

# The 28th Amendment:

by Jeffrey D. Clements



Chief Justice John Roberts speaking at the Federalist Society

In a five-to-four decision in *Citizens United v. FEC* on January 21, 2010, the Supreme Court ruled that Americans are powerless to stop corporate funds from influencing state and federal elections. Overruling *McConnell v. FEC*, decided only six years ago, the Court held that restrictions on corporate election expenditures in

the federal Bipartisan Campaign Reform Act violated First Amendment protections of free speech. In effect, this equates corporations with people for purposes of free speech and campaign expenditures. And by overruling *Austin v. Michigan Chamber of Commerce*, the Court also essentially invalidated restrictions on corporate political expenditures in 24 states.

The *Citizens United* decision is unhinged from American history and from traditional American understandings of both the First Amendment and corporations. Justice Stevens' dissent describes the decision as a "radical departure from what has been settled First Amendment law." And Justice Stevens blasted away the pretense of the conservative majority that they rest decisions on "original intent" of the Constitution's framers. Justice Stevens, speaking for four dissenting Justices, states, "Unlike our colleagues [on the Court], they [the Framers] had little trouble distinguishing corporations from human beings."

The majority opinion rested on what Justice Stevens' dissent calls a "glittering generality": "Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."

Justice Kennedy's notion that corporations are equivalent to "other associations" is a fundamental error that would embarrass a conscientious law student. Corporations simply do not exist unless we enact laws that enable people to organize a corporation and provide the rules of the road for using a corporation. We all can start and run businesses, form non-profits and all kinds of groups without the government permission. But we cannot form or operate a corporation unless the state provides authority to form a corporation, and the rules of the road that accompany use of the corporate form. The use of incorporation to organize joint activity, whether economic or otherwise, is a privilege provided by the people who make the laws. That is not so with unincorporated associations.

The *Citizens United* majority, and too many who control large corporations and their political allies, confuse (intentionally or not) these privileges and policies with Constitutional rights.

## Where did *Citizens United* come from?

The case is the end-game of a well-funded political push in recent years that fabricated a doctrine of corporate "speech" rights that has no foundation in our Constitution. For 200 years, there was no such thing as corporate speech rights under the First Amendment. And no one thought that the First Amendment prevented legislatures from enacting restrictions on corporate political expenditures.

During the Nixon Administration, however, in reaction to increasing legislative efforts to improve environmental, consumer, civil rights and public health laws, corporate executives began aggressively to push back for the creation of corporate rights. They followed a playbook spelled out in a memo from Lewis Powell, then a private corporate attorney advising the Chamber of Commerce. President Nixon then appointed Lewis Powell to the Supreme Court.

Over the following years, a divided Supreme Court transformed the First Amendment into a powerful tool for corporations seeking to evade democratic control and sidestep sound public welfare measures. With increasing aggressiveness, the judiciary has since used this new corporate-rights doctrine to strike down state and federal laws regulating corporate conduct in wide areas of our public life from: clean and fair elections; to environmental protection and energy; to tobacco, alcohol, pharmaceuticals, and health care; to consumer protection, lottery, and gambling; and much more. Now, *Citizens United* removes remaining restraints intended to prevent corporate domination of our political process.

## Why is *Citizens United* so devastating to self-government?

If we take only the profit of the 100 largest corporations alone, those corporations would need less than one percent of their \$605 billion in profit to make political expenditures that would double all current political spending by all of the parties and federal candidates. Another way to look at it: Assume the 100 largest corporations wished only to double—and therefore, swamp—President Obama's record \$745 million fundraising effort in 2008? That would require shaving a little more than the slightest fraction—1/100—off the top of corporate profits from those 100 corporations.

This sledgehammer falls on top of a democracy already impaired by corporate-interest money. Corporations already spend vast sums of money to dominate political debate and

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