Citizens Unite: Combating Corporate Suppression of the Voice of the People

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We the ***People*** of the United States. The famous first words of the Constitution. People can vote. People can run for office. People have inalienable rights. Yet, in 2012, a presidential candidate exclaimed: “Corporations are people.” The notion that corporations have identical rights to human beings is the logic applied by the Supreme Court in the infamous case *Citizens United v. Federal Election Commission*. The Supreme Court overruled decades of precedent when it declared that there should be no restriction on corporations and unions from making independent campaign expenditures and electioneering communications. The rationale behind the decision was that spending money is a form of speech that is protected under the First Amendment of the United States Constitution – and, corporations are entitled to First Amendment protections. Not only was this judicial activism in its purest, it also creates the avenue for corruption and for corporate juggernauts to dwarf the speech of people – individual, voting, people with inalienable rights. Ironically, *Citizens United* diminishes the same speech that the Constitution seeks to protect.

Under the Bipartisan Campaign Reform Act of 2002 (BCRA), also known as the McCain-Feingold Act, federal law prohibited corporations from airing any "broadcast, cable or satellite communication" advocating for or against a candidate running for federal office within 30 days of a primary election, and prohibiting any such ad paid for using corporate treasury funds.[[1]](#footnote-1) *McConnell* v. *Federal Election Commission*, a 2003 Supreme Court case, upheld the constitutionality ofthe BCRA. In upholding the BCRA, the *McConnell* Court relied upon *Austin* v. *Michigan Chamber of Commerce,* which held “that political speech may be banned based on the speaker’s corporate identity.”[[2]](#footnote-2) Taken together, *Austin* and *McConnell* categorically recognized that the government had a compelling interest to limit corporate speech in the realm of campaign contributions.

 In 2008, a conservative nonprofit corporation, Citizens United (hereinafter referred to as “Citizens”), released a documentary, *Hillary: The Movie* (hereinafter referred to as “the documentary” or “*Hillary”*). Ultimately, *Hillary* was to be made available through cable video on demand services. Citizens produced television ads to promote the documentary. The documentary (and the television ads promoting it) were to be available within 30 days of the primary election. Concerned about the civil and criminal penalties for violating the BCRA, Citizens sought a declaratory judgment on whether the BCRA applied to its documentary. The request for injunctive relief was denied and the case was ultimately appealed to the Supreme Court. After two separate oral arguments, the Court declared that a ban on the use of corporate treasury money to advocate for a political candidate was in violation of the First Amendment right to speech. The Court determined that the BCRA "prohibition on corporate independent expenditures is an outright ban on speech."[[3]](#footnote-3)

When the case was initially brought before the Supreme Court, the argument made by Citizens avoided challenging the constitutionality of the BCRA.[[4]](#footnote-4) Rather, Citizens sought to demonstrate that the law was not applicable to its documentary. Citizens argued “that the law did not apply to documentaries broadcasted with video-on-demand technology, only to commercials.”[[5]](#footnote-5) Citizens also sought to clarify that the documentary does not advocate for the viewer to vote or not vote for a certain candidate, it merely documented facts regarding a Senator who just happened to be running for President. Despite the arguments being made, several Justices chose to “turn[] a fairly obscure case about campaign-finance reform into a battle over government censorship.”[[6]](#footnote-6) More specifically:

In Citizens United, the Supreme Court reached out to decide the facial constitutional validity of provisions of BCRA, a question not in dispute between the parties and not necessary to decide the case before it. The only questions petitioner Citizens United had asked the Court to resolvewere whether the particular provisions of BCRA were invalid as applied to video-on-demand showings of its documentary movie about Hillary Clinton and to advertisements for the movie.If the Court had found the provisions invalid as applied, there would have been no need to declare the statute unconstitutional on its face or to overrule precedent. Instead, however, the Court, after hearing oral argument, asked for supplemental briefing and argument, instructing the parties to address whether the Court should overrule two prior cases, *Austin v. Michigan Chamber of Commerce,*and *McConnell v. Federal Election Commission*, which had upheld the issue of facial validity of Section 203 of BCRA.[[7]](#footnote-7)

