A AGREE OR DISAGREE?

Directions: *Mark each statement with an "A" if you agree or a "D" if you disagree.*

_____ 1. Government should be able to punish the Sierra Club if it were to run an ad immediately before a general election, trying to convince voters to disapprove of a Congressman who favors logging in national forests.

_____ 2. Government should be able to punish the National Rifle Association if it were to publish a book urging the public to vote for the challenger because the incumbent U. S. Senator supports a handgun ban.

_____ 3. Government should be able to punish the American Civil Liberties Union if it creates a website telling the public to vote for a presidential candidate in light of that candidate's defense of free speech.

_____ 4. "The First Amendment protects speech and speaker, and the ideas that flow from each."

_____ 5. "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."

_____ 6. "When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."

B BACKGROUND ESSAY
Citizens United v. F.E.C., 2010

During his 2010 State of the Union address, President Barack Obama did something very few presidents have done: he openly challenged a Supreme Court ruling in front of both chambers of Congress and members of the Supreme Court of the United States. That ruling, *Citizens United v. F.E.C.* (2010), and the President's commentary on it, reignited passions on both sides of a century-long debate: to what extent does the First Amendment protect the variety of ways Americans associate with one another and the diverse ways we "speak," "assemble," and participate in American political life? It is this speech – political speech – that the Founders knew was inseparable from the very concept of self government.

Since the rise of modern "big business" in the Industrial Age, Americans have expressed concerns about the influence of corporations and other "special interests" in our political system. In 1910 President Teddy Roosevelt called for laws to "prohibit the use of corporate funds directly or indirectly for political purposes…[as they supply] one of the principal sources of corruption in our political affairs." Already having made such corporate contributions illegal with the Tillman Act of 1907, Roosevelt's speech nonetheless prompted Congress to amend this law to add enforcement mechanisms with the 1910 Federal Corrupt Practices Act. Future Congresses would enlarge the sphere of "special interests" barred from direct campaign contributions through – among others - the Hatch Act (1939), restricting the political campaign activities of federal employees, and the Taft-Hartley Act (1947), prohibiting labor unions from expenditures that supported or opposed particular federal candidates.

Collectively, these laws formed the backbone of America's campaign finance laws until they were replaced by the Federal Elections Campaign Acts (FECA) of 1971 and 1974. FECA of 1971 strengthened public reporting requirements of campaign financing for candidates, political parties and political committees (PACs). The FECA of 1974 added specific limits to the amount of money that could be donated to candidates by individuals, political parties, and PACs, and also what could be independently spent by people who want to talk about candidates. It provided for the creation of the Federal Election Commission, an independent agency designed to monitor campaigns and enforce the nation's political finance laws. Significantly, FECA left members of the media, including corporations, free to comment about candidates without limitation, even though such commentary involved spending money and posed the same risk of quid pro quo corruption as other independent spending.

In *Buckley v. Valeo (1976)*, however, portions of the FECA of 1974 were struck down by the Supreme Court. The Court deemed that restricting independent spending by individuals and groups to support or defeat a candidate interfered with speech protected by the First Amendment, so long as those funds were independent of a candidate or his/her campaign. Such restrictions, the Court held, unconstitutionally interfered with the speakers' ability to convey their message to as many people as possible. Limits on direct campaign contributions, however, were permissible and remained in place. The Court's rationale for protecting independent spending was not, as is sometimes stated, that the Court equated spending money with speech. Rather, restrictions on spending money for the purpose of engaging in political speech unconstitutionally interfered with the First Amendment-protected right to free speech. (The Court did mention that direct contributions to candidates could be seen as symbolic expression, but concluded that they were generally restrict-able despite that.)

The decades following *Buckley* would see a great proliferation of campaign spending. By 2002, Congress felt pressure to address this spending and passed the Bipartisan Campaign Finance Reform Act (BCRA). A key provision of the BCRA was a ban on speech that was deemed "electioneering communications" – speech that named a federal candidate within 30 days of a primary election or 60 days of a general election that was paid for out of a "special interest's" general fund (PACs were left

untouched by this prohibition). An immediate First Amendment challenge to this provision – in light of the precedent set in *Buckley* – was mounted in *McConnell v. F.E.C. (2003)*. But the Supreme Court upheld it as a restriction justified by the need to prevent both "actual corruption…and the appearance of corruption."

Another constitutional challenge to the BRCA would be mounted by the time of the next general election. Citizens United, a nonprofit organization, was primarily funded by individual donations, with relatively small amounts donated by for-profit corporations as well. In the heat of the 2008 primary season, Citizens United released a full-length film critical of then-Senator Hillary Clinton entitled *Hillary: the Movie*. The film was originally released in a limited number of theaters and on DVD, but Citizens United wanted it broadcast to a wider audience and approached a major cable company to make it available through their "On-Demand" service. The cable company agreed and accepted a $1.2 million payment from Citizens United in addition to purchased advertising time, making it free for cable subscribers to view.

