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PUBLIC CHOICE THEORY, CATHOLIC SOCIAL TEACHING AND *CITIZENS UNITED*

MATTHEW J. PARLOW¹

Matt Parlow: Hi. It's good to be with you all. I wanted to take a moment to thank Ruth and Emily and all the editors of the Journal for inviting me here today. I'd also like to thank my friend and former colleague, Senator Russ Feingold who recommended me to the Journal as part of this symposium. I saw him just last week and he asked that I relate his warm gratitude for the invitation to him as well as to say he hopes it is a wonderful event. So my talk, as was just mentioned, is "Public Choice Theory, Catholic Social Teaching and *Citizens United*." What I thought I might do is begin my talk with some of the legal and policy critiques of the *Citizens United* decision. As I look at the panel of speakers, I suspect I will be in the minority on this. I am going to be critical, very critical of the *Citizens United* decision. So I will go through some of the legal and policy critiques of the decision and then try to contextualize that a bit in public choice theory as well as Catholic social teaching.

The *Citizens United* decision has been described by journalist E.J. Dionne as potentially the most Machiavellian decision in American history. Ronald Dworkin, another critic, wrote that "the conservative justices savaged canons of judicial restraint they themselves have long praised," calling the decision an "appalling" one. Justice Stevens in his dissent said that "[t]he Court's ruling threatens to undermine the integrity of elected institutions across the Nation." And I couldn't agree more. So, let's begin by asking, how did the majority fail to adhere to the judicial restraint that they have long espoused? Indeed one might say that they themselves have engaged in the type of judicial activism that they criticize.

Let me for a moment describe what I deem to be judicial activism. And that is, if you do something I don't like, it's judicial activism. You know, you're showing great restraint if you agree with me, but if you do

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something I disagree with—and I criticize the left and the right on this—then it’s judicial activism. So I think that’s a loaded term and I actually don’t give it a lot of credence. But nevertheless, with the parlance of today, with the common rhetoric of judicial activism and judicial restraint, one could argue that the majority in *Citizens United* failed to show judicial restraint.

Let me unpack that a little bit. First, the Court ruled on issues that were not actually presented. This creates a question regarding the case or controversy requirement. Indeed, *Citizens United* did not raise a facial challenge to the constitutionality of section 203 of the Bipartisan Campaign Reform Act (BCRA) (popularly known as the McCain-Feingold Act). The Court affirmatively raised it on its own. *Citizens United* had actually dropped that claim at the district court level. Now, to be sure, can the Supreme Court ask to consider any decision it wants? Or could it choose to take a look at any decision or issue it wants? Absolutely. But the Court has tended to do so only in extraordinary circumstances. And here, maybe there were extraordinary circumstances. But it really was not explained that way. There really was not any sort of detailed explanation as to why they would raise that issue and ask to have it heard. The other problem with it—because it was a facial challenge to section 203, but it had been dropped at the district court level—you essentially had no factual record on which to base the decision. So you had a facial challenge without much of a record that had been developed. It’s curious and it’s somewhat rare.

Second, as a professor who teaches legislation or the legislative process and statutory interpretation, the canons—judicial canons, statutory interpretation canons—are of particular interest to me, and the Court seemed to ignore some of them. For example, the avoidance canon: this is a well-established canon in jurisprudence that essentially says that courts should interpret statutes to avoid constitutional problems. There are a lot of different cases that deal with this, but essentially, if there is a statute and it implicates constitutional issues, particularly ones that would pose problems, the court is supposed to try to interpret the statute to avoid the constitutional problems. It is not supposed to just throw the statute out; it is supposed to try to interpret the statute in a way that keeps the legislative branch’s interest in passing a law in this area alive by avoiding the constitutional problems. Indeed, *both sides* in this case offered a variety of different narrower grounds on which the Court could have decided this case and could have avoided the constitutional problem. Yet the Court did not. The Court decided to take it head on. This raises the question: “Why are we not sticking to some of the canons of judicial interpretation and statutory interpretation that had been long-standing in our history?”

Another canon, or another long-standing principle in our legal system is *stare decisis*. The Court has upheld, in many cases, decisions that were flat

out wrong based on *stare decisis*. The Court has deemed *stare decisis* to be somewhat sacred. Indeed, the Court has pointed out that a precedent is bad and flat out wrong. But given *stare decisis*, the Court upheld the precedent.