In its decision, the Court overruled precedent set forth by *Austin* and *McConnell,* which clearly established the constitutionality of the BCRA. Despite no challenge to the constitutionality of the law itself, and there being two cases reaffirming its validity, the Court decided an issue in *Citizens* *United* that was not presented by either litigant. In this sense, the Court acted as a legislature and used the case as a channel for changing the law to what the Court felt it should be. Most notably, Justice Stevens, in his dissent, offers immense criticism on the process utilized by the Court in reaching its decision:

Today’s decision is backwards in many senses**. It elevates the majority’s agenda over the litigants’ submissions**, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality.[[8]](#footnote-8)

The Court acted outside the scope of its powers and “no longer act[ed] as a court when it change[d] the nature of the case the parties brought in order to create an opportunity to change the law.”[[9]](#footnote-9) In *Citizens United*, the Court “reache[d] out to decide issues not properly before it and not based on a record or decisions below[.]”[[10]](#footnote-10) This example of judicial activism is a threat to the core values of American democracy. The Court justified its opinion using the Constitution as a shield while its decision raises questions about the Court’s adherence to the structure of the Constitution itself.

By recognizing a corporation as being equal to people, the Supreme Court is undermining the quality of human life and the principles set forth by the Constitution. Justice Stevens, in identifying problems inherent from attempting to equate corporations to people, observed:

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters.[[11]](#footnote-11)

The Constitution makes a clear distinction that the rights set forth are for the ***people***. The dissent in *Citizens United* further elaborates upon this principle:

It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their ‘personhood’ often serves as a useful legal fiction. But they are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.[[12]](#footnote-12)

The Constitution was established for the people, not corporations. While corporations should have protections, their interests should not trump the rights of the people. Justice Ginsburg, who joined the dissent in *Citizens* *United*, articulated this point in a question she posed to counsel for Citizens during oral arguments. Specifically, she asked: “are you taking the position that there is no difference between the First Amendment rights of a corporation and those of an individual? A corporation, after all, is not endowed by its creator with inalienable rights. So is there any distinction that Congress could draw between corporations and natural human beings for purposes of campaign finance?”[[13]](#footnote-13) Justice Stevens, expounds on this issue and notes the inconsistencies in attempting to categorize corporations as people with the same protections afforded to an individual person who can vote. Justice Stevens recognizes that:

Under the majority’s view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech. In short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.[[14]](#footnote-14)

*Citizens United* extended the First Amendment to corporations in order to protect their freedom of speech. The Court believes that spending money to endorse a candidate is a form of speech that cannot be limited; ironically, however, the same corporation that can now spend unlimited funds from its treasury to advocate for a candidate, cannot vote for the candidate.

The majority’s opinion is that limiting a corporation’s ability to use corporate money in advocating for or against a candidate is a violation of the First Amendment right to speech. There are years of precedent, however, demonstrating a compelling interest to regulate corporate spending for campaign expenditures in order to combat corruption. As corporate wealth expanded over the course of the last 100 years, it came with concerns as to how the wealth and power could be used to shape the political arena. In response, legislation was passed regulating corporate spending in advocating for or against candidates. Prior to *Citizens United*, the Supreme Court granted deference to the legislature in First Amendment challenges regarding regulation of corporate campaign financing. As observed by one legal scholar:

Congress, however, has a long-standing history of treating corporations differently for the purposes of regulating campaign expenditures--money spent by individuals to advocate for the election or defeat of a candidate--and has traditionally justified separate treatment as necessary to prevent corruption of the democratic political process. Through decades of state and federal corporate campaign expenditure regulation, the Supreme Court has afforded great deference to legislatures and has acquiesced to these regulations. Although the Court previously ruled that the government cannot place caps on campaign expenditures on the basis of a speaker's wealth or limit corporate speech on referenda to only those issues that affect corporate interests, the Court did not strike down corporate campaign expenditure regulations specifically.[[15]](#footnote-15)

