



**Testimony of Judith A. Browne-Dianis  
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**Hearing on “Defining the Future of Campaign Finance in an  
Age of Supreme Court Activism”**

**Before the Committee on House Administration  
Washington, DC**

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*(Revised: February 9, 2010)*

Chairman Brady and Members of the Committee on House Administration, my name is Judith Browne-Dianis. I submit this testimony today in my capacity as Co-Director of Advancement Project—a policy, communication, and legal action civil rights organization that supports organized communities in their struggles to achieve universal opportunity and a just democracy. Advancement Project has been involved in the important voting rights issues of our day, including issues relating to the administration of elections. We work to eliminate barriers to voting through our Voter Protection program, have been advocating for the automatic restoration of the voting rights of persons with felony convictions in Virginia, represent communities of color in the redistricting process and lastly, we have initiated a campaign to ratify a constitutional amendment for a right to vote. We commend our partners, including Common Cause and Voter Action, for their vigilant, longstanding advocacy on campaign finance reform efforts. Their work has allowed groups like ours to maintain a full focus on supporting a wide variety of

community-based efforts to increase civic participation, improve election administration, and remove structural barriers to electoral participation in low-income communities of color.

In the wake of unprecedented judicial activism in the area of campaign reform law, however, we recognize that all our groups must work together to prevent the erosion of citizen participation, especially in communities in color. We realize, in particular, the urgency in joining our partners in identifying the specific harms that could be generated under newly permitted candidate-centered corporate spending during elections. For that reason, we thank you for this opportunity to testify about the potential impact of the *Citizens United v. FEC*<sup>1</sup> decision on racial minority groups.

The struggle to gain equal voting rights in our nation for citizens of color has been a long and painful one. Today marks the 140<sup>th</sup> anniversary of the ratification of the 15<sup>th</sup> Amendment, prohibiting the denial of the right to vote on the basis of race, color or previous condition of servitude. For almost one hundred years after, people continued to suffer, bleed, and die to ensure that individuals can express their voices equally through the ballot box. Equating the rights of corporations to the rights of individuals in an election context defies logic and trivializes the movement to gain the right to vote that was secured by the blood of too many Americans.

On January 21, 2010, by a 5-4 vote, the Supreme Court struck down a provision of the McCain-Feingold campaign finance law that prohibited corporations, including unions, from using their general treasury funds to make an “electioneering communication,” which is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and that is made within 30 days of a primary election or 60 days of a general

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<sup>1</sup> *Citizens United v. FEC*, No. 08-205, \_\_\_\_ U.S. \_\_\_\_, 2010 U.S. LEXIS 766 (Jan. 21, 2010).

election.<sup>2</sup> Certainly this ruling ushers in a new, unprecedented era of direct corporate wealth influence in our elections in ways never before imagined. The literature suggests that this large influx of private corporate wealth in federal, state, and local elections will have a particularly devastating impact on communities of color, which lack comparable resources with which to fund competing ads. This disparity is due, in large measure, to the lingering negative effects that racial discrimination has had in the distribution of property in the United States.

As former law professor Spencer Overton noted, “Governmental entities have long used racial identity to define and allocate property rights.”<sup>3</sup> For example, official government actions and policy stripped Native Americans and Mexican Americans of their land in this country, subjugated African-Americans to slavery and reaped the benefits of their labor, promoted immigration from European countries over others, and even sanctioned racially restrictive covenants as a condition of federal loan guarantees.<sup>4</sup> All of these officially sanctioned actions specifically inured to the benefit of White non-Hispanic Americans, and the intergenerational transfers of wealth that have happened since the abandoning of those policies have only exacerbated the racial disparities.<sup>5</sup>

People of color, by and large, do not proportionally control the nation’s wealthiest businesses. Indeed, as of November 2008, there were only 15 minority CEOs at Fortune 500

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<sup>2</sup> 2 U.S.C. §§ 441b, 434(f)(3)(A).

<sup>3</sup> Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987, 1004 (Apr. 2002).