The Curt Flood case is a great example of it. There is a long-standing precedent that Major League Baseball is not engaged in interstate commerce. It is one of the most silly and ridiculous decisions in the world. Of course Major League Baseball is engaged in interstate commerce. Baseball teams travels across state lines—of course it is engaged in interstate commerce. But Major League Baseball, unlike all other professional sports leagues, actually has an exemption from anti-trust laws. Why? Because of this silly precedent that the Court held many, many years ago that Major League Baseball was not engaged in interstate commerce. The Court said as much in the Curt Flood case. The Court acknowledged that it was a bad decision, that it was dead wrong. The Court acknowledged that Major League Baseball is engaged in interstate commerce. But because of *stare decisis*, the Court refused to change the precedent. There might be reasons why the Court did not do so in the Curt Flood case. Do you really want to be the nine justices who, you know, drove a stake through the heart of Major League Baseball for all to hate you? So there may be other good reasons for it but the articulated one in the decision is “we respect past precedent.” The Court said that there would have to be extraordinary circumstances before overturning precedent.

So what is that significant justification or special reason for *Citizens United*? It is not simply supposed to be because the composition of the Supreme Court has changed (where the justices have deemed other decisions to be bad or wrong or ones they would have decided differently). There is supposed to be a pretty significant justification. Here the Court overturned well-established precedent. If you go back to *Austin* you have got at least 20 years. If you take *McConnell* on top of that, you have pretty clear interpretation on this topic, and while maybe it was not 100 years of precedent because certainly pre-*Austin* cases kind of came out a little bit differently on this point, it was certainly 100 years’ worth of regulation in the area of corporations and campaign finance and elections. It was one hundred years’ worth of regulation in that area on the local, state and federal level with precedent such as *Austin* and *McConnell* and the Court overturns the precedent. This approach does not show a respect for *stare decisis*. Rather, the Court cannot wait to dismantle the precedent. What is interesting is that since *McConnell* there were no significant changes in the law. There were none. The law had not changed. There had not been some dramatic shift in campaign finance laws and election laws as it relates to corporations. It just had not happened. So what changed? The justices. That’s the only thing that changed.

The other point I would like to make regarding *stare decisis* relates to

the Court's reasoning. The Court's decision in *Citizens United* also seems to fly in the face of the *Caperton* decision. In *Caperton*, the Court held that judges may be forced to recuse themselves when one of the parties has provided large campaign contributions to the judge's election. In this regard, the Court's decision in *Citizens United* seems inconsistent with its own precedent in related areas. I am not really going to get into the area of judicial elections and funding and recusals, but it is a fascinating area that needs some work now that *Citizens United* has been passed. And, as one can see from the examples in my home state of Wisconsin, you see a lot of outside money in judicial elections. What will that mean in terms of recusals, and what will that mean for the integrity of judicial elections? I think all this remains to be seen.

Another canon relevant to the *Citizens United* decision is the severability doctrine. Courts usually adhere to this doctrine which says that a court should not invalidate more of a statute than is absolutely necessary. A court is not supposed to throw the whole thing out. Again, this is a well-established canon. What is a court supposed to do? It is supposed to take the statute and only strike out the portions that are problematic. The court is not supposed to throw out the whole statute. This canon goes to federalism as well as separation of powers issues.

Facial challenges, as we had here in *Citizens United*, have a higher standard under the severability doctrine because invalidation claims in facial challenges often rely on speculation and are based on incomplete records. Indeed, that is what the Court had here and yet it still moved forward. The Court basically had a non-existent record. Remember, the facial challenge was dismissed at the district court level. There was not much of a record.

But even more importantly, the Court ignored a tremendous amount of congressional research that was done when the BCRA was passed about corporate corruption and about corporate corruption in the political system and governmental system. Congress had used all of this as the basis for passing these types of laws. The Court, with no real record before it, also ignored all of this past research.

Perhaps the Court strayed from its normal judicial restraint rhetoric because of the merits. But to me it's a tough sell. I will now go through some of the explanations the Court used and why I do not find them particularly persuasive. First, the majority said that the BCRA was a categorical ban on corporate speech. But it was not; it simply was not. Corporations could still create PACS and conduct electioneering communications through those PACS. Now, the Court deemed that to be insufficient because it was overly burdensome to create a PAC. But, is it really that hard? And with the resources that corporations have, is it really that difficult or that expensive to create a PAC? I'm not so sure.