Since the film named candidate Hillary Clinton and its On-Demand showing would fall within the 30-days-before-a-primary window, Citizens United feared it would be deemed an "electioneering communications" under the BCRA. The group mounted a preemptive legal challenge to this aspect of the law in late 2007, arguing that the application of the provision to *Hillary* was unconstitutional and violated the First Amendment in their circumstance. A lower federal court disagreed, and the case went to the Supreme Court in early 2010.

In a 5-4 decision, the Supreme Court ruled in *Citizens United v. F.E.C.* that: 1) the BCRA's "electioneering communications" provision did indeed apply to *Hillary* and that 2) the law's ban on corporate and union independent expenditures was unconstitutional under the First Amendment's speech clause. "Were the Court to uphold these restrictions," the Court reasoned, "the Government could repress speech by silencing certain voices at any of the various points in the speech process." *Citizens United v. F.E.C.* extended the principle, set 34 years earlier in *Buckley,* that restrictions on spending money for the purpose of engaging in political speech unconstitutionally burdened the right to free speech protected by the First Amendment.

Comprehension and Critical Thinking Questions

1. Summarize the ways in which various campaign finance laws have restricted the political activities of groups, including corporations and unions.
2. What was the main idea of the ruling in *Buckley v. Valeo*?
3. What political activity did the group Citizens United engage in during the 2008 primary election? How was this activity potentially illegal under the BCRA?
4. How did the Supreme Court rule in *Citizens United v. F.E.C.*? In what way is it connected to the ruling in *Buckley*?
5. Do you believe that the First Amendment should protect collective speech (i.e. groups, including "special interests") to the same extent it protects individual speech? Why or why not?
6. What if the government set strict limits on people spending money to get the assistance of counsel, or to educate their children, or to have abortions? Or what if the government banned candidates from traveling in order to give speeches? Would these hypothetical laws be unconstitutional under the reasoning the Court applied in *Buckley* and *Citizens United*? Why or why not?

1. Summarize the ways in which various campaign finance laws have restricted the political activities of groups, including corporations and unions.

2. What was the main idea of the ruling in *Buckley v. Valeo*?

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5. Do you believe that the First Amendment should protect collective speech (i.e. groups, including "special interests") to the same extent it protects individual speech? Why or why not?

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DOCUMENT I: *CITIZENS UNITED V. F.E.C.*, 2010

The F.E.C. has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975. … given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against F.E.C. enforcement must ask a governmental agency for prior permission to speak.

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. All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech.

At the founding, speech was open, comprehensive, and vital to society's definition of itself; there were no limits on the sources of speech and knowledge….By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of 'destroying the liberty' of some factions is 'worse than the disease' [*Federalist* 10]. Factions should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false...

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.

Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. Today, 30-second television ads may be the most effective way to convey a political message. Soon, however, it may be that Internet sources … will provide citizens with significant information about political candidates and issues. Yet, [the BCRA] would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.

1. **Why does the Court say that current F.E.C. regulations results in citizens needing "permission to speak"?**
2. **Why does the Court say that "The First Amendment confirms the freedom to think for ourselves"?**
3. **The Court reasoned, "The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy." Do you agree? What effect, if any, does this ruling have on the republican principle of the United States government?**

Document J: Dissenting Opinion, *Citizens United v. F.E.C.*, 2010

[In] a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees.

Unlike our colleagues, the Framers had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind. ... [M]embers of the founding generation held a cautious view of corporate power and a narrow view of corporate rights... and...they conceptualized speech in individualistic terms. If no prominent Framer bothered to articulate that corporate speech would have lesser status than individual speech, that may well be because the contrary proposition—if not also the very notion of "corporate speech"—was inconceivable.

On numerous occasions we have recognized Congress's legitimate interest in preventing the money that is spent on elections from exerting an 'undue influence on an officeholder's judgment' and from creating 'the appearance of such influence.' Corruption operates along a spectrum, and the majority's apparent belief that quid pro quo arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics....A democracy cannot function effectively when its constituent members believe laws are being bought and sold.

A regulation such as BCRA may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice.

At bottom, the Court's opinion is thus 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.

