

Before the United States Senate Committee on Rules and Administration

Statement of Professor Allison R. Hayward
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Executive Summary

The holding in *Citizens United* is consistent with the Supreme Court's approach to laws restricting independent political activity. The expenditure ban found unconstitutional in *Citizens United* was placed on corporations and unions in 1947. It had been controversial from the beginning. Additionally, the legislative history of the expenditure ban undermines any argument that Congress carefully calibrated the law to serve compelling governmental interests, as strict scrutiny requires.

When the Court has squarely faced limits on expenditures, it has found them unconstitutional. *Austin v. Michigan Chamber of Commerce* from 1990 falls outside this generality. If for no other reason, the Court in overruling *Austin* in *Citizens United* should be applauded for bringing coherence and consistency to an area of constitutional law that had lacked both.

Phrases from the Senate debate have been taken out of context to argue that the expenditure ban was an incremental clarification of the 1907 Tillman Act. It is asserted that this contribution ban also prohibited independent expenditures. However, in context, one can read those debates as addressing what we would now describe as "coordinated expenditures." From its text, it is impossible to see how the 1907 contribution ban could have meant more. The 1907 law prohibited "money contributions" specifically.

In short, the expenditure ban was a departure from existing law, enacted as an obscure and little-debated provision buried in a hotly contested legislative package.

Going forward, it would seem appropriate to observe how corporations (or unions) react to *Citizens United* before legislating. Judicial review of any burdens on independent spending will demand evidence of a compelling governmental interest behind the restriction. It is doubtful that interest could be established to a court's satisfaction *ex ante*.

It is the task of Congress, based on experience and sound logic, to respond appropriately if aspects of the political system endanger the integrity of the institution and its members. Only when such issues emerge will there be any way to evaluate the threat, the government's interest, and which of the many means available – campaign finance laws, ethics rules, tax incentives, or others -- might be best to meet that threat.

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Mr. Chairman and Members of the Committee: Thank you very much for providing me the opportunity to testify before you today. I would like to place the *Citizens United v. Federal Election Commission* decision in context, and discuss with you what it may mean for future efforts to limit corporate participation in federal elections.

My reading of history has convinced me that the holding in *Citizens United* is consistent with the Court's approach over time to these questions. The expenditure ban found unconstitutional in *Citizens United* was placed on corporations and unions in 1947. It had been controversial from the beginning. In the wake of that law's enactment, test cases brought against unions went poorly for the United States Department of Justice. This discouraging record, plus the fear that a test case might eventually yield a decision overturning the law, made federal prosecutors reluctant to bring more prosecutions. That reluctance was resolved only when amendments to the Federal Election Campaign Act in 1974 provided for civil enforcement with the newly created FEC.

The Appendix accompanying my statement demonstrates the history and legal developments leading up to *Citizens United*. The Appendix also shows that when the Court has squarely faced limits on expenditures, it has found them unconstitutional. *Austin v. Michigan Chamber of Commerce* from 1990 falls outside this general trend. *Austin* professes to apply a strict standard of scrutiny to Michigan's corporate expenditure ban, but upheld it with reasoning that fell short of that standard. If for no other reason, the Court in overruling *Austin* in *Citizens United* should be applauded for bringing coherence and consistency to an area of constitutional law that had lacked both.

The legislative history of the expenditure ban undermines any argument that Congress carefully calibrated the law to serve compelling governmental interests, as strict scrutiny requires. The expenditure ban was placed in the lengthy (and management-supported) Taft-Hartley labor reform bill at the eleventh hour during conference committee.¹ There was no real debate in the House about the amendment.² The Senate debate pitted Senator Robert Taft against several Democratic Senators, but both sides knew Taft had the necessary votes, and the package passed easily.

¹ See U.S. v. UAW-CIO, 352 U.S. 567, 582-83 (1957).

² 93 Cong. Rec. 3522-23 (1947).

Phrases from the Senate debate have been taken out of context in recent days to argue that the expenditure ban was an incremental clarification of an earlier consensus that the 1907 Tillman Act's contribution ban also reached independent expenditures. There is no doubt that Senator Taft seemed to argue this point, as did a 1946 House Committee report investigating labor union expenditures.³ However, in context, one can read these statements as addressing what we would now describe as "coordinated expenditures." For instance, Taft contended the expenditure ban would be necessary to reach the coordinated purchase by a corporation of advertising *at the behest* of a candidate. The House Report likewise discussed expenditures "in [sic] behalf" of a federal candidate.