Second, the majority said that you cannot restrain political speech based on a speaker's identities. This is something that Professor Susanna Kim Ripken discussed in terms of directing speech-based regulation less on personhood and based more on the speaker's identity. And that is true. The first amendment certainly frowns upon identity-based distinctions. But, free speech restrictions on certain types of justifiable special characteristics are not constitutionally suspect. Indeed, the government puts restrictions on the freedom of speech for certain classes of people, like prisoners, government employees, those who are not naturalized citizens, and military personnel. So we do have identity-based restrictions on free speech. Government restrictions on identity, certain identity-based classifications have been found to be constitutionally permissible. Plus, picking up on something that I think Professor Ripken really did a good job of—that is, contextualizing corporate personhood—let me say that corporations are not natural people. They are just not. And the government has an interest in protecting political discourse. So I think the natural person theory that the Court discusses in *Citizens United* is simply misguided. Indeed, if you actually look to the Framers of our Constitution, they were far more suspect of corporations than we are today and certainly than the majority was in *Citizens United*.

So, what are some of the problems as I see it? One is the anti-corruption interest. The Court has long recognized in election law cases—not just those related to corporations, but election law generally—that the government has an interest in rooting out corruption and the appearance of corruption in both government and the electoral system. Indeed, when Congress was putting together the BCRA, it had a lot of evidence about corporate corruption in government and elections. And in my opinion, the Court is extremely naïve in how it views the political process. They think that corruption is only quid pro quo: handing the legislator the bag of money in the unmarked brown lunch bag and pushing it under the table and then they get something in return—yeah, a little bit of that happens. We are shocked when it happens because we think, “How stupid can you be?”

But really, corporate influence goes beyond quid pro quo, at least in the technical sense. Access to elected officials and the ability to have those officials not only grant requests for meetings but actually feel obligated to you because you have supported them financially, because you have raised a lot of money for them, is problematic. To have the influence to get elected officials to vote for you on, say a government contract or rescinding regulation or putting regulation in place that makes it harder for your competitors to compete against you, etc.—these are all problems that make for a corrupt political and governmental system. It would be extremely naïve to believe that there are not significant special interest influences in power in government. Not just corporations—do not get me wrong—labor unions, all sorts of non-profit organizations, activist groups. They all have

power and influence. And to think that it has to be solely a quid pro quo—"I'll give you this if you give me that." That's illegal. No one who is intelligent is going to do that. They are just not going to do that.

But, I think that there is plenty of improper influence that goes on and to minimize it by saying, "Well, there really is not a lot of quid pro quo," I think is, again, naïve. Indeed, I think part of what we are seeing in terms of the low satisfaction rate in Congress and with government generally is the public's belief that the government does not work for them. That it works for special interests. So the right will say, "They work for the labor unions, all those people on the left." And the people on the left will say, "See, the government works only for those corporations." But at the end of the day people feel like government is run by special interests. Government is run by whoever is in power; whoever the special interest groups are that give money and help get people elected. And when the average citizen feels that government is bought and sold and his interests are not being taken into account in the governing process, the public confidence is undermined. And it undermines the ability for people to govern themselves if they believe that government is so illegitimate that the only people who have a voice, the only people who have influence, are the special interests. And again, I take that broader than just corporations, but to special interests generally. Indeed, as Justice Stevens said, "A democracy cannot function effectively when its constituent members believe laws are being bought and sold."

A second issue is that unlimited corporate spending will make for a less informed public. The majority said that the more information is better. That is sort of the pluralism argument, right? The more money and the more voices that are in politics the better because you get to sort out what is right and what is wrong. You have a robust debate about the issues of the day and the only way that the issues get debated is if there are different voices, and the only way different voices can be heard is if they have money and they are able to get into the political process. I am not sure that the problem is information starvation, but rather information overload. We are increasingly able to access information much better than in the past because of technology. You see a lot more campaigns using YouTube and using Twitter and Facebook and all sorts of other media and mediums which are not necessarily as expensive as, say, going on television airwaves or even radio airwaves.