1. **How does the reasoning in the dissenting opinion differ from that of the Majority (Document I)?**
2. **How would you evaluate the dissenters statement, "A democracy cannot function effectively when its constituent members believe laws are being bought and sold."**

Document K: Concurring Opinion, Citizens United v. F.E.C., 2010

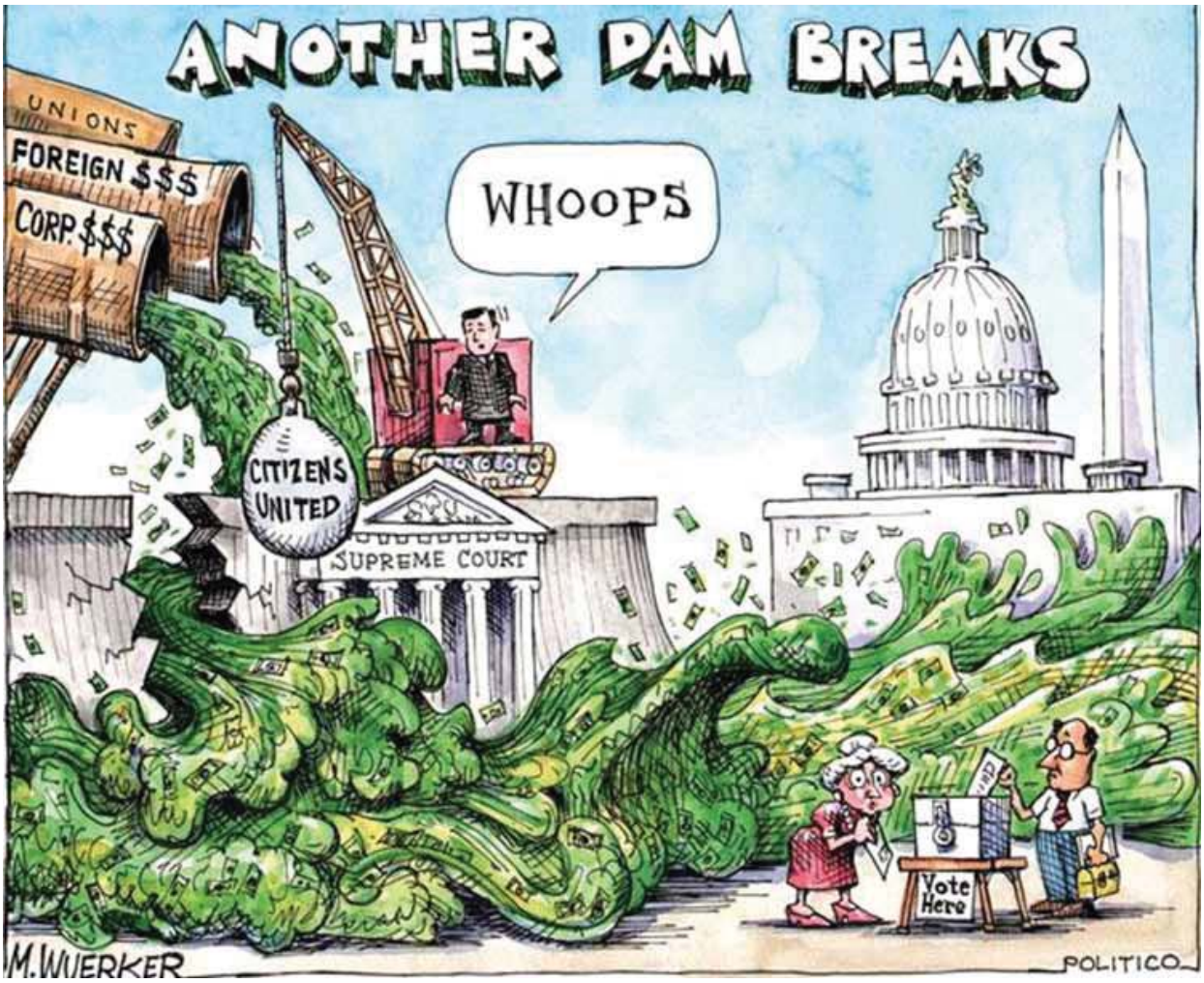
The Framers didn't like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech.

The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak. To the contrary…both corporations and voluntary associations actively petitioned the Government and expressed their views in newspapers and pamphlets. For example: An antislavery Quaker corporation petitioned the First Congress, distributed pamphlets, and communicated through the press in 1790. The New York Sons of Liberty sent a circular to colonies farther south in 1766. And the Society for the Relief and Instruction of Poor Germans circulated a biweekly paper from 1755 to 1757.

The dissent says that when the Framers "constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind." That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak in association with other individual persons. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of "an individual American." It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not "an individual American."

