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Opening the Political Dam: A Call to Free Speech Reform in Wyoming

by Benjamin Barr

"The Framers knew that free speech is the friend of change and revolution. But they also knew that it is always the deadliest enemy of tyranny."

Justice Hugo Black[1]

EXECUTIVE SUMMARY

Americans are guaranteed the freedom of speech. Even those who cannot quote the First Amendment instinctively understand that the government has no place controlling the thoughts and words of any group or individuals. But in Wyoming, the state Election Code imposes real burdens – demanding individuals register and report with the state before speaking, demanding that but miniscule amounts of money might be spent to support favored groups and candidates, demanding the surrender of constitutional rights.

These laws are like many regulations in Wyoming: instead of protecting individuals, they insulate a certain industry—in this case, the political class—from competition. For a state that prides itself on having a citizen legislature and politicians who are in touch with their constituencies, Wyoming law goes to great lengths to give advantage to incumbents, entrenched political parties, professional lobbyists and other political players who can navigate the system.

Free speech means protecting the robust exchange of ideas on all topics, and politics should be no exception. This issue of the *Liberty Brief* offers solutions to making Wyoming a leader in free political speech, a state where citizens may easily challenge politicians and political players.

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INTRODUCTION

What kind of state is Wyoming, and what does it dream to become? In many ways, Wyoming stands proud as a national leader, both because of its historical achievements and its current ranking as the best run state in the Republic.[2] But when it comes to the protection of constitutional liberties, Wyoming evinces a laggardly complex. This paper concerns itself with simple issues that are usually made entirely too complex: Should Wyoming put restrictions on how, when, and what people may say about candidates for public office or should the people decide these issues in their own sovereign capacity? The First Amendment suggests an easy answer to this question, favoring the uninhibited flow of ideas that guard our proverbial American marketplace of ideas where democracy may thrive.

This white paper illustrates the tangled mess of campaign finance laws contained in state law books and conveys how they inhibit free speech and electoral competition in Wyoming. Adhering to first principles that give heightened protection to First Amendment speech and associational liberties, this paper calls for the liberalization of the state's dense election law, letting grassroots organizations speak more robustly, and permitting a free people to speak as they see fit without bureaucratic red tape gagging their mouths. The paper concludes with a principled question to members of the Wyoming Legislature: Will they embrace the fullest protection of free speech and association, or continue to follow the national pack, frightened of electoral competition and diverse ideas?

On January 21, 2010, the United States Supreme Court released one of its most favorable rulings for free speech in the history of the Republic—*Citizens United v. Federal Election Commission*.[3] Prior to *Citizens United*, the federal government regularly banned grassroots groups from speaking out about the merits of candidates for public office due to the operation of the Bipartisan Campaign Reform Act. The Wyoming Liberty Group played a defining role in the outcome of *Citizens United*, nudging the Court to fundamentally shift its free speech jurisprudence back to one whose first focus is the preservation of that inimitable liberty. As a result, we offer this paper as a starting point for fundamental campaign finance reform in Wyoming for the state to embrace competitive, speech-friendly, and open election systems.

Alas, Wyoming—a state enshrined with a custom and culture dedicated to liberty and the rule of law—retains several unconstitutional statutes that harm First Amendment liberties. Wyoming residents who gather together to do an intrinsically American activity—speak out about politicians—must first register and report with the state. The government also places draconian limits on how much money people may spend to support candidates they like, but places no limits on entrenched political parties. This proves constitutionally infirm, at best. Unless one manages to wade through the various blockades, legal confusion, and stacks of paperwork, only the most able and politically connected can effectively speak out

against political candidates or mount effective campaigns in Wyoming. The result is a system that effectively blocks dissent, runs afoul of the Supreme Court's instructions in this area, and thereby limits free speech and competitive elections in Wyoming.

Through the recommendations offered in this paper, the Wyoming Liberty Group provides steps to secure the fullest protection of free speech and association. This white paper signals three areas of reform where Wyoming should provide greater protections for speech and associational rights than the minimum demanded by the Constitution. In doing so, Wyoming can do more than merely catch up with a technical ruling of the U.S. Supreme Court. It can usher in the state as a national beacon for free speech and political competition. Through the liberalization of contribution limits, enhanced donor privacy, and streamlined reporting, Wyoming can establish the surest safeguards for open debate and political competition in the Republic.

I. A Matter of First Principles: The Wyoming Liberty Group Approach

The Wyoming Liberty Group (WLG) anchors its research and publications in eight fundamental principles commonly attributed to the well functioning of free societies.[4] The first of these includes a respect for individual dignity and sovereignty. This establishes that individuals are capable of reason and action based in moral agency, but only when the state is sufficiently disengaged from interfering in that agency.[5] As Justice Jackson once remarked, "The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error."[6] A corollary of this first principle is respect and protection for independent and voluntary associations, for it is within the very act of association that average Americans are able to pool their resources and amplify their voices to be heard.[7] Without the consistent protection of both of these liberties, civil society falters.

One might very well ask whether the degree to which Wyoming protects speech and associational rights matters. After all, Wyoming embraces strong western ethics and values. Dedicating itself to local custom and culture, it may be presumed that the state affords sufficient breathing space for the exercise of these basic civil liberties. This presumption would be unfounded, given that Wyoming has largely lost sight of founding principles related to the import of the First Amendment. Instead of leading, it has followed the direction of many other states that view the exercise of these basic liberties more like a suspicious activity and less like a sacrosanct right. This process has gradually diminished the protective function of the First Amendment in safeguarding civil society—something most Wyoming residents ought to share great concern about.

Since the inception of the American Republic, the preservation of free speech and association has been the "very foun-

dation of constitutional government."[8] In the same manner, the U.S. Supreme Court has long recognized that these freedoms represent the cornerstone of "nearly every other form of freedom."[9] Free societies trust their citizens to criticize, debate, or applaud their public officeholders while authoritarian regimes stymie dissent. It is "only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."[10] Because of this principled difference, the protections offered under the First Amendment should be viewed as the indispensible condition for the preservation of individual liberty and the well functioning of the Republic. Justice Thomas has echoed the need for serious anchors of protection for free speech as well:

> The Founders sought to protect the rights of individuals to engage in political speech because a self-governing people depends upon the free exchange of political information. And that free exchange should receive the most protection when it matters the most-during campaigns for elective office. "The value and efficacy of [the right to elect the members of government] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively."[11]

What began as a constitutional roar has quieted to but a whisper as the First Amendment's promise to secure free speech in absolute terms has waned. Through numerous state-driven emergencies, exceptions to the scope and strength of the First Amendment have come to be accepted, even embraced, in modern political climates. Fighting words, incitement to riot speech, symbolic speech, and communications occurring over regulated airwaves have all come to receive little or no constitutional protection.[12] Perhaps these exceptions are called for in periphery areas of speech. But when it comes to political speech, an area the Supreme Court has referred to as the core of the First Amendment, any such exceptions receive heightened suspicion. Until just recently, political speech underwent a progressive atrophy; courts recognized less and less protection of communications that discussed the merits of candidates for public office and related public policy concerns.[13] Even today, spectral fears about the "appearance of corruption" are sufficient to quell some types of political speech.[14] Should we, as a nation, really be so willing to sacrifice liberty because our incumbent officeholders mutated the concept of civil dissent into an act of corruption?