However, corporate advertising and corporate speech might suggest more public support than actually exists. Corporations, as Professor Ripken pointed out, have a lot of money. And, they can go on the airwaves. They can put ads up on television, and they can put ads up over and over and over again if they so choose because they have the money to do so. People watching on television may believe that there is enough support—public support—for these positions because of the frequency of the messaging and

because of the amount of money that would allow them to be on television in a way that perhaps other types of voices and other interests could not because they do not have the same kind of money and the same kind of resources as corporations. So I worry a little bit that corporations will be able to have their voice heard more so in a way that might actually mislead people into thinking that their positions are broader, more publicly held ones. Indeed, in expensive markets, it may be that corporations are the only people that could afford to go on the airwaves because some television advertising in some markets is incredibly expensive. And, the proof is in the pudding in terms of expenditures in political campaigns. In 2010, there were 308 organizations that reported campaign related spending. Ten of those 308 accounted for 52% of their spending. That is striking. Indeed, of donors, approximately a tenth of one percent of donors were responsible for almost 67% of reported contributions. This shows you that those with money—and I put corporations in that group—are going to have their voices heard. Why? Because the few are making up the majority of money that is getting spent in political campaigns. Now, again, this may be an indication that there are actually larger systemic issues with our campaign finance and election systems. But, nevertheless, the decision in *Citizens United* certainly has not helped this state-of-affairs when giving more access and more unbridled ability to affect the electoral system to corporations who have a lot more funds and resources at their discretion and disposal.

Corporate interests also will not necessarily match the public interest. As Professor Ripken pointed out, corporate managers are required to spend money in the best interest of the corporation. So their ads, logically, will advocate for positions or for candidates that are going to help the corporation. That may or may not actually be in the best interest of the public. So, let us take a very simple example. Let us imagine that there is a manufacturing plant that is going to spew toxic chemicals into ground water which then would contaminate the local ground water system; I'm using an extreme example of course. The corporation, if it wants to be profitable and not have to abide by regulations, (I love the current rhetoric: "All regulations are burdensome"); if there are "burdensome" regulations that are going to affect its businesses, the corporation is going to want to have these laws repealed so that they can spew all those chemicals into the ground water. They do not care. Or they may care but it is certainly going to maximize profits. And so if the corporation can get people into office who will repeal these environmental laws or, in other cases, get people elected that will help them get government contracts or government subsidies, is that necessarily in the public interest? It is certainly in the corporation's interest. But is it necessarily in the public interest? So, corporations will be able to pump money into the electoral system in a more meaningful way

now after *Citizens United*.

Who corporations support, the message that they put out, the interests that they push, by definition, as Professor Ripken points out, have to advance the corporation's best interest and profit maximization. But profit maximization on the part of corporations is not always in the public interest. Is it in the public interest to give government subsidies to a corporation? It may or may not be. But it is absolutely in the corporation's interest. Is weakening environmental laws, is giving them a protection from lawsuits related to environmental hazards that they may create from their work, is that in the public interest? Probably not. Is it in the corporation's interest? Absolutely so. So that is what corporations will push. They are not always going to align with the public interest. That is a concern.

But perhaps the biggest problem that has happened is the rise of the Super PACs. The main purpose of Super PACs is to make independent campaign expenditures. These organizations often go by nondescript or misleading names. This again is a criticism of the electoral system more broadly, but *Citizens United* has really pushed it in a very bad direction in my mind. The ability for Super PACs to arise and to go by these nondescript and misleading names helps distort the political process and makes it more difficult to know where the money is coming from. Campaign ads from Super PACs, as we have seen recently, tend to be more negative because they are theoretically independent and not technically part of a candidate's campaign. They have become sort of the pit bull for campaigns where the candidate can look positive with all of their ads and the Super PAC that supports them can be the pit bull that goes after whoever the closest competitor is and just attack them mercilessly. So Super PACs have led to an increase in negative ads. Now do not get me wrong, I know what all the data shows: negative ads work. So it is rational that this is happening, but I am not sure that these are always necessarily helping politically with educating the body politic and advancing a meaningful political discourse.

Super PACs also can choose to either disclose their donors monthly or quarterly. They all do it quarterly, for a variety of reasons, one of which is that it delays the actual disclosure of who the donors are, and so that delays transparency. But even worse, Super PACs allow for individuals to create bogus LLCs from which they can donate money to PACs, which then undermines disclosure. So instead of "John Smith" it is "XYZ Corporation" (that John Smith has set up) that gives to Super PACs. When the Super PAC then discloses who its donor is, well, it is XYZ Corporation, not John Smith. XYZ Corporation can be much of nothing. Indeed, we have seen some 527's and 501(c)(4)s that have been created in association with Super PACs for what looks like the reason of not wanting to disclose donors.