1. **Why does this Justice argue that the original understanding of the First Amendment does not allow for limitations on the speech of associations such as corporations and unions? Do you agree?**

Document L: "Another Dam Breaks," Matt Wuerker, 2010



1. **What does the cartoonist predict will be the effect of the *Citizens United* ruling?**
2. **What assumptions does the cartoonist seem to make about voters? Are they valid assumptions? Explain.**

January 21, 2010

Justices, 5-4, Reject Corporate Spending Limit

By ADAM LIPTAK

WASHINGTON — Overruling two important precedents about the First Amendment rights of corporations, a bitterly divided Supreme Court on Thursday ruled that the government may not ban political spending by corporations in candidate elections.

The 5-to-4 decision was a vindication, the majority said, of the First Amendment's most basic free speech principle — that the government has no business regulating political speech. The dissenters said that allowing corporate money to flood the political marketplace would corrupt democracy.

The ruling represented a sharp doctrinal shift, and it will have major political and practical consequences. Specialists in campaign finance law said they expected the decision to reshape the way elections were conducted. Though the decision does not directly address them, its logic also applies to the labor unions that are often at political odds with big business.

The decision will be felt most immediately in the coming midterm elections, given that it comes just two days after Democrats lost a filibuster-proof majority in the Senate and as popular discontent over government bailouts and corporate bonuses continues to boil.

President Obama called it "a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."

The justices in the majority brushed aside warnings about what might follow from their ruling in favor of a formal but fervent embrace of a broad interpretation of free speech rights.

"If the First Amendment has any force," Justice Anthony M. Kennedy wrote for the majority, which included the four members of the court's conservative wing, "it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."

The ruling, Citizens United v. Federal Election Commission, No. 08-205, overruled two precedents: Austin v. Michigan Chamber of Commerce, a 1990 decision that upheld restrictions on corporate spending to support or oppose political candidates, and McConnell v. Federal Election Commission, a 2003 decision that upheld the part of the Bipartisan Campaign Reform Act of 2002 that restricted campaign spending by corporations and unions.

The 2002 law, usually called McCain-Feingold, banned the broadcast, cable or satellite transmission of "electioneering communications" paid for by corporations or labor unions from their general funds in the 30 days before a presidential primary and in the 60 days before the general elections.
The law, as narrowed by a 2007 Supreme Court decision, applied to communications "susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

The five opinions in Thursday's decision ran to more than 180 pages, with Justice John Paul Stevens contributing a passionate 90-page dissent. In sometimes halting fashion, he summarized it for some 20 minutes from the bench on Thursday morning.

Joined by the other three members of the court's liberal wing, Justice Stevens said the majority had committed a grave error in treating corporate speech the same as that of human beings.
Eight of the justices did agree that Congress can require corporations to disclose their spending and to run disclaimers with their advertisements, at least in the absence of proof of threats or reprisals. "Disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way," Justice Kennedy wrote.
Justice Clarence Thomas dissented on this point.

The majority opinion did not disturb bans on direct contributions to candidates, but the two sides disagreed about whether independent expenditures came close to amounting to the same thing.

"The difference between selling a vote and selling access is a matter of degree, not kind," Justice Stevens wrote. "And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf."

Justice Kennedy responded that "by definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."

The case had unlikely origins. It involved a documentary called "Hillary: The Movie," a 90-minute stew of caustic political commentary and advocacy journalism. It was produced by Citizens United, a conservative nonprofit corporation, and was released during the Democratic presidential primaries in 2008.

Citizens United lost a suit that year against the Federal Election Commission, and scuttled plans to show the film on a cable video-on-demand service and to broadcast television advertisements for it. But the film was shown in theaters in six cities, and it remains available on DVD and the Internet.

The majority cited a score of decisions recognizing the First Amendment rights of corporations, and Justice Stevens acknowledged that "we have long since held that corporations are covered by the First Amendment."

But Justice Stevens defended the restrictions struck down on Thursday as modest and sensible. Even before the decision, he said, corporations could act through their political action committees or outside the specified time windows.

The McCain-Feingold law contains an exception for broadcast news reports, commentaries and editorials. But that is, Chief Justice John G. Roberts Jr. wrote in a concurrence joined by Justice Samuel A. Alito Jr., "simply a matter of legislative grace."

Justice Kennedy's majority opinion said that there was no principled way to distinguish between media corporations and other corporations and that the dissent's theory would allow Congress to suppress political speech in newspapers, on television news programs, in books and on blogs.

Justice Stevens responded that people who invest in media corporations know "that media outlets may seek to influence elections." He added in a footnote that lawmakers might now want to consider requiring corporations to disclose how they intended to

spend shareholders' money or to put such spending to a shareholder vote.