The Court’s decision in *Citizens United* not only flouts *stare decisis,[[16]](#footnote-16)* but it erodes legislative efforts to preserve the American democratic process. The Court, in its fortitude to protect corporate right to speech, threatens the election process and, as a result, the legislative process by exposing it to corruption and exploitation. On a playing field where corporations and the wealthy already dominate the game, the Court has now handed over full control. In advancing its own interests and ideals, the Court neglects to recognize reality and the corollaries of its decision.

 In understanding why the government has a compelling interest to regulate corporate campaign financing, it is also necessary to examine the notion that corporate speech was never fully restricted. While corporate speech was regulated, it was never banned. Under the BCRA, Citizens could have used its assets to televise and promote *Hillary* wherever and whenever it wanted to. It could have spent unlimited sums to broadcast *Hillary* at any time except for 30 days prior before the last primary election. As Justice Stevens noted, neither Citizens’ “nor any other corporation’s speech has been ‘banned.’”[[17]](#footnote-17) All that was disputed was whether Citizens had a right to use funds in its treasury to pay for broadcast during that 30 day period.

Moreover, the majority opinion claimed any burden on free speech was unconstitutional and could not be regulated based on the speaker’s identity; but, our society has already demonstrated the need to regulate certain types of speech in order to serve a legitimate government interest. Justice Stevens explains:

Yet in a variety of contexts, we have held that speech can be regulated differentially on account of the speaker’s identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students,prisoners,members of the Armed Forces,foreigners,and its own employees.When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems.[[18]](#footnote-18)

The Court broadens protections to corporations who can use wealth and influence to mold the election process, despite the reality that the corporation itself cannot vote. The wealth and power that a corporation has cannot be paralleled by individual people. “The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match.”[[19]](#footnote-19) *Citizens United*, while expanding the power of an already supreme entity, simultaneously mutes the speech and rights of the people. The rights of the people the Constitution is intended to protect are now threatened by corporations whose rights are now equal to individual people. Individual people who can vote. Individual people who can run for office. Individual people who are supposed to have inalienable rights. Corporations are given a larger platform to advance their interests while people are barely even heard.

In recent years, data has suggested that the views of the donor class have an outsized impact on policy decisions.[[20]](#footnote-20) “By giving a tiny group of mega-donors an even greater voice relative to everyone else, the Court’s jurisprudence exacerbated an already troubling situation. No other consequence of *Citizens United* has been more significant.”[[21]](#footnote-21)

Evidence is supportive of the notion that corporations and money can control the political process. When a non-voting donor pays get a candidate elected, the candidate becomes indebted to the sponsor, not the voter who made no donation except his vote. This disrupts and imperils the ideals of American democracy and further dwarfs the interests of the people who go unrepresented in a society dominated by corporate giants. The peril to American democracy is proliferated by the empowerment of corporations and by protecting their rights above the people.

Corporations, with their vast wealth, can control elections. A corporation can endorse a candidate, and attempt to successfully get them elected. Corporations can also use boundless power to threaten a candidate should their interests be vulnerable. If a candidate refuses to comply, the corporation can in turn threaten to fund attack ads. If corporations are able to assert “undue influence in electoral races, the speech of the eventual winners of those races may also be chilled. Politicians who fear that a certain corporation can make or break their reelection chances may be cowed into silence about that corporation.”[[22]](#footnote-22) The *Citizens United* decision further propagates corruption:

As a consequence of Citizens United, political distortion will now manifest in two forms: (1) the political marketplace of ideas, and possibly the composition of representative government itself, will be skewed by the addition of inordinately large sums of corporate money; and (2) it will be impossible to trace money from corporate general treasuries back to actual individuals' support for the political speech in question. Thus, by allowing corporations to use their general treasuries to make campaign expenditures, the Citizens United majority has invited ‘phantom speakers’ to participate in, and distort, American politics via the marketplace of political speech.[[23]](#footnote-23)

*Citizens United* has created a doorway for corporations to, in effect, control legislation by determining the legislatures. The interests of a corporation are vastly different from individual people. A person has specific interests when voting someone to political office. Individuals elect someone to represent their political interests. This can include a range of ideals such as civil liberties, fundamental rights or welfare programs. A corporation’s sole purpose is to amass profit. By gaining unlimited power over the election process, a corporation can use its power and wealth to further its interests—making money.

This is a divergence from American ideals, which promote democracy and strive to represent ***every*** individual. Despite assertions that each vote counts, and every person needs to exercise their right to vote, in light of *Citizens United*, corporations now have the opportunity to dominate elections and the political spectrum. As a result, people might be even less likely to vote given that they feel their vote is futile and of minimal bearing. In addition to this drowning of individual voices, “there may be deleterious effects that follow soon thereafter [because] [c]orporate ‘domination’ of electioneering . . . can generate the impression that corporations dominate our democracy.”[[24]](#footnote-24) Specifically, when citizens turn on their televisions and radios during an election cycle and hear only corporate electioneering, “they may lose faith in their capacity, as citizens, to influence public policy.”[[25]](#footnote-25) Citizens will believe that “Government captured by corporate interests . . . will be neither responsive to their needs nor willing to give their views a fair hearing.”[[26]](#footnote-26) Ultimately, the “result is cynicism and disenchantment: an increased perception that large spenders ‘call the tune’ and reduced ‘willingness of voters to take part in democratic governance.’”[[27]](#footnote-27)

The rights of the people continue to be overshadowed in wake of further empowerment of corporate wealth. If people believe their voice is lost, then we no longer function as a democracy. Corporate power over the political spectrum contradicts the foundation of our government. The voice of the people is lost to a powerful group against which the people have no mechanism to combat.

 The implications of the *Citizens United* decision are far reaching. In addition to the muting effect it has on the people, it also similarly discounts the rights of employees and shareholders of the corporation itself. Shareholders who carry stock in a company generally do so without political motivations. Yet, when a corporation advances its political views through corporate campaign financing, it is forcing its political views onto shareholders, who have no voice in the matter. Simply stated:

Shareholders in these companies usually hold stock for reasons having nothing to do with a desire to participate in collective political expression. In fact, such activity may harm their interests; studies have shown that it correlates negatively to shareholder value. When for-profit companies nevertheless choose to ‘speak’ through political advocacy, that speech typically reflects not the views and priorities of the shareholders, but those of high-level corporate managers. These managers may be trying to advance their personal beliefs, or they may feel the need to spend money for strategic reasons (corporate PACs, for example, commonly give to both political parties). Regardless, shareholders typically have no input over such decisions.[[28]](#footnote-28)

 While the decision in *Citizens United* was intended to protect the speech of the corporation, it is difficult to ascertain who is expressing their right to speech when a corporation funds endorsements or attack ads for a candidate. The shareholders and employees, who have little to no participation in the decision, are not having their views expressed. Likely, the political views of the shareholders go unknown to the decision makers within a corporation. Justice Stevens examines this issue in attempting to understand who actually does the speaking for a corporation when endorsing or advocating against a candidate. “Perhaps the officer or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends.”[[29]](#footnote-29) The corporate speech being protected should reflect the entity as a whole. Instead, it remains vague whose views within the corporation are actually being expressed.

 Corporate Managers generally determine how to allocate treasury money for elections. Shareholders are not given a voice in this determination and generally they can do little to remedy the actions of a controlling group within the corporation. Even more troubling is the fact that “shareholders often do not even know when their money is being spent on electoral advocacy. Many large corporations funnel their election spending through 501(c) nonprofits and trade associations that can keep their donors secret.”[[30]](#footnote-30) Not only do shareholders have little to no control over how treasury funds are used in campaign finance, they do not even know where most of the money goes.

