I would like to thank Professor Smith for his most gracious invitation to join you today, and to Gloria Lucy for helping to make this possible. I am glad that I had the opportunity to be in St. Louis so that I could join you, particularly since I think this is a beautiful campus. This is a truly great place. It is very similar to my college at Colby, where we have a similar history. The college was very old and the town grew up around it. There was no longer much room for the college to grow so they looked at having to move, back in the 19th century. The town gave us a hill just outside of town, Mayflower Hill, and said you can build your college up there. During the Depression, the big project was building the campus of Colby College, which is all made out of Colby brick. Not the brick you have here; it’s a little deeper red. But more or less, I have traveled from one hilltop to another hilltop campus so I feel very comfortable here.

I’ll be happy to address any issues you might want to raise with respect to campaign finance. I thought before we get to some questions and answers, I would talk about the current controversy in Washington and the current debate on campaign finance, which involves corporate and labor union participation in the financing of elections. This has developed out of a Supreme Court ruling in January and has now led to campaign finance legislation, which is currently being debated on Capitol Hill. A bill actually came out of a House Committee on Friday. The debate is focused on prohibitions on the use of corporate and labor union treasury funds in financing elections.
It has been a long-standing principle of federal campaign finance law, and most state campaign finance laws, that corporation and labor union treasury funds – the money that corporations have in their corporate accounts, the profits, the monies they take in or the dues that unions collect from their members – that these monies were prohibited for use in federal campaigns. In 1907, Congress banned corporate treasury contributions in federal elections. In 1947 when Congress passed the Taft-Hartley Act, they extended the ban on contributions to include labor unions and, in addition, said corporations and labor unions not only could not contribute to candidates, but also could not spend treasury funds in support of candidates, so that spending money directly would not become a way of evading the contribution limit.

This became a cornerstone of federal campaign finance law. It was incorporated into all of the subsequent laws. It was incorporated into the major campaign finance legislation in the 1970s. Then, in the McCain-Feingold bill, which was adopted as the Bipartisan Campaign Reform Act in 2002, these provisions were strengthened by ensuring that candidates or parties could not use any of this money and by ensuring that none of this money was used for advertising that occurred close to an election. As part of the McCain-Feingold law, Congress passed rules that defined any broadcast advertisement that features a federal candidate that is broadcast within thirty days of a primary or sixty days of a general election as a campaign ad. Congress decided that such an ad is an electioneering communication; it has the same function as a campaign ad and therefore corporate or labor union treasury money cannot be used to pay for such ads. Money from individuals can be used. Money from political action committees that are soliciting contributions for political purposes is permissible. But no corporate and labor union treasury money is permitted. Congress adopted these rules because they did not want to prohibit the money to the parties and then have the money just turn around and go to groups who could then use it to pay for ads before an election.

The courts upheld these restrictions and found them to be constitutional over the years. As recently as 1990, in a case called Austin v. Michigan Chamber of Commerce, and in 2003
when the Supreme Court ruled on the constitutionality of the McCain-Feingold law, these provisions were upheld as appropriate restrictions. Under court doctrine, campaign finance falls under the First Amendment because money is considered to be an essential component of political speech. Therefore, in order to limit any form of political speech, the state has to have some interest in doing so and the courts have said that preventing corruption or the appearance of corruption is an appropriate basis for limiting political speech. In this case, provisions that prevent corporations and labor unions from engaging in this type of election activity are appropriate in accordance with the theory that the money that was amassed in the economic marketplace under preferential rules that allow corporations to accumulate profits or labor unions to engage in certain activities to solicit money from their memberships and that these kinds of funds raised in the economic marketplace would give an undue or unfair advantage when applied to the political marketplace. Therefore, it was appropriate to exclude them, since they would have a potentially corruptive effect.

This all changed in January when the Supreme Court, in a case called Citizens United v. Federal Election Commission, overturned past precedent, overturned the provisions of previous law, and ruled that corporations could make independent expenditures in support of candidates. In other words, they could use their funds to expressly advocate the election or defeat of candidates. They still could not contribute to the candidates, but they could spend money in support of candidates, and by extension of the analysis, this would mean that labor unions could also do the same thing.