Even if Senator Taft did mean to argue that "contribution" properly understood would reach what we call independent expenditures, like those found constitutionally protected in *Citizens United*, it is impossible to see how the 1907 contribution ban could have meant that. The 1907 law prohibited "money contributions" specifically. It was later amended (to strike "money") with the discovery of the "in-kind" contribution.

Nor could that broad interpretation of "contribution" have developed over time. The distinction between contributions and expenditures is not new. The reporting requirements dating to the 1920s required separate contribution and expenditure reports. The 1940 Hatch Act amendments set a contribution limit of \$5,000, and a committee expenditure limit of \$3 million. Both would be rendered nonsensical if the meaning of "contribution" also included expenditures.

Moreover, contemporaneous interpretations of the law point toward a narrower construction of "contribution." As labor unions prepared to spend money independently on "voter education" in the 1944 election, they interpreted the statute to allow these activities. The Department of Justice concurred with this interpretation, analogizing the union activity to expenditures by incorporated newspapers.⁴ President Truman, for his part, singled out the 1947 expenditure ban as a "dangerous intrusion on free speech, unwarranted by any demonstration of need and quite foreign to the stated purposes of this bill" in his Taft-Hartley veto message.⁵

In short, the expenditure ban was a departure from existing law, enacted as an obscure and little-debated provision buried in a hotly contested legislative package. It would be better if laws limiting political activities were crafted in a straightforward and open manner.

³ 98 Cong. Rec. 6436-47; H.R. Rep. 79-2739 (1946).

⁴ Department of Justice Clears PAC, 4 Law. Guild Rev. 49 (1944) (quoting DOJ press release).

⁵ H.R. Doc. No. 80-334 (1947)

In the present debate, I would like to offer a few modest suggestions. First, it would seem appropriate to observe how corporations (or unions) react to *Citizens United* before legislating. Judicial review of any burdens on independent spending will demand evidence of a compelling governmental interest behind the restriction. It is doubtful that interest could be established to a court's satisfaction *ex ante*.

Moreover, the conjecture about potential for abuse involves hypothetical conduct that is already illegal. Foreign nationals may not make contributions or expenditures in any election (federal or local), nor may they play a role in the decisions behind fundraising or expenditures. Attempts to disguise the role of such a person, or the true source of funds, are also illegal. Deliberate falsification of reports is a federal crime. If the concern is that we lack the necessary resource to detect and prosecute bad actors, that problem will persist regardless of changes made to the substantive law.

About half the states permit corporate expenditures at present. These states have apparently not found it necessary to amend their state corporation codes in radical or novel ways to regulate pernicious corporate political activity. We may find the same is true in federal campaigns. In any case, federal lawmakers should hesitate before extending federal regulation over corporate governance, which traditionally has been provided in state law.

Citizens United should dispel any lingering doubts that the Supreme Court might not protect political speech with the same vigor it applies to restrictions on speech in the arts, education, or popular culture. It is the task of Congress, based on experience and sound logic, to respond appropriately if aspects of the political system endanger the integrity of the institution and its members. Only when such issues emerge will there be any way to evaluate the threat, the government's interest, and which of the many means available – campaign finance laws, ethics rules, tax incentives, or others - might be best to meet that threat.

Appendix
Benchmarks in the History of Federal Campaign Finance Law
Expenditures by Corporations

Prof. Allison R. Hayward

1907: Following revelations from the New York Insurance investigations, Congress passed the “Tillman Act,” which banned “money contributions” by corporations.

1916: The Supreme Court upheld prosecution of several brewers for making campaign contributions to anti-Prohibition candidates.

1943: The corporate contribution ban was temporarily extended to labor unions for the duration of World War II, over Roosevelt’s veto. Two weeks after enactment, the CIO organized the first PAC. The Justice Department confirmed that the PAC’s expenditures are permitted under the new law.

1947: Over President Truman’s veto, Congress made the labor contribution ban permanent, and extended to both corporations and unions a ban on expenditures. The first appearance of the expenditure ban was in the Taft-Hartley conference committee report. Unions pledged to violate this new restriction to bring about a test case.