Ideological interests of all varieties have sponsored assaults on the protections promised under the First Amendment, contributing to its shriveled state. In more recent days, the frenzied drive to somehow cleanse public political debate of "impure" speech has proven shockingly popular. And while this movement

seems repulsive today, notions of eradicating impure speech or politically offensive communications are nothing new. From the Archbishop of Canterbury and multitudes of Puritan dissenters, licensing laws, purification edicts, and the emotional desire to cleanse opposition speech proves all too common in human history.[15] Naturally, those advancing speech-cleansing laws do not advertise them as such. These speech bans are usually marketed with great emotional fervor and attach to other important societal concerns like promoting patriotism, ensuring fair elections, or dismantling hate speech on college campuses—all at the expense of undoing the very cornerstone of individual liberty in the U.S. Constitution.[16]

The Wyoming Liberty Group leads policy discussion with a firm anchor to established first principles. In that sense, WLG supports the full exposition of competing positions in a traditional marketplace of ideas. As recognized by the Supreme Court, however "pernicious an opinion may seem, we depend upon its correction not on the conscience of judges and juries but on the competition of other ideas."[17] There is great power in that statement; by relying on the competition of other ideas, it is a free people who must inform themselves, make accurate judgments, and obtain truth. After all, only an individual can do that for himself. It is never the proper role of government to suppress, equalize, or modify competing speech.[18] In today's political climate, both within Wyoming and without, government has seized the crucial role that private associations and individuals must assume in determining truth, leading to an increasingly paternalistic function. This then only atrophies a free people's capacity to reason and judge in their own right. Perhaps Justice Blackmun got it best in writing the majority opinion in *Virginia State Board of Pharmacy*:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.[19]

Fortunately, First Amendment jurisprudence is starting to move, once again, in just the direction suggested by Justice Blackmun.

a. Taking a Principled Position in *Citizens United*

The Wyoming Liberty Group shifted the Court's First Amendment jurisprudence considerably in favor of free speech during the *Citizens United* challenge.[20] On August 18, 2008, the Supreme Court officially docketed the *Citizens United* challenge to portions of the Bipartisan Campaign Reform Act (BCRA), popularly known as McCain-Feingold. The case began as a narrow and uninspiring challenge to the Act. The crux of the Citizens United appellant's early challenge was to ask the Court to provide an exception to the speech banning effects of the BCRA because the appellant's speech was "Video on Demand" and consequently did not pose the same problem of

"corruption" as other forms of political speech. While the early question introduced by *Citizens United* was quite circumscribed, the case took on a new dimension after the Wyoming Liberty Group and others called on the Court to fundamentally reassess the facial constitutionality of McCain-Feingold and the Court's earlier decision to uphold its constitutionality in *McConnell v. FEC*.[21] Moving the Court to reverse itself on key precedent, especially of recent origin, is no easy task. Due to the effect of the doctrine of *stare decisis*, courts understandably place high importance on not disturbing earlier holdings.[22]

During the Supreme Court's consideration of *Citizens United*, a throng of parties with vested interests in the "campaign finance reform" movement led public image campaigns decrying the effect any reversal of precedent would have on the American electoral process. Incredible pressure was levied against the high court to preserve the status quo and leave existing precedent undisturbed. The Wyoming Liberty Group filed two briefs in the challenge to help give support to the Court's principled need to reverse earlier precedent and otherwise open the floodgates of free speech. In its first brief, WLG illustrated the vague nature of the Federal Election Commission's regulations that were guaranteed to stymie public debate. It also demonstrated the FEC's penchant for contradiction—itself being unable to apply its supposedly easy-to-understand regulations in a way that average citizens could comprehend. The Wyoming Liberty Group went so far as to label the FEC's complicated speech test as a "two factor, eleven element balancing test"—a term that stuck in the Court's mind when it relied on WLG's brief in its opinion.

In its final brief, the Wyoming Liberty Group went a step further to illustrate that the Court itself was the responsible progenitor for government bodies inventing just these sorts of damaging speech tests. Citing more than one hundred years of examples, the WLG brief had an uncharacteristic tone compared to most legal documents before the Court—it called on the Court itself to reform its belief in speech balancing and rationing in sharp language. In what has come to be known as the Roberts Court—one marked by consensus and judicial minimalism—the result in *Citizens United* was a strong win for reclaiming the purity and truth of the First Amendment.

b. Designing a Better Speech Trap

Supporters of so-called campaign finance reform never lead their cause with an open admission about quelling free speech. Reform advocates rely on emotional concerns about corruption, or if that will not do, the hazy "appearance of corruption," as bases for limiting speech. It will also be assured that government bureaucrats, speech commissions, and judges possess the right kind of wisdom for balancing, weighing, and considering the relative merits of conflicting speech. This process, we are assured, will lead to pure and clean speech as a result, driving impure and unclean speech away. By the time *Citizens United* was before the Supreme Court, judges had largely bought into these notions. In response the Wyoming Liberty Group asked the Supreme

Court to examine its own penchant for playing the role of speech czar before condemning government agencies:

> Some justices of this Court may be aggravated with the FEC and other speech commissions when they invent vague, lengthy speech rules that leave citizens confused and unable to speak easily. Members of this august bench have flung about weighty jurisprudential Rorschach tests for some time, asking whether speech could be banned because of self-styled "compelling" justifications, *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238, 252 (1986), or upholding "significant interferences" of speech due to "sufficiently important interests," *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), and examining when, and how much, "empirical information" might compel this Court to ration speech for citizens' best interests, *id.* (Breyer, J., concurring). Behind the mysterious allure of black robes, only the justices of this Court know how to soothsay to foresee when free speech turns into banned speech.

The problem the Supreme Court faced rested not in the intellect of its members or faulty starting premises ("Congress shall make no law…."), but in the institutional values held by some members of the Court. As illustrated in the WLG briefs, the Court had already been in the business of developing weighing and balancing tests for discerning "appropriate" speech since election law matters received serious focus in 1976. What the Wyoming Liberty Group communicated was based in first principles: No matter how noble the intent of the Court, it could not balance speech in a justified or even workable manner. As elucidated more directly in the second WLG brief:

> Given the historical record of the powerful few seeking to silence unconventional messages, and the repeat failure of any government agency to administer speech standards in an equitable manner, this Court cannot justify its continued reliance on slippery speech standards left to the whimsical discretion of bureaucrats. "Subject opinion to coercion: whom will you make your inquisitors? Fallible men, governed by bad passions, by private as well as public reasons." Samuel Eagle Forman, THE LIFE AND WRITINGS OF THOMAS JEFFERSON (1998). Speech commissioners possess their own prejudices and ideologies when making decisions about whether citizens might speak freely. Trusting fallible men, each and every one of us, to weed out caustic, mean, or unfitting speech is intrinsically impossible.

No longer do two-prong, eleven factor speech tests rule the day. No more weighty philosophical discussions decide whether certain speech will be afforded first class, second class, or jurisprudential cheap seats protection. The WLG approach helped tip the Court toward a jurisprudence that valued the natural rights of free speakers first, and the concerns of panic-stricken government speech bu-

reaucrats second. With some fortune, the lessons of *Citizens United* are taking hold. Further barriers to open political competition and political speech are being torn down. Wyoming now stands ready to embrace reform to make it the most speech-friendly state in the Republic, if it so chooses.

