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Money in Politics After Citizens United: Troubling Trends & Possible Solutions

ANALYSIS

By Mimi Marziani

– 04/18/12

The following presentation was delivered to the League of Women Voters of New York City on April 18, 2012. [\[1\]](#)

The Supreme Court under Chief Justice William Rehnquist is most readily associated with *Bush v. Gore*, the case that famously (or infamously, depending on your view) determined the 2000 presidential election. The current Court—led by Chief Justice John Roberts—announced its legacy decision a decade later, with a decision that will ultimately have even greater implications for our democracy. In *Citizens United v. FEC*, the Court held that corporations and unions have a First Amendment right to spend unlimited funds on campaign advertisements, provided that these communications are not formally “coordinated” with any candidate. In so holding, it found that the political speech rights of American voters and corporate entities are indistinguishable.

Citizens United’s immediate impact was substantial. In one swift stroke, the Court overturned at least twenty years of its own precedent, rendered unconstitutional more than sixty years of federal law restricting corporate electioneering expenditures, and annihilated the statutes of twenty-two states that previously prohibited election spending from corporate general-treasury funds. *Citizens United* also ignited widespread popular, academic and political discussion about money, politics and the Constitution—a nationwide dialogue that has not yet abated.

Now that we are well into the 2012 election cycle, the decision’s lasting effects are clearer and clearer. I am here today to explain these troubling trends, and offer some possible solutions.

Troubling Trends in Federal Elections

Super PACs

The creation, and subsequent rise, of so-called “Super PACs” is the most prominent post-*Citizens United* development. Regular PACs have been around for a long time, but could only accept contributions up to \$5,000 from human beings. Super PACs are mutant PACs that can raise, and then spend, unlimited amounts money from corporations, unions, and individuals on political advertisements, as long as they do not coordinate their spending with any candidate.

Despite popular belief, *Citizens United* did not create Super PACs—at least, not directly. The Court, in holding that corporations have the same right to engage in independent spending as natural persons, naively stated that political spending can only corrupt if it is directly coordinated with a candidate’s campaign. Afterward, the Federal Election Commission (“FEC”) and lower federal courts quickly expanded this logic. They reasoned that as long as a group is not coordinating with any candidate, there is no anti-corruption reason to impose contribution limitations on that group. Thereafter, numerous political committees declared independence from their preferred candidate, and Super PACs were born.

Contrary to the Supreme Court’s assumption, however, there is no reason to believe that independent spending benefiting a candidate is, in fact, less likely to lead to corruption than direct contributions. After all, political candidates want to win. From the perspective of Newt Gingrich, for example, it makes little difference whether Sheldon Adelson spends millions on supportive campaign advertisements rather than donating that money directly to the campaign—Gingrich will simply consider whether the money helped his efforts. If the money was valuable to the campaign (and in Gingrich’s case, it was essential), Adelson would be treated no differently than someone who had donated millions directly to Gingrich’s campaign committee. Except that it is illegal to make million-dollar contributions directly.

To make matters worse, the definition of “coordination” under federal campaign finance law allows a considerable amount of cooperation between a candidate and his or her nominally independent supporters. (This is largely the result of the FEC’s dysfunction). Thus, for instance, members of President Barack Obama’s cabinet have appeared at fundraisers for Priorities USA Action—a Super PAC that is supporting Obama’s re-election—to help raise money for pro-Obama campaign ads, without technically violating any coordination rules. Mitt Romney’s campaign and his Super PAC, Restore Our Future, retain the same political consulting firm and have hired the same event-planning company, rented rooms in the same hotel, and depended heavily upon the same New York City fundraisers—again, all while remaining “independent” under the law.

Now, Super PACs have raised almost \$160 million dollars this election cycle and have spent close to \$90 million—more than six months from the general election. Unsurprisingly, wealthy interests have seized this opportunity to throw resources behind their preferred candidate. At the end of 2011, contributions from donors giving over \$100,000 accounted for 85.5 percent of all Super PAC donations. At last count, about 35 corporations, unions and individuals have donated more than \$1 million to their Super PACs of choice. As Professor Rick Hasen put it, “Super PACs are for the 1 percent.”[\[2\]](#)

Secret Money

While striking down restrictions on corporate electioneering, the *Citizens United* Court upheld campaign finance disclosure requirements by an almost-unanimous 8-to-1 vote. In doing so, the Court assumed that federal law mandates “prompt disclosure” that “enables the electorate to make informed decisions and give proper weight to different speakers and messages” in advance of casting a ballot.[\[3\]](#) Again, the Court was wrong.

