

Between a Rock and a Hard Place? The Constitutional Question at the Heart of S.322

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“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

Justice Louis Brandeis, dissenting in
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)

I. Introduction

My name is Peter Teachout. I am a Professor of Law at Vermont Law and Graduate School with an area of special interest and expertise in state and federal constitutional law. I appreciate this opportunity to testify before the Senate Judiciary Committee on the corporate and constitutional law issues raised by S.322.

Before turning to the legal issues, it is important to understand the nature of the problem with which S.322 is dealing. In *Citizens United v. FEC* in 2010,¹ a divided Supreme Court held by a 5-4 vote that laws restricting political spending by corporations and unions violate the First Amendment.² Corporations and unions have a constitutional right to make unlimited “independent expenditures” aimed at influencing the outcome of political campaigns, the Court ruled,³ provided safeguards are in place barring coordination with the campaigns themselves.⁴ *Citizens United* opened floodgates.⁵ Since 2010, the amounts spent on elections in this country have skyrocketed, dwarfing those spent prior to the decision, and they have been increasing exponentially with each new election cycle.⁶ The money is being spent to influence the outcome of elections - to promote candidates who are viewed favorably by moneyed interests and to

¹ 558 U.S. 310 (2010)

² *Id* at pp. 365-66.

³ *Id* at p. 365.

⁴ The safeguards are notoriously difficult to enforce. See, e.g., <https://www.nytimes.com/2026/02/28/us/politics/wesley-hunt-texas-senate-race-campaign-finance.html>

⁵ See, e.g., https://americanpromise.net/citizens-united-vs-fec/?gad_source=1&gad_campaignid=1807138779&gbraid=0AAAAADCzojO8rlabk_hM6AHeoepQ4DMU&gclid=EAlaIObChMlzK_wpc6ZkwMVvUhHAR2yoQjXEAYASAAEgIWxPD_BwE

⁶ It is important to keep expectations in perspective. Spending by corporations represents only one contributing factor to this increase. Spending by wealthy individuals represents an increasing large share. <https://www.nytimes.com/2026/03/09/us/billionaires-federal-election-campaign-contributions.html>. So even if S.322 were adopted and survived constitutional challenge, it would not solve the problem. But it would at least help put a dent in it.

sabotage the candidacies of those who do not play along – and by doing so to shape public policy. It does not take great imagination to understand how this development threatens to undermine public confidence in the fairness and integrity of our electoral system and, more generally, the health and integrity of our democratic institutions.

S.322 seeks to address this problem by adopting a novel approach. Crucially, it does not challenge *Citizens United* head-on by seeking to restrict or limit constitutional rights but approaches the problem instead by redefining - or “resetting” - the powers that corporations are authorized to exercise under state corporate law. Although application of this approach in the campaign spending context is novel, the approach itself rests on a solid and well-established body of American law holding that corporations are “creatures of state law” and that states therefore may determine the powers that corporations operating under state are allowed to exercise.

By taking this approach, S.322 raises a novel constitutional question: Are corporations still considered “creatures of state law” entitled to exercise only those powers granted by state law, or have they become, by virtue of decisions like *Citizens United*, semi-autonomous artificial entities armed with built-in powers over which states no longer have control?

There are still some issues I have not had a chance to research thoroughly, but based on my research so far, I don’t think there are serious constitutional barriers to adopting S.322. The constitutional problem will arise, rather, when a state seeks to enforce the spending restrictions imposed by S.322 and the corporation threatened with sanctions challenges the restriction on grounds it violates its rights under *Citizens United*.

It is difficult to predict how a court would rule if legislation based on the approach adopted by S.322 were to be challenged. One can anticipate the basic thrust of the challenge and the arguments likely to be made on one side and the other, but how the court would rule cannot be predicted with confidence. It can’t be predicted with confidence because approach adopted by S.322 is novel, thus the context for the challenge would be different from that in previous cases. In every previous case, including *Citizens United*, the corporation bringing the challenge was granted by state corporate charter law “the same powers as an individual” or “same powers as a natural person” to pursue corporate objectives.⁷ But S.322 would fundamentally change the context by striking the phrase “the same powers as an individual” from the state’s corporate charter law. The Supreme Court has never before been asked to decide what constitutional rights, if any, may be claimed by a corporation in a state where the corporations do not have the “same powers as an individual.”

⁷ The corporation in *Citizens United* was a Virginia corporation. Virginia corporate law grants corporations chartered in the same powers as an “individual” or “natural person” to pursue business objectives. See Virginia Code, §13.1-627.

