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

Prithviraj Datta
Department of Government, Harvard University

**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 case 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 v 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 threats informed voting
- In addition to speech rights, the First Amendment’s freedom of association guarantee is also implicated by independent expenditure regulation (*Buckley v 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 (*Shuffin, 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*)

**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 (*Hansen, 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-Straybell, 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

---

**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.