"The Nature as well as Rights of Man"[1]

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It is my intent to make a few observations about civility and its relevance to American governance and then suggest that the third estate has in recent years misunderstood the nature of speech and human nature itself and in so doing weakened 1st Amendment protections for the American public. In this discussion I would like to put in context the oaths public officials take and conclude with a challenge to our nation's highest court and the legal profession.

Few subjects seem duller than concern for public manners. But in the framework of American history, where change was wrought in the crucible of debate about the nature as well as the rights of man, little is more important for the world's leading democracy than recommitting to an ethos of thoughtfulness in the public square. The times require a new social compact rooted in mutual respect and equalitarian trust.

The concept of civility implies politeness, but civil discourse is about far more than good etiquette. At its core, civility requires respectful engagement: a willingness to consider other views and place them in the context of history and life experiences.

Words matter. They reflect emotion as well as meaning. They clarify – or cloud – thought and energize action, sometimes bringing out the better angels of our nature, sometimes baser instincts.

[1] The talk was abbreviated in delivery.

Stirring anger and playing on the irrational fears of citizens inflames hate. When coupled with character assassination, polarizing rhetoric can exacerbate intolerance and perhaps impel violence.

Conversely, just as demagoguery can jeopardize social cohesion and even public safety, healing language such as Lincoln's call in his second inaugural for "malice toward none" and "charity for all" can uplift and help bring society together.

Thoughtful public policy making requires civility, but civility is not exclusively a governance concern. At issue is whether individual citizens perceive themselves as belonging to a single American community with all its variety, and whether citizens look at people in other neighborhoods and other parts of the world as members of families seeking security and opportunity for their kin just as we do for our own.

Mannerly behavior may be an admirable trait. But vigorous public advocacy should never be considered a thing to be avoided. Argumentation is a social good. Indeed, it is a prerequisite to blocking tyranny and avoiding dogmatism. Rather than policing language, the goal should be to uplift the tenor and tone of debate and infuse it with historical and philosophical perspective.

The founders of our republic were moral philosophers as well as political activists. They affirmed a trinity of natural rights – "life, liberty and the pursuit of happiness" – precepts synthesized from two Enlightenment philosophers, John Locke and Jean-Jacques Burlamaqui. These natural rights adherents applied to political theory an analytical framework analogous to the natural laws laid out by Sir Isaac Newton in the natural sciences. Just as Newton had studied the geophysical nature of motion, the founders dwelled on the nature as well as the rights of man.

Hence, to protect against abusive authority characteristic of feudal hierarchies they established a Constitutional system designed to divide rather than

concentrate power. They understood, as Madison pointed out in the 55th Federalist paper, that just "as there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence." Republican governance, Madison emphasized, presupposes the existence of these estimable qualities in a higher degree than any other form of governance.

In a parallel observation on human nature, I want to report on a difference between natural law and social behavior that I observed some years ago on the House floor. You may recall that Newton's third law of motion is that for every action there is an equal and opposite reaction. Human nature operates differently. Watching one afternoon the reaction of my colleagues on the other side of the aisle to a blistering partisan critique by the leader of my party it became clear that in human dynamics, unlike natural laws of physics, reaction can sometimes be greater than action. I label this phenomenon a 4th "Newt-onian" Law or, more precisely, a social corollary to Sir Isaac's immutable natural laws.

When individuals, groups or nations are described in a pejorative manner, divisive feelings are stoked. The likelihood is that rhetorical reactions with potential actionable dimensions will escalate. In this era of over-reaction, this observation has relevance at the dinner table, in local communities, national politics, and, most consequentially, international relations. It is no accident that geo-strategic thinkers have for generations raised the issue of "face" and warn against backing adversaries into a corner where mutual accommodation becomes impossible.

In today's political context, let me mention three words used in particularly troubling ways – "fascism," "communism," and "secession." Critics used to refer glibly to our former President, George W. Bush, as a fascist. Our current President, Barack Obama, has been called a fascist and a communist, sometimes at the same time. And since this past fall's election, hundreds of thousands of Americans have signed petitions sent to the White House suggesting that

secession may be a legitimate option. What's wrong with this kind of political hyperbole? Plenty. These are words that historically have contained warring implications. They infuse political discourse with "enemy" as opposed to "rival" attitudes. Yet the last thing America needs is to make war on itself.