<sup>4</sup> *Id.*

<sup>5</sup> For example, Professor Overton notes that in 1995, “the median net worth for white households (\$61,000) was over eight times greater than for African-American households (\$7,400) and over twelve times greater than for Latino households (\$5,000). *Id.* at 1009 (citing Chuck Collins & Felice Yeskel, UNITED FOR A FAIR ECONOMY, ECONOMIC APARTHEID IN AMERICA: A PRIMER ON ECONOMIC INEQUALITY & INSECURITY 55, 57 fig. 10).

companies.<sup>6</sup> In 2006, people of color held just 188 board seats out of the 1,219 board seats at Fortune 100 companies.<sup>7</sup>

People of color are also significantly less able to make individual financial contributions to political campaigns. According to a study of the 2004 presidential primary race, all the major 2004 presidential candidates (including President George W. Bush, Sen. John Kerry, and the two African-American candidates, Sen. Carol Moseley Braun and Rev. Al Sharpton) raised the majority of their individual contributions of more than \$200 from majority White non-Hispanic neighborhoods.<sup>8</sup> Just one ZIP code in the Upper East Side of Manhattan, containing 91,514 adults, contributed more funds than 377 ZIP codes with the largest percentage of African Americans (containing 6.9 million adults), 365 ZIP codes with the largest percentage of Latino Americans (containing 9.1 million adults), and 123 ZIP codes with the largest percentage of Asian Americans (containing 2.8 million adults).<sup>9</sup>

Given the historical and lingering racial disparities in property distribution and transfer and in net worth accumulation, coupled with the low representation of people of color in the management sphere of our nation's largest companies and the overwhelmingly White non-Hispanic demographic of major campaign contributors, it is easy to see why any campaign finance regime that allows and relies heavily upon large private financial contributors—especially major corporations—would structurally exclude people of color from any significant

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<sup>6</sup> Latif Lewis, *Yang, Thompson Departures to Further Diminish Pool of Minority CEOs*, Blogging Stocks (Nov. 19, 2008), available at <http://www.bloggingstocks.com/2008/11/19/yang-thompson-departure-to-further-diminish-pool-of-minority-ce/> (last accessed Feb. 1, 2010).

<sup>7</sup> The Alliance for Board Diversity, *WOMEN AND MINORITIES ON FORTUNE 100 BOARDS (2008)*, available at [http://www.elcinfo.com/downloads/docs/Final\\_1\\_22\\_08.pdf](http://www.elcinfo.com/downloads/docs/Final_1_22_08.pdf) (last accessed Feb. 1, 2010).

<sup>8</sup> Public Campaign, the Fannie Lou Hamer Project, and the William C. Velasquez Institute, *COLOR OF MONEY: THE 2004 PRESIDENTIAL RACE—CAMPAIGN CONTRIBUTIONS, RACE, ETHNICITY, AND NEIGHBORHOOD (2004)*, available at [http://www.colorofmoney.org/report/2004\\_cofm\\_pres\\_complete.pdf](http://www.colorofmoney.org/report/2004_cofm_pres_complete.pdf) (last accessed Jan. 31, 2010).

<sup>9</sup> *Id.* at 3-4.

degree of effective political influence. Simply put, the voices of communities of color will be drowned out as corporations spend millions of dollars to influence the outcomes of elections.

In addition to the unprecedented racial exclusion that will result from *Citizens United*, it is also disconcerting to consider the Supreme Court's willingness to sell our democracy off to the highest corporate bidder in the name of free speech and participation, while in other instances eviscerating protections for citizens to have their voices heard by voting.

This activist court has applied the most restrictive standard of review in its consideration of whether the campaign finance statute at issue in *Citizens United* ran afoul of the First Amendment but is not so exacting when it comes to looking at barriers to voting. Specifically, in *Citizens United*, this Supreme Court used strict scrutiny to review the law burdening what it called the political speech of corporations, requiring that the government prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" <sup>10</sup>

Yet when considering Indiana's law requiring voter identification, in *Crawford v Marion County Election Board* the Court departed from past precedent and used a less stringent standard of review where there was a clear burden on voting. In *Crawford v Marion County Election Board*, the Court considered a constitutional challenge to a voter ID law.<sup>11</sup> That law required citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government. In reviewing this law, the Court acknowledged the law would have a heavier burden on elderly persons with economic or personal limitations and homeless persons. Instead of the strict scrutiny the Supreme Court followed in *Citizens United*, the Court reviewed the state law's

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<sup>10</sup> *Citizens United v. FEC*, 2010 U.S. LEXIS 766, 51-52 (Jan. 21, 2010) citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007).