Although federal law requires political advertisers to file a disclosure report once they spend more than \$10,000 on campaign advertisements, existing regulations severely undermine this scheme. The FEC rules in fact allow political spenders to withhold all information about the underlying source of funds unless contributors expressly indicate that their donations were given to further a particular ad. Not surprisingly, donations are rarely earmarked in this manner, and savvy donors understand that it is easy to contribute major support for electioneering while keeping their identities—and the amount of their donation—shielded from public knowledge.

Thus, certain politically-active nonprofits that are under no other obligation to disclose their supporters can permanently shield the sources of their funding from public scrutiny.[\[4\]](#) Now, these dark groups are enthusiastically

taking advantage of political donors' desire for secrecy, and playing a larger role in federal elections than ever before.

For example, in the 2010 federal elections, the first after *Citizens United*, outside groups spent \$294 million on political advertising. Forty-six percent of these expenditures—\$135 million worth—was spent by groups that did not provide any information about their sources of money.^[5] These same trends are continuing. Indeed, the Chamber of Commerce, a trade association for business interests that never publicly reveals its finances, has already spent almost \$ 3.5 million on political advertisements this election season.^[6]

In addition to spending dark money directly, nonprofits can give unlimited donations to Super PACs for electioneering. Thus, although Super PACs are transparent, underlying donors can remain anonymous by simply routing their money through an intermediary nonprofit. Now, many—if not most—Super PACs operate with an affiliated nonprofit to give camera-shy donors a means to contribute large sums of money without public scrutiny. For instance, the Cooperative of American Physicians, a medical malpractice and medical liability insurer, has contributed \$2.4 million to its own Super PAC for political ad buys—without any public knowledge of its underlying funders.^[7] This practice has become so widespread that comedian Stephen Colbert has lampooned current law as essentially legalizing money laundering.^[8]

And so, the media, and shareholders have been left with incomplete information about political spending. Even worse, American voters have been left in the dark about the individuals and groups spending millions of dollars to influence our votes.

Demise of Presidential Public Financing

The presidential public funding program—arguably the most important reform to come out of the Watergate scandal—has served as a bulwark against corruption in the White House. This election will be the first in which neither major-party candidate will accept presidential public financing in the general election, nor accept the spending ceiling that goes with it. Instead, President Obama and Mitt Romney will seek to raise and spend as much money as possible.

Citizens United is not solely responsible for the demise of the presidential public financing—the program has needed modernization and repair for years. But, by inviting unlimited sums of outside money into the system, *Citizens United* granted greater political power to corporations, nonprofits, unions and wealthy individuals at the expense of the political parties and actual candidates. Candidates and parties now face a substantial monetary disadvantage vis-à-vis special interests. As a result, the funding program's \$20 million-dollar grant no longer provides enough cash to ensure that the candidates can be heard over the din.

Possible Solutions

There is, unfortunately, no silver bullet that can eradicate the corrosive effect of big money in politics. There are, however, a series of reforms that, working in tandem, could guard against possible corruption and facilitate greater political participation.

Enhance Disclosure

As many states have done, Congress needs to modernize federal disclosure rules to account for the influx of new money in the political system. The DISCLOSE Act of 2012, currently pending in both houses of Congress, would fix three of the most serious flaws in our porous federal disclosure scheme. Specifically, the Act would:

- expand current reporting requirements to capture any outside person or organization that spends substantial amounts of money on campaign advertising, either directly or by transferring money to

another;

- accelerate the timetable for reporting such spending; and
- enhance current disclaimer requirements to provide more information on the face of campaign advertisements.

Each of these provisions would address specific—and serious—problems that currently plague our elections process. By doing so, they would safeguard the integrity of our elections and shore up public confidence in our democracy.

Tighten & Enforce Coordination Rules

Federal coordination rules need to be tightened and aggressively enforced to ensure that purportedly independent spending is truly unrelated to any candidate campaign. Lawmakers can look, for instance, to laws against illegal insider trading that prevent persons from buying or selling stock based on nonpublic information. Similarly, when Super PAC decision-making is based upon nonpublic information about campaign strategy, the resulting actions should be considered “coordinated” with the campaign. Likewise, anti-coordination laws should be aggressively enforced in the manner that the Securities and Exchange Commission enforces the insider trading rules.

Demanding true independence between Super PACs and candidate campaigns would greatly alleviate the possibility for corruption. Super PAC spending will become less valuable to candidates, because they will have less control over the message. And, donors could no longer give to a Super PAC and be assured that their money will be spent precisely how their preferred candidate desires.