1947-49: The Truman Justice Department prosecuted three separate unions for making illegal expenditures. In none of those cases did the Department prevail. In a series of corporate *contribution* investigations, the Department was able to negotiate pleas of *nolo contendere*. However juries acquitted the two corporations tried in court. The Department declined to bring prosecutions for the next six years.

1955-57: The Eisenhower Justice Department prosecuted the UAW for making illegal expenditures. The Supreme Court held that the union’s conduct fell within Taft-Hartley’s expenditure ban. The subsequent UAW trial ended in acquittal.

1963-66: Lewis Foods was prosecuted for using corporate funds to run a newspaper advertisement in favor of candidates who support “constitutional principles.” After the first jury deadlocked, the judge in the second trial dismissed the indictment because the advertisement did not contain “active electioneering.” The Ninth Circuit reversed, and on remand the company pled *nolo contendere* and paid a \$100 fine.

1971: The Federal Election Campaign Act reconfigured federal campaign finance laws, tightened reporting requirements, provided rules for labor and corporate PACs, but keeps prosecutorial authority with the Department of Justice.

1974: Major amendments to FECA in the wake of Watergate do not alter the corporate and labor bans, but do provide for civil enforcement of the law under the newly created FEC.

1976: The Supreme Court in *Buckley v. Valeo* interpreted the term “expenditure” to include only communications expressly advocating the election or defeat of a clearly identified candidate for federal office.

1978: The Court in *First Nat’l Bank of Boston v. Bellotti* held unconstitutional under the First Amendment a state law prohibiting corporate expenditures in ballot measure campaigns.

1985: In *FEC v. NCPAC*, the Court held unconstitutional a law limiting to \$1,000 independent expenditures by PACs in presidential elections.

1986: The Court in *Massachusetts Citizens for Life* held unconstitutional the corporate expenditure ban as applied to a nonprofit pro-life group, and reiterated its *Buckley* holding that “expenditures” included only communications containing express advocacy.

1990: The Court in *Austin v. Michigan Chamber of Commerce* held constitutional a state corporate expenditure ban applied to a business association.

2002: Congress enacted the Bipartisan Campaign Reform Act. To address the growing practice of using corporate and labor funds in “issue advertising” this law extended the expenditure ban to targeted “electioneering communications” that mentioned a candidate with 30 days of a primary or 60 days of a general election.

2003: The Court in *McConnell v. FEC* upheld the electioneering communications restrictions against a facial challenge to its constitutionality.

2007: In *Wisconsin Right to Life v. FEC*, the Court held the electioneering restrictions unconstitutional as applied to advertising that did not contain the “functional equivalent” of express advocacy.

2010: In *Citizens United v. FEC*, the Court held unconstitutional the ban on independent expenditures by corporations.

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Prof. Hayward is Assistant Professor of Law at George Mason University School of Law. She has taught constitutional law, election law, ethics, and civil procedure. She writes widely on election law topics and has been published in a variety of law journals and magazines, including the *Harvard Journal of Legislation*, *Case Western Reserve Law Review*, *National Review*, the *Weekly Standard*, *Reason*, the *Journal of Law and Politics*, *Political Science Quarterly*, *The Green Bag*, and the *Election Law Journal*.

Prof. Hayward graduated from Stanford University with degrees in political science and economics, and received her law degree from the University of California, Davis. She clerked for Judge Danny J. Boggs of the United States Court of Appeals for the Sixth Circuit. She was an associate at Wiley, Rein & Fielding in Washington DC and Of Counsel at Bell, McAndrews & Hiltachk in Sacramento, California. More recently, she was Counsel to Commissioner Bradley A. Smith of the Federal Election Commission.

Before attending law school, Prof. Hayward served as staff in the California legislature and managed a state assembly campaign. She is a native Nevadan and was born and raised in Las Vegas. She now lives in McLean, Virginia with her husband and two children.

Prof. Hayward is a Board member of the Center for Competitive Politics and Chairman of the Federalist Society's Free Speech and Election Law Practice Group. She also serves on the Board of the Office of Congressional Ethics. She is an active member of the California and Washington DC bars.