

## 10 WAYS

# CITIZENS UNITED ENDANGERS DEMOCRACY

*Liz Kennedy*

Two years ago the Supreme Court got it supremely wrong when it held that corporations had the same rights as people to spend money in elections. Campaign finance laws protect our democracy from corruption and preserve the integrity of our elections. These rules governing the use of money in politics were in a sorry state before *Citizens United v. FEC*. Here are ten ways in which the *Citizens United* decision has made a bad situation much worse.

### 1 “INDEPENDENT” SPENDING FARCE LEADS TO SUPERPACS

The Supreme Court thought non-candidate spending would be “independent” and therefore non-corrupting. This proposition not only beggars belief, it led to the rise of SuperPACs, which are allowed to raise and spend unlimited amounts because they don’t contribute directly to candidates and are purportedly independent. These Super PACs, [more than 250 of which registered between their creation in 2010 and the end of 2011](#), have super-charged the influence of the biggest corporations and wealthiest individuals. The Supreme Court still recognizes that contributions to candidates can be corrupting, which is why direct contributions can be limited; if outside groups coordinate spending with a candidate it is treated like a direct contribution and can also be limited. [Rules exist to prevent coordination between candidates and outside groups](#). But these rules have been reduced to such swiss cheese that they barely maintain the pretense of independence. That is how we’ve ended up with candidate SuperPACs - founded by former campaign associates, funded by family and friends, explicitly supporting one candidate, who is allowed to fundraise for these groups himself. [These candidate SuperPACs are making a mockery of contribution limits](#) by running figure eights around and through the coordination rules; the idea that they are independent in any real sense is absurd.

### 2 LEGAL MONEY LAUNDERING INCREASES SECRET SPENDING

Justice Kennedy wrongly assumed that disclosure rules would reveal who was spending money to influence elections and enable voters “to make informed decisions and give proper weight to different speakers and messages.” While certain groups are required to reveal their financial backers, the Federal Election Commission’s rules fail to enforce many disclosure laws. [Underlying donors to groups running political ads remain hidden through technicalities](#). Even when a particular group discloses its funders, the identity of

the real source of the funds can be shielded. With more and more money flooding the system the need for real transparency that gets to the true source of funds has never been greater - groups that didn't disclose their donors report spending **over \$130 million** in 2010. Voters deserve information, and are in danger of being misled without it. For example, a campaign about a change to zoning policy favorable to Wal-Mart was run by a group calling itself "**Littleton Neighbors Voting No**". There, state disclosure laws revealed that the group was funded by Wal-Mart, and not a group of concerned citizens as the name suggests. At the federal level we are not so lucky. Tax-exempt groups like 501(c)(4)s, with names like Freedom Loving Americans for Freedom, can accept unlimited money from any source without revealing the names of their donors. These groups can give that money to a PAC and, though the PAC has to disclose its donors, the source of the funds is recorded as the tax-exempt group with the inoffensive name, not the name of the real source of the money. "**What's the difference between that and money laundering?**" asks leading campaign finance satirist Stephen Colbert. He reminds us that "*Citizens United* said that transparency would be the disinfectant, but (c)(4)'s are warm, wet, moist incubators. There is no disinfectant."

### **3 CORPORATE MONEY DISTORTS DEMOCRACY**

The Court turned its back on the reality recognized by political actors for a century: concentrated wealth has a distorting effect on democracy, therefore, winners in the economic marketplace should not be allowed to dominate the political marketplace. Before *Citizens United*, the Supreme Court recognized in *Austin v Michigan Chamber of Commerce* that the government had a compelling interest in protecting our democracy from "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." The Court that decided *Austin* was rightly worried that corporate wealth can dominate the political process and "unfairly influence elections." *Citizens United* disavowed this understanding. The public supports the prior consensus of the Court. Shortly after the *Citizens United* decision, **78% of poll respondents agreed that the amount that corporations are allowed to spend in order to influence campaigns should be limited**, and 70% believed that corporations have too much control over elections already. Unfortunately, spending through new and less accountable channels continues to rise. **In the 2010 election, outside groups spent over \$280 million to influence federal elections, according to the Campaign Finance Institute.** This was more than double the nearly \$120 million spent by outside groups on Congressional elections in 2008, and more than five times the almost \$54 million spent by outside groups in 2006. It's hard to escape the conclusion that Government of and by big money supporters can only be for big money supporters.