So let me give you an example. Let us imagine there is a Super PAC

called “The Americans for Apple Pie.” Who could hate that, right? Not only it is the group a collection of Americans, but they love apple pie! These must be good people. The Super PAC is required to disclose its donors. So what do the Super PAC do? It creates a 501(c)(4) called “Patriots Who Love Their Grandmothers.” Not only are they patriotic, but they love their grandmothers. These, too, must be good people. And again, of course, this is misleading. What do they stand for? What do they mean? What do they do? But it sounds good. It sounds really nice. So the Americans for Apple Pie Super PAC instructs their donors—and most likely probably their controversial donors or donors who have already given a lot, and they do not want others to notice that they are giving even more—to donate to the Patriots Who Love their Grandmothers 501(c)(4), because the 501(c)(4) does not have to disclose its donors. Because the Patriots Who Love Their Grandmothers do not have to disclose who its donors are, the group gives a big donation to the Americans for Apple Pie Super PAC—after aggregating all this money from these individual donors. The Americans for Apple Pie Super PAC has to disclose that the Patriots Who Love their Grandmothers 501(c)(4) gave them money, but none of those who gave the Patriots group its funding. Who gave them money? We will never know. What do they stand for? They do not have to have a website. They do not have to have a mission statement. They do not have to have a bunch of stuff that you might want to know for transparency purposes. So who is giving this money and for what purposes we do not know. And if you look at election law, one thing you see consistently in scholarship, court opinions, and public discourse is that transparency is important. If we are going to restrict the dollar amount someone can give, what is one way to check against corruption? Transparency. What has the current system provided? A lack of transparency.

So, with my remaining time, I want to go through the two theories that I mentioned at the beginning of my talk to sort of highlight some of these problems. The first is public choice theory, which is a descriptive theory that applies economic ideas to political structures and processes. The theory focus on interest groups and policy makers through the lens of supply and demand. It applies economic principles that would apply in the business world to actors in the political world. Interest groups are consumers in the political market place, so they are the demand side. They seek benefits from the government. Interest groups want the passage of regulations, the rescinding of regulations, or to avoid new regulations getting passed. They want government money—whether it be block grants, low interest loans, or tax breaks. They may want government contracts. They want stuff from the government, either by laws or by public benefits, public goods, public monies that government can dole out. And the policy makers on the other side are the supply side. They are the ones who hand out the goodies. They

are the ones who pass the laws. They are the ones who rescind the laws. They are the ones who make sure proposed laws get killed in committee. They are the ones who vote to give tax breaks. They are the ones who vote to give government contracts. They are the ones who vote to give government monetary incentives and the like. And so, we look at the political marketplace like an economic marketplace, that these groups—that is the demand side, the interest groups—and the supply side, the government actors, largely elected officials, are rational actors. They act in their own rational interests. The demand side—the interest groups—want things which are going to benefit them, which are going to help them benefit the corporation: that is, make money or otherwise advance whatever their interests are in getting laws passed, laws rescinded, or proposed bills not passed.

For elected officials, usually what they're looking for is to get re-elected. Most politicians are looking either to stay in the position they are in, to move up, or to get into another elected position. And what are they looking at these interest groups as? They are looking at these interest groups as people who will support them, who will donate to their campaigns. So, they want to keep these people happy in order to get re-elected. Mind you, this is not a normative theory. Public choice theory does not posit this explanation as desirable. Rather, this is a descriptive theory that says, "This is what the political system is like. This is what our government is like." And it is actually a very critical descriptive theory. In fact, public choice theory is oftentimes a theory that many on the right like to use to describe politics. So these groups act as rational actors in the political marketplace, scratching each other's backs to help get out of the political system what they want. The costs are borne by the public. The public pays for it through their taxes to the government. The public pays for it through the regulation if it benefits others at its expense. So, this legislation—these public decisions—benefit interest groups so that politicians can get re-elected. Not a pretty picture.