As reflected in oaths of office, the rule of law is the American way. In the oaths taken by our Parliamentary ancestors in Great Britain, allegiance to the crown was affirmed. The essence of the oath that American officials must take is of a very different nature. It is to "support and defend the Constitution of the United States against all enemies, foreign and domestic" and to "faithfully discharge the duties of office." What does duty to office and allegiance to the Constitution rather than head of a state entail?

The Constitution establishes a sovereign basis for the rule of law in a governing arrangement where power is divided and individual rights enumerated. These enumerated rights were not all-encompassing at the beginning of the Republic. People of color, those without property, and women were left out. It took most of a century to rectify the Constitution's sanctioning of slavery and most of another one to make citizenship rights meaningful for all. When Abraham Lincoln signed the Emancipation Proclamation seven score, ten years and five months ago, his clear intent was to make America truer to the ideals expressed in the Declaration of Independence.

Trumpeted in the midst of war, the President also conceived and advanced the Emancipation Proclamation for practical political advantage. Lincoln wanted to rally abolitionist critics who had been pressing him to be more definitive about the values for which the Union stood. And he sought to keep Britain and France, which had already abolished slavery, from supporting the Confederacy.

I mention the international dimension of the Emancipation Proclamation because the implicit assumption of the founders was that the American model of Constitutional governance was designed to be the most effective as well as

humane manner of organizing public decision-making ever created. Today we're challenged by legitimate concerns about national security, fiscal imbalance, and how best to incentivize job creation. These challenges are compounded by political ruptures that make decision-making based on mutual respect irascibly difficult.

Unless we get our politics in order, the perceived magic of the American way could unravel before our eyes and America's global leadership could be jeopardized.

These are contentious times but we have had testier moments in our history. The first decade of the 19th Century saw Thomas Jefferson hire a journalist who described his Presidential opponent, John Adams, as a "hermaphrodite." Four years later our greatest Secretary of the Treasury, Alexander Hamilton, was shot dead in a duel with the Vice President of the United States, Aaron Burr, the triggering cause being Hamilton's assertion that Burr was "despicable." And in the decade preceding the Civil War, Congressman Preston Brooks of South Carolina strode onto the Senate floor where he caned almost to death Senator Charles Sumner, an abolitionist from Massachusetts, for describing a Senator who happened to be Brooks' uncle as a "pimp" for slavery.

Democracy requires civil discourse and civil manners. But civility itself is not about staid politeness. Spirited advocacy energizes deliberations on public policy. Listening is as important as speaking. Everybody can learn from somebody else. Seldom, after all, is there only one proper path determinable by one individual or one political party. Public decision-making does not lend itself to certitude. That is why humility is a valued character trait and why partisan intransigence is rarely a worthy strategy in a Constitutional democracy.

The taking of an oath "to support and defend the Constitution" and "faithfully discharge the duties" of office is to recognize that process is our most important

product. Government of, by, and for the people requires a respectful give and take with an understanding that we are all connected and rely on each other.

Governance is a shared responsibility. If all men are created equal, it follows that every individual deserves respect and that decision-making is enhanced by diversity of thought. There are times when partisan unity is justifiable in legislative chambers but times, too, when calls for partisan homogeneity shackle individual judgment and so undercut institutional procedures that the national interest is jeopardized. The power of negation may be difficult to resist but too easily it leads to systemic dysfunctionality.

As Lincoln warned in words borrowed from Scripture, a house divided cannot stand.

Historically, all leaders in the Executive branch call for bi-partisanship by which they too often simply seem to presume that others should go along with their vision, their policies. I am as uncomfortable as anyone with the current state of executive-legislative relations but I do not share the view that dissent is by its nature unconstructive. Bipartisanship should be viewed in ways far beyond majority-minority relations. It is inevitable that in an increasingly complex society political issues will become more diverse with positions not conducive to a neat wrapping into a Democratic or Republican package. It is simply inconceivable that citizens will be able to agree on every formal stand taken by one party or the other.

Legitimate bi-partisanship should thus respect internal party dissent. Similarly, each party should expect support on its initiatives from some and, on occasion, many members of the other political party. Elected officials in legislative settings have an obligation to examine open-mindedly all policy initiatives, whatever their source, and be prepared to oversee critically executive governance on a bipartisan basis.