On its central point, Justice Kennedy's majority opinion was joined by Chief Justice Roberts and Justices Alito, Thomas and Antonin Scalia. Justice Stevens's dissent was joined by Justices Stephen G. Breyer, Ruth Bader Ginsburg and Sonia Sotomayor.

When the case was first argued last March, it seemed a curiosity likely to be decided on narrow grounds. The court could have ruled that Citizens United was not the sort of group to which the McCain-Feingold law was meant to apply, or that the law did not mean to address 90-minute documentaries, or that video-on-demand technologies were not regulated by the law. Thursday's decision rejected those alternatives.

Instead, it addressed the questions it proposed to the parties in June when it set down the case for an unusual second argument in September, those of whether Austin and McConnell should be overruled. The answer, the court ruled Thursday, was yes.

"When government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought," Justice Kennedy wrote. "This is unlawful. The First Amendment confirms the freedom to think for ourselves."

The hard truth about Citizens United

by Steven Rosenfeld Jan. 21, 2012

Across the country, two distinct strategies are converging on Congress. More than a million people have signed online petitions. State legislators, city and township governments, Democratic Party groups and unions have sponsored and passed measures in 23 states demanding that Congress pass a constitutional amendment to reassert and elevate the political speech of individual citizens and roll back the growing legal privileges of corporations.

The two approaches can be seen in the protest signs and sound bites proclaiming, "Money is Not Speech" and "Overturn Corporate Personhood." But these slogans are not calling for the same remedy, especially when transformed into legal language in 10 proposals that have been introduced in the current Congress.

The first would address campaign finance setbacks in a 35-year line of Supreme Court rulings, including the *Citizens United* ruling in 2010, which deregulated campaign spending by corporations and unions. The second would go further and seek to revoke the status of corporations as persons under the Constitution, rolling back more than a century of Supreme Court rulings.

These two approaches expose an emerging split among progressives with deeper problems that go beyond the steep if not improbable political climb required to adopt any constitutional amendment: passage by two-thirds of Congress followed by ratification by three-quarters of state legislatures.

With a few exceptions, the growing movement to overturn *Citizens United* and revoke corporate personhood is not being taken seriously beyond America's liberal communities. The guardians of American capitalism—the U.S. Chamber of Commerce and Republican National Committee—do not even feel a need to attack it, unlike recent barbs aimed at the National Popular Vote campaign to reform the Electoral College.

Corporate America's assessment that this activity is not yet a serious threat to their power is also shared by another key sector of the progressive spectrum. Many of the country's top liberal constitutional scholars have been silent, as this bandwagon has gathered momentum. They sympathize with its goals but think its champions are not only overpromising to grassroots supporters but have not thought out what they want Congress to do. Nor do they think the frontline voices have done a good job explaining what is at stake beyond hurling bumper sticker slogans. In other words, they reach the same conclusion as America's corporate titans: this clamor is not yet poised to upend the law behind America's political system.

"I am really excited about the fact that there is so much public interest in this stuff and on the right side—the visceral sense that the Supreme Court has got it wrong," said Dan Tokaji, co-editor of *Election Law Journal* and an Ohio State University professor of law. "But at the same time I'm uncomfortable with the bumper sticker-like critiques. It's not like there's a magic bullet. Every solution has a downside. It's a matter of weighing costs and benefits. And that is especially true in campaign finance reform."

"I do think the body of law from *Buckley* through *Citizens United* to *Bennett* needs readjustment, and I helped Rep. Donna Edwards draft one potential constitutional amendment," said Harvard Law School's Laurence Tribe, one of the country's leading constitutional scholars and a man liberals lobbied President Clinton to appoint to the Supreme Court. "But most of the constitutional amendments floating around seem to be seriously misguided; they would do both too much and too little."

Such skepticism is not what amendment proponents, particularly those favoring the most sweeping ideas, believe or want to hear. They say there is a danger in doing too little; that a populist campaign is needed and working; and that an amendment reserving constitutional rights only for natural persons is on par with the post-Civil War amendments ending slavery and protecting former slaves as citizens.

"We are doing movement building in order to win a constitutional amendment within a decade," said David Cobb, the 2004 Green Party presidential candidate and board member of the Move To Amend coalition, which has led much of grassroots organizing. "We have a meta-perspective about what is going on, but we also have a sense of movement history; in recognizing what it takes to actually get a lot of people in motion demanding systemic change. Our call is no more radical or will be no more difficult than the abolitionist movement, the women's suffrage movement, trade union movement or the Civil Rights movement."

But liberal skeptics also include groups that have been helping local governments adopt laws subordinating corporate rights to community and individual rights in a range of environmental fights. These ordinances are below-the-radar equivalents to the recent Montana Supreme Court decision that upheld its century-old ban on corporate electoral spending. They all make a "compelling" claim, the highest standard in constitutional law, to affirm democratic rights.