So how does public choice theory apply with regard to *Citizens United*? Well, *Citizens United* messed with campaign finance regulation which intended to try to keep corporate money and corporate influence out of politics and, let's not kid ourselves, minimize or try to curb its influence to some degree through these regulations. And, we see it everywhere. No one can deny it. Corporations get public benefits from the government. They get tax breaks. They get government contracts. They get regulations that help them or they try to help rescind regulations they do not like. Now, with their ability to influence the political system more, with more money that they are able to put into the political system, corporations can do more directly than they used to be able to do before *Citizens United*. Now, I include labor unions here too, as they are also able to affect the political

process in a more meaningful way. They are now even more emboldened as these rational actors seeking public benefits, seeking the supply side of government. That is not necessarily a good thing because again, who bears the cost? The public. Through public choice theory the one who ends up paying for all this is the general public because they are not organized into interest groups in the way that various interest groups are. The problem that public choice theory points out is that, oftentimes, these are minority factions who are capturing government for their own benefit with cost borne by the public.

The other theory that I mentioned is Catholic Social Teaching. This is the Catholic Church's teaching or its doctrine related to how we should view and act in society. It seeks to ensure that society as a whole respects all people and human dignity in general. The U.S. Conference of Bishops has laid out seven key themes that it relates to Catholic Social Teaching, including one I'll focus on: the preferential option for the poor. This is sort of a fundamental position of Catholic Social Teaching. And what is it? It is exactly what it describes: a preferential option for the poor. It prefers policy making, societal thinking, societal action for the poor and the powerless over those individuals who are not marginalized in society. It is supposed to be putting the needs and the interests of the poor first in how we think as a society and how we act as a society, including in our government. It imposes obligations. If you read Catholic Social Teaching, the preferential option for the poor imposes on us obligations to maintain solidarity with the poor and with the powerless. And to seek to evaluate all political and economic action from the perspective of the poor and the commitment to act on behalf of justice. We want justice for all, and the only way to do that is to lift up the poor and make them equals.

So how do we live that out? One Catholic Social theorist gives three examples: first, to prioritize the needs of the poor over the needs of the rich. Let me take that for a moment and apply it to a post-*Citizens United* world: those with money have the most voices in the electoral system. They are able to get on the airwaves. They are able to mobilize "get out the vote" efforts because they can pay for phone banking, they can pay for walkers, they can pay for the various junk mail that you get in the mail that you usually throw away because you are sick and tired of getting them. Where is the voice of the poor? Where is the voice advocating for the poor and the injustice that they face in our society? Corporations will not. Because even if they are socially conscious, when they spend money, they have to spend money in their own corporate interest, to benefit them. So if they are engaging in the electoral system it must be for the corporation's benefit. I would suggest that this runs against the preferential option for the poor. The voice of the poor—even if you have those who are well-to-do who care about the poor—the amount of money that gets spent to advocate for the

issues of the poor is a *de minimus* amount compared to money spent for other special interests.

Number two: freedom of the dominated takes priority over that of the rich. Again, a political system, an electoral system, that helps those with money to have more influence and more of a voice and more ability to influence the electoral system is one that does not prefer the poor. Participation of marginalized groups takes priority over preservation of an order that excludes them. We should be looking to reform our system to where we, if we believe in Catholic Social Teaching, have an electoral system, have a governmental system, where the voice of the poor is heard. Where the voice of the poor can have influence. Where the voice of the poor can have an impact on our society to help lift them up. One Catholic Social theorist wrote, justice for the poor “involves breaking down economic institutional and political relationships built on injustice and rebuilding those relationships on a more just foundation.”

If you look at the Catholic Bishops, they have advocated for national standards for welfare benefits—this is on behalf of the poor by the way—higher minimum wage, worker’s rights in the form of more rights for unions, more public sector employment, gender-based pay equity, affirmative action, a steeper progressive tax on income, and environmental justice. I am willing to bet that many corporations would find most of those things absolutely untenable because they would hurt their bottom line. But the Catholic bishops—hardly a bastion of liberalism—have advocated for these things because of the preferential option for the poor. With a system that allows for more and more corporate money to get into politics and to influence politics, and in light of the issues that the Catholic Bishops have identified as what the poor need (and what our society needs to do to help lift up the poor), it is hard to see how these things get effected—*effected* not affected—if you have so much corporate influence in politics.

Matt Parlow: I will finish here with one more quote and then a thought and then I am happy to take any questions. “It is almost impossible to hear the voices of the marginalized through the din of lavish lobbying and glitzy advertising.” That may be actually a condemnation on our electoral system more broadly. But *Citizens United* has exacerbated the problem even more so. And with that I would be happy to take any questions.