We have today, for instance, legitimate concern being reflected about a governmental agency, the IRS, that appears to have ignored its legal responsibilities in three regards.

First, the agency for at least a decade and a half proffered misleading and ambiguous rule making for a 1958 law establishing a category of non-profit organizations. While the law stipulated that 501 (c)(4)organizations must be operated "exclusively" for social welfare purposes, IRS rules published in 1995 introduced mischievous ambiguity by asserting that compliance existed if such an organization "primarily" engaged in promotion of the common good and general welfare of the people. This change in adverbial emphasis opened the door for some to assert that 49% and conceivably more of 501(c)(4) assets could be used for non-traditional charity purposes.

Second, the IRS tolerated a practice of allowing powerful insiders to stretch non-transparent, tax deductible, non-profit activities to increasingly include political advocacy.

Third, while liberal as well as conservative groups had begun to use the 501 (c)(4) mechanism, the IRS reportedly began in the last election cycle to target disproportionately new applications from conservative groups.

Those in the executive branch who may have failed to live up to their Constitutional obligations to insure that our laws are faithfully executed should be held accountable. Likewise, in light of the revelations that the tax exempt purpose of some of these organizations has reportedly been stretched to include extensive engagement in political activities, Congress which had failed to conduct adequate oversight in the past would appear obligated to conduct a critical review of the merits as well as the execution of the law authorizing 501 (c)(4) organizations.

As money conflicts have multiplied and ideological cleavages intensified, the will and capacity of representatives of the people to mediate social differences is breaking down. Compromise may have once been the art of politics, but intransigence is the new art of political survival. If a legislator in today's environment chooses to seek common ground on an issue – i.e., compromise – he or she becomes vulnerable to a primary challenge where participation is low and money games are unforgiving.

What has brought this circumstance into being? After leaving Congress and wending my way to the academy, I developed a series of what I call two minute courses in American politics. I'll mention a couple:

Political Science 101: The country over the past generation has been approximately one-third Democratic, one-third Republican, and one-third independent. Basic math tells us that one-half of one-third is one-sixth. So 16 2/3rds percent of the voters nominally controls candidate selection in a typical election. But only one in four voters (often a fraction of this figure) participates in primaries where candidates are chosen. Thus, it is $1/4^{th}$ x $1/6^{th}$, or $1/24^{th}$ of the electorate that determines who the candidates of the principal parties will be. This 4 percent is socially quite conservative on the Republican side and actively liberal on the Democratic. Consequently, legislative bodies intended to represent a cross-section of the American public come principally to reflect its philosophical edges. The most under-represented part of the American public today in Congress is thus the great, probably majoritarian, center.

Political Science 102: In primaries for president, it is widely understood that Republican candidates lean to the right, where the vote is, and then, if nominated, scoot to the center in the general election; Democrats do the same, but begin from the left. When it comes to Congress, however, the scoot to the center seldom materializes. Approximately 380 of the 435 House seats are naturally or gerrymandered to be safe for one of the parties. About half of these safe seats are held by Republicans and half by Democrats. With few exceptions,

safe-seat members must lean to the philosophical edges to prevail in primaries. Once nominated, there is no incentive for politicians to move to the center, either as candidates or legislators, because the only serious electoral challenge is likely to come from within their party's uncompromising base. Polarization is the inevitable result.

Sports 101: A mid-20th Century sports journalist, Grantland Rice, famously observed that winning and losing are less important than how the game is played. Likewise in politics. The temper and integrity of the political dialogue are more important for the cohesiveness of society than the outcome of any election. When I first campaigned for office I used to make one-to-one analogies between sports and politics. By the time I left Congress I had concluded that these analogies were frail. The sports ethic is far stronger. There are rules for everything and referees trained to call fouls in basketball and throw flags for clips in football. On the other hand, there are surprisingly few rules in politics and no referees. While coaches teach players to respect their opponents, campaign advisers tell candidates to accentuate the negative. Is it asking too much for candidates and their supporters to play with higher standards?