II. Free Speech: A Cause of Celebration, not Concern

For most people, day-to-day speech and public debate is a given. We might not very much enjoy the whole array of speech we sample, but we have ample remedies against bad ideas. Turning off the television, making a contribution to a favored political candidate, or even communicating our own ideas shapes the very culture we live in. However, when speech regulators process political speech, they view it as a nasty problem needing some solution or oversight—usually their own. When citizens hear or receive such speech, they process the arguments involved, make best judgments, and move on in their day. Of course, not all speech is welcome, tasteful, or well-articulated. The mad prophet of doom on the street corner, the family members who e-mail urban myth upon urban myth, and last minute electoral phone calls prove almost exhausting at times. But as a free society, we tolerate the outer fringes of speech to ensure its very core remains protected. As stated by the Supreme Court, the First Amendment "protects a controversial as well as a conventional dialogue."[23]

In authoritarian regimes, something markedly different happens to pesky and annoying speakers: They disappear, die, or are muzzled for the rest of their lives. After reform candidates lost during the Iranian 2009 elections, existing officeholders grew tired of their subjects' non-stop chorus of dissent and criticism. From the perspective of the Iran's governing class, dissent was of offensive and scandalous origin, and played no favorable role in electoral debate. In the wake of Iran's forced purification of dissenting opinions, we would do well to observe our Republic's foundational principles to prevent such speech-cleansing efforts at the local level.

a. The Situation in *Citizens United*

One would be hard pressed to find an average American who would think the US government banned grassroots organizations from putting out documentary films about presidential candidates. One would be equally hard pressed to find someone who believed the US government thought it possessed the power to ban books. But as briefings and oral arguments developed in *Citizens United*, it became clear that the answer to both inquiries was in the affirmative.

At issue in *Citizens United* was the effect of law that banned "electioneering communications"—part of the controversial McCain-Feingold legislation. As described by Justice Kennedy:

> The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the

> election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under §441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U. S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.[24]

While the Supreme Court has never given absolute protection to speech under the First Amendment, its protection has waned with exceptions over time. Prior to more recent rulings in the Court's election law jurisprudence, the government could target but a very narrow class of electoral speech consistent with the demands of the Constitution. Under the Court's seminal campaign finance reform case in 1976, *Buckley v. Valeo*, limited regulation of so-called express advocacy was permitted, while issue advocacy could not be regulated.[25] Express advocacy communications were those that in express terms advocated the election or defeat of a clearly identified candidate. Issue advocacy communications were all other communications falling outside of express advocacy. Lastly, the Court viewed contributions—or the giving of a gift or money to a candidate for office or his campaign committee—as having intermediate protection under the First Amendment.

In the wake of *Buckley*, the Supreme Court generally protected core political speech with its most serious level of review—strict scrutiny—recognizing that First Amendment protection was at its zenith in such instances.[26] However, in 2003 the Supreme Court decided *McConnell v. FEC*, which upheld the validity of McCain-Feingold, based, in part, on the Court's premise that Congress could distinguish between "sham" and "genuine" electoral advertisements and appropriately ban or regulate these "sham" communications.[27] This sea change in jurisprudence—transforming the Court from its improper role as "guardian of the public mind" into one generally protective of free speech—took time and effort to accomplish.

Carrying a zeal for cleansing the electoral landscape, the Federal Election Commission promulgated regulations to better sort and separate "permissible" from "impermissible" speech. After a series of convoluted rulemakings, the FEC found its protracted speech regulations stricken as unconstitutional before the Supreme Court in *Wisconsin Right to Life v. FEC*.[28] In that case, the operation of McCain-Feingold prohibited a Wisconsin pro-life organization from airing television advertisements about judicial filibusters while mentioning the names of Senators Kohl and Feingold. The Court elected to spare the FEC the full strength of its wrath, is-

sued a limited ruling about the particular issue before it, but warned the Commission that it must adopt simple, speech-friendly standards in conducting its mission.[29]

Along the way, the Commission pled with the Court for its need to retain "flexible" standards to weed out bad speech, to sanction its broad investigative and enforcement authority, and to grant deference to its speech-sniffing operations. In the case of the FEC, "flexible" usually meant ill-defined and complicated, leading people to need to trust the judgment of six speech commissioners sitting in Washington, DC to determine the fate of good, bad, and ugly speech. Failing to learn any lessons from its string of losses, the FEC set out once again to conduct a complicated set of rulemakings about how best to monitor and regulate impermissible electoral speech, leading to its newest and most grand failure in *Citizens United*.[30]

The greater body of election law cases leading up to and after *Citizens United* contains a simple lesson: Favor free speech and association.[31] Although the Supreme Court's treatment of the First Amendment has been incoherent, its past reliance on balancing tests and intermediate protection of political speech is over. With the Court's new trend in robustly protecting First Amendment rights, states would do well to reform and open key areas of liberty before being faced with litigation doing just the same.

b. Myths of the Reform Lobby

It takes talented marketing to move a nation away from principled truths celebrating the role of free expression and association. For some time, a professional reform lobby has waged just such a public relations war from Washington—convincing Americans that money spent on political speech is somehow tainted. Indeed, when the Supreme Court held the *Citizens United* opinion in delay, organizations like Democracy 21 and the Brennan Center for Justice proclaimed that numerous calamities would occur if grassroots organizations and corporations were permitted to speak freely.[32] Over time, that which Americans celebrated as the most sacred of speech has been deemed the profane—common citizens gathering together to speak out about issues of the day.

The Supreme Court's move away from speech-protective rules to speech-weighing rules happened gradually and with the help of considerable influence. In 1998, the Pew Charitable Trusts considered funding a "Buying Time" study addressing federal campaign finance laws with a guarantee that it would be "abandoned midstream if the results being obtained were not helpful to the cause for more stringent campaign finance regulation."[33] Further, New York University's 2000 "Buying Time" project promised that it would be designed to achieve reform—that is, the silencing of political debate.[34] These influential studies helped shape the core of this Court's reasoning in *McConnell v. FEC*, gave further life to paternalistic exceptions to the First Amendment, and reinforced this Court's belief that it could devise a judicial formula to somehow sort "sham" speech from "pure" speech.

In 2002, Professor Stephen Ansolabehere and others examined the precise question in controversy—were large sums of money somehow buying up the American electoral process? Their study, *Why is There so Little Money in U.S. Politics?*, conducted at the Massachusetts Institute of Technology, provided unexpected results.[35] In conducting a rigorous examination of existing studies, the professors concluded that there is little relationship between contributions and legislative voting behavior. For example, defense firms and individuals connected to these firms gave around $13.2 million in 2000 to candidates and parties, but the U.S. government spent around $134 *billion* on defense procurement contracts in fiscal year 2000. Given the heightened value of policies at stake, it would make sense to witness maximized giving by firms and individuals to procure favorable defense contracts. Oddly enough, these firms and individuals were "under-giving" in this sense, or not giving at all—exposing the fallacy about common assumptions regarding the effect of contributions. The underlying answer behind all this is simple: It is the people, not special interests, who hire and fire public servants. When freedom is allowed to work and our constitutional compact honored, the system provides just results.