Questioner: Thank you, Professor. I have a number of questions already. I don’t know if we’ll be able to get through them all, but please continue to ask questions, or write questions and we’ll get them up to me.

Matt Parlow: And during the break I would be happy to talk to folks as well.

Questioner: The first question: should the canon of *stare decisis* prevent an unconstitutional law from being struck down because of incorrect legal precedent?

Matt Parlow: Okay, so I will just repeat them, so they can hear. No, of course not. If something is unconstitutional, then indeed *stare decisis* should not protect it and I would never argue that. On the other hand, you had a Supreme Court who had cases on this for quite a while and it did not get changed until the difference in composition of the court. I would suggest to you that if we get to a position in society where it has become so politicized that we are just waiting for a different constitution of the Court to overturn a precedent we do not like in the name of unconstitutionality, we are going to really see an eroding of confidence in the Supreme Court. Which is why I think traditionally the Supreme Court has been ever so careful in when it has gone away from *stare decisis* and overturned past precedent.

Questioner: Next question: the Supreme Court's dissent in *Citizens United* would censor *Hillary*, the movie. What other movies or books do you believe the government should censor?

Matt Parlow: There are a lot of bad movies that should never have been made that I would be all too happy for the government to censor. You know, I do not really have an opinion on that. I am not a big believer in censorship. On the other hand, when campaign finance reform intersects with free speech, the Court has been clear that there are certainly permissible ways to be able to censor speech or to limit speech in certain ways but still allow for its airing in certain manners—and I think that is something that is contextual and dependent.

Questioner: Given the huge amount of money that has flowed into political campaigning in 2012 from individuals, what is the principal distinction for limiting wealthy corporations from making the same kind of expenditures?

Matt Parlow: Well, one is the difference between individuals and free speech and corporate personhood and free speech—I would suggest that is one. I would also suggest that part of the reason for this is that some people are very wealthy. Corporations, many corporations, are ridiculously wealthy. And so I think there is more capital, more money that corporations have than even a lot of individuals do. So I think that there is a power imbalance which is what the BCRA and McCain-Feingold's efforts and all of the different campaign finance reform laws tried to acknowledge when they were trying to limit the ability of corporations to donate in ways that individuals have not. But do not get me wrong: in an ideal world, we would be able to regulate that in a more meaningful way. It is just with case law, it will not happen.

Questioner: This is a two part question. How would you remedy the problem created or the problems created by *Citizens United*, and do you think that it will stand as precedent?

Matt Parlow: Yes, I think it will stand as precedent, and overturning

the decision would be probably the best way to undo it. But, even despite the fact that what Justice Ginsberg said in the Montana petition, I just do not see it getting overturned.

Questioner: Catholic doctrine of subsidiarity would result in a more decentralized local government. Such a teaching would make corporate speech more difficult. The problem is centralized power. Please comment.

Matt Parlow: That is a really good question. So Catholic Social Teaching talks about subsidiarity, which suggests that government should be sort of as limited as possible and that to the degree government has sort of more robust powers, it should be decentralized on the local level because the local level can better effect the needs of its constituents and help the poor rather than sort of a centralized federal government. It is a great question. The problem is, you have such a big federal government and a lot of big state governments and there are a lot of goodies that people want to get out of those governments. But even on local level, you still see a lot of businesses, you still see a lot of interest groups that very much lobby on the local level for government contracts, for government regulations. Whether that be land use development, whether that be for government contracts to pick up trash or to do whatever. So, I do not think it does away with it. Most political theory will tell you it is easier to hold your local government accountable because you are more likely to know your officials on the local level. They are closer to the people. There are also fewer people on the local level that you need to get rallied to “vote the bums out” as opposed to federal level or even state level. It’s a government that’s farther away. But with subsidiarity, you would see a much smaller federal government. You would see a much smaller state government. You would see more decentralization to the local level. But I just do not see that happening in our governmental system.

Questioner: Next question. Aren’t Super PACs more of a problem of McCain-Feingold than *Citizens United*? Specifically, McCain-Feingold limited an individual’s voice, so individuals have sought to pool their voices much like corporate investors. At this point then wouldn’t it be more pragmatic to repeal McCain-Feingold, force disclosures of donations and then let customers vote on corporate speech with their dollars?

