until the BCRA regulated such contributions, soft money donations were unregulated and routinely used to circumvent contribution regulations. *See* Corrado, *supra* note 15, at 32-39 (discussing the rise in use of soft money as a result of loopholes in FECA which allowed both liberal party spending and fundraising).

33. *See id.* at 33; *see also id.* ("In the 1990s, the national parties raised increasingly large sums of soft money. Receipts rose from $86 million in 1992 to about $260 million in 1996 to more than $495 million in 2000. That steep jump was spurred in part by the parties' discovery of 'issue advocacy' advertising, which offered another method of circumventing FECA restrictions. . . . Because the ads did not 'expressly advocate' the election or defeat of a federal candidate, they were not regulated under the FECA and therefore could be financed with soft money.").

34. *See* Potter, *supra* note 8.

35. CAL. FAIR POLITICAL PRACTICES COMM'N, INDEPENDENT EXPENDITURES: THE GIANT GORILLA IN CAMPAIGN FINANCE 4 (2008), *available at* http://www.fppc.ca.gov/ie/IEReport2.pdf.

> viduals to spend $100,000 in their own advertising for this candidate, and it says at the bottom of the ad, you know, paid for by Schwartz, and the candidate knows Schwartz has bought hundreds of thousands of dollars of television advertising, that is perfectly okay, right? . . . But if Schwartz gives $100,000 to the Democratic Party, we're suddenly worried that the candidate is going to be corrupted . . . . I can't understand that. That seems to me so fanciful to think that the one situation presents . . . an opportunity for corruption and the other doesn't. You're much better off if you want to corrupt [the candidate by] spending the money on [the] advertisement.[36]

Whether campaign spending is in the form of direct donations, soft money, issue ads, or independent expenditures, the potential for corruption remains a threat as the difference between these methods of campaign funding are more form than substance. To think that elected officials will not feel similarly indebted to special interests who make significant independent campaign expenditures on their behalf in the same way that they would if the special interest made a direct campaign contribution is, as Justice Scalia says, fanciful. When added to the Court's newly adopted quid pro quo corruption requirement, we are left with an unreasonably narrow definition of corruption applied by a Court that fails to see how each new loophole exploited by special interests is related to the last.

D. Corporate Political Involvement

Some attempt to frame the *Citizens United* decision as a debate over whether corporations are good or bad.[37] This contention, however, only obscures the issue of whether a narrow restriction on corporate independent expenditures is necessary to protect both the electoral and legislative processes. Campaign finance regulation should not become a debate over the value of the corporate form. Corporations play a vital role in our society, yet neither our historical nor modern understandings include political speech as fundamental to the corporate form. In 1819, Chief Justice John Marshall explained that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."[38] As Marshall stated, the corporate form is a legal tool that allows for an efficient operation of business. To bestow corporations with the same constitu-

36. Transcript of Oral Argument at 5-6, FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) (No. 00-191); *see* Adam Clymer, *Justices Join Argument on Spending for Elections*, N.Y. TIMES, Feb. 28, 2001, http://www.nytimes.com/2001/03/01/us/justices-join-argument-on-spending-for-elections.html.

37. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 925 (2010) (Scalia, J., concurring) ("The Framers didn't like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech.").

38. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

tional rights as U.S. citizens is a sharp departure from the Court's own precedent, and a serious mistake.[39]

The *Citizens United* majority opinion attempts to convince its audience that BCRA section 203 barred corporate ideas and viewpoints from the political discourse—that it was "an outright ban" on corporate speech.[40] Justice Scalia, in his concurring opinion to *Citizens United*, states that "to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy" and that "we should celebrate rather than condemn the addition of this speech to the public debate."[41] To say that the provision of the BCRA that the Court struck down "excluded" or "muzzled" the viewpoints of corporations from the public debate is untrue. The interests of corporations are exceedingly well represented in the public debate. Corporations spend large amounts of their general treasury money lobbying government officials and they raise campaign contributions through their Political Action Committees that allow both shareholders and employees to pool their resources for the purpose of express advocacy for or against a federal candidate.[42] Further, corporations' U.S. employees and shareholders are not only allowed, but encouraged, to make their policy views known through the electoral process and by contacting their members of Congress.