Literature101: In a set of four books published more than half a century ago called the *Alexandria Quartet*, the British author Lawrence Durrell describes the fictional interactions of a small, Euro-centric group in Alexandria, the ancient Egyptian city on the Mediterranean, between the first and second World Wars. In the first book, Durrell spins a story from the perspective of one figure. In each subsequent book, he describes the same somewhat mundane interactions from the perspective of others. While the surrounding events are the same, the stories are profoundly different, informed by each narrator's life and circumstances. The moral is that to get a sense of reality it is illuminating to see events from more than one set of eyes. This observation can apply to interactions in a court room or town hall or on the international stage. What America, for instance, does may seem reasonable from our perspective, but look very different to a European, African, Middle Easterner, or Asian.

Humanities 101: In Western civilization's most prophetic poem, *The Second Coming*, William Butler Yeats suggests that "the centre cannot hold" when "the best lack all conviction, while the worst are full of passionate intensity." Yeats was reacting to the carnage associated with World War I trench warfare. But the poignancy of his description has an echo in today's politics. Citizens of all philosophical persuasions are displaying increased disrespect for their fellow citizens and thus for modern day democratic governance. Much of the problem may flow from the fast-changing nature of society, but part of the blame falls at the feet of politicians and their supporters who use inflammatory tactics to divide the country. Candidates may prevail in elections by tearing down rather than uplifting, but if elected they cannot then unite a splintered citizenry. Negativity dispirits the soul of society just as it raises the temperature level of legislatures.

Negative campaigning has become a sophisticated art form but, ironically, is more than matched in nefariousness by seemingly polite after-effects evident on a daily basis on Capitol Hill.

Example. A typical conversation between a lobbyist and legislator walking to and from a vote on the House floor goes like this: "Congressman, as you know, we maxed out for you in the last election and we and our allies sure hope to be able to more than match that support this Fall. But please understand that tomorrow a bill of importance to us is coming up on the floor and we would sure appreciate your support. And, by the way, how are your wife and kids?" Politely stated, but there is no reference to the common good. Instead, coercively implied is an on-going, quasi-contractual relationship between an interest group and a public official.

These implicit uncivil contracts can be coercive even if never discussed because corporate power, newly magnified by one of the Supreme Court's gravest historical errors – the 2010 *Citizens United* decision – can so easily reward a candidate or inflict political retribution. On the assumption, for instance, that

politicians have an instinct for political survival, a key component of which is a desire to raise campaign revenues and suppress opponent treasuries, why in a corporatist political system would a politician want to speak up against the drug companies, gambling interests or oil companies if corporate monies can quickly be shoveled into campaigns?

Over our tumultuous history, the Supreme Court has generally been at the forefront of advancing justice and protecting the rule of law. But from time to time our politics and the Court have been out of step with our deepest ideals. For almost nine decades after our founders signed the Declaration of Independence affirming that all men are created equal, a number of states sanctioned slavery, and until the Civil War the Supreme Court formally upheld this egregious assault on human dignity.

Brazenly, in *Citizens United,* the Court employed parallel logic to the syllogism embedded in the most repugnant ruling it ever made, the 1857 *Dred Scott* decision. To justify slavery, the Court in *Dred Scott* defined a class of human beings as private property. To magnify corporate power a century and a half later, it defined a class of private property (corporations) as people. Ironies abound. Despite overwhelming evidence to the contrary, the mid-19$^{th}$ Century Court could see no oppression in an institution that allowed individuals to be bought and sold. In the *Citizens United* ruling, despite overwhelming evidence to the contrary, the Court implied that corporations were somehow oppressed – in this case presumably censored – and therefore should be freed to buy political influence and sell opposing candidates down a river of negativity.

How are corporations oppressed? Do corporate leaders not have free speech and the right to give campaign contributions like all other citizens? Have they and the political action committees (PACs) that they control not already been over-empowered to infuse millions in the political process? Is it an accident that as the influence of moneyed interests has increased in American politics, the gap between the rich and poor has widened?

To advance the sophistic argument that first amendment rights apply to corporations and that more money in politics equates to more democracy, the Court had to employ a linguistic gyration. It presumed that "money" is "speech" and that a "corporation" is an "individual." But where in any dictionary or in any founding documents are these equivalencies made?

