

# A Progressive Defense of *Citizens United v Federal Election Commission*

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## Overview

In January 2010, the United States Supreme Court handed down its decision in *Citizens United v Federal Election Commission*. In that decision, a 5-judge majority of the Court held that the restrictions which the Bipartisan Campaign Finance Act of 2002 imposed preventing corporations and labor unions from making independent expenditures from general treasury funds were unconstitutional under the First Amendment. As a result of the decision in *Citizens United*, no restrictions on the ability of corporations to make independent expenditures can be constitutionally imposed by law, though restrictions on political contributions by corporations to candidates and parties are still permissible. The only constitutionally compliant method of regulating corporate-funded independent expenditures, following the Court's decision, is that of disclosure.

*Citizens United* sparked outrage among contemporary progressive commentators, who argued that the decision would have the effect of opening the floodgates to corporate political spending, and of reducing the ability of ordinary individuals to participate in the political process. In the course of my paper, I hope to provide a normative argument for why *Citizens United* may actually have the effect of *enhancing* political participation by individual citizens, instead of reducing it.

## Political Influence – Who Exerts It?

- The vast majority of political expenditures are made by campaigns and political parties, rather than independent entities
- This is true even of the 2010 mid-term elections, where
  - Independent spending by non-party groups was \$280 million (CFI, 2010)
  - Total spending was ~\$3.8 billion (CRP, 2010)
- To the extent that concerns exist over the role of disproportionate influence in the campaign context, it appears that they are best directed towards *parties* rather than *corporations* and *unions*
- The Supreme Court, however, has defended the ability of political parties to make unlimited independent expenditures on grounds of their rights to freedom of association (*California Republican I*, 1998)
- The logic of the Court's decision should be applied across the board to *all* forms of associations.

## First Amendment Issues

- Must be incurred without coordination with political parties, or candidates (FECA, 1971)
- Involve First Amendment considerations, as they enable citizens to participate in political expression to the exclusion of political parties (*Buckley v Valeo*, 1976)
- Additionally, enable voters to make informed political decisions, by increasing the diversity of sources from which they obtain information about politics (*Buckley; Bellotti*, 1978)
- The regulation of independent expenditures thus involves important First Amendment issues, since it potentially affects the ability of individuals to influence the decisions of their fellow citizens, and threatens informed voting
- In addition to speech rights, the First Amendment's freedom of association guarantee is also implicated by independent expenditure regulation (*Buckley; Bellotti*)

## The Political Value of Associations

- Associations serve as a forum for individuals to come together in an effort to obtain a common objective (Olson, 1971)
- In the campaign context, associations serve to enhance the voices of individual citizens, by pooling their resources and amplifying their voices (Sullivan, 1998)
- Associations also provide sites for political action by individual citizens, allowing them to participate in politics by influencing the decision-making process within organizations (Shiffrin, 2005)
- Associations are thus extremely vital to the campaign process, since they enhance the ability of citizens to participate in politics, and multiply the contexts in which they can do so

## Corporations as Political Associations

- A very large proportion of independent spending is done by non-profit corporations
- The corporate form is preferred because of the advantages it provides in gathering and distributing funds from members (*Citizens United*)
- Restricting corporate participation in electoral speech, therefore, could have a deleterious impact on the ability of citizens to participate through their preferred form of organization (*Massachusetts Citizens for Life*, 1983)
- Additionally, large for-profit corporations, with the wealth at their disposal, are the entities most likely to be able to challenge the domination of the political process by parties and candidates (BeVier, 1994; Redish, 1997)

- Finally, corporate political participation seems to have a feedback effect on the involvement of *anti-corporate* groups in the campaign process, thereby contributing to the diversity and volume of views expressed therein (La Raja, 2010)

## The Threat of Political Corruption

- Corporations can seek political favors from candidates in return for making expenditures supporting them (Issacharoff, 2010)
- Corporate funding for independent expenditures can gain them greater access to legislators and policy-makers (Thompson, 2004)
- Corporate spending will cause citizens to lose faith in the political process, by furthering the “appearance” of corruption (Lessig, 2010)
- Problems with these views – there is little evidence to support them
  - Given the proportion of total federal spending which independent expenditures represent, it is extremely unlikely that they are made with a view to inculcating favors (Ansolabehere et al., 2003)
  - No evidence of legislative voting being influenced by independent expenditures (*Citizens United*)
  - Lobbying and corporate PAC contributions more effective means of gaining access (Milyo, 2002)
- Furthermore, the “appearance of corruption” is a very lax standard for courts to adopt, since it sets no principled limit on campaign finance regulation
  - Negative approval of Congress and Presidency are uncorrelated to the rigor of campaign finance regulation (Persily and Lammie, 2004)

## The Threat of Excessive Influence

- Corporations, through the vast resources at their disposal, can “drown out” the voices of individuals (Fiss, 1985; Sunstein, 1992)
- This concern fails to take into account the diversity of views which are funded by corporations (Sullivan, 1998)
- Instead of restricting corporate participation, measures could be taken to enhance the ability of individuals to make independent expenditures:
  - Public financing of elections
  - Provision of independent expenditure “vouchers” to ordinary citizens (Hasen, 1996)
  - Provision of fair access to variety of groups on television and radio (fairness doctrine)

## Problems with Corporate Organization

- Shareholder compulsion (Karlan, 2011)
- The “business judgment” rule (Bebchuk and Jackson, 2010)
- The lack of means by which shareholders and other stakeholders can influence the decision-making process of the management (Torres-Spelliscy, 2010)
- Furthermore, corporations are free to spend without fear of disclosure, by making contributions to 501(c)(4) & (6) groups (CFI, 2010)
- As a result, corporations are not, currently, accountable to anyone for the decision to participate in campaign speech
- This is a major distinction between corporate political speech and that of parties and candidates

## Participatory Solutions

- Shareholder disclosure norms (as followed in the UK)
- Director's Report filing requirements (ibid.)
- Prior authorization for all political expenditures (ibid.)
- Disclosure requirements for all corporate expenditures, regardless of choice of entity for use of such expenditures (DISCLOSE Act)
- *Prompt* and *effective* disclosure requirements are imperative (Fung, et al., 2007)
- Disclaimer requirements for all advertisements, messages and campaign activity funded by corporate expenditures
- Some anecdotal evidence to suggest that these measures may enhance the diversity of political speech during campaigns:
  - Best Buy/Target boycotts, 2010
  - Labor union counter-mobilization, 2010 –

## Conclusion

There is much in the Supreme Court's decision in *Citizens United* which should be supported by progressive democratic theorists, who treat the expansion of means and methods of participation as being of fundamental political importance. To the extent that increased corporate funding for independent expenditures threatens the ability of individuals to influence campaigns, the regulatory methods endorsed by the Court – most notably disclosure and public financing – are more than sufficient to preserve the integrity of the political process.