<sup>11</sup> *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

burden on a political party, an individual voter, or a discrete class of voters by asking whether it was justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation." As such, even though the Court itself acknowledged, "[t]he record contains no evidence of any such [voter] fraud actually occurring in Indiana at any time in its history", it still felt that the state's asserted concerns about voter confidence and fraud, were "sufficiently weighty" to uphold the requirements.<sup>12</sup> It is outrageous that voting is not entitled to review under the most stringent protections that now apply to corporate influence in the outcomes of elections.

While the Supreme Court held that the First Amendment rights of corporations cannot be abridged without a compelling state interest, the same assurances should be extended to the right to participate in elections. To protect voters, the U.S. Constitution must be amended as described below.

In the wake of *Citizens United*, Congress should take several steps. Some public interest organizations suggest that the U.S. Constitution should be amended in another way, to clarify that the rights secured under the First Amendment do not extend to artificial entities such as corporations, but may only be claimed by natural persons.<sup>13</sup> That is certainly an idea that merits serious consideration. However, there are a number of things that Congress can do right now, short of amending the Constitution, to address the *Citizens United* opinion and ameliorate the negative effects thereof on low-income communities of color. Advancement Project respectfully recommends the following six steps:

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<sup>12</sup> *Id* at 1619.

<sup>13</sup> Voter Action Press Release, *Public Interest Groups and Independent Business Advocates Condemn Supreme Court's Ruling On Corporate Money In Elections* (Jan. 21, 2010), available at <http://www.voteraction.org/news-article/2010/public-interest-groups-condemn-supreme-courts-ruling-corporate-money-elections>.

**1. Strengthen public financing of all federal elections by passing the Fair Elections Now Act (S. 732 / H.R. 1826).**

The Fair Elections Now Act is a federal “clean elections” bill modeled after successful statewide public financing legislation in Arizona, Connecticut, and Maine. The bill would allow federal candidates to choose to run for office without relying on large contributions, big money bundlers, or donations from lobbyists, and would be freed from the constant fundraising in order to focus on what people in their communities want. To qualify for the funding, candidates would have to raise a large number of small contributions (usually less than \$200) from residents in their state or congressional district. The funding covers the primary election and (for the primary winner) the general election.

**2. Establish direct expenditure and electioneering limits on all federal contractors (individual and corporate).**

Yale Law professors Bruce Ackerman and Ian Ayres have championed this measure as an effective and constitutionally permissible way to target the majority of large companies that do business with the federal government.<sup>14</sup> Under their proposal, which they say would reach approximately 75% of the 100 largest publically traded companies, all federal contractors would be banned from “endorsing or opposing a candidate for public office.”<sup>15</sup>

**3. Require all states that receive federal elections funds to amend their corporate and business entity laws to require explicit shareholder/member approval for electioneering expenditures.**

Corporations and other business entities, such as LLCs, are fictional entities created by state law. Most of these laws require specific advance shareholder or member approval for significant business transactions, such as a sale of a certain percentage of the company’s assets. Many

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<sup>14</sup> Bruce Ackerman and Ian Ayres, *Despite Court Ruling, Congress Can Still Limit Campaign Finance*, Washington Post (Jan. 26, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/25/AR2010012502970.html> (last accessed Jan. 31, 2010).

<sup>15</sup> *Id.*

commentators have suggested that shareholder approval should be required for direct electioneering expenditures by corporations.<sup>16</sup> One way that Congress could “nationalize” this standard is to tie compliance with federal funding. As the Supreme Court has noted, “Congress may attach conditions on the receipt federal funds, and has repeatedly employed the power ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.’”<sup>17</sup> A bill recently introduced by Rep. Michael Capuano called the Shareholder Protection Act of 2010 (H.R. 4537) would amend the Securities and Exchange Act to require this condition for all public companies. The federal funds approach would possibly provide a more broad-based way to achieve uniformity, since it would impose upon states the duty to amend *all* corporate and business entity laws, for public and non-public companies alike, to require shareholder approval.