II. Understanding S.322

A. What is the “Corporate Powers Reset” Approach?

The idea behind the “corporate powers reset” approach is remarkably simple. It rests upon two established propositions of corporate and constitutional law: first, that corporations are “creatures of state law;” and second, that corporations only have those powers granted by state law. As Chief Justice John Marshall put it in the famous *Dartmouth College v Woodward* case (1819):⁸

“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.”

This view forms the legal foundation for S.322. You can find the same view expressed in countless court decisions and in legal treatises over the last two centuries, starting in the first half of the nineteenth century and carrying up to the present.

This approach adopted by S.322 is called the “corporate powers reset” approach because it proposes replacing current provisions in state corporate law setting out the powers that corporations can exercise with new provisions redefining – or “resetting” – those powers. It proposes the change be effected by wholesale repeal of current provisions coupled with the simultaneous adoption of the new provisions on the date the law goes into effect. The shift, as I understand it, would be accomplished by seamless transition from one system to another, not dissimilar in this respect from the shift experienced on personal computers when Windows 10 was replaced by Windows 11. There would not be a single moment when corporations would be without power. In one moment they would have the powers currently listed, and in the next, without interruption, they would have the redefined or reset powers conferred by the new provision.

B. How Would S.322 Apply in the Vermont Context?

The current provision in Vermont corporate law⁹ listing the powers that corporations can exercise reads as follows:

“Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual

⁸ 17 U.S. (4 Wheat.) 518 (1819)

⁹ 11A V.S.A. §302

to do all things necessary and convenient to carry out its business and affairs, including without limitation power [listing 16 specific powers that corporations can exercise]. [emphasis supplied]¹⁰

If S.322 were adopted, the provision would be changed to read as follows:¹¹

(a) All powers, privileges, and capacities granted or implied under the laws of this State to a corporation organized under this title on or before December 31, 2026, are hereby revoked in their entirety.

(b) Unless its articles of incorporation provide otherwise, every corporation is granted artificial-person powers along with any enumerated power that is consistent with such artificial-person powers, including the power . . . [listing specific powers.]:

“Artificial-person powers” are then defined as:

“the powers necessary or convenient to carry out the lawful purposes of a corporation, excluding any authority of the corporation to engage in election activity or ballot-issue activity.”¹² [emphasis supplied]

Notice these changes strike the phrase that corporations have “the same powers as an individual” that you find in the current version of Vermont corporate law and the phrase granting corporations the right to exercise their powers “without limitation” making clear that, while corporations would still have all the powers necessary to conduct business, those powers would not include the power to spend unlimited amounts in elections¹³ or, for that matter, the power to make expenditures at all if doing so would constitute “election activity” or “ballot-issue activity” as those terms are defined elsewhere in the legislation.

Other sections of S.322 propose similar changes in the powers that other state-created artificial entities can exercise. But the core purpose and effect of the act are most clearly reflected, in my view, in the key changes to the corporate powers section described above.

¹⁰ This provision, it is important to stress, is not unique to Vermont law. You will find identical or similar language in the corporate charter laws of other states that have adopted the Model Business Corporations Act.

¹¹ S.322, page 25.

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Before turning to discuss the *Citizens United* challenge, let me briefly address some of the non-*Citizens United* questions that have been asked about the application of S.322 to Vermont corporate law.

Does Vermont law authorize the repeal or amendment of existing corporate charters? Yes, repeal or amendment of existing charter rights is expressly authorized by both statutory and constitutional provisions in Vermont law. Most other states have similar provisions. There may be some outer limits to the exercise of repeal powers, for example, if the repeal deprives a corporation of vested property rights or makes it impossible for the corporation to function,¹⁴ but they are not relevant here.

Does Vermont case law support the right of the state to amend existing charters when it serves the public interest? Yes. The leading case in Vermont on this question is *Thorpe v. Rutland*, 27 Vt. 140 (1854).¹⁵

Since corporate charters represent a contract between a corporation and the state, would the repeal of existing charter grants constitute unconstitutional impairment of contract? No. It would if the state had not reserved the right to repeal or amend. That is why state statutes and constitutional provisions, not only in Vermont but in most other states, specifically reserve the right.

Does Vermont law require that out-of-state corporations doing business in the state play by the same rules as domestic corporations? Yes. When an out-of-state corporation seeking to do business in the state registers with the Secretary of State it agrees to abide by the same rules as domestic corporations. Other states have similar provisions.

