



## Making a Beast with Green Backs

The Legal Battle over Money in American Elections

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### Abstract

An examination of the legal battle over *Citizens United* and its consequences for our electoral system.

**Keywords:** *Super PAC, Citizens United, judicial power, money in politics*



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On a blazing summer afternoon in August of 2011, presidential candidate Mitt Romney's famously granite exterior showed a few cracks. The Republican frontrunner made the critical mistake of engaging with a heckler. At the insistence that we raise taxes on corporations, Romney recoiled: "Corporations are people, my friend!" The ensuing chorus of boos did not sound like it was coming from a friend.

While Governor Romney's quip proved unpopular, the opinion he espouses forms the crux of the majority rationale in the landmark Supreme Court case *Citizens United v. Federal Election Committee*. In this 5-4 decision, the United States' highest court overturned several key election law provisions, igniting a fiery public debate and opening the door to unlimited spending on political campaigns. The decision, handed down in January 2010, enshrines the principle of corporate personhood—the notion that corporations, just as individual citizens, hold a First Amendment right to free speech. This principle, coupled with Congress' refusal to regulate itself, has created a status quo that has the potential to harm the legitimacy of our political process. This can only be changed through legal action.

Mr. Romney's comment would have been a non sequitur in 2008 when Citizens United, a right-wing corporation, sought to advertise and distribute its film *Hillary: The Movie*. This "documentary" revolves around the life and times of Hillary Rodham Clinton, then one of the leading contenders for the Democratic nomination for president. The film paints an unflattering portrait of an egomaniacal woman, ruthless

in her tactics, extreme in her beliefs, and unencumbered by common sense.<sup>1</sup> Citizens United attempted to distribute its 90-minute attack ad, promoting it with corporate-backed TV advertisements. Its strategy ran afoul of two key Supreme Court decisions: one, a 1990 decision that barred corporations from using money to purchase advertisements for or against a particular candidate, and two, a 2003 decision upholding the McCain-Feingold Act. Among other limitations imposed on the influence of money in politics, McCain-Feingold prohibits corporate "electioneering," making political statements within a given period in the run-up to an election. When the Federal Election Commission (FEC) stepped in to stop Citizens United, the group sued the FEC on the grounds that the laws violated its First Amendment right to free speech. Two years later, the case made its way to the Supreme Court.<sup>2</sup>

Just as in many controversial cases before, the decision in *Citