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**Testimony of
Anthony Johnstone
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University of Montana School of Law**

Senate Judiciary Committee

**Hearing on
“The *Citizens United* Court and
the Continuing Importance of the Voting Rights Act”**

September 12, 2012

Mr. Chairman and Members of the Committee,

My testimony today concerns the role of the Supreme Court in reviewing the constitutionality of “laws of democracy,” including campaign finance regulation, election administration, and voting rights enforcement. I will compare the different approaches the Court has taken toward two controversies, corporate campaign spending and voter identification laws, and attempt to draw some lessons from the comparison for the Court’s pending review of the Voting Rights Act.

INTRODUCTION

Before taking my current position, I was honored to serve the People of Montana as the State’s Solicitor, where I assisted the Attorney General in defending our laws against constitutional challenges. In that position I developed a deep respect for the democratic process. That process—this process at work here today—is grounded in a principle of popular sovereignty that is the first right declared in our Montana Constitution.¹ The same principle is reflected in our national Constitution that puts “We the People” first,² followed by Congress,³ next the President,⁴ and then the “judicial Power ... vested in one supreme Court.”⁵

¹ “All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.” MONT. CONST. Art. II, § 1.

² U.S. CONST., Preamble.

³ U.S. CONST., Art. I.

⁴ U.S. CONST., Art. II.

⁵ U.S. CONST. Art. III, § 1.

My final case for the State was a defense of a law called the Corrupt Practices Act.⁶ At the turn of the last century, Montana stood in the grips of “corporate dictation and corruption,” in the words of one contemporary newspaper.⁷ Montana’s “general aura of corruption” extended to this body, a committee of which “expressed horror at the amount of money which had been poured into politics in Montana,” and urged the expulsion of Montana’s newly elected Senator William A. Clark for bribery and corruption.⁸ One hundred years ago, Montanans recognized this corruption for what it was, called it as they saw it, and did something about it. By initiative, three-quarters of Montana voters, including farmers, ranchers, miners, businessmen, Democrats and Republicans alike, enacted the Corrupt Practices Act of 1912.⁹ For a century, that law ensured democratic accountability by requiring individuals—real people—to stand behind campaign money spent on behalf of their corporate interests.

This year, the Supreme Court ended this tradition in a case named, ironically, *American Tradition Partnership*. After our Montana Supreme Court upheld the Corrupt Practices Act in a detailed opinion applying the First and Fourteenth Amendments to the undisputed facts before it,¹⁰ and after twenty-two States led by a bipartisan set of attorneys general joined Montana in seeking a hearing,¹¹ the Supreme Court summarily reversed in an unsigned opinion, five-to-four.¹² The Court did not allow briefing on the merits, hold a hearing, or review the record in the case.¹³ Here was an extraordinary exercise of the

⁶ Init. Act. Nov. 1912, § 25.

⁷ Miles Romney, *A Better Era Dawning*, Western News (Hamilton, Mont.) 2 (April 4, 1911); see generally Jeff Wiltse, *The Origins of Montana's Corrupt Practices Act: A More Complete History*, 73 MONT. L. REV. __ (2012) (forthcoming); Larry Howell, *Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, 73 MONT. L. REV. 25 (2012).

⁸ K. Ross Toole, *Montana: An Uncommon Land*, 191 (Univ. Okla. 1959); see generally, *Report of the Committee on Privileges and Elections of the United States Senate, Relative to the Right and Title of William A. Clark to as Seat as Senator from Montana*, S. REP. NO. 56-1052 (1900).

⁹ See Mont. Sec’y of State, *Statutory Initiative and Referendum Issues Since Adoption of the Constitutional Amendment, Article V, Section I, Permitting the Referendum and Initiative*, available at http://sos.mt.gov/elections/Ballot_Issues/initandref2010tbl.pdf (2010).

¹⁰ *Western Tradition Partnership v. Attorney General*, 2011 MT 328, 271 P.3d 1 (Mont. 2011).

¹¹ Brief for the States of New York et al. as Amici Curiae in Support of Respondents, *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (No. 11-1179).

¹² *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

¹³ Docket, *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (No. 11-1179).

judicial power. This decision may be the first time in decades that a divided Court summarily struck down a state law on constitutional grounds.¹⁴ The four dissenters, led by Justice Breyer, so doubted the majority's willingness "to reconsider *Citizens United*," despite the "grave doubt" experience cast "on the Court's supposition that independent expenditures do not corrupt," that they voted to deny review rather than participate in the summary reversal.¹⁵

What does Montana's experience tell us about this Supreme Court, as this hearing's title puts it, "the *Citizens United* Court"? To answer this question, we can contrast the Court's approach to campaign finance laws in *Citizens United* and the Montana case with its approach to voter identification laws in a 2008 case, *Crawford v. Marion County Election Board*.¹⁶ These cases bear basic similarities in the laws and rights at issue, and telling differences in the scrutiny the Court applies.

THE RIGHTS TO CAMPAIGN AND TO VOTE

Both *Crawford* and *Citizens United* involve fundamental rights. The freedom of speech guaranteed by the First Amendment¹⁷ protects a right to campaign spending because "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."¹⁸ The First Amendment and Equal Protection Clause of the Fourteenth Amendment¹⁹ protect a right of equal access to voting

¹⁴ See *Ashland Oil, Inc. v. Tax Commissioner of West Virginia*, 497 U.S. 916 (1990) (per curiam) (holding state tax law unconstitutional under retroactive effect of prior decision); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (per curiam) (holding state rule of criminal procedure unconstitutional under First Amendment). Cf. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam) (holding state statute preempted by Federal Arbitration Act). One commentator found the last time such a narrowly divided Court summarily reversed a state court with so little reasoning was in 1966. See *Riggan v. Virginia*, 384 U.S. 152 (1966); see also Steve Vladeck, Prawfsblawg, *The Math of 5-4 Summary Reversals (or, What I Don't Get About Bullock)*, Comment of Samuel Feldman (Jun. 27, 2012), available at <http://prawfsblawg.blogs.com/prawfsblawg/2012/06/the-math-of-5-4-summary-reversals.html>.

¹⁵ *American Tradition Partnership, Inc.*, 132 S. Ct. at 2492 (Breyer, J., dissenting).

¹⁶ 128 S. Ct. 1610 (2008) (plurality opinion).

¹⁷ "Congress shall make no law ... abridging the freedom of speech." U.S. CONST. Amend. I.

¹⁸ *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976); see also *Citizens United*, 130 S. Ct. 876, 898 (2010) (relying on *Buckley*).

¹⁹ "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, § 1.

because “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.”²⁰

Neither the right to campaign nor the right to vote is absolute, however. Often, when a law implicates these rights, “constitutionally protected interests lie on both sides of the legal equation.”²¹ In campaign finance, for example, “corruption is a constant source of danger” to “a republican government, like ours, where political power is reposed in representatives of the entire body of the people.”²² Moreover, campaign finance laws also facilitate free speech by “enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages.” In election administration, “[c]ommon sense as well as constitutional law, compels the conclusion that government must play an active role in structuring elections ... if they are to be fair and honest.”²³

THE THREATS OF CORRUPTION AND FRAUD

It should come as no surprise, then, that supporters of laws like campaign finance regulation and voter identification requirements invoke these countervailing constitutional interests to justify any burden on the rights to campaign or to vote. Supporters of campaign finance regulation claim that the law should prevent corruption of the political process, and the Court has recognized this threat as a sufficient justification for the constitutional burdens imposed by certain campaign finance laws.²⁴ Supporters of voter identification requirements claim that the law should prevent voter fraud, and the Court has recognized this threat as sufficient for certain election administration laws.²⁵

These claims of political corruption and voter fraud are widely and deeply contested. I do not want to enter that debate today except to note some parallels between the two claims. Both are widely

²⁰ *Harper v. Virginia Board of Elections*, 383 U.S. 663, 667 (1960), quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“voting is of the most fundamental significance under our constitutional structure”); see also *Crawford*, 128 S. Ct. at 1615-16 (plurality opinion) (relying on *Harper* and *Burdick*).

²¹ *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

²² *Burroughs v. United States*, 290 U.S. 534, 547 (1934), quoting *Ex Parte Yarbrough*, 110 U.S. 651, 666 (1884).

²³ *Burdick*, 504 U.S. at 433.

²⁴ *Buckley*, 424 U.S. at 26 (upholding campaign contribution limits).

²⁵ *Crawford*, 128 S. Ct. at 1619 (plurality opinion) (rejecting facial challenge to voter identification law).

recognized as problems by the electorate and, relatedly, both are played to partisan advantage in politics.²⁶ Yet both political corruption and voter fraud can be difficult to detect, and neither is a sufficiently definite problem to lead to a consensus solution. So, as the Court in *Citizens United* observed, about half of the States regulated corporate campaign spending and half did not.²⁷ To some, these laws ban core political speech by censoring corporations; to others, these laws preserve the integrity of the democratic process by requiring the filing of a simple two-page form.²⁸ Thirty-three States passed voter identification laws of varying strictness, about half of which require photo identification.²⁹ To some, these laws impose modern-day poll taxes by conditioning the franchise on the time and expense of a visit to the Bureau of Motor Vehicles; to others, again, these laws preserve the integrity of the democratic process by requiring the filing of a simple two-page form.³⁰ As this Committee knows from its hearings this past summer, reasonable people can and do disagree about the ills of corruption and fraud in electoral politics, and the appropriate remedies, if any.³¹

JUDICIAL DEFERENCE AND SUSPICION

Given this, what should a court do when confronted with a constitutional challenge to laws at the center of the democratic process? This Court gives us two examples of how to answer that question in *Crawford* and *Citizens United*: deference or suspicion.

In *Crawford*, the Court defers to the legislature. It does not question “the legitimacy or importance of the State’s interest in counting only the votes of eligible voters,” or weigh the risk of voter fraud.³² Besides, it says, “[f]or most voters who need them, the inconvenience of making

²⁶ See, e.g., Brent Zongker, *Most oppose unlimited corporate campaign spending*, ASSOC. PRESS (July 17, 2012); Michael Brandon & John Cohen, *Poll: Voter ID laws have support of a majority of Americans*, WASH. POST, Aug. 11, 2012.

²⁷ *Citizens United*, 130 S. Ct. at 908-909.

²⁸ See Commissioner of Political Practices, *Form C-2*, available at <http://politicalpractices.mt.gov/content/pdf/5cfp/fillC-2COMPLETE2012-6rev>.

²⁹ Nat’l Conf. of State Legislatures, *Voter Identification Requirements* (Sept. 5, 2012), available at <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx>.

³⁰ See Pennsylvania Dept. of Transportation, *Application for Initial Identification Card*, available at http://www.dmv.state.pa.us/pdotforms/dl_forms/dl-54a.pdf. A second form is required if the voter lacks proof of identification.

³¹ See, e.g., Senate Comm. on the Judiciary, *Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs*, 112th Cong. (July 24, 2012); Senate Comm. on the Judiciary, *Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in Federal Elections: S. 1994*, 112th Cong. (June 26, 2012).

³² *Crawford*, 128 S. Ct. at 1619 (plurality opinion).

a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote.”³³ The Court could take a similarly deferential approach to *Citizens United* (as the dissent does). The Court might recognize that “Congress surely has both wisdom and experience in these matters that is far superior to ours.”³⁴ Complying with the law through the political committee form “entails some administrative burden,” but “no one has suggested that the burden is severe for a sophisticated for-profit corporation,” and “[t]he owners of a ‘mom & pop’ store can simply place ads in their own names.”³⁵ Meanwhile, “[c]orruption can take many forms,” and “the record Congress developed ... stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other’s backs.”³⁶ Deference thus respects the democratic process.

In *Citizens United*, the Court suspects Congress. The Court finds such laws “ban the political speech of millions of associations of citizens,” and speculates “the result [of the law] is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government.”³⁷ It asserts “independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.”³⁸ Again, the Court could be equally suspicious in *Crawford* (as the dissent is). It could assume that a voting “nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to travel to the Bureau of Motor Vehicles.”³⁹ The factual justification for the law, it might note, is especially weak given “that the State has not come across a single instance of in-person voter impersonation fraud” in its history.⁴⁰ Suspicion thus questions the democratic process.

There is another approach the Court traditionally takes. Sometimes it adopts a double standard of scrutiny depending on whether or not there are independent reasons to respect or question the democratic process. For example, in the *Carolene Products* “footnote four” formulation, the Court might be more suspicious of a law that “restricts those political processes which can ordinarily be expected to

³³ *Id.* at 1621 (plurality opinion).

³⁴ *Citizens United*, 130 S. Ct. at 969 (Stevens, J., dissenting) (quotation omitted).

³⁵ *Id.*, at 943 (Stevens, J., dissenting).

³⁶ *Id.*, at 961 (Stevens, J., dissenting).

³⁷ *Id.*, at 907.

³⁸ *Id.* at 910.

³⁹ *Crawford*, 128 S. Ct. at 1644 (Breyer, J., dissenting).