"They're good people and their heart is in the right place, but they're not being helpful—as a matter of fact, they are doing damage," said Ben Price, project director of the Community Environmental Legal Defense Fund (CELDF), which has helped 130 municipalities in a half-dozen east-central states—–including the city of Pittsburgh, Pennsylvania–local anti-corporate ordinances in environmental fights. "They won't bring the outcomes that are needed."

"We don't think that is the right strategic move at this time because it will be overturned," Cobb said, when asked why his coalition's members do not pursue CELDF-style changes in law, citing his own experience in Humboldt County, California, where a county ordinance was reversed in federal court. "And why will it be overturned; because corporations have constitutional rights, according to the federal district courts and U.S. Supreme Court. The ultimate win has to result in a constitutional amendment."

This debate—to go narrow or to go big; to focus in Washington or in the states; or what is the relationship between divergent strategies—has not been heard on the airwaves as Americans see the big-spending excesses in the first 2012 presidential contests and as many liberal public interest groups focus on the anniversary of the *Citizens United* ruling. But it is a vast middle ground that is not esoteric or fruitless.

It is not difficult to understand the substance of the law or the choices before Congress. Do people want to see candidates like Newt Gingrich knocked from the lead in Iowa with millions of dollars in largely negative TV ads from super PACs, which Gingrich decried until a billionaire friend gave $5 million to a pro-Newt super PAC before the upcoming South Carolina primary? Do they want to see public financing as a way that non-wealthy candidates can run for federal office? Do they want to see corporations banned from spending money on ballot measures in states like California? Do they want to see limits imposed on all political donations and expenditures to prevent corruption? Do they want to see all money—above the smallest donations—flowing in and out of campaigns and electioneering reported in a timely way?

And what loopholes do people want to let slip into the latest reform proposals in Congress—since every amendment proposed thus far contains exceptions giving a way for people with the means to monopolize the microphone? Does it matter that groups representing communities of color, like the NAACP, could lose their rights to run as a non-profit corporation which includes the right of assembly and to speak on behalf of its members? Should property owners lose a constitutional due process right to sue if the government seizes their property?

These are some of the questions that are not being clearly discussed as many progressive groups are increasingly promoting punishing corporate America by revoking all their constitutional rights. But raising these very questions, elevating the public discussion around them, and getting to specifics is precisely what is needed before any prospect for reform will be taken more seriously.

Democracy's Nemesis: The Supreme Court

"Rarely have so few imposed so much damage on so many," is how Bill Moyers refers to the Supreme Court's deregulation of money in politics, in a forward to a new book on how decades of Court doctrine have increased political speech for corporations while leaving individuals' rights unchanged and in some cases diminished. These rulings are not hard to understand. But they must be understood to coherently discuss what reforms and choices are available to Americans in 2012.

Today's rules for raising and spending campaign cash go back to the post-Watergate era when Congress decreed that campaign donations and political spending could be regulated. With a few temporary exceptions, since 1976 the Court has been rolling back that proposition. In 1976, the Court held in *Buckley v. Valeo* that spending money was a form of political speech—not conduct—entitled to the highest First Amendment protection. *Buckley* ended congressional and state limits, and enabled wealthy individuals to spend unlimited sums from their own pockets in their runs for office.

But that was just the beginning. In 1978, in *Bank of Boston v. Bellotti*, a case involving a Massachusetts ballot referendum, the Court held that corporations could spend money in non-candidate elections. No candidate meant nobody could be corrupted by donations, it held. *Bellotti* invalidated laws in 30 states, prompting a subsequent explosion of corporate-financed ballot measures in states with that option, a significant factor in undermining the legislative process in those state capitals.

This campaign finance landscape essentially held until John Roberts became Chief Justice. In the intervening years, however, the Supreme Court continued to expand corporate speech rights—repeatedly ruling that commercial speech, including advertising and product labeling, was more deserving of First Amendment protection than public-interest efforts by local, state and federal governments.

The Supreme Court blocked efforts to include energy conservation notices in utility bills. Lower federal courts followed and subsequently rejected pro-consumer labels and health warnings on milk, tobacco and cellphones. Another ruling upheld pharmaceutical companies' right to use medical records for commercial purposes, diminishing personal privacy. And another rulingheld that corporations have constitutional protection against searches by federal agencies. Thus in a range of rulings beyond elections, the federal judiciary expanded corporate constitutional rights and eroded legislated public protections.