Basically, the Court determined that if money is spent independently of a campaign - so a spender hasn’t been told by the candidate to spend the money, hasn’t worked with the candidate’s committee to decide how to spend money, but has decided independently to go out and spend money supporting candidate X or candidate Y - that this poses no risk of corruption. It is the First Amendment right of a corporation to spend money in this way. Just as individuals
have this right, political parties have this right, and political organizations have this right, so too do corporations and labor unions.

The Court basically took the view that the political arena should be viewed as a marketplace of ideas and that the health of our democracy depends on having more and more speech, more and more different ideas and viewpoints. Every speaker should be allowed to express their view and there is no reason to restrict the rights of corporations in this regard. The Court also noted that under the First Amendment we shouldn’t be giving preference to one speaker over another. Giving preference to an individual or a political party or a candidate over a political organization or a corporation or a labor union is not within the parameters of the First Amendment and therefore all should equally have the right to spend money as they see fit.

As you have probably read in the news, this decision quickly became a lightning rod for controversy around the country and in Washington, particularly in Washington, where suddenly incumbent members of Congress are facing the prospect of corporations spending money in their election campaigns. As you would expect, it is generally the case that incumbent members of Congress don’t like anyone spending money in their election campaigns who they are not certain will support them. Thus, the decision in Citizens United quickly became a partisan issue as the Democrats began to fear that the ruling would lead to a flood of corporate money in their election campaigns. Republicans, in some ways, saw this as favoring them because if there were to be any additional corporate spending, it would probably be in their behalf. The Democrats and Republicans therefore started to quickly divide on this issue.

The leading critic, as we have seen, is President Obama, who even took time in his State of the Union Address to single out this decision as worthy of criticism and to call for reform. That has sparked the most recent debate in Congress on campaign finance reform. The Democrats have quickly come up with new legislation to address the issue and, as a result, we now have a new debate in Congress. Not a debate about whether too much money is being spent, not a debate about how to equalize the resources among candidates, not a debate about
how to get more resources to candidates so that they might better be able to compete in elections; but a debate about how to put the genie back in the bottle. How do we restrict corporations and unions given that the Supreme Court has affirmed the right to spend money in elections?

I’m not sure this is the crisis that many are making it out to be. I don’t think that this is necessarily going to unleash a flood of corporate money into elections. There are already plenty of ways that corporations can participate in the financing of an election activity if they decide to do so. What the Supreme Court decision basically said was for those advertisements close to an election, corporate and labor union money can now be used. Instead of just talking about a candidate’s background or issues, corporations and labor unions can now actually say in advertisements, “vote for the candidate.” Some corporations that chose to be involved in politics had already been involved in a number of ways. The assumption is that there is a large reservoir of money just waiting for some way to get into politics and it is now going to be unleashed. It remains to be seen whether that is the case. However, it is the case that at least some members of Congress feel that it is the case. Thus, we now have the DISCLOSE Act, which is Congress’ current attempt at campaign finance reform.

When I first heard of the DISCLOSE Act, I thought, well that’s fine, because disclosure is something everyone supports. It is a good name for a bill. But then I found that this is a long tortured acronym. Obviously some staff members got together and said “disclose” is a good word, now what would that mean? So what is now being presented is the “Democracy is Strengthened by Casting Light on Spending in Elections” Act. I would stick with the “Disclose Act”. Senator Schumer has introduced the bill in the Senate. Congressman Chris Van Hollen, who is the head of the Democratic Congressional Campaign Committee, has introduced the bill in the House. The bill is designed to improve disclosure and find some ways to address the concern about corporate spending. At this point, the bill is a bit of a moving target because they
are rewriting provisions, inserting provisions, taking provisions out; but generally it is designed, I think, for all intents and purposes to do a couple of things.

One is to improve disclosure of campaign funding, which is something that is sorely needed. There is not enough transparency in the system as it exists today. One particular concern is how to ensure that the monies being put into elections, particularly through third-party committees or organizations are made transparent so that the public knows who is behind the funding of these entities. Right now we have laws that require the disclosure of any monies spent independently in support of candidates. So if it were the case that a corporation were to pay for advertising, we would know under current regulations that company Y spent X amount on an ad. If the money were spent through a third party group, as opposed to a corporation directly, we would not necessarily know where the money came from. Because of the way current law is written, a group would only have to disclose the source of the money used to pay for an ad if the contribution was made with the explicit purpose of funding that kind of expenditure.