### **4 COURT IS BLIND TO REALITY OF CORRUPTION**

*Citizens United* concluded, without evidence, that independent spending doesn't corrupt, ignoring that ingratiation, loyalty, access, and influence are the coin of the realm in politics. Justice Kennedy blinked when he wrote that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt. ... Ingratiation and access, in any event, are not corruption." Showing a serious tin ear to our times, the Court also decided that "[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy." *Citizens United* overruled recent precedent, *McConnell v. FEC*, which had upheld the very same corporate spending restrictions. The *McConnell* Court had found that corruption of government is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." The possibility that legislators will "decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder" is a

more subtle form of corruption than straight *quid pro quo* transactions, but is “equally dispiriting.” Indeed, Justice Kennedy’s own opinion in a prior case, [Caperton v. Massey Coal](#), recognized that an elected official could be, and would certainly appear, indebted to the largest financial supporter of his election. Massey Coal had a \$50 million adverse judgment on appeal to the West Virginia Supreme Court, so the CEO invested \$3 million dollars to impact the judicial election. Lo and behold, his Supreme Court candidate won, and voted to spare Massey the fine. In that case, Justice Kennedy recognized that the disproportionate independent spending to elect the judge made the judge appear biased.

Just as litigants have the right to impartial justice, citizens should have a right to a representative who will fairly weigh the interests of all constituents, not merely moneyed supporters. *Citizens United* also said that that our democratic government is not corrupted when those who can afford to spend huge sums of money on behalf of candidates have influence over or access to elected officials—presumably greater influence than non-moneyed supporters—and that the appearance of access or influence by financial supporters will not cause Americans to lose faith in their democracy. Eighty-seven percent of Americans polled soon after *Citizens United* believed that members of Congress are influenced more by donors than by constituents’ views. [more polls] [Voters say](#) “we don’t have a representative government anymore” and believe that “the nexus of money and power, greased by special interest lobbyists and large campaign donations” means that “the game is rigged” and “the wealthy and big industries get policies that reinforce their advantage.” *Citizens United*’s constricted understanding of true corruption of a representative democracy has potentially disastrous consequences for the core principal of self-government on which our democracy rests.

## 5 CITIZEN VOICES ARE DROWNED OUT

The Supreme Court required electoral districts to be drawn with roughly equal populations because the Constitution “demands” that each citizen have “an equally effective voice.” Hence, “one person, one vote.” When corporations, or other big money spenders, are able to flood the airwaves with their own message, it can effectively drown out the voices of other citizens, whose democratic right to political speech deserves no less protection than those with financial resources. This undermines the political equality that gives our government legitimacy. A town hall meeting, or Congress for that matter, has rules so that each person who wants to is able to speak. Otherwise the discourse would be in danger of being overwhelmed by a “[Heckler’s veto](#),” where one voice overwhelms other rightful participants. [Judge Nelson of the Montana Supreme Court writes](#) that “it is utter nonsense to think that ordinary citizens or candidates can spend enough to place their experience, wisdom, and views before the voters and keep pace with the virtually unlimited spending capability of corporations to place corporate views before the electorate. In spending ability, bigger really is better; and with campaign advertising and attack ads, quantity counts. In the end, candidates and the public will become mere bystanders in elections.” [In a prior case defending contribution limits Justice Breyer wrote that](#) “by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process.” With huge corporations and the richest 1% given free reign to dominate elections through unlimited spending, political equality suffers a huge setback. What’s ultimately at stake is how much say the average citizen has over the policies that govern her life. The answer is clear: much less than before *Citizens United*.

## 6 MONEY IS STILL NOT SPEECH

The *Citizens United* decision renews the Court’s mistaken commitment to idea that money is speech. [At the beginning of this century Justice Stevens wrote](#) that “Money is property; it is not speech.” “Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground,

or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.” [Judge Nelson of the Montana Supreme Court wrote](#) “*Citizens United* has turned the First Amendment’s ‘open marketplace’ of ideas into an auction house for . . . corporatists. Freedom of speech is now synonymous with freedom to spend. Speech equals money; money equals democracy. This decidedly was not the view of the constitutional founders, who favored the preeminence of individual interests over those of big business.” This perversion of the First Amendment must be overcome if we are to have sensible rules for money in politics.

## 7 OPEN SEASON ON REMAINING MONEY IN POLITICS PROTECTIONS

Now that reform opponents have succeeded in striking down the century old prohibition on corporate spending in elections, they are attacking any and all campaign finance rules left standing. Opponents of reasonable money in politics rules are [fighting to allow corporations to contribute directly to candidates](#), and arguing [against contribution limits](#). Opponents tried to overturn the ban on foreign money in our elections. The Supreme Court upheld the law, but didn’t explain the [logical incoherence with \*Citizens United\*](#)—namely, that foreign money might make beneficiaries improperly in debt to foreign interests, but corporate money doesn’t pose the risk that beneficiaries will be improperly in debt to corporate interests. Worse, after years of bi-partisan agreement that transparency was necessary, opponents are attacking the idea that money in politics should be disclosed. Once again, Stephen Colbert sums it up, this time with a campaign finance knock-knock joke. [As reported at TPM](#) “Knock knock?” Colbert said. “Who’s there?” asked the crowd. “Unlimited union and corporate campaign contributions,” Colbert said. “Unlimited union and corporate campaign contributions who?” the crowd replied . . . “That’s the thing, I don’t think I should have to tell you,” Colbert said.