I fully support corporate involvement in our public dialogue, so long as it does not lead to corruption or drown out the voices of individual citizens. BCRA section 203 was not a ban on the views of corporations; it was a rational attempt to turn the *volume* of corporate political speech from deafening to loud. It was in line with the Court's precedent and should have been upheld.

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39. Congress's authority to adopt regulations that differentiate the acceptable political involvement of individual citizens in comparison to organizations such as corporations and labor unions is well established. *See, e.g.*, FEC v. Nat'l Right To Work Comm'n, 459 U.S. 197, 210 (1982) ("[T]he 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.'" (quoting Cal. Med. Ass'n v. FEC, 453 U.S. 182, 201 (1981))).

40. 130 S. Ct. at 897 ("The law before us is an outright ban . . . ."); *see also id.* at 898 ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.").

41. *Id.* at 929 (Scalia, J., concurring).

42. 2 U.S.C. § 441(b)(4)(B) (2006) (allowing corporations to solicit funds from stockholders and employees for separately segregated funds); *see, e.g.*, JOSH ZAHAROFF, COMMON CAUSE, LEGISLATING UNDER THE INFLUENCE 2 (2009), *available at* http://www.commoncause.org/healthcarereport (describing the health care industries' involvement in the political process through both lobbying and PAC contributions; during the heat of the health care reform debate in Congress, the health care industries were spending $1.4 million a day lobbying Congress, and from 2000 to 2009 the health care industry had made $373 million in campaign contributions to members of Congress).

II. The Endless Campaign Cycle

Beyond exposing our electoral and legislative processes to corruption as discussed above, our current campaign finance system has locked members of Congress into an endless campaign cycle. Elected officials spend far too much time raising money for campaigns, and not enough time carefully considering legislation or listening to constituents. The drive to raise money is constant, and allowing vast new amounts of special interest money into the system will only increase the pressure. This causes a deterioration of Congress's ability to function, including its ability to adequately represent and respond to its constituents.

Politico, one of the daily Capitol Hill newspapers, recently interviewed a dozen House of Representatives freshmen about the amount of time they spend fundraising. On the promise of anonymity, each of the House members described spending "10 to 15 hours a week on the phone raising money" from "boiler-room-style call centers operated by the campaign committees," and "holding fundraising events in restaurants, offices or clubs that surround the Capitol . . . ."[43] And this is time spent during an already shortened work week. Senator Fritz Hollings, the former Senator from South Carolina, described the unfortunate deterioration of Congress' priorities:

> Money has not only destroyed bi-partisanship but corrupted the Senate. Not the senators, but the system. In 1966 when I came to the Senate, Mike Mansfield, the Leader, had a roll call every Monday morning at 9:00 o'clock in order to be assured of a quorum to do business. And he kept us in until 5:00 o'clock Friday so that we got a week's work in . . . Today, there's no real work on Mondays and Fridays, but we fly out to California early Friday morning for a luncheon fundraiser, a Friday evening fundraiser, making individual money appointments on Saturday and a fundraising breakfast on Monday morning, flying back for perhaps a roll call Monday evening.[44]

As the money raised and spent on campaigns by special interests continues to climb, members of Congress will have to devote more time trying to keep up in the fundraising race. It is no wonder that, as the pursuit of campaign money has come to dominate politics, the American people have become increasingly dissatisfied with Congress' performance.

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43. Alex Isenstadt & James Hohmann, Freshman Say Eric Massa Is Right About the Money, POLITICO (Mar. 11, 2010, 4:50 AM), http://www.politico.com/news/stories/0310/34244.html.

44. Fritz Hollings, *Money: It's the Problem with Politics*, Huffington Post (June 21, 2010, 4:13 PM), http://www.huffingtonpost.com/sen-ernest-frederick-hollings/money-its-the-problem-wit_b_619972.html.