To hold that a corporation is a person with citizenship rights simply doesn't square with the Declaration of Independence. All men may be created equal in relation to each other, but not necessarily in relation to corporations or, under *Citizens United*, in relation to how corporations may empower some individuals relative to others. There is great inequality between corporations, no equality of individual and corporate "personhood," and no equality of individuals when one with many corporate ties may have more capacity to influence decision-making than one with none or just a few.

*Citizens United* is rooted in a stretched reference to the 1st Amendment to the Constitution that guarantees freedom of speech. But it would be substantially more appropriate to reach a very different conclusion by reference to three other amendments to the Constitution – the 13th, 14th and 5th – and by a different interpretation of the 1st. In abolishing slavery the 13th Amendment established that a human being is not property. As the Princeton historian R.R. Palmer observed, the ending of slavery without compensation was an "annihilation of individual property rights without parallel."

Clearly, if the amended Constitution affirms than an individual cannot be equated to property, then property cannot be equated to an individual. In mathematics the logical principle dating back to the ancients is that things equal to the same thing are equal to each other. Hence if "a equals be, and b equals c, then a equals c and vice-versa." A logical analogue that isn't quite the obverse is that if "a is not equal to b, then b is not equal to a." And because a corporation is undeniably a category of property it cannot logically be considered a person, at least for

political rights purposes. Indeed, one of the functions of corporate law is to protect the non-management shareholder from the liabilities of corporations. A corporation is not a shareholder cooperative.

Democratic values are at issue. So is corporate larceny. To presume that corporate money can be construed as "speech," that speech for many will be coerced rather than free. After all, to tap for political purposes the assets of shareholders or by implication union members, more than a few of whom can be expected to hold different political judgments than management or union stewards, is a "taking" of their assets, a perversion of their "speech," a diminution of their political rights. The 1st Amendment arguments the majority of the Court stands on are insubstantial compared to the 1st Amendment umbrages the Court ruling establishes.

As for the intent of our founders and the 5th Amendment's protection against "takings," Thomas Jefferson made an observation that might be considered of some relevance to the question of whether the Supreme Court should simply have ruled on whether to strike down as unconstitutional provisions of a campaign spending law instead of peremptorily choosing to initiate its own law making approach which ends up having dimensions far less in synch with the Constitution than any concerns the Court had with prior law.

The tell-tale quote: Jefferson observed that "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical."

An argument could be made that management knows corporate interests and therefore can be entrusted with the power to expend resources that may be against the political grain of many shareholders, some of whom may prefer other candidates, others who may wish simply not to have their assets used in a political way. Where the management trust premise is flawed relates to how individual judgments are made in the political arena. Human nature and the

diversity of individual judgments cannot be ignored even in the board room where rationality holds greater sway than in many other facets of life. Political judgments on whom to support or oppose inevitably involve assessments that relate to more than corporate vested interests – party preference, for instance, or positions on macro-economic issues (including individual tax rates) as contrasted with a corporation's micro-perspective, or judgments on non-commercial issues ranging from social to environmental to foreign policy causes, or personal respect or lack thereof for a candidate, or personal indebtednesses for political favors done family members. These considerations plus many others such as shared background -- common neighborhood, town, or state, high school or college, religion or military service – come into play for corporate management just as they do voters.

The public policy dilemma that revolves around the role of money crowding out concern for the common good cannot be underestimated. But to the degree corporate money creates political conflicts, it is not a one-way coercive street. It is a mistake to assume that corporations will always be the initiators of money games. Politicians rather than lobbyists may in many instances instigate the development of what might be considered mutually coercive relationships. A corporation, for instance, may not respect a particular politician or may not want to engage in the political money game, but what happens when the politician or his/her surrogate approaches the corporation and indicates support would be appreciated? And who is coercing whom if that politician notes that he/she had already become the beneficiary of political advocacy generated by competitors in the same industry or, more ominously, competitive industries or those with different perspectives on union-management issues? Similarly, what happens when a staff member of a party leader hints broadly that a bill might not come to the House or Senate floor or contain a particular approach or provision unless his/her boss feels comfortable that reelection is assured with sufficient political advocacy?