This would be hilarious if it weren’t so sad. Proponents of secret political spending cry “harassment” in an attempt to defeat disclosure laws that provide accountability over the corporate political spending allowed by *Citizens United*. But even Justice Scalia, no fan of many campaign finance laws, understands that “[r] [equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.](#)”

## 8 INCREASES CORPORATE POWER

[The Court granted corporations extensive constitutional protections even before \*Citizens United\*](#). But in this decision the Court treated corporations as equally deserving of First Amendment rights as people, and found that the free speech rights of corporations were burdened by requirements that they engage in political spending through political action committees. Again, Justice Nelson of the Montana Supreme Court writes: “the notion that corporations are disadvantaged in the political realm is unbelievable. Indeed, it has astounded most Americans. The truth is that corporations wield enormous power in Congress and in state legislatures. It is hard to tell where government ends and corporate America begins: the transition is seamless and overlapping.” *Citizens United* allows corporations to flex their financial muscles and pressure officials to support their positions or risk massive spending attacking them in their next election. [The Chamber of Commerce alone spent \\$32.9 million from its general coffers](#), and did not have to disclose the corporate source of the funds. This was more than any other outside organization, and nearly double the amount the Chamber spent in 2008. A group called Farmers for Fairness, [created advertisements opposing the re-election of certain officials](#), screened them for targeted legislators, and explained that the ads would

run unless the representative supported their position. Though the ads had no connection to the group's political goals to deregulate the hog industry, the *Citizens United* protects them as “political speech” rather than recognizing this transaction as a shakedown. According to Judge Nelson, the idea that corporations have constitutional rights like people is “an affront to the inviolable dignity of our species.” The events of the last few years can only serve to remind us what can happen when necessary protections are removed and [leviathans are allowed to use their full economic power to gain and entrench greater political power.](#)

## 9 UNLIMITED CORPORATE SPENDING IS BAD FOR BUSINESS AND SHAREHOLDERS

The Court said that procedures of shareholder democracy would allow shareholders to know how their money was being spent and ensure accountability. But most corporations don't disclose their political spending even to their own beneficial owners. Investor money is being used in politics without their knowing or agreeing to it. Now that business corporations have the right to spend unlimited amounts of money on politics, they have a responsibility to disclose the money they spend to the owners of the company. Also, [as Target Corp.](#) experienced in 2010, getting involved in politics can present risks to the company's brand, reputation, and shareholder value. [Domination of politics and government by certain big spending corporate interests is not in the interest of the broader business community.](#) If government contracts and regulations (some of which can serve as barriers to entry for start-ups and potential competitors) are awarded a result of rent-seeking, that benefits only the current dominant economic players, not the economy as a whole. The Committee for Economic Development makes the point that without rules, corporations may find themselves shaken-down for financial support. Responsible corporate actors may come to feel they are trapped in a prisoners' dilemma - disadvantaged if they don't play the political spending game, even if they would prefer not to.

## 10 RISKS REDUCING RESPECT FOR THE SUPREME COURT

The Supreme Court risks delegitimizing itself when it creates a legal fiction – that outside political spending cannot corrupt – and sets it loose on the citizenry. In *Citizens United* the Court struck down hard won political reforms enacted after much Congressional deliberation about the need for common sense rules to prevent money in politics from corrupting democracy. The five-member majority responsible for *Citizens United* overturned a section of the [Bipartisan Campaign Reform Act](#) that the Supreme Court had just upheld in 2003's *McConnell v. FEC*. [In his dissent from \*Citizens United\* Justice Stevens noted that “\[t\]he only relevant thing that has changed since \[the Court's controlling precedents were decided\] is the composition of this Court.”](#) Polls taken in the weeks after the decision showed widespread strong disagreement with the decision across party lines; a [Washington Post-ABC News poll](#) found that “eight in ten poll respondents opposed the decision, with 65% ‘strongly’ opposed.” By abruptly changing Constitutional decrees on issues central to our democratic government, ignoring political reality as determined by co-equal elected branches, and entrenching political power in undemocratic ways instead of opening it up to broader citizen participation, the Court runs the risk of reducing Americans' respect for the highest court in the land.