The pressure to raise money also discourages many qualified Americans from running for office. Former U.S. Senators Warren Rudman (R-NH) and Tim Wirth (D-CO) recently published a joint op-ed in which they state:

> If there's one reason for leaving [the Senate] that both Senators [George] Voinovich [(R-OH)] and [Evan] Bayh [(D-IN)]—and ourselves in our time—share in common, it's money. Congress is stuck in the mud of strident partisanship, excessive ideology, never-ending campaigns, and—at the heart of it all—a corrosive system of private campaign funding and the constant fundraising it demands.[45]

In addition to the sheer amount of money and fundraising time that it takes to run for public office, there is also a problem with the source of the campaign money. Senators Rudman and Wirth agree. They warn that "[f]or years, big money has quietly undermined the integrity of our representative government," and that "[w]ealthy contributors . . . expect—and too often receive—a return on their investment in the form of earmarks and legislative favors."[46] Our campaign finance system does not sufficiently incentivize localized campaign fundraising. Congress must reform the campaign finance system to better align politicians' efforts with their constituents' interests rather than with special interests.

III. Reforming a Broken System: Options for Congress

Special interests are already taking advantage of the loophole opened by the *Citizens United* decision.[47] By allowing corporations and unions to make unlimited independent expenditures out of their general treasury funds on behalf of or against candidates, the Supreme Court has opened the floodgates to vast new risks of corruption. But the Court's decision has severely limited Congress's ability to use its normal legislative process to address the corruptive influence of unrestrained special interest campaign spending. Trying to reform the system in

45. Warren Rudman & Timothy E. Wirth, *Politicians in Congress Should Serve You, Not Rich Contributors*, Christian Sci. Monitor (May 24, 2010), *available at* http://www.washingtonspeakers.com/prod_images/pdfs/RudmanWarren.PoliticiansinCongressShouldServeYou.05.24.10.pdf (explaining that Senators George Voinovich and Evan Bayh are "just the latest in a stream of moderate Senators who are too fed up to seek another term").

46. *Id.*

47. *See* T.W. Farnam & Dan Eggen, *Outside Spending up Sharply for Midterms; Fivefold Rise from 2006 Elections; Most of the Money Comes from Undisclosed Sources*, Wash. Post, Oct. 4, 2010, at A1 (reporting that "[t]he $80 million spent so far by groups outside the Democratic and Republican parties dwarfs the $16 million spent at this point for the 2006 midterms"); Kenneth P. Vogel, *Campaign Finance Reform: R.I.P.?*, Politico (Oct. 13, 2010, 1:47 PM), http://www.politico.com/news/stories/1010/43515.html (quoting one campaign finance expert's expectation that there will be up to $200 million of anonymous independent campaign expenditures on advertising for the 2010 election cycle).

a piecemeal fashion, and in a way that the Court is likely to uphold, will only create new loopholes for special interests to exploit. I discuss several of these legislative options in Section III.A below. The best option—and the long-term solution—is a constitutional amendment that provides Congress the broad authority to regulate the campaign finance system. Section III.B presents my argument for this constitutional amendment.

A. Legislative Options

There have been many attempts over the years to regulate the campaign finance system through legislation, with mixed results. Recent bills tend to fall into three categories: (1) comprehensive reforms that are unlikely to withstand judicial scrutiny; (2) somewhat broad reforms that are crafted to conform to the holdings of the Court; and (3) narrowly tailored reforms to address specific issues, such as disclosure requirements for corporations and labor unions.

Congressman David Obey (D-MN) argues for a bill in the first category—comprehensive reforms that would have difficulty surviving judicial scrutiny. He has been an outspoken advocate of fundamentally changing how elections for the House of Representatives are financed, and has introduced the "Let the People Decide Clean Campaign Act" in each Congress since the 109th.[48] The bill requires all House candidates to participate in a public funding system, prohibits private campaign contributions, and caps the amount that can be spent in each election.