However moneyed relationships develop, and however seemingly inconsistent the patterns of giving may appear, there is simply no escaping the reality that the precept of corporate personhood pushes American politics in an oligarchic direction. Nor is there escaping the only justification for spending corporate assets in elections. Money spent in the political arena must be considered good investments for shareholders, *quid pro quos* that can be banked. Could it be that the Court's definition of protected "speech" might more accurately be described as influence buying?

Prior to *Citizens United,* the Supreme Court implicitly recognized that citizen expression was different than issue advocacy backed by money. Hence it upheld Congressionally established reporting requirements and limits on campaign giving for individuals making campaign contributions. However, in *Citizens United* the law now suffers from radically unequal applications. Corporate persons are granted "supra-man" status: limited transparency requirements and unlimited capacity to spew money into the political system.

Ironically, while the Court can always challenge legislature made law on Constitutional grounds, the Congress cannot challenge Court made law despite the fact that in its first test in a presidential primary, one candidate is reported to have received over $20 million from sources controlled by a single individual. It may be the case that the first presidential election test for expanded corporate giving saw increased spending by both parties and a relatively status quo result. But the lack of decisive change does not vindicate the Court's approach as one without partisan dimensions or social consequences. The effects of the change in law are just beginning. This election served as a kind of test run, a forerunner of much greater intervention to come. It underscored how the public loses its democratic authority no matter which party's candidates prevail.

The Court's law-making judgment cannot be challenged by Congress because an activist five-to-four majority has presumptuously held that corporate money investments in the political system are protected by the 1st Amendment. And,

lacking an evidentiary basis and appreciation for human nature, the majority concluded that whatever their size, independent corporate political expenditures "do not rise to corruption or the appearance of corruption." Really.

Is it not clear that under a free speech guise the Supreme Court has authorized influence wielders, in many cases masked to the public, to use unlimited resources to rob America of our democratic heritage.

Since the last presidential election, investigative reporters have pointed out that candidates of both of our major parties benefitted from moneyed corporate advocacy. But the principal issue here is neither whether one side or the other has become more mired in the money trenches nor which political party over the long term most benefits by the effects of *Citizen United*. The issue is corporatism. Corporate interests are not the same as the public interest. In fact, in a globalized economy, corporate interests can be expected increasingly to advocate positions at odds with the national interest.

Perspective demands a look backwards in history as well as a contemporaneous review of systems outside our own country. Many countries, even those with a sheen of democracy, have systems today that accentuate corporate power to the disadvantage of the public at large. And, historically, it is relevant to note that a European democracy, albeit one recovering from a destructive war, fell prey in the 1930s to an ideology of hate abetted by corporate interests.

By contrast, American democracy is generally stable and relatively mature, but citizen concerns are rising. As divisively partisan as corporate giving often is, there is also a troubling bipartisan dimension to moneyed power brokering. Corporations have a tendency to align with those in either party who hold positions that may affect issues of direct concern to their interests. Corporations are thus generally blind to the party affiliation of those they support in legislative committees that have jurisdiction over their interests.

Surprising to some, *Citizens United* thus increases the likelihood that financial interests will increase their donations to both sides of banking oriented committees; commodity groups to both sides of the agriculture committees; the military-industrial complex to both sides of the armed services committees, etc. Ideology has its place, but power in the commercial sphere supports power in the political domain. Indeed, just as in presidential and gubernatorial elections some interest groups are ideological; others often give to both sides and simply make pragmatic decisions about how most effectively to advance their interests. Whether the goal of corporate investments in politics is to advance an ideological or commercial agenda, the result can never be balanced when the unmoneyed have no voice, especially after elections when legislation and policy is advanced.

The electoral process is more than about what happens on election day. It is also about what happens between elections. To paraphrase Clausewitz, law making is the continuation of politics in another forum. Electoral politics never stops. It is just interrupted every year or two to count ballots.

It is no accident that our tax laws are loaded with loop-holes, that corporate muggings are frequent in American politics. Nor is it an accident that many Americans, from tea party advocates to middle class home owners to the Occupy Wall Street movement, believe that they are not being listened to, that vested interests hold an improper, behind-the-scenes sway in the political life of our country. Nuances aside, the main casualty of the *Citizens United* ruling is idealism.

At a time when the country needs to pull together, the Supreme Court has chosen a path to magnify public cynicism. It has determined to protect moneyed influence peddling that obscures citizen speech and eviscerates the capacity of policy makers to weigh competing views in balanced ways.