Based on my review of applicable law, I don't see any serious constitutional barriers to enacting S.322.

III. The Constitutional Challenge Based on *Citizens United*

¹⁴ See, e.g., *Phillips Petroleum Co. v. Jenkins*, 297 U.S. 629, 634–35 (1936)

¹⁵ In upholding a legislative change in the charter of a Vermont railroad corporation, the Vermont Supreme Court said: “We think the power of the legislature to control existing railways in this respect, may be found in the general control over the police of the country, which resides in the law-making power in all free states, and which is, by the fifth article of the bill of rights of this state, expressly declared to reside perpetually and inalienably in the legislature, which is, perhaps, no more than the enunciation of a general principle applicable to all free states, and which cannot, therefore be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation . . . [It] is a responsibility which legislatures cannot divest themselves of, if they would.” 27 Vt 140, at .

However, if the state were to enact S.322, attempts to enforce the spending limitations in the bill would almost certainly trigger a challenge by a corporation subject to the enforcement action on grounds that the limitations violate the corporation's constitutional rights under the *Citizens Union* decision. The basic thrust of the corporation's claim is easy to anticipate: it would be that federal constitutional law trumps inconsistent state law. That proposition is so well-established that it is beyond dispute. The state may be free to determine the powers that corporations can exercise, the corporation would argue, but when state-imposed limitations on those powers violate the corporation's constitutional rights to free speech, the limitations must be struck down.

I do not want to spend time here rehearsing the arguments that the state might make in defending the law, or those the challenger would make in support of the view that the spending limitations violate the constitutional rights of corporations established by *Citizens United*. The Committee has access to other experts who can readily supply those arguments. I think it is important to appreciate, however, that there is no guarantee that the law would survive constitutional challenge. The fact is we just don't know, and cannot predict with confidence, how a court would decide.

Conclusion and Recommendations

I think that, generally speaking, S.322 does the work that needs to be done. It is a complex piece of legislation containing many provisions I think important but have not attempted to address here. With one exception, the bill consistently frames the issue as that of establishing new powers rather than removing existing powers. In that respect, I have only one minor suggestion. The statement of purpose on page 1 describes the purpose of the bill, in lines 10 and 11, as that of "removing the power" as if the power exists. I think the state does have authority to remove powers that can be exercised by corporations chartered by the state, but it seems more consistent with the way the bill is otherwise structured to state that its purpose is "to clarify" that corporations chartered in the state do not have that power.

Let me summarize then my conclusions.

(1) I don't think there are serious constitutional problems with enacting S.322. Vermont law clearly contemplates the repeal or modification of existing charter rights. There are some outer limits on what a state can do by way of repealing or amending charter provisions, but I don't think they are implicated here. The proposed repeal and replacement would not constitute an unconstitutional impairment of contracts. State law already provides that when out-of-state corporations seeking to do business in the state register with the Secretary of State they must agree to abide by the same rules that govern domestic corporations.

(2) The constitutional problem are likely to arise, rather, as explained above, in the context of enforcement. The one thing that is certain is that if the state were to attempt to enforce the spending limitations in S.322, a corporation threatened with enforcement sanctions would challenge the constitutionality of those limitations on grounds that they conflict with the Court's decision in *Citizens United*.

(3) How courts would decide that challenge is difficult to predict because the approach adopted by S.322 is novel. It is difficult to predict because the context for decision would be different from that in every other case the Court has decided. Nonetheless, in considering possible adoption of S.322, it is important to appreciate there is no guarantee that, if adopted, S.322 would survive constitutional challenge. That is a reality that cannot be avoided.

(4) That does not mean that the state should not move forward with enacting S.322. The approach adopted by S.322 is solidly grounded in well-established court doctrine. It is supported by some of the nation's leading legal scholars¹⁶ and legislation based on the approach is currently under consideration in other states.¹⁷ In short, it is an approach that needs to be taken seriously. Whatever the courts ultimately decide, S.322 represents an innovative and important approach to bringing election spending in this country back under control.

(5) At the top of my testimony, I quote from Justice Brandeis's dissenting opinion in the *New State Ice* case because I think it captures the spirit in which the Judiciary Committee should approach the decision of whether to move forward with the bill. In my view, S.322 represents one of those creative state "experiments" in social and economic and political legislation that, to paraphrase Justice Brandeis, "form the genius of our federal system." I urge the Committee to vote in support of the bill.

Thank you for your consideration.

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