Even in the wake of *Citizens United*, some organizations have realized that on occasion less speech is more. JP Morgan and Goldman Sachs both joined a growing chorus of financial powerhouses who will not spend corporate funds on independent expenditures for political campaigns.[36] Interestingly enough, in the wake of one of the most fundamental sea changes for free political speech, some actors have elected *not* to speak.

The battle between a small fear-generating reform lobby in Washington, DC and those who stand by the guarantees of the First Amendment has lasted for some time. While it is true that a small minority of free people will abuse free speech or attempt to game the system, our natural remedy is to combat bad speech with good and hold those guilty of more contemptible offenses responsible under the law through existing ethics and criminal law provisions. To do otherwise is to undermine the First Amendment in the pursuit of the impossible: A "cleansed" political debate.

III. Realizing Competitive Elections in Wyoming: Practical Steps Guiding Reform

Like many states, Wyoming employs a lengthy election code, found at Wyoming Statutes 22-1-101 through 22-1-102, along with a supplementary patchwork of additional election related laws.[37] Wyoming's election laws contain a number of rather standard items—declaring the Secretary of State as chief election officer, setting dates and timing for voting practices, and establishing voting districts and polling practices.[38] The Wyoming Election Code also contains constitutionally questionable laws that infringe on the First Amendment rights of individuals. The question that remains before the people of Wyoming is whether they desire to limp along in a state that minimally protects speech and association, or whether they will take a principled lead to secure these liberties.

It has become all too popular to support bans against irritating political speech while forgetting just how important it is that every American retain their right to speak out about public policy and candidates for office.[39] Even Wyoming's Election Code demands that citizens register and report with the state, even if just two people come together to "influence" or even "attempt[] to influence" the election or defeat of candidates for public office. Is there something particularly suspect about speaking out about candidates for public office?

Wyoming law is yet further intrusive, as individuals must register and report with the state if they make any attempt to influence initiatives, referendum petition drives, or ballot propositions.[40] Beyond this, Wyoming is a latecomer to reforming its election law in the wake of *Citizens United*, having failed to pass reform in its legislative session immediately following the release of the Supreme Court's opinion.[41] This failure to act left speech-banning rules in place that prohibit grassroots organizations from speaking out about popular issues of the day related to candidates for public office. In a Republic premised on the notion that the domain of free expression is safeguarded from intervention by the state, Wyoming's laws remain an unfortunate curiosity.[42]

Given the remarkable import of securing First Amendment guarantees, this section identifies several areas existing within Wyoming election law that should be modified or eliminated to reclaim the most secure footing for freedom of expression and association.

a. Define and Legalize Contributions

In Wyoming, the state government imposes a daunting series of restrictions, bans, and limits on how or if residents may provide contributions for political candidates or political ideas. Under Wyoming Statute 22-25-102, regular groups of citizens may not contribute money or items of value to candidates.[43] When acting alone, citizens may contribute to candidates or candidate committees, but only up to the amount of $1,000 per election.[44] By means of contrast, individuals may contribute up to $2,400 in federal elections per candidate per election with an overall limit of $45,600 to all candidates.[45] Over the course of two years in Wyoming, no individual may contribute more than $25,000.[46] To ensure compliance with the law and otherwise stifle political speech and association, the State of Wyoming imposes a hefty civil penalty against would-be speakers up to $10,000 per violation of Wyoming election law.[47]

i. The Constitutional Implications of Contributions

The Supreme Court affords political contributions an intermediate level of constitutional protection.[48] The *Buckley* Court explained that state contribution limits will be stricken when they prevent candidates from "amassing the resources necessary for effective [campaign] advocacy."[49] Recognizing the harms that contribution limits can inflict on the electoral process, the Court has reasoned: "contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent office-

holders, thereby reducing democratic accountability."[50] Where contribution limits reign supreme, incumbent officeholders are protected due to less rigorous and competitive elections.

In *Nixon v. Shrink Missouri Government PAC*, the Court detailed its constitutional standard with respect to contributions in noting:

> "We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." It has, in any event, been plain ever since *Buckley* that contribution limits would more readily clear the hurdles before them. Thus, under *Buckley*'s standard of scrutiny, a contribution limit involving "significant interference" with associational rights, could survive if the Government demonstrated that contribution regulation was "closely drawn" to match a "sufficiently important interest," though the dollar amount of the limit need not be "fine tun [ed]."

More recently, the Supreme Court struck down legislative efforts to restrict political contributions in *Randall v. Sorrell*.[51] In *Randall*, the State of Vermont sought to restrict contributions to $200 per election per candidate. At the time of the challenge, Vermont's contribution limits were the lowest in the nation and worked a cognizable injury against residents in the state, leading the Supreme Court to invalidate them.

ii. Wyoming Does not Define a "Political Contribution"

Wyoming election law places limits on what it terms "political contributions," but never defines that phrase. By contrast, and perhaps an example of statutory overkill, federal election law defines what constitutes a "contribution" at 28 U.S.C. § 431(8). Significantly, federal law includes *exemptions* to the definition of a contribution under the law.[52] This is important: Would-be contributors are offered objective safeguards in the law so they may more freely and openly engage in political debates and campaigns.

Examining the practical impact of Wyoming's hazy definition of "political contributions" illustrates how such undefined terms cause harm for free discussion. Three ranchers decide to form the "Free Grazing PAC" and register as a political committee under Wyoming law. This organization would enjoy speaking about issues related to mismanagement of public lands. It would also like to publicly support candidates who favor or support grazing rights. And it would like to speak to issues raised by environmental advocates about western land policy. To do so, the PAC would need to be incorporated as a legal entity, register with the Wyoming Secretary of State as a political committee, file regular reports as to its spending and operations, and otherwise comply with the law.[53] Beyond facing a bevy of paperwork, the three ranchers would have to decide how state bureaucrats would legally classify the money they give to the PAC. Remember—just one error in miscalculating how the government might interpret your "political

contribution" to an organization can lead to a $10,000 penalty per infraction.

Assuming three ranchers come together to create the "Free Grazing PAC," several logistical problems occur with Wyoming's election code. If Rancher A donates $5,000 to the PAC because he wants to see eminent domain reform changed and also favors Candidate Jones, how much of that money is a "political contribution" subject to limits under the law and how much is for the support of the organization? Without a definition of "political contribution," it is quite possible that the state might view the entire donation of funds as a "political contribution" (and thus illegal). It is possible, too, that Wyoming bureaucrats might decide an allocation formula (known only to them) to decide how to legally interpret the giving of money to a non-profit or PAC. Remember that a $1,000 contribution limit is enforced in Wyoming. So, should the state decide that the $5,000 donation is really $2,500 for eminent domain reform and $2,500 to support Candidate Jones, Rancher A then violated state law as well, subjecting him to as high as a $10,000 penalty.

If Rancher B gives $10,000, but only wants the money to support the PAC's discussion of water rights, and water rights happen to be a popular issue in the upcoming election, is that money a "political contribution," subject to state limits, or is it uncapped? Remember that the Wyoming Election Code's central test for deciding whether money is a contribution is whether the funds are given as "election assistance to aid, promote or prevent the nomination or election of any candidate or group of candidates." With such broad statutory language, the giving of $10,000 to support water rights reform in an election season when water rights reform is a hot topic might just be viewed as "election assistance" to "aid" the election of a candidate. Read in this light, Rancher B's giving of $10,000 becomes an illegal political contribution under the law, subjecting him to hefty fines.