 In defending its opinion, the majority determined that the lack of distinction between a corporation and media corporations opens the door to limits on freedoms that would be unconstitutional. The majority opinion in *Citizens United* argued that “there was no principled way to distinguish between media corporations and other corporations and that the dissent’s theory would allow Congress to suppress political speech in newspapers, on television news programs, in books and on blogs.”[[31]](#footnote-31) In response, Justice Stevens claimed “that people who invest in media corporations know ‘that media outlets may seek to influence elections.’” [[32]](#footnote-32) Justice Stevens added that lawmakers may now wish to consider requiring corporations to disclose how they intend to spend shareholders’ money or put the spending to a shareholder vote.[[33]](#footnote-33) The distinction between media and a corporation (such as BP or Hewlett Packard) is determinable. A reputable media outlet is recognized as such whereas corporations such as BP or Hewlett Packard have no media foundation and can easily be distinguished from a media corporation. If the issue were to arise it could be addressed. The purpose of regulating corporate campaign financing is not to limit speech or any First Amendment right. Rather, such limitations operate to preserve American ideals and allow power to rest in the hands of the people, as intended by the Constitution.

 In examining the lasting impact of the *Citizens United* decision, it becomes apparent why it is necessary to limit the use of corporate treasury funds for campaign financing. Moreover, limiting those funds will not affect the “autonomy, dignity, or political equality” of any individual.[[34]](#footnote-34) Yet, the Court has chosen to address, and reassess, this issue repeatedly in a quarter-century span. Thus, in order to end the judicial indecisiveness (which is largely predicated upon the political composition of the Court), it has become necessary for Congress to pass an amendment to rectify the decision in *Citizens United*. This Amendment should adopt the statutory language of the BCRA and prohibit corporations from airing any broadcast, cable or satellite communication advocating for or against a candidate running for federal office within 30 days of a primary election. The Amendment should prohibit corporate treasury funds from being used to pay for any such ads.

 The Constitution was created with the intent of protecting the rights of the ***people***. People who can vote. People who can run for political office. People who are endowed with inalienable rights. When the Constitution was drafted, corporate giants, which have evolved over the last century, did not yet exist. The purpose of the Constitution is to protect people from a dominant group translating the political arena of America to serve their own agenda. The core of American democracy is embedded in the people. The people vote to elect their representatives to advance their interests. The people have a voice in the political scheme. *Citizens United* abandons the fundamental principles of American democracy and the rights of the people in favor of wealthy corporations. To reverse the harmful effects of *Citizens United*, it has become necessary for an Amendment to rectify this blemish in American History in order to adhere to the ideals of the Constitution intended by our forefathers.

 Failing to pass such Amendment (or, otherwise reverse the effects of *Citizens United*) will allow corporations to silence the voice of the people. The United States of America was founded on the principles of a representative democracy. If the people have no voice in electing their representatives, we are left with an oligarchy where the power rests in the hands of powerful corporations. A Constitutional Amendment, adopting the statutory language ruled unconstitutional by *Citizens United*, will give power back to “We the People,” whom our Constitution was established to protect.