At issue is whether a new analytical paradigm about the 1st Amendment more consistent with linguistic logic, American history and democratic values is in

order. Absent a clear directive from the Constitution, absent carefully expressed views of the founders, should not the courts follow a strict constructionist approach to the meaning of our individual rights centered democracy? Rather than conflate a corporation with a person and money with speech, should not the focus be shifted to the transactional relationship inherent in speaking and listening?

If all men are created equal, surely it follows that all citizens are entitled to have their views respectfully listened to in the public square and, after elections, to have the representatives they choose be in a position to seek common ground in pursuit of the common good unconstrained by having their ears plugged with corporate money.

Massive investments of corporate money in politics inherently exacerbates partisan conflict and induces candidate conflicts of interest. It isn't that unmoneyed voters lose the right to speak after elections but that successful candidates lose the capacity to listen. More money may produce more sound in elections but not more balance in the aftermath.

In this period of rampantly growing inequality, would not a 1st Amendment emphasis on the transactional relationship between speaking and listening be compelling in itself and at the same time be more consistent with the 14th Amendment's requirement that no state should deny equal protection of the law? And do not the oaths federal judges take provide relevant guidance?

Unlike executive and legislative branch officials, federal judges are required to take two oaths. One is the same oath that the first two estates take. The second oath calls on judges to "administer justice" doing "equal right to the poor and to the rich." In suggesting that review of a Court ruling is warranted, should not the public assume that the federal judiciary would want to take great care to refrain from empowering moneyed interests, especially in our democratic processes, to the disadvantage of the "un-moneyed" or less "moneyed"?

The goal of advancing equal justice under the law, after all, applies just as much to the making and administering of laws as it does to their adjudication in a court room. Indeed, the objective of advancing equal justice begins in the first and second estates before it becomes the responsibility of the third estate, where judges, generally speaking, are tasked with interpreting and enforcing rather than making law – *Citizens United* being a sparingly embraced, lawmaking exception.

The principal standard of judiciousness in the making of law is fairness, while the standard of judiciousness in the adjudication of law is allegiance to the letter of law and its constitutional framework. Hence from an equal justice perspective the judiciary should be acutely concerned about lawmaking that empowers deep-pocketed special interests to the detriment of the common good. No judge should be placed in the position of having to uphold patently unfair laws designed to appease corporate power brokers to whom legislators or elected executives may be indebted. In this circumstance, public confidence in the judicial as well as the legislative and executive branches of government is jeopardized. A citizenry simply cannot be expected to have confidence in a judicial system in which the standard becomes equal application of unfair laws. Equal justice requires that the law itself be fair.

Historians are familiar with the saying (sometimes attributed to Bismarck) that the public should not look too closely at laws or sausages being made. Law and sausage making are different, but the commonality is public concern that the seen and unseen ingredients of each be integrated in as "clean" a manner as possible.

Many good people enter politics only to find that the system causes the low road to become the one most travelled. Politicians routinely develop conflicts that do not technically rise to a legal standard of corruption because legislated law and now judicial fiat have weakened that standard.

The low road is travelled because it is the shortest path to office and justified because other contenders generally stampede alongside, though increasingly far from the center stripe. If a candidate chooses a less conflicted route where few travel, the likelihood is that candidates will come up short.

Speech is thus at issue from two perspectives. At one end, uncivil speech must be protected by the courts, but filtered by the public; at the other, moneyed "speech" must not be allowed to weaken the voices of the people. The Constitution begins "We the people…" not "We the corporations…"

I would like to conclude with a challenge.

On the premise that lawyers have special obligations to express professional judgment on rule of law questions, should not bar associations and law schools consider it appropriate to take stands and present friend of the court briefs on citizenship issues like *Citizens United*. Likewise, should not the legal community make a concerted effort to make its views known to Congress and the Executive branch on the merits of expanding international law? Issues like ratification of the Law of the Seas Treaty, a Comprehensive Test Ban, and various human rights treaties should not be funneled into the playpen of ideological politics.

It could be that the most important "pro bono" work that the legal profession can provide our country is to offer judgment on the key rule of law issues of the day?

Lawyers are officers of the court. They are also citizens.

Thank you.