Lastly, if Rancher C provides $15,000 in a donation to the PAC with an oral understanding that $5,000 will be used to support pro-Second Amendment candidates and $10,000 will go toward personnel, will that private agreement be honored by the state? Given the breadth of the language employed in the Wyoming Election Code, as discussed above, there is little security for private parties to make their own arrangements for managing their discussion of public issues.

Other states have gone the way of Wyoming as well, offering definitions of "contribution" that were open-ended, vague, and ultimately stricken through judicial review. For example, the Sixth Circuit United States Court of Appeals held that Kentucky's campaign finance system violated the Constitution in offering a constitutionally suspect definition of "contribution."[54] There, Kentucky defined a contribution as any "[p]ayment, distribution, loan, deposit, or gift of money or other thing of value…." (including the giving of money by a candidate to his own campaign).[55] Because the state's definition of "contribution" included a host of constitutionally protected conduct, the courts invalidated Kentucky's overbroad and

vague definition of contribution.

In the case of Kentucky, the state tried at some minimum level to define what constituted a contribution. In Wyoming, the state has done just the opposite—leaving the term open for political manipulation and state control. As illustrated earlier, ordinary citizens cannot know in advance how to structure their organizations when they wish to speak. Since Wyoming places caps on how much money one may offer as a "political contribution," but does not define the term, residents must haphazardly guess how much they can spend and what will be tallied as a limited political contribution and what will not. State bureaucrats might get it right and honor the Constitution in interpreting what constitutes a contribution. But the point is that no speaker should have to play constitutional-roulette to see whether First Amendment liberties will be protected. These types of confusing laws violate a basic norm of constitutional law: Statutes must provide a "person of ordinary intelligence fair notice of what is prohibited."[56] Wyoming election law does not comply with this standard, and thus runs afoul of the Constitution.

The uncertainty contained in Wyoming election law causes a second harm. Vague laws permit state bureaucrats to decide, often by whim, what kind of money is a "political contribution" (and thus limited by the state) and which is free money. When it comes to vagueness and the First Amendment, the Supreme Court has held states to strict standards, noting: "[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."[57] Thus, Wyoming election law suffers from another fundamental defect in that it traps the "innocent by not providing fair warning."[58] This also encourages a related vice: Vague laws encourage arbitrary and erratic convictions.[59]

In the end, by not defining "political contributions" and by including caps on that undefined term, the result of Wyoming election law is to chill speech and association. Ordinary citizens, when faced with the decision of how to interpret just what constitutes a "political contribution" will err on the side of less speech or not speaking at all. Or as the Supreme Court stated most recently in *Citizens United:* "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day."[60] Just the same, Wyoming residents should not be forced to guess or hire election law attorneys just to decide what constitutes a "political contribution." It is of little avail to claim that people are free to speak, but only after they have received nods of approval from bevies of attorneys and government agents.

Fortunately, there is an easy solution to Wyoming's problematic usage of "political contribution" in its election law. The state should amend the Wyoming Election Code to include a narrow definition of "political contribution" that designates clearly to would-be participants in Wyoming politics the exact scope and

reach of the law. In that sense, a modified version of the Federal Election Campaign Act's definition of a contribution marks a good starting point for giving precision to the term, such as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of the election or defeat of a clearly identified candidate."

Just as important, Wyoming should take care to include exemptions to its definition of "political contribution," making sure, for example, that the services of volunteers do not count as in-kind contributions or that money given to establish a political action committee is not treated as contributions just the same. Under the present legal landscape, individuals interested in getting active in the political process must guess which kind of donations might subject themselves to civil penalties and which they are free to make without state oversight and inspection. Taking the time to add clarity, precision, and give breathing space for protected First Amendment liberties would go a long way in curing existing defects in the Wyoming Election Code.

b. Wyoming's Contribution Limits are Unconstitutional

Beyond definitional problems, Wyoming election law enforces a $1,000 limit against individuals wishing to contribute to candidates for political office in the state.[61] There is also an aggregate limit in that individuals can give no more than $25,000 in political contributions. Believing it can somehow ration the amount of money flowing into an election, Wyoming places significant burdens on emerging candidates, competition, and free speech and association in the state. Some six states (Illinois, Missouri, New Mexico, Oregon, Utah, and Virginia) place *no limits* on contributions and another seven states (Alabama, Indiana, Iowa, Mississippi, Pennsylvania, North Dakota, and Texas) have minimal contribution limits. Together, there has been no showing that these thirteen states are somehow more corrupt, inefficient, or poor stewards of the public trust because of the free flow of money in state elections. Indeed, Virginia has routinely been ranked as one of the best-run state governments—all with no contribution limits in effect.

Wyoming law includes a broad prohibition against corporate contributions to candidates. That is, the local barbershop, the non-profit Boys and Girls Club, and Exxon alike cannot contribute any general treasury funds to a candidate. Thus, individuals composing such corporations must make contributions separately (and be capped at $1,000 per candidate) instead of being able to use whatever legal organization they belong to or own to efficiently to demonstrate support of that candidate. Presumably, there exists great concern that candidates sponsored by the Boys and Girls Club or Exxon would somehow become corrupt or otherwise tainted by such sponsorship.

The practical effect of Wyoming's contribution caps is easily demonstrated. An oft-cited rationale for contribution limits is that lowering the amount of money individuals may donate to a candidate eliminates corruption or its appearance in government. But money alone is nothing

to fear in the realm of politics and free speech. Nearly forty years ago, the distinguished professor Gordon Tullock asked the fundamental question: "considering the value of public policies at stake and the reputed influence of campaign contributions in policy-making, why is there so little money in U.S. politics?"[62] As discussed earlier, more recent research in the social sciences has illustrated that it is the people, not special interests, who hire and fire public servants. When freedom is allowed to work and our constitutional compact honored, the system provides just results.

When contribution limits are imposed, candidates regularly bemoan the time and effort they must spend on the phone and at fundraisers to raise the resources necessary to mount an effective campaign. There remains an obvious connection: When you place limits on how much people may contribute to candidates, those candidates will need to spend more time seeking out contributions. Eliminating contribution limits thus makes political campaigns more dynamic and efficient, allowing candidates to focus more time and energy on their constituents' needs or their official function.

Another important observation is that the act of giving a contribution to a political candidate or even a political action committee is a protected constitutional right. By contributing, one makes a symbolic expression of support for a preferred candidate.[63] And that act of donating is protected both as speech and association under the First Amendment. What is certain from the Supreme Court's treatment of contributions and their constitutional protection in *Buckley*, *Shrink-PAC*, and *Randall* is that states must afford protection and sufficient breathing room for them. In that sense, the Supreme Court has not distilled clear-cut criteria as to what will make a contribution limit invalid. It has, however, relied on five factors[64] in making such determinations:

(1) Do contribution limits effectively restrict the amount of funding available for challengers to run competitive campaigns?

(2) Do contribution limits impact political parties' abilities to help get their candidates elected?

(3) Do contribution limits negatively restrict the role of volunteers in the political process?