If passed, the Obey bill would face several constitutional challenges. The Supreme Court would likely strike down the requirement that candidates participate in the public funding system, the limit on the amount candidates can spend, and the ban on private expenditures in House elections.[49] However, if any provision of the bill were ruled unconstitutional, it also provides an expedited legislative procedure for Congress to consider a constitutional amendment allowing broad regulation of the campaign finance system.[50] Rather than trying to tailor a bill that would withstand judicial scrutiny, the Obey bill directly addresses the most egregious problems of the system and allows for a constitutional amendment to be considered if it becomes necessary.

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48. H.R. 158, 111th Cong. (2009); H.R. 2817, 110th Cong. (2007); H.R. 4694, 109th Cong. (2006). I cosponsored the bill twice during my service in the House.

49. *See* Buckley v. Valeo, 424 U.S. 1, 55, 57 n.65 (1976) (striking down mandatory expenditure limitations and requiring that any system of public financing be voluntary).

50. H.R. 158, 111th Cong. § 501 (2009). The Obey bill makes use of language contained in section 2908 of the Defense Base Closure and Realignments Act of 1990, Pub. L. No. 100-510, § 2908, 104 Stat. 1808, 1816, providing for expedited committee and floor debate procedures in the consideration of a constitutional amendment in the event the Supreme Court were to find any provision of the bill unconstitutional.

Broad reform legislation that is more likely to withstand constitutional challenges, and that falls into the second of the three aforementioned categories, has also been introduced in the 111th Congress. The Fair Elections Now Act, introduced by Senator Dick Durbin (D-IL) in the Senate and Representatives John Larson (D-CT) and Walter Jones, Jr. (R-NC) in the House, would provide a public financing system that incentivizes small contributions from within members' own states.[51] Candidates who choose to participate in the program would receive a base subsidy, matching funds for small donor contributions, and broadcast vouchers.[52] The system is voluntary and would not impose spending limits on participants as long as they agreed to limit private individual contributions to no more than $100.[53] Although the Court would probably find such a system to be constitutional, it is hard to believe that the proposed legislation would fix the fundamental problems of the campaign finance system. Because the system is voluntary, candidates who choose to participate would likely be grossly outspent by wealthy opponents who do not participate. Participants would also still be required to spend significant amounts of time raising small dollar contributions. Finally, the bill fails to address the problem of unlimited spending by corporations or interest groups left open by *Citizens United*, leaving publicly financed candidates at a severe disadvantage if they are negatively targeted by well-funded special interests.

Falling into the third category I described above, the bill that has received the most attention recently is the Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE) Act, which was introduced to limit the negative impact of the *Citizens United* decision.[54] The bill requires organizations involved in political campaigning to disclose the identity of the large special interest donors who are actually funding political advertisements, introducing greater transparency to the process. Despite the fact that even the *Citizens United* majority supports such disclosure protections,[55] the bill was filibustered

51. H.R. 6116, 111th Cong. (2010); S. 752, 111th Cong. (2009). Section 523 of the Senate version provides a four-to-one matching program to participating candidates for "qualified small dollar contributions received by the candidate" from in state residents. S. 752, 111th Cong. § 523 (a) (2009).

52. *See* S. 752, 111th Cong. §§ 521-24 (2009).

53. *See id.* §§ 501(11)(C)(i), 511.

54. H.R. 5175, 111th Cong. (2010) (introduced in the House by Representatives Chris Van Hollen); S. 3295, 111th Cong. (2010); S. 3628, 111th Cong. (2010). Both Senate versions were introduced by Senator Charles Schumer.

55. *See* Citizens United v. FEC, 130 S. Ct. 876, 914 (2010) (noting that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" (quoting McConnell v. FEC, 540 U.S. 93, 201 (2003); Buckley v. Valeo, 424 U.S. 1, 64 (1976)).

by the Republican minority on a motion to proceed to debate.[56] The Senate therefore never debated the important substance of the bill or voted on final passage. Despite the urgent need for legislation such as the DISCLOSE Act, such narrowly tailored laws will not eliminate the large influx of special interest money that will result due to *Citizens United*, and thus these laws will not fully address this newest loophole for corruption.