"In the last few years, the Supreme Court and lower federal courts have shown a new hostility toward laws that regulate the economy and try to limit the effects of economic power," wrote Jedediah Purdy in *Democracy Journal's* Winter 2012 issue. "The First Amendment has helped the Supreme Court do for the consumer capitalism of the Information Age what freedoms of contract did for the Industrial Age: constitutionally protect certain transactions that lie at the core of the economy."

The Court is not unable to distinguish corporations from people as many activists assume. The Roberts Court ruled in 2011, without dissent, that corporations are not entitled to a personal privacy right exemption to block Freedom of Information Act requests. Chief Justice Roberts, who wrote the opinion, concluded by saying the justices "trust that AT&T will not take it personally." But this was not a constitutional decision. And in elections, the Court has blurred the distinctions between corporate and individual participants.

In *Citizens United*, the Court turned a relatively narrow case into a giant leap forward for corporate electioneering. The ruling did a handful of things. It first struck down a

prohibition that barred broadcasting a certain type of political ad—almost always negative and from sponsors who barely identified themselves—in the 60 days before an election. That provision in a 2002 campaign reform law tried to elevate political debate. It then overturned parts of prior Supreme Court rulings that said independent corporate spending could be regulated. Thus it undermined a century-old regime barring direct corporate participation in elections, elevating corporate political rights to the same level as those of citizens.

The Court's ideological conservative majority did not stop with *Citizens United*. Last June, it chipped away at public financing laws by siding with *Buckley's* protection of independently wealthy candidates. In *Arizona Free Enterprise Club v. Bennett*, it struck down a matching funds formula in Arizona's public financing law that gave additional funds to publicly financed candidates if a rival personally spent more than a stated amount. The ruling gutted the law but said public financing was still permissible.

Too Little, Too Much

The amendment proposals fall into two categories with some overlap in between. The first group takes a legislative empowerment approach. They seek to return the campaign finance landscape to pre-*Buckley* days, stating that Congress and the states have power to regulate the raising and spending of money in elections. Proposals by Rep. Donna Edwards, D-Maryland, on theHouse side, and Sen. Tom Udall, D-New Mexico, on the Senate side, take this route. In other words, they seek to reclaim the power to regulate campaign spending away from the Supreme Court.

The opening clause in Edwards' proposal, "Nothing in this Constitution shall prohibit Congress and the States," is very important, Tribe said, because it specifically tells the Supreme Court how the Constitution is *not* to be read. "Proposals that merely affirm legislative power to enact spending caps on corporations or individuals," Tribe pointed out, "could well fail to achieve their objectives because they don't directly address how the Supreme Court has read the First Amendment's restrictions on such legislative power."

However, Edwards's language does not necessarily address some recent political trends that did not exist when *Buckley* was issued. Supposedly "independent" spending by very rich individuals, such as Sheldon Adelson's recent $5 million gift to a super PAC supporting Newt Gingrich, would not be limited by her proposal because it would only limit "funds for political activity by any corporation."

Tribe said Congress had to be more precise to not leave any room for the Court to meddle. Slightly more specific wording that addresses both wealthy individuals and corporations was in Udall's proposal, which seeks broader authority to regulate donations and spending "of money and in-kind equivalents with respect to Federal elections."

Neither the Edwards nor Udall resolutions mention public financing, however. Edwards' proposal would stop corporate spending in ballot initiatives, which would reverse the Court's *Bellotti* decision. That could significantly change political dynamics in initiative states like California, where big business routinely spend millions on these campaigns. Udall's proposal, in contrast, only focuses on candidate elections.

Another legislative empowerment approach is a bipartisan proposal from Rep. Walter Jones, R-SC, and Rep. John Yarmouth, D-KY. It would allow limits on people or groups who might seek to monopolize political microphones and also would revive public financing. It seeks to close a loophole that emerged after *Buckley* where political groups evaded regulation by raising issues associated with the candidates, instead of specific words urging their election or defeat. It also says Congress can create a "mandatory public financing system" and it would make Election Day a holiday.

The second type of amendment proposals—most notably identical measures from Rep. Ted Deutch, D-FL, and Sen. Bernie Sanders, I-VT, a like-minded measure from Rep. Jim McGovern, D-MA, and another from Rep. Keith Ellison, D-MI—seek to address the distinct issue of corporate personhood by declaring, as in the McGovern proposal, "the rights protected by this Constitution to be the rights of natural persons."

These measures, in varying ways, would strip corporations and other business and possibly charitable entities of their constitutional rights—and not just those pertaining to election spending or even under the First Amendment, although most of them make exceptions for "freedom of the press." The most detailed language is in the Deutch-Sanders proposal. It has been won the support of most progressive groups.

The Deutch-Sanders proposal goes on to ban "corporate and other private entities" from contributing or spending money "in any election." Like the first group of proposals, it also grants Congress and states "power to regulate and set limits" on campaign donations and spending. By explicitly targeting profit-seeking corporations and their promoters, it carves out an exception for non-profits—a distinction not made in McGovern's proposal and most of the grassroots advocacy.

Details are important. The Deutch-Sanders amendment would not stop groups like Citizens United, the non-profit group whose anti-Hillary Clinton video was at issue in the Supreme Court case, or some super PACs that are also organized as non-profits because it carves out an exception for non-profits. Robert Weissman, the President of Public Citizen, which supports this amendment, said that its authors discussed what rights corporations should have and concluded that none should be granted to for-profit entities under the Constitution. Congressional legislation could address those rights as needed, he said.

That is a consequential decision and not a widely explained one. It enlarges the focus on tackling the distortions brought by big money in politics to a wider strike at the legal form used for much of the country's business transactions. The Deutch-Sanders proposals would strip businesses of any size—not just big corporations—of the due process right to sue if property were seized. Liberal scholars point to the way President Truman sought to seize corporate assets—steel mills after World War Two—before being stopped by the Supreme Court in a famous 1952 decision.

Proposals from two leading grassroots groups, Move To Amend and Free Speech For People—reflected in the McGovern proposal—would strip constitutional rights from all corporations, for-profit and non-profit. That provision, were it in effect during the Civil Rights movement, could have stopped the NAACP from operating. That very issue—did the NAACP, as a non-profit corporation, have First Amendment rights to assemble and speak for members—arose in the famous 1963 Supreme Court case and ruling, *NAACP v. Button*, a where the affirmed the NAACP's First Amendment freedom to assemble and speak.

These kinds of consequences and issues are not too complicated to discuss or understand. They should be the staple of progressive talk radio shows, but mostly they are not. Instead, progressives driving the anti-*Citizens United* and corporate personhood bandwagon are not being specific enough to threaten the big money forces in America. Instead, they risk alienating supporters by overpromising—like Obama.

"To focus on the fact that corporations are not technically people seems to be missing the point," said Tokaji, *Election Law Journal's* co-editor. "It's really less focused on who's a person and who's not, than on the fact that certain big money interests are able to drown out other voices in the political conversation." To Tokaji, the most promising avenue is exploring how public financing can be revived under the current Court—especially since it did not reject it in wholesale fashion in the Arizona case. "If we want to talk about what meaningful reform can be accomplished given the constitutional doctrine we've really got, I think we are talking about public financing."

There is one other key piece of this discussion getting lost in the growing momentum behind proposals in Washington. That is what action can be taken in the states beyond sending e-mail blasts and resolutions to Congress telling them to act. It is incorrect to suggest that nothing short of a constitutional amendment, reconstituting the current Supreme Court, and electing a new congressional majority will have any meaningful impact—and isn't worth trying.

Actions at the state level could be taken, said Erwin Chemerinsky, founding dean of University of California Irvine School of Law and a respected constitutional scholar. Beyond passing more disclosure laws that report political spending, states could require shareholders to approve corporate political expenditures. "These kinds of laws have been adopted for unions. It's time to do it with regard to corporations," he said.
Another idea is legislation barring a state contractor from spending money for partisan election activities, much like the federal Hatch Act of 1939 limiting federal civil servants from a range of partisan activities. "There are a number of legislative things that can be done to lessen the ill effects of *Citizens United*," Chemerinsky said. "The legislative changes are a lot more realistic than a constitutional change."
The Montana Supreme Court's recent ruling that their state had a compelling interest to regulate how corporations can raise and spend money in elections, and can establish that interest*within* Supreme Court doctrine, is an example of a state taking this stance. The ruling raises questions that may end up before the U.S. Supreme Court. Similarly, the City of San Diego, California, is in court defending local corporate contribution limits after being sued by the Republican activist attorney who brought the *Citizens United* suit. And the New York state Legislature is poised to adopt a public financing regime, Weissman said.
Neither constitutional scholars nor movement activists view these stances as insignificant.

But these steps involve moving beyond bumper sticker sloganeering and rhetoric beating up corporations. This growing movement needs to speak more clearly, elevate the discussion and educate Americans, who know very well what is wrong with American politics and want to hear about solutions that work.

The Community Environmental Legal Defense Fund's Price said today is a rare historic moment and worries that too much oxygen is being consumed by the focus on a federal amendment in Washington and not on changing local and state laws—or even state constitutions. After a half-hour interview, he offered a personal plea that deserves to be heeded by all in this progressive movement.

"The liberal progressive line—and I have been there most of my life—sees a victory as being on the side of the angels, whether or not you actually create outcomes. I am tired of moral victories. I want some real ones."