For example, if I were to give money to Professor Smith and say, “Professor Smith, I want you to use this money to do an independent advertisement in support of candidate X”, he would have to disclose that the money came from me and he would have to disclose how much he spent. If I just gave him a check and he decided to spend that money on an advertisement for candidate X, he wouldn’t have to disclose that I was the source of the funding. One of the things the bill is designed to do is to solve this problem by ensuring that all of these contributions and sources of funding are disclosed to the public.

What is more controversial is that the bill tries to shed light on the spending done by tax-exempt organizations and other entities that is not subject to disclosure. Right now candidates are required to disclose their funding. We require political parties and political committees to disclose their funding. But tax-exempt non-profit groups, organizations that are organized under the Internal Revenue code to engage in public policy advocacy such as a group like Citizens for
Life, trade organizations like the Chamber of Commerce or Pharmaceutical Manufacturers Association, and labor unions are not required to disclose all of their election-related spending. These groups have become more and more active in campaigns because this is a place where money can be spent without having to report where it came from or without having to report what it was spent on in every instance. We know that in recent elections tens of millions of dollars have been spent by these organizations in election campaigns. For example, the Chamber of Commerce just announced that they are going to launch a fifty million dollar campaign effort this year in Congressional elections, but most of that money won’t have to be disclosed as to where it came from or what they spend it on.

The second thing the act seeks to do is to open up and shed light on these committees, based on the idea that election-related spending by these tax-exempt organizations should also have to be disclosed. The law would require additional reporting by corporations, including posting all political spending on the organizations’ websites, as well as reporting by any nonprofit corporation that spends money on elections. In addition, the law would require reporting of political spending and donations in every annual report or every periodic financial report issued by a company so that shareholders and others with interests in corporations can know how much money the company is spending on political activity.

Also controversial are the provisions that have been set up to try to prohibit corporations from being involved. In this regard, the proposal includes a couple of notable provisions. First of all, it has set up a number of different criteria or conditions that would make companies ineligible to engage in political spending. Specifically, if a company receives TARP funds under the government’s Troubled Asset Relief Program; or if a company is a federal contractor; or if a company has foreign ownership, defined as any individual who owns twenty percent of the voting stock in a company or any company that has for the most part a board of directors which has a majority comprised of foreign nationals or a company in which a foreign national might have the power to direct the decision making of the company – these companies would not be
permitted to make expenditures in political campaigns. These provisions have become highly controversial. Current law already prohibits foreign companies, foreign citizens, or foreign nationals from participating in the financing of campaigns and making any expenditure or contribution either directly or indirectly to any federal, state or local election. That’s already the law. For a long time, federal campaign finance law has prohibited foreign companies from coming in and being involved in our elections or foreign citizens from being involved in our elections. What this bill proposes would specifically affect U.S. companies or U.S. subsidiaries of foreign companies that may have foreign ownership of twenty percent either directly or indirectly by any one individual.

To see the effect of these new rules, let’s take an example. Sam Adams Beer (since I am from New England), Ford Motor Company, and Hershey’s would be allowed to make political expenditures. Anheuser Busch, GM, and Nestle, would not. Since Anheuser Busch has foreign ownership, it would be in a position where it would be ineligible to exercise its First Amendment rights. Banks that had paid off their TARP funds would be allowed to engage in political spending. AIG, which may never pay off their TARP funds, would not. This has created a situation where Congress is looking at a bill that is going to result in differential treatment of different companies.

Or consider the example of the prohibition applicable to a federal contractor. If a company has a federal contract, it won’t be able to make independent expenditures. If it does not have a federal contract, it will be able to. Originally this restriction was set apply to a contract of fifty thousand dollars. But a quick analysis showed it would involve 56,000 corporations in America. So on Friday, the Democratic sponsors changed the provision to increase it to seven million dollars. If a company has a contract with the federal government of seven million dollars or more, it won’t be able exercise its First Amendment liberties; if it does not, it will. As far as I understand federal procurement, seven million dollars, that might just be a paper towel contract. This proposal has thus become a real concern to many companies.
Second, the bill seeks to ensure that the CEO or major officers of any company or labor union or political organization take responsibility for their actions by requiring, for example, the CEO, under penalty of perjury, to certify that any of the political ads a company might finance were not coordinated with a candidate, and by requiring them to certify that the company is not prohibited from making any of the political expenditures it makes. Furthermore, if a company does make an ad, the bill requires the CEO to appear in the ad and have a disclaimer that says, “I am so and so and our company supports this ad,” just like political candidates have to do. These are not the types of provisions that are likely to encourage a lot of CEOs to engage in this kind of advertising. Although I’m sure that Boone Pickens will still be appearing in a lot of his ads.