B. Constitutional Amendment

For over a century Congress has recognized the need to protect its legislative function from the corruptive influence of special interest money.[57] As previously discussed, each time Congress has enacted laws to close loopholes, special interest groups have consistently found new ways to fund campaigns, keeping elected officials beholden to special interests.[58] Now, with decisions like *Buckley* and *Citizens United*, the Court has effectively bound the hands of Congress—Congress can no longer constitutionally protect the integrity of the electoral process. Because the Court views money as speech, and believes corporations and unions should enjoy the same free speech rights as individuals, any regulations that would pass judicial scrutiny are unlikely to have a significant impact on reforming the broken campaign finance system.

Comprehensive reform can be passed only if there is a constitutional amendment that provides Congress with the authority to regulate all aspects of the campaign finance system. Amending the Constitution is not something that should be taken lightly, but without an amendment, the speech rights of individual Americans will be trampled by the speech rights of corporations.

This is why I have cosponsored Senate Joint Resolution 28 with Senator Chris Dodd (D-CT).[59] This Resolution proposes a constitutional amendment that would authorize Congress and state legislatures to regulate the raising and spending of money in political campaigns. It also contains language that allows for the implementation and enforcement of the Amendment's provisions. The constitutional amendment would read as follows:

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56. *U.S. Senate Roll Call Votes 111th Congress - 2nd Session*, UNITED STATES SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00240 (last visited Dec. 1, 2010); *see also* Dan Eggen, *Senate Democrats Again Fail To Pass Campaign Disclosure Law*, WASH. POST, Sept. 23, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/23/AR2010092304578.html (reporting on the second Republican filibuster of the DISCLOSE Act).

57. *See* Corrado, *supra* note 15.

58. *See supra* Section I.C.

59. S.J. Res. 28, 111th Cong. (2010). Senate Joint Resolution 28 is similar to the constitutional amendment legislation introduced by Senator Chuck Schumer (D-NY) in the 110th Congress, S.J. Res. 21, 110th Cong. (2007), and to that introduced by Senator Fritz Hollings (D-SC), S.J. Res. 4, 107th Cong. (2001).

> Section 1. Congress shall have power to regulate the raising and spending of money with respect to Federal elections, including through setting limits on
>
> (1) the amount of contributions to candidates for nomination for election to, or for election to, Federal office; and
>
> (2) the amount of expenditures that may be made by, in support of, or in opposition to such candidates.
>
> Section 2. A State shall have power to regulate the raising and spending of money with respect to State elections, including through setting limits on
>
> (1) the amount of contributions to candidates for nomination for election to, or for election to, State office; and
>
> (2) the amount of expenditures that may be made by, in support of, or in opposition to such candidates.
>
> Section 3. Congress shall have power to implement and enforce this article by appropriate legislation.

This amendment does not dictate the type of campaign finance regulations that Congress or states should enact, as the specific regulations should be thoroughly debated in both Congress and state legislatures, a process that will make those bodies more accountable to those regulations and to their electorates. This flexibility will also allow campaign finance regulations to adjust to new problems as they develop and fully utilize the states as the laboratories of democracy.

Senator Max Baucus (D-MT) has introduced a different constitutional amendment that is more narrowly tailored to address the issue of whether corporations or labor unions enjoy the same free speech rights in political campaigns as an individual citizen.[60] I prefer the broader approach of my proposal because it is not limited to corporations and labor unions. I fear that the more limited Baucus approach would lead to new loopholes, such as the creation of entities that would not fall within the amendment's scope.

Opponents of amending the Constitution argue that it should only be considered in rare circumstances and for issues that cannot be resolved through legislation. Many citizens believe that now is such a time. In a recent poll by Hart Research, seventy-seven percent of voters surveyed said they supported a constitutional amendment that would allow Congress to regulate campaign expenditures by corporations.[61] We have amended the Constitution several times

60. S.J. Res. 36, 111th Cong. (2010).

61. HART RESEARCH ASSOCS., PROTECTING DEMOCRACY FROM UNLIMITED CORPORATE SPENDING (2010), *available at* http://www.pfaw.org/sites/default/files/CitUPoll-PFAW.pdf.

during our country's history, and almost every time it was done to protect the rights of individual citizens.[62] This is again one of those times.