⁴⁰ *Id.* at 1637 (Souter, J., dissenting).

bring about repeal of undesirable legislation” or “tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”⁴¹ This approach assumes that courts in general are less capable of representing our constitutional values than the political branches, and narrows the focus of judicial review to only those cases where the democratic process malfunctions in some important way.

In *Citizens United*, the Court gives little reason to suspect the democratic process that results in a corporate campaign spending law. Due to their state-conferred organizational advantages and relative wealth, corporations are especially effective at influencing legislation.⁴² The federal law also is the *Bipartisan* Campaign Reform Act, after all, and if the law has any effect on incumbents it might be to weaken the capacity of corporate interests to entrench incumbents who favor the status quo.⁴³ In *Crawford*, on the other hand, the Court has several reasons to suspect the democratic process leading to the voter identification requirement. “Partisan considerations may have played a significant role in the decision to enact” the law, which the legislature enacted on a straight party-line vote.⁴⁴ The impact of the law, meanwhile, disproportionately falls on “the poor and the weak,” who may be deterred “from exercising the franchise.”⁴⁵

But in *Crawford* and *Citizens United*, the Supreme Court does not consistently apply any of these approaches to judicial review. It upholds the voter identification law and strikes down the corporate campaign spending law. Instead of deference or suspicion, or the traditional double standard, it applies a new double standard. The new standard demotes the right to vote of the relatively underrepresented individuals subject to the voter identification law in *Crawford*, and promotes the right to speak of the relatively well-represented corporations subject to the campaign finance law in *Citizens United*. The Court’s decision whether to approach these laws with deference or suspicion is what matters most to the outcome of these cases, not the legislature’s purpose or the parties’ proof of facts, much less the text or history of the Constitution. To the extent we can call this Court “The *Citizens United* Court,” one of its distinguishing characteristics is this new double standard.

⁴¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

⁴² *Citizens United*, 130 S. Ct. at 975 (Stevens, J., dissenting).

⁴³ *See id.* at 969-70 (Stevens, J., dissenting).

⁴⁴ *Crawford*, 128 S. Ct. at 1623-24.

⁴⁵ *Id.* at 1643 (Souter, J., dissenting).

DEFERENCE, DEMOCRACY, AND THE VOTING RIGHTS ACT

This brings us to the Voting Rights Act. In 1965, this building's namesake introduced the Act with a great Montanan, Senate Majority Leader Mike Mansfield, a graduate of and former professor at the University of Montana. The Act passed overwhelmingly. As the Supreme Court recently observed, "the historic accomplishments of the Voting Rights Act are undeniable."⁴⁶ The fact that it was an Act of Congress, and not a judgment of the Supreme Court, facilitated these accomplishments. Through civil rights enforcement legislation, Congress offers courts a way out of the choice between deference and suspicion. Appropriate legislation enforcing Constitutional guarantees strengthens rights by grounding them in democratic legitimacy.⁴⁷ When Congress enforces the right to vote, for example, it can consider a broader factual record, draw on a more representative body of national values, and provide more effective and flexible remedies, than the Supreme Court can on its own. Indeed, throughout our history Congress, through the proposal of constitutional amendments and enactment of civil rights legislation like the Voting Rights Act, has shown itself to be at least as effective a guarantor of our constitutional rights as the Supreme Court.

Yet the Court recently noted that the Act's preclearance requirements, reauthorized and amended in 2006, "raise serious constitutional questions."⁴⁸ Constitutional challenges to the Act are now pending before the Supreme Court.⁴⁹ In light of the discussion above, the issue these challenges pose is not whether these constitutional questions should be resolved, but where and on what basis. There are reasons for the Court to defer these questions to the democratic process. The 2006 reauthorization and amendments to the Voting Rights Act passed Congress by wider margins than the original Act.⁵⁰ If the Supreme Court suspects this process and invalidates the Act, we should expect it to explain why the Court has a better understanding of our constitutionally guaranteed voting rights than Congress, which most directly speaks for We the People.

⁴⁶ *Northwest Austin Mun. Utility Dist. v. Holder*, 129 S. Ct. 2504, 2511 (2009).

⁴⁷ See U.S. CONST., Amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."); see also U.S. CONST., Amend. XIV, § 5.

⁴⁸ *Id.* at 2513.

⁴⁹ See, e.g., *Shelby County, Alabama v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), petition for cert. filed (No. 12-96); *Nix v. Holder*, 679 F.3d 905 (D.C. Cir. 2012), petition for cert. filed (No. 12-81).

⁵⁰ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246 (2006).