Reform & Expand Public Financing

Providing public funding for federal congressional elections, and reforming the presidential program, would fundamentally alter the role of money in politics. Specifically, small donor public funding, like New York City’s successful program, would provide federal money to candidates who collect small donations from their constituents. By matching these small donation at a multiple rate—such as four-to-one or six-to-one—small donor public financing would leverage the power of small donors and incentivize candidates to focus on low dollar donations from their constituents instead of large contributions from lobbyists and others advancing narrow goals.

Such a systemic reform would allow candidates to rely on the American people for the resources needed to communicate their campaign messages. Ultimately, public financing would enhance voter participation and reduce the influence of special interests.

Change the Court’s Understanding of Constitutional Law

Perhaps the most disturbing aspect of *Citizens United*, and the Supreme Court’s recent campaign finance cases in general, is the Court’s unwillingness to consider the American voters. While the Court has been quick to strike down laws that allegedly stifle the First Amendment rights of wealthy individuals and corporations, it has ignored collective countervailing interests in promoting a trustworthy, fair, and inclusive democracy. [9] In doing so, the Court has overlooked a strong American tradition of embracing deliberative democracy and recognizing that the overriding purpose of the First Amendment is to promote an informed, empowered, and participatory electorate.

The Brennan Center for Justice, along with law professors, members of the press, and other advocacy groups, is striving to promote a different vision of campaign finance jurisprudence. We are doing this through books, law review articles, and popular commentary, as well as through impact litigation. Eventually, we hope to persuade the

Court that the government can impose reasonable regulations upon political fundraising and campaign spending in order to combat corruption and promote equality.

One final note: There has been growing vocal opposition from citizens united against *Citizens United*. Multiple resolutions have been introduced in Congress to amend the Constitution to overturn the decision. Across the country, local governments—from Los Angeles to Albany, N.Y., from Duluth, Minn., to South Miami, Fla.—have passed legislation objecting to corporate personhood and unlimited campaign spending. Community groups nationwide have taken similar steps.

Such political opposition reinforces the jurisprudential arguments being promoted by the Brennan Center and others. History teaches that constitutional understandings eventually evolve to meet public will.^[10] If the Court refuses to recalibrate, we can expect citizens to continue to rally against the Supreme Court's distorted democracy. If this occurs, *Citizens United* will someday cease to be the law of the land. The real question is not when, but how.

[11] The Brennan Center is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The Center's Money in Politics project works to reduce the real and perceived influence of special interest money on our democratic values. Our counsel defend campaign finance, public funding, and disclosure laws in courts around the country, and provide legal guidance to state and local reformers through counseling, testimony, and public education.

[12] See Paul Blemental, *Super PACs' \$500,000-Plus Donors Account For Majority Of Money*, The Huffington Post (March 14, 2012, 10:31 AM), http://www.huffingtonpost.com/2012/03/14/super-pacs-donors-500000-dollars_n_1339169.html.

[13] *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010).

[14] Such include social welfare nonprofits organized under section 501(c)(4) of the tax code and trade organizations organized under section 501(c)(6). Indeed, just a few weeks after *Citizens United*, one of the country's largest law firms advised its corporate clients that trade organizations could provide "sufficient cover" from campaign finance disclosure.

[15] See Public Citizen, *12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process* 9 (2011).

[16] Running totals are compiled by the Center for Responsive Politics. Center for Reproductive Politics, 2012 Outside Spending, By Groups, OpenSecret.org, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=O&type=A&chrt=D> (last visited April 16, 2012).

[17] See Blemental, *supra* note 2.

[18] See Interview by Terry Gross with Trevor Potter, attorney to comedian Stephen Colbert, Fresh Air, National Public Radio (Feb. 23, 2012), *available at* <http://www.npr.org/2012/02/23/147294509/examining-the-superpac-with-colberts-trevor-potter>.

[19] In the words of Justice Stephen Breyer, "constitutionally protected interests lie on both sides of the legal equation." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring); *see also United States v. Int'l Union United Auto. Workers*, 352 U.S. 567, 590 (1957) (noting "delicate process" of reconciling labor union's rights with value in promoting "active, alert responsibility of the individual citizen in a democracy").

[10] On repeated occasions, the Court has corrected its constitutional mistakes after widespread defiance from the public. The Court reversed its initial faulty decisions, for instance, on racial segregation, the New Deal, giving equal weight to each person's vote and same-sex sexual privacy.

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Brennan Center for Justice at NYU School of Law | 161 Avenue of the Americas, 12th Floor | New York, NY 10013
646.292.8310 phone | 212.463.7308 fax | brennancenter@nyu.edu

Washington, D.C. office | 1730 M Street, NW, Suite 413 | Washington, D.C. 20036
202.249.7190 phone | 202.223.2683 fax | brennancenter@nyu.edu