Those opposed to a constitutional amendment and the comprehensive reform that it would allow have suggested that elected officials who favor reform do so only to silence their opposition in elections and to protect their own incumbency. At the oral argument of *Citizens United* Justice Scalia stated that:

> Congress has a self-interest. I mean, we—we are suspicious of congressional action in the First Amendment area precisely because we—at least I am—I doubt that one can expect a body of incumbents to draw election restrictions that do not favor incumbents. Now is that excessively cynical of me? I don't think so.[63]

Having attended the oral arguments of *Citizens United*, Senator John McCain responded to Justice Scalia's comment on the floor of the Senate:

> I take great exception to Justice Scalia's statement, as should every Member of both Houses of Congress. It is an affront to the thousands of good, decent, honorable men and women who have served this Nation in these Halls for well over 200 years. Not only was Justice Scalia's statement excessively cynical, it showed his unfortunate lack of understanding of the facts and the history of campaign reform. Throughout our history, America has faced periods of political corruption, and in every instance Congress has risen above its own self-interest and enacted the necessary reforms to address the scandals and corruption that have plagued our democratic institutions over time.[64]

Studies have shown that campaign finance reforms are likely to benefit challengers to the detriment of incumbents and would result in more competitive elections.[65] Considering that reform is likely to work against incumbents' political interests, that generations of incumbents have nevertheless argued passionately for the need to protect the political system from the corrupting influence of special interest money should not only earn those public servants respect, but also open others' eyes to the extent of the problem.

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62. *See, e.g.*, U.S. Const. amend. XIII (abolishing slavery); U.S. Const. amend. XIV (guaranteeing liberty, equal protection, and due process of law); U.S. Const. amends. XV, XIX (guaranteeing the right to vote).

63. Transcript of Oral Argument at 50-51, Citizens United v. FEC, 130 S. Ct. 876 (2010) (No. 08-205).

64. 155 CONG. REC. S10,622 (daily ed. Oct. 21, 2009) (statement of Sen. McCain).

65. *See* CIARA TORRES-SPELLISCY ET AL., BRENNAN CTR. FOR JUSTICE, ELECTORAL COMPETITION AND LOW CONTRIBUTION LIMITS 2-3 (2009) (discussing Dr. Thomas Stratmann and the Brennan Center for Justice's research concluding that contribution limits and public financing systems may make elections more competitive, benefiting challengers rather than incumbents).

Without a constitutional amendment, or a reversal of Supreme Court precedent, special interest campaign funding will continue to corrupt our elections and legislative process. This proposed Amendment would give both Congress and state legislatures the ability to finally break the cycle of unlimited special interest money influencing the outcome of elections. I look forward to working with other public officials and concerned citizens in our effort to restore the voice of individual Americans in our political process.

Conclusion

As James Madison noted, the Constitution should be amended only upon "extraordinary occasions."[66] Now is one of those occasions. Although our campaign finance system has, unfortunately, a history of distorting our representative democracy in favor of rich special interests to the detriment of individual citizens, the *Citizens United* decision creates an unprecedented new risk for corruption. Our campaign finance system substantially harms Congress's function—with each passing election, public officials spend less time doing their jobs as lawmakers and more time raising money for the next election. As an elected member of Congress, I cannot overstate the damage that this does to our system of governance. *Citizens United* has effectively tied the hands of Congress to address this risk of corruption through its traditional legislative process.

We must work toward a constitutional amendment that will restore integrity to our elections and legislative process. We, as Americans, believe in government "of the people, by the people, for the people."[67] Generations of Americans before us have spoken out, worked tirelessly, and even given up their lives so that we might have the chance to have such a government. We cannot sit by as that ideal is lost.

66. The Federalist No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

67. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).