What this suggests is that we are trying now to address one problem by creating others. I think particularly the differential treatment this would give to corporations, the attempt to in some ways try to limit corporate spending by creating these categories of companies, are going to create problems that are unlikely to withstand judicial scrutiny. It is going to be difficult to uphold these provisions in court simply because the Court has ruled that spending is protected under the First Amendment and that spending conducted independently poses no risk of corruption. As long as that’s the basic principle, I think its going to be very difficult to get any of the restrictions through the courts.

As a result, the current effort shows us a couple of things. First, right now the major changes in campaign finance are occurring in the courts, not in legislatures. There are a large number of cases in federal court now, building on Citizens United to try to reduce other regulatory aspects of campaign finance law. The court, from one perspective, has given us a much fuller, more robust conception of First Amendment liberties in recent cases, and in some ways has brought some consistency to the law by determining that everyone has a right to spend money independently expressing their political viewpoint. There’s no reason to sequester out corporations or labor unions. From another perspective, however, the Court has
moved too far in favor of the First Amendment and is much more skeptical towards regulation. This is going to make it very difficult for advocates of campaign finance reform to maintain some of the restrictions that have already been adopted.

The plus side of this debate has been the fact that it is finally revealing the need for greater disclosure and transparency in the system, and we now have the Congress actually moving toward creating better disclosure and transparency in political spending. Right now we have too many black holes in the system where money can go to be spent on campaign activity that never has to be reported to the public. The new legislation would help address that problem. If it does not, it will be very difficult—if not impossible—to find out where some of the money is coming from and what it is being spent on. If corporations and labor unions decide to spend more money, one of the ways they are likely to do so is by giving it to their trade associations, giving it to other political committees, giving it to organizations like Americans for Job Security, and having those groups spend the money. The only way to know whether they will be backed by labor funding or corporate funding or individuals is to have new disclosure laws.

The third aspect of the current debate worth highlighting is that it shows the frustration and futility that advocates of campaign finance reform are now experiencing in pursuing efforts to try to limit spending in federal elections. Given the fact that any organization can always spend unlimited amounts of money—and now unregulated amounts of money in terms of the size of any contribution—independently, it makes it very difficult to try to frame a campaign finance regime that seeks to limit or control from the top down. The current debate and the DISCLOSE Act make clear that efforts to try to squeeze from the top down are inevitably problematic. What Congress should really be doing is looking at ways to build from the bottom up, looking at ways to get more individuals involved in the financing of campaigns, to get more small donors involved, and to try to provide new incentives for more civic engagement in the financing of campaigns.
We have the technology available to encourage broad participation in elections, to involve millions of people in donating to campaigns. The Obama campaign gave us some insight into that. We saw it with the Scott Brown election in Massachusetts. There a candidate who at the beginning was given little chance became a contender who – believe it or not – in the last couple of weeks in his campaign raised twelve million dollars, largely as a result of people making contributions from around the country over the Internet. There is a possibility now to create a system where we place more emphasis on individuals and small donors and build from the bottom up. But to do that Congress has to change its orientation and worry less about how to impose new regulations to try to get the genie back in the bottle. Instead, Congress should seek means of promoting broader civic engagement with the tools that we now have available to us. Accordingly, one of the things that I have been working on in recent months is looking at different ways to encourage more small contributions in the political process, as opposed to ways to create new regulations that just try to squeeze down at the very top.

That’s where we are. The bill has been passed out of committee in the House. I expect in the next couple of weeks you will be reading a lot about this because the Congress, at least the Democratic leadership, is trying to get this bill passed by July. They want to try to put this bill into effect before the fall general election. So it has been put on a very fast track. I expect that once this gets to the Senate, there will be some wrangling over the disclosure provisions and over the new restrictions. That will be something you will want to pay attention to. With that, I will end these opening remarks and as I said, I’m happy to answer any questions you might have on campaign finance.