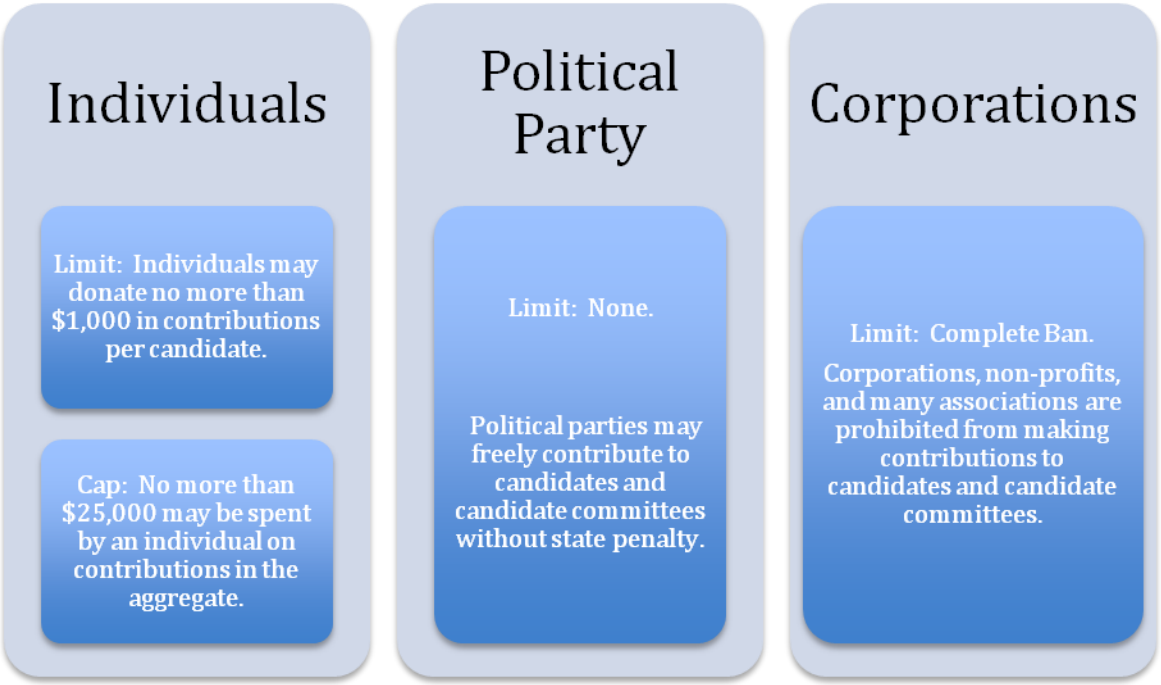
(4) Are the contribution limits indexed for inflation?

(5) Are there exceptional and unique factual considerations that would warrant the contribution limits in question?[65]

Analyzing the five factors as a whole illustrates that Wyoming's contributions limits are likely unconstitutional. As to the first two factors, Wyoming favors the freedom of political parties and, to some extent, political action committees, over the freedom of individuals when it comes to contributions. While individuals are capped at $1,000 per candidate and corporations and unions are absolutely barred from making contributions, political parties and PACs may make unlim-

ited contributions to candidates. This lack of symmetry in the treatment of capped individual contributions versus unlimited political party contributions is troublesome. More concretely, established and powerful political parties may donate freely, while emerging parties and candidates suffer from this uneven flow of money in Wyoming's electoral process. Under the third factor, since Wyoming does not define "political contribution," the actions of volunteers could easily be tallied as in-kind contributions, greatly dampening free speech and association. Moving ahead, Wyoming does not index its contribution limits for inflation, causing it to fail the fourth prong of this analysis. Lastly, it remains unclear that there are unique or exceptional conditions that would warrant Wyoming to impose nonsymmetrical contribution limits, capped at $1,000 for individuals, and entirely banned by corporations and unions. The chart below illustrates the practical effect of Wyoming's nonsymmetrical contributions in favoring the constitutional rights of certain groups, while completely banning others.

Table: Wyoming's Nonsymmetrical Contribution Limits



In accord with the Supreme Court's formula set forth in *Randall*, Wyoming's contribution limit scheme fails to pass constitutional muster. It favors established political powers that be, while diminishing the role of individuals, volunteers, and corporations in the political process. Amazingly, the concentrated powers of the Republican Party and Democratic Party may contribute as much as they wish to candidates while would-be emerging third party grassroots organizations and individuals acting alone may not. In Wyoming, what is deemed permissible for the politically established is illegal for all others.

As to Wyoming's $1,000 limit on individual contributions, it is likely this would fail the *Randall* analysis. Providing for inflation-indexed contribution limits significantly higher than the current $1,000 limit would provide minimal compliance with the Supreme Court's guidance in this area. However, an approach based in first principles that trusts everyone with their decisions about who to support, or not, politically would eliminate contribution limits by individuals in their entirety, allowing people to give and donate as they see fit in a free society.

Beyond this, Wyoming's odd adherence to contribution limits from individuals to political action committees seems especially unsupported. Under existing state law, an individual may not donate more than $1,000 to a candidate and no more than $25,000 in total contributions in a two-year period. Pursuant to the Secretary of State's Campaign Guide, this $25,000 limit applies to individual contributions to political action committees.[66]

In a recent challenge to the Federal Election Campaign Act, *Speechnow.org v. FEC*, the United States Court of Appeals for the District of Columbia Circuit held that contribution limits applied against individuals giving to a PAC were constitutionally invalid.[67] In doing so, the court relied on *Davis v. FEC*, which reasoned that a "contribution limit involving significant interference with associational rights must be closely drawn to serve a sufficiently important interest."[68] Where a group of citizens independently speak out about the merits, or lack thereof, of candidates for office, the court could find no government interest in retaining contribution limits against such organizations. Where governments place limits on what individuals may contribute to a PAC who wishes to produce independent expenditures, such contribution limits must necessarily fail as a result of the reasoning in *Speechnow*, *Davis*, and *Citizens United*. Given this trend, Wyoming's contribution limit applies to individuals against their donations to PACs must also necessarily be removed.

Under current judicial treatment of corporate contributions, Wyoming is under no compulsion to excise its corporate and union contribution ban, but it should anyway. Pursuant to current practices, corporations all of shapes and varieties take great time and planning to establish political action committees that make independent expenditures, produce issue advocacy, and provide campaign donations. But the result is a funneled and secretive process—with the creation of side-groups, affiliated PACs, and interlinking organizations. Under a "hydraulic theory" of campaign finance reform, money will always be present in the political process.[69] When one pushes money down in a given area, it will pop back up somewhere else. The key in a free society is to legitimize the act, make it open and transparent, and eliminate burdens and barriers to what corporations do already through their PACs. In that regard, Wyoming can wait for the eventual Supreme Court protection of corporate campaign contributions to candidates, or it can take a front and center lead in the nation, permitting corporate and union contributions while making its electoral process more competitive and transparent.

On the corporate front, a minimalist approach would at least permit non-profit corporations, like the locally Boys & Girls Clubs and small corporations to freely contribute to candidates they wish to support. Should the Boys & Girls Club of Casper favor a candidate that advances helpful juvenile reform and education programs, why should it be prohibited from assisting that candidate? Likewise, local barbershops, law firms, and the like are unlikely to rise the ire of suspicion in providing similar contributions to candidates for office. In any of these scenarios, traditional reporting requirements would be maintained, allowing the public to see who is giving and who is receiving such funds. Wyoming is encouraged to test the free waters of liberty and open up the spigot of political giving in the state.

c. Register and Report with the State?