Matt Parlow: That is one very popular narrative of campaign finance—and while I would be critical of some of McCain-Feingold—I am not sure you should overturn everything. I think there is some very good stuff in there, with all due respect to my friend Senator Feingold. But that is a way to do it. Disclosure is one very viable option. Because we have an imperfect disclosure system which I sort of mapped out earlier. That is one way. I am not sure that is the entire way. I am also not sure that there is any perfect campaign finance system. Because no matter what reforms you pass, the money just seems to find where the open holes are, and find its way

around. But that is certainly one option. I am not sure I favor it but I understand why people advocate for it.

Questioner: Here's another question about Catholic Social Teaching. What system does more to reduce poverty than the free market and capitalism? If none, then don't corporations by providing the vehicle for economic growth help reduce poverty? What's good for the corporation is good for the poor, correct?

Matt Parlow: That is a good question. I am not sure. I think, in my ideal world it is a combination both of responsible corporate action and meaningful government action in certain areas—and I am not necessarily a big government person—but I do think that there is a role for government in trying to help the poor. But it is hard to say that businesses are always helping the poor if their interest is their shareholders. Their primary fiduciary duty is to their shareholders, and if we are outsourcing jobs overseas because it is cheaper—and, in the process, exacerbating unemployment here by doing things which are economically rational but which actually cut jobs in America—I am not sure that is right. And if you look at what the Catholic Bishops say, they would say more unionization, right? Businesses would hate that. They say steeper income tax, progressive income tax; corporations would hate that. So I do not know, and I am not sure that the Catholic Bishops would necessarily agree that that is entirely the way to go. There has to be a combination of both government and corporate action.

Questioner: We have time for just a couple more questions. You mentioned government doesn't work for the average citizen, or at least individuals feel that is the case. What is the alternative to make sure that individuals without special interests are heard in their political speech? Please describe the average citizen without special interest.

Matt Parlow: That's a good question. I like to think of myself as an average citizen without a special interest. I suspect most of you in the room are. But maybe not. Maybe some of you are; some of you are not. You know, people who join special interest groups, who pool their resources tend to be those who are more engaged. I mean, this is part of the free rider and collective action problem that we face in interest group politics. That is, you have your sort of average American who is not working actively for a special interest or actively engaged in a special interest who wants to raise their family, wants to have a nice life, wants to have a job, provide for their family, have a nice safe neighborhood, send their kids to good public school and be able to have their kids have the American dream. A goal we all have, I suspect. And does the political system work for us? Sometimes yes. Sometimes no. But we do not pool our resources together. We do not collectively act as a group, at least not proactively. Sometimes we will react. Sometimes we will be so upset with the way the economy is, we

“vote the bums out” or sometimes we are so upset with something that a local elected official will do or did that we vote them out of office.

But traditionally, we do not collectively act and we certainly do not sustain it on a consistent level in politics. Who does? Those interest groups who are able to have both a collective set of people who are interested in their issues, as well as the resources to be able to advocate and lobby. That is just not your average neighbor in your community and all of you joining together. It is usually a particular interest, whether it be based on monetary interests or social or political interest, etc., etc. I think the collective action problem—that is trying to convince people to pool their resources, pool their time and try to affect the political system—is difficult. I am not saying it is actually able to be effected, but it is still a criticism of the political system because it allows special interests to dominate because those who depend on their support and their money to get re-elected (politicians) feel compelled to give the interest groups what they want. This applies to both sides by the way: the left and the right.

Questioner: One more question then we’ll let you off the hot seat. If it is unconstitutional to prevent Sheldon Adelson from spending unlimited amounts on independent expenditures, why would it be constitutional to prevent his corporation or a group he funds from doing the same thing?

Matt Parlow: Could you repeat that, sorry.

Questioner: If it is unconstitutional to prevent Sheldon Adelson from spending unlimited amounts on his independent expenditures, why would it be constitutional to prevent his corporation or a group he funds from doing the same thing?

Matt Parlow: Again, this gets to the sort of issue of “person versus corporate personhood” and in “an individual speech versus corporate speech.” I think in a post-*Citizens United* world we have to look at where is money coming from. Are we okay with how it is coming into the political system? Do we want more disclosure? Based on what *Citizens United* said, are there ways to tighten up the rules either to ensure transparency or to try to allow for some regulation of the kind of money in a way that would be upheld by the Supreme Court? I think that if *Citizens United* does not get overturned, I think that is the area that they will have to look.

Questioner: Let’s thank Professor Parlow.