**4. Evaluate the feasibility of creating a federal “Equal Opportunity in Electoral Participation Act,” pursuant to the Congress’s enforcement powers under the 14<sup>th</sup> and 15<sup>th</sup> Amendments, to ensure that people of color—who have been victims of *de***

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<sup>16</sup> See e.g. Fredreka Schouten & Joan Biskupic, “It’s a new era for campaign spending; High court rejects limits on well-funded backers” *USA Today*, 1A (Jan. 22, 2010) (options for congressional solutions to Citizens United include requiring advance shareholder approval of political spending and mandating that corporate CEOs and union heads appear in any advertising they fund); David D. Kirkpatrick, “Lobbies’ New Power: Cross Us, And Our Cash Will Bury You”, *The New York Times*, Section A; Column 0; National Desk; Pg. 1 (Jan. 22, 2010)(noting a potential response to the case would include a requirement to have shareholder approval of political expenditures, or even to force chief executives to appear as sponsors of commercials their companies pay for.); Alan Wirzbicki, “Capuano seeks to limit ruling’s effect; Wants shareholder approval for most political donations”, *The Boston Globe*, Pg. 7 (January 30, 2010) (US Representative Michael E. Capuano is proposing to limit the impact of a Supreme Court decision on campaign financing by requiring companies to seek shareholder approval for most political donations. The legislation would apply to any corporate donation of more than \$10,000. Executives would have to convene a shareholder vote to get permission to spend such money for any political purposes. It would also require companies to report such expenditures quarterly to shareholders).

<sup>17</sup> *South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987) (21-year-old drinking age), citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

***jure* racial discrimination in property distribution and who continue to suffer the negative effects of such discrimination as a result of the intergenerational transfer of wealth—have an equal opportunity to participate in all stages of the political process (federal, state, and local) without regard to income or wealth.**

As Jamin Raskin and John Bonifaz have noted, “the tyranny of private money corrupts the democratic relationship of one person/one vote by making it exceedingly difficult for poor or middle-class persons to run for office, by leaving them without meaningful electoral choices, and by assuring that wealthy interests will set the parameters of political debate and the nature of the legislative agenda.”<sup>18</sup> By adopting a robust system of total public financing with mandatory expenditure limitations pursuant to its enforcement power under Section 5 of the Fourteenth Amendment, Congress could constitutionally ensure a meaningful opportunity for low-income citizens to participate effectively in the political process.<sup>19</sup> In addition, given the history of racial discrimination, discussed earlier, that has created this structural barrier to wealth accumulation in communities of color, Congress has additional enforcement authority under both the Fourteenth and Fifteenth Amendments that would justify such a mandatory public financing system.

Under such a system, Congress could constitutionally mandate electioneering expenditure limits on individuals and corporate entities. For example, in a given statewide election, individuals and business or nonprofit entities may each have a \$5,000 base limit on electioneering expenditures. In addition, subject to shareholder/member approval, for-profit entities may be entitled to a per-person enhancement based on the number of employees it has in a given jurisdiction (e.g., \$200 per employee). Similarly, non-profit entities may be entitled to a per-person enhancement based on the number of financial contributors it had in a jurisdiction (e.g., \$200 per individual contributing \$10 or more dollars in the past 2 years). Thus, if Wal-Mart

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<sup>18</sup> Jamin Raskin & John Bonifaz, *Restoring Faith in Government: Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273, 277 (1993).

<sup>19</sup> *Id.* at 313.

had 20,000 employees working in a particular state and the Sierra Club Action Fund had 5,000 qualifying financial contributors in the same state, Wal-Mart could spend up to \$4,005,000 in electioneering expenditures for statewide offices, and the Sierra Club could spend up to \$1,005,000.

#### **5. Ratify a Constitutional Amendment Establishing an Explicit Right to Vote**

To ensure vigorous protection of individual voting rights, Advancement Project urges Congress to enact House Joint Resolution 28 to amend the Constitution to enshrine an express right to vote. The United States is only one of eleven democracies that do not have a constitutional right to vote. The qualifications and rules for all elections in the U.S. are determined primarily at state and local level, with over 13,000 jurisdictions setting their own requirements and procedures. The vast dispersion of authority over elections is a major obstacle to efforts to eliminate structural disenfranchisement. Democracy advocates literally have to monitor and negotiate with thousands of local jurisdictions over issues such as how missing information on voter registration forms is handled, when and under what circumstances voters are "purged" i.e., removed from the rolls, what types of election equipment are used and how that equipment is allocated among precincts and how poll workers are trained.