1. *Citizens United v. Federal Elections Commission*, 558 U.S. 310, 318-19 (2010). [↑](#footnote-ref-1)
2. *Id* at 319. [↑](#footnote-ref-2)
3. *Id*. at 311. [↑](#footnote-ref-3)
4. *Austin* and *McConnell* unambiguously established that restriction on corporate expenditures for electioneering communications was not a violation of the First Amendment or any other constitutional provision. [↑](#footnote-ref-4)
5. Jeffrey Toobin, *Annals of Law: Money Unlimited*, The New Yorker, May 21, 2012, <http://www.newyorker.com/magazine/2012/05/21/money-unlimited> [last accessed 7/30/2015]. [↑](#footnote-ref-5)
6. *Id*. [↑](#footnote-ref-6)
7. Margaret L. Moses*, Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. Pa. J. Const. L. 161 (2011). [↑](#footnote-ref-7)
8. *Citizens United*, 558 U. S. at 479, Stevens, J., dissenting (emphasis added). [↑](#footnote-ref-8)
9. Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. Pa. J. Const. L. 161 (2011). [↑](#footnote-ref-9)
10. *Id*. [↑](#footnote-ref-10)
11. *Citizens United*, 558 U. S. at 394, Stevens, J., dissenting. [↑](#footnote-ref-11)
12. *Id*. at 466. [↑](#footnote-ref-12)
13. Jeffrey Toobin, *Annals of Law: Money Unlimited*, The New Yorker, May 21, 2012, <http://www.newyorker.com/magazine/2012/05/21/money-unlimited> [last accessed 7/30/2015]. [↑](#footnote-ref-13)
14. *Citizens United*, 558 U. S. at 425, Stevens, J., dissenting. [↑](#footnote-ref-14)
15. Esther Houseman, Note, *Citizens United v. FEC: Departure from Precedent Opens the Gate to “Phantom” Political Speakers*, 70 Md. L. Rev. Endnotes 50, (2011). [↑](#footnote-ref-15)
16. *Stare decisis* is the term used to refer to the fundamental legal principle that a court must follow earlier judicial decisions when the same issue arises again in litigation. Black’s Law Dictionary (9th ed. 2009). [↑](#footnote-ref-16)
17. *Citizens United*, 558 U. S. at 393, Stevens, J., dissenting. [↑](#footnote-ref-17)
18. *Id.* at 420-21. [↑](#footnote-ref-18)
19. *Id*. at 469. [↑](#footnote-ref-19)
20. Daniel I. Weiner, *Citizens United Five Years Later*, Brennan Center for Justice, 6 (2015), <http://www.marshall.edu/spc/files/Citizens_United_-5_-Years_-Later.pdf> [last visited 7/30/2015]. [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)
22. *Citizens United*, 558 U. S. at 471, Stevens, J., dissenting. [↑](#footnote-ref-22)
23. Esther Houseman, Note, *Citizens United v. FEC: Departure from Precedent Opens the Gate to “Phantom” Political Speakers*, 70 Md. L. Rev. Endnotes 50, (2011). [↑](#footnote-ref-23)
24. *Citizens United*, 558 U. S. at 470, Stevens, J., dissenting. [↑](#footnote-ref-24)
25. *Id*. [↑](#footnote-ref-25)
26. *Id.* [↑](#footnote-ref-26)
27. *Id.* [↑](#footnote-ref-27)
28. Daniel I. Weiner, *Citizens United Five Years Later*, Brennan Center for Justice, (2015), <http://www.marshall.edu/spc/files/Citizens_United_-5_-Years_-Later.pdf> [last visited 7/30/2015]. [↑](#footnote-ref-28)
29. *Citizens United*, 558 U. S. at 467, Stevens, J., dissenting. [↑](#footnote-ref-29)
30. Daniel I. Weiner, *Citizens United Five Years Later*, Brennan Center for Justice, (2015), <http://www.marshall.edu/spc/files/Citizens_United_-5_-Years_-Later.pdf> [last accessed 7/30/205]. [↑](#footnote-ref-30)
31. Adam Liptak*, Justices, 5-4, Reject Corporate Spending Limit*, The New York Times, January 21, 2010, <http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?pagewanted=all&_r=1> [last accessed 7/30/205]. [↑](#footnote-ref-31)
32. *Id.* [↑](#footnote-ref-32)
33. *Id.* [↑](#footnote-ref-33)
34. *Citizens United*, 558 U.S. at 467, Stevens, J., dissenting. [↑](#footnote-ref-34)