According to Wyoming law, when two or more persons gather to criticize or applaud candidates for public office, they must register and report with the state.[70] In legal jargon, these people amount to a "political action committee" which is "two (2) or more persons organized and associated for the purpose of raising, collecting or spending money for use in the aid of, or otherwise influencing or attempting to influence, directly or indirectly, the election or defeat of candidates for public office, candidate's committees, or political parties, for support of or opposition to any initiative or referendum petition drive or for the adoption or defeat of any ballot proposition."[71] In other areas of the law, when government attempts to prohibit individuals from speaking before receiving state permission, courts deem this an unconstitutional prior restraint.[72]

When it comes to free speech, prior restraints are viewed as the "most serious and the least tolerable infringement on First Amendment rights."[73] A prior restraint is any action by a government body that restricts the communication of speech prior to its publication. In the Supreme Court's modern jurisprudence, any government scheme that makes the exercise of protected First Amendment liberties subject to compliance with complicated government regulatory programs equally constitutes a prior restraint. An example of this occurred in *Citizens United*, where Justice Kennedy noted: "These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit."[74] As a result of the Court's holding in *Citizens United*, government programs that impose delays, complexities, and burdens on speakers just because they elect to associate together must be deemed constitutionally void.

In Wyoming, state election law provides that a political action committee (PAC) must file a statement of formation with the state within ten days of formation. This statement must include the mailing address of the committee, as well as the residential address of the chairman and treasurer (who must be separate individuals under the law). Thus, to speak, individuals must sacrifice their privacy by submitting their addresses to the state

for public inspection. Further, if it is the case that the PAC wishes to support or oppose a ballot proposition, the PAC must signal this to the state in its statement of formation.

Wyoming election law requires several reports to be filed by PACs. These reports must include a list of contributions from individuals, other PACs, political parties, corporations or organizations, anonymous contributions, in-kind contributions, any existing loans or obligations, and unitemized receipts. Contributions received from individuals must divulge the name and address of the contributor in question. Beyond this, expenditures, too, must be reported—signaling to the state why and how you are speaking, and about what topics. Most of this information is then made publicly available through the Secretary of State's website, fully eradicating the privacy of any associations of citizens in Wyoming wishing to maintain their privacy while speaking out about political issues and candidates.

If there is a recognizable trend in campaign finance reform jurisprudence, it is toward deregulation and broader protection of enshrined constitutional liberties. Still, more progress must be had on this front. The Supreme Court has repeatedly upheld organizational and reporting requirements for political action committees based on a supposed government interest in providing the "electorate with information" about the sources of political campaign funds.[75] Even so, in the wake of *Citizens United*, the Court will be less likely to uphold obscure and imposing registration and reporting requirements just because citizens wish to band together and speak out about candidates. Certainly, under the *Speechnow* precedent, contribution limits to PACs making independent expenditures are invalid. In the near future, broad organizational registration, monitoring, and reporting will likely be scaled back or eliminated due to its intrusiveness and chill against would-be speakers.

Wyoming can take a principled stand to support the principle that a free people speaking freely are nothing to worry about. By doing away with political action committee registration and reporting requirements for all or most people, Wyoming would come one step closer to the commonsense notion that gathering together and speaking out are protected freedoms entitled to the greatest degree of protection, not the cause of concern for prying government eyes.

d. Wyoming Election Law: Half as Long and Twice as Free

As it currently stands, the State of Wyoming deploys a 21 page "Campaign Guide" so speakers might understand how to comply with the Wyoming Election Code. The Election Code itself weighs in at some 61,645 words or 268 printed pages, depending on pagination preferences. In addition, the Secretary of State offers numerous additional guides and informative documents on the law and the Attorney General's office also retains several advisory opinions detailing the complicated application and interpretation of the Code. In a state that values liberty and cherished constitutional freedoms, one wonders whether the Wyoming Election Code should be half as

long, making people twice as free as to their speech and associational rights.

The "where" of Wyoming goes in reforming its election law depends greatly on the substance of the first principles it adheres to regarding speech and competitive elections. Should Wyoming be a state that determines what kind of organizations might provide contributions to candidates for public office or let everyone have a say? Should Wyoming be in the business of micromanaging the receipts, expenses, and contributions held by candidates, PACs, and other entities, or should it open the field, retaining disclosure of contributions and otherwise honoring the privacy of private associations in the state? At their very core, these represent value choices on behalf of the Wyoming Legislature—either trusting people and private associations with liberty, and consequently liberalizing campaign finance laws, or not, and consequently retaining strict rationing rules on how people and groups may spend money and speak in elections. The size and scope of Wyoming's election law is a very real reflection of the degree of that trust today.

CONCLUDING THOUGHTS

Wyoming is something of an anomaly when it comes to free speech, competitive elections, and campaign finance reform. A state proud of its western heritage and liberty retains curious speech-quelling laws that make speaking out, competitive campaigns, and rigorous debate rather difficult. This paper suggests several key areas of campaign finance reform that would transform Wyoming from a state that follows the campaign finance reform pack into a national leader, trusting its people to speak and associate freely. To get there, state legislators must embrace a simple truth: The rugged and unrestricted exchange of ideas is nothing to fear because it ultimately produces the best government and returns constitutional liberties to their proper special status.

ENDNOTES

[1] Justice Hugo Black, first James Madison lecture at New York University School of Law (Feb. 17, 1960), *in The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

[2] *The Best and Worst Run States in America: A Survey of all Fifty*, 24/7 WALL STREET (Oct. 4, 2010), http://247wallst.com/2010/10/04/the-best-and-worst-run-states-in-america-a-survey-of-all-fifty/.

[3] Citizens United v. Fed. Election Com'n, 130 S.Ct. 876, 895 (2010).

[4] These principles are more fully described at: Core Principles, WYOMING LIBERTY GROUP, http://www.wyliberty.org/index.php?option=com_content&view=article&id=104:core-principles&catid=67:core-principle&Itemid=104 (last visited Dec. 29, 2010).

[5] Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.").

[6] Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 442–43 (1950).

[7] *See* NAACP v. Alabama, 357 U.S. 449 (1958).

[8] DeJonge v. Oregon, 299 U.S. 353, 365 (1937).

[9] Palko v. Connecticut, 302 U.S. 319, 327 (1937).

[10] Terminiello v. City of Chicago, 337 U.S. 1, 3 (1949).

[11]Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 411 (2000) (Thomas, J., dissenting).

[12] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Brandenburg v. Ohio, 395 U.S. 444 (1969); United States v. O'Brien, 391 U.S. 367 (1968); Fed. Commc'n Comm'n v. Pacifica Found., 438 U.S. 726 (1978).

[13] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), *overruled in part by Citizens United*, 130 S.Ct. 876 (2010).

[14] *Nixon*, 528 U.S. at 388.

[15] *See, e.g.*, LUKE OWEN PIKE, 2 HISTORY OF CRIME IN ENGLAND (1876); ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776–1791 (1983).

[16] *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); McComish v. Brewer, 2010 WL 2292213 (slip op.) (D. Ariz. 2010); Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357 (M. D. Pa. 2003).