Without an explicit federal guarantee of the right to vote, states will continue to use their vast control over this basic citizenship right to create an unwieldy patchwork quilt of arbitrary rules with vast consequences for close elections. A federal constitutional amendment specifically enshrining citizens' right to vote will also make it more difficult for the judiciary to downplay voting rights as something to be "balanced" against specious claims of state "burden" and instead will help to ensure that right is properly viewed as fundamental and subject to the highest form of judicial scrutiny.

**6. Modernize America’s voter registration system and, in the short term, pass needed fixes to NVRA and HAVA to ensure that all eligible citizens may register without onerous and unnecessary barriers and that, once registered, they may remain on the rolls without being subjected to unwarranted purges.**

No matter how much money corporations may choose to spend to influence elections and the political debate in the wake of *Citizens United*, the one thing they will never be able to do is cast a ballot on Election Day. This is a right that is reserved to natural persons.<sup>20</sup> In that sense, then, voting is the “last frontier” of our democracy. Therefore, now more than ever, Congress must act to ensure that all of America’s citizens—particularly traditionally disadvantaged and disenfranchised citizens of color and low-income citizens—do not encounter needless roadblocks in registration and voting.

To that end, Advancement Project urges Congress to improve voter registration by enacting legislation that would require automatic registration of all eligible voters and permit eligible voters who do not become registered automatically to register to vote on Election Day.<sup>21</sup> Legislation to automate and modernize voter registration should be crafted with particular emphasis upon ensuring the registration of eligible voters from historically disenfranchised communities, particularly low-income communities of color. It should also ensure that non-citizens who are inadvertently registered to vote due to automatic registration are not placed at risk of deportation proceedings or other adverse legal consequences.

In the nearer term, Congress should take immediate steps—in advance of the 2010 federal elections—to address the registration barriers and list maintenance issues that remain in

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<sup>20</sup> *But cf. Citizens United*, 2010 U.S. LEXIS at \*198 (Stevens, J., dissenting in part) (“Under the majority’s view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.”)

<sup>21</sup> For general background on the topic of modernizing the voter registration process, *see* [http://www.brennancenter.org/content/pages/voter\\_registration\\_modernization](http://www.brennancenter.org/content/pages/voter_registration_modernization) (last accessed Feb. 1, 2010).

place even after the enactment of the National Voter Registration Act of 1993<sup>22</sup> and the Help America Vote Act of 2002.<sup>23,24</sup> In particular, we urge Congress to enact two bills sponsored by Rep. Rush Holt of New Jersey: H.R. 3835, the Protection Against Wrongful Voter Purges Act, and H.R. 3552, the Provisional Ballot Fairness in Counting Act. These bills, which have been referred to this Committee, would remedy many of the perennial voter registration and list maintenance issues that have prevented eligible voters from becoming registered to vote and have their ballots counted since the 2000 elections.

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Thank you for your kind consideration of my testimony and for ensuring that all voters have the opportunity to vote, have their vote counted, and receive equal protection under the law. Advancement Project is pleased at any time to provide technical advice, assistance, and testimony to this Committee as it develops legislative reforms that will safeguard the ability of eligible voters to participate in elections.

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<sup>22</sup> 42 U.S.C. § 1973gg *et seq.*

<sup>23</sup> 42 U.S.C. §§ 15301 to 15545.

<sup>24</sup> For general background on registration and voting barriers encountered during and in advance of the 2008 election cycle, see Advancement Project, NAACP National Voter Fund and Voter Action, *Uncovering Flaws in Election Administration: A Joint Report on the 2008 Presidential Election Based on CNN and MYVOTE1 Voter Hotline Data* (Jul. 23, 2009), available at [http://www.voteraction.org/files/Report\\_R5\\_Final.pdf](http://www.voteraction.org/files/Report_R5_Final.pdf) (last accessed Feb. 1, 2010).