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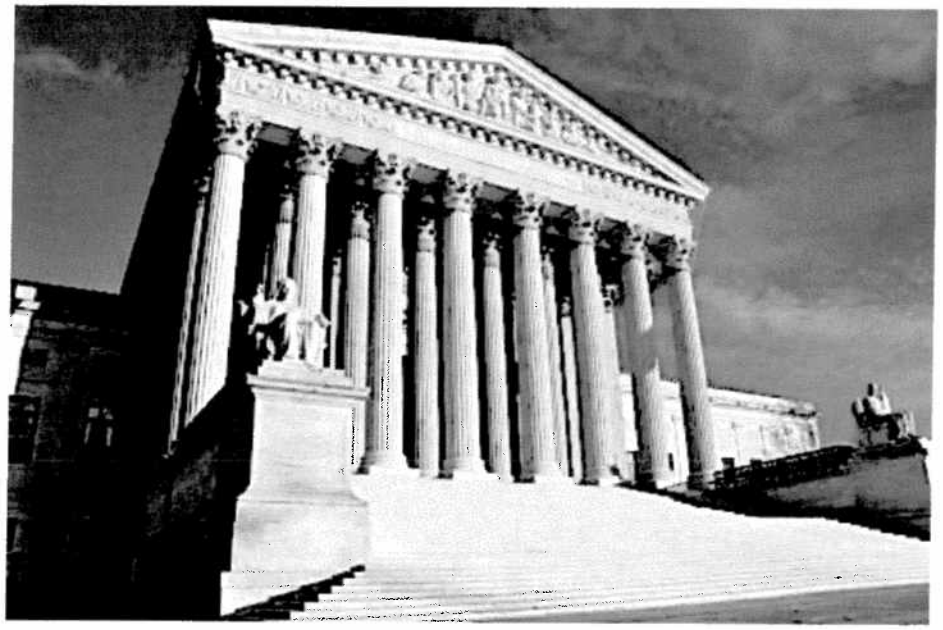
The hard truth about Citizens United

On the second anniversary of a terrible decision, every proposed solution has a downside.

BY STEVEN ROSENFELD



Birthplace of the Citizens United decision (Credit: Orhan Cam via Shutterstock)

The movement to overturn the Supreme Court's controversial *Citizens United* ruling and confront the doctrine of "corporate personhood" stands at a perilous crossroads.

AlterNet NEWS & POLITICS

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."