[17] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 –40 (1974).

[18] Buckley v. Valeo, 424 U.S. 1, 49 (1976) ("But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (internal quotations omitted)).

[19] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976).

[20] *Citizens United*, 130 S.Ct. at 895(citing the Wyoming Liberty Group's brief in support of its approach).

[21] 540 U.S. 93 (2003).

[22] Montejo v. Louisiana, 129 S.Ct. 2079 (2009).

[23] Whitehill v. Elkins, 389 U.S. 54, 57 (1967), *citing Terminiello*, 337 U.S. at 69.

[24] 130 S.Ct. at 897.

[25] 424 U.S. 1 (1976).

[26] Meyer v. Grant, 486 U.S. 414 (1988).

[27] *McConnell*, 540 U.S. at 131–32 (citing a Senate Study supporting restrictions on "sham issue advocacy by nonparty groups").

[28] 551 U.S. 449 (2007).

[29] *Id.* at 482 (offering the benefit of doubt to speech, not censorship).

[30] *See, e.g.*, *Citizens United,* 130 S.Ct. 876; Davis v. Fed. Election Comm'n, 128 S. Ct. 2759 (2008); Wisconsin Right to Life v. Fed. Election Comm'n, 551 U.S. 449 (2007); Faucher v. Fed. Election Comm'n, 928 F.2d 468 (1st Cir. 1991), Maine Right to Life Committee v. Fed. Election Comm'n, 98 F.3d 1 (1st Cir. 1996); Minnesota Citizens Concerned for Life v. Fed. Election Comm'n, 113 F.3d 129 (8th Cir. 1997).

[31] *See, e.g.*, *Buckley*, 424 U.S. 1 (drawing a firm line between issue advocacy and express advocacy); Fed. Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238 (1986); *Wisconsin Right to Life*, 551 U.S. 449 (building a presumption in favor of speech).

[32] Ciara Torres-Spelliscy, *The Citizens United Confirmation*, BRENNAN CENTER FOR JUSTICE (Jul. 6, 2010), http://www.brennancenter.org/blog/category/public_financing;
Federal Election Reform Hearings, BRENNAN CENTER FOR JUSTICE, http://www.brennancenter.org/content/pages/federal_election_reform_hearings (last visited Dec. 29, 2010);
Fred Wertheimer, *Big Stakes for Voters in the DISCLOSE Act*, DEMOCRACY 21 (Jun. 22, 2010), http://www.democracy21.org/index.asp?Type=B_PR&SEC={91FCB139-CC82-4DDD-AE4E-3A81E6427C7F}&DE={1CD0BEFB-AA39-4532-8BC4-049F7B6E536C};
Fred Wertheimer, *Are Corporations About to Take Over American Politics and Washington Decision-Making?*, DEMOCRACY 21 (Sept. 8, 2009), http://www.democracy21.org/index.asp?Type=B_PR&SEC={218BA301-C441-46B6-AEC6-652FB714E66F}&DE={3C8B2823-5597-4392-BFBA-21F60F3D9635}.

[33] James Bopp Jr., *Silencing Criticism*, NAT'L REV., Apr. 24, 2007, *available at* http://www.nationalreview.com/articles/220712/silencing-criticism/james-bopp-jr.

[34] *Id.*

[35] Stephen Ansolabehere, John de Figueiredo, James Snyder, Jr., *Why Is There so Little Money in U.S. Politics?*, *available at* http://web.mit.edu/polisci/research/representation/CF_JEP_Final.pdf.

[36] Erika Enquist, *JP Morgan Will Not Run Political Ads*, ADVERTISING AGE (Sept. 17, 2010), http://adage.com/article?article_id=145966.

[37] *See, e.g.*, Wyoming Election Code, WYO. STAT. ANN. §§ 22-1-101–22-1-102 (2010); Initiative and Referendum, WYO. STAT. ANN. §§ 22-24-101–22-25-115 (2010); Special District Elections Act, WYO. STAT. ANN. §§ 22-29-101–22-29-119 (2010).

[38] *See* WYO. STAT. ANN. § 22-2-103 (2010) (defining the Secretary of State as chief election officer); § 22-2-104 (defining election dates); § 22-3-103 (establishing poll and registration practices).

[39] WYO. STAT. ANN. § 22-1-102(a)(xx) (2010) (defining "political action committee").

[40] *Id.*

[41] *See* H.B. 0068, 60th Legis. (Wyo. 2010), *available at* http://legisweb.state.wy.us/2010/Introduced/HB0068.pdf.

[42] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, 536 (1969) (noting that politicians invariably seek to infringe upon the fundamental rights of individuals).

[43] WYO. STAT. ANN. § 22-25-102(a), (b) (2010).

[44] WYO. STAT. ANN. § 22-25-102(c)(i)(A) (2010).

[45] *See* FEC CONTRIBUTION LIMITS 2009-10, http://www.fec.gov/info/contriblimits0910.pdf.

[46] WYO. STAT. ANN. § 22-25-102(c)(ii) (2010).

[47] WYO. STAT. ANN. § 22-25-102(e) (2010).

[48] *See, e.g.*, *Nixon*, 528 U.S. 377 (describing how the judicial scrutiny applied may shift up or down depending upon the novelty and plausibility of the government interest at hand).

[49] 424 U.S. at 21.

[50] Randall v. Sorrell, 548 U.S. 230, 248–49 (2006).

[51] *Id.*

[52] *See, e.g.*, 11 C.F.R. § 100.6(c)(exempting donations of money to a political committee for the purposes of establishment or administrative costs from the definition of a contribution).

[53] *See, e.g.*, WYO. STAT. ANN §§ 22-1-102(a)(xx), 22-2-113, 22-25-101(b), 22-25-105(a) (2010).

[54] Anderson v. Spear, 356 F.3d 651 (6th Cir. 2004).

[55] KY. REV. STAT. ANN. § 121A.010(11) (2010).

[56] United States v. Williams, 553 U.S. 285, 304–05 (2008).

[57] Smith v. California, 361 U.S. 147, 151 (1959).

[58] Grayned v. City of Rockford, 408 U.S. 104 (1972).

[59] Thornhill v. Alabama, 310 U.S. 88 (1940).

[60] *Citizens United*, 130 S.Ct. at 889.

[61] WYO. STAT. ANN. § 22-25-102(c)(i)(A) (2010).

[62] Ansolabehere, *supra* note 35.

[63] *Randall*, 548 U.S. at 246–47.

[64] *Id.* at 253–61.

[65] *Id.*

[66] *See* WYOMING SECRETARY OF STATE CAMPAIGN GUIDEBOOK 2010, *available at* http://soswy.state.wy.us/Forms/Publications/CampGuide_10.pdf.

[67] Speechnow.org v. Fed. Election Comm'n, 599 F.3d 686 (D.C. Cir. 2010).

[68] 128 S.Ct. 2759, 2772 n.7 (2008).

[69] MICHAEL J. MALBIN, LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 3 (2003).

[70] WYO. STAT. ANN. § 22-25-101(b) (2010).

[71] WYO. STAT. ANN. § 22-1-102(a)(xx) (2010).

[72] *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931); New York Times Co. v. United States, 403 U.S. 713 (1971).

[73] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[74] 130 S.Ct. at 895–96.

[75] 424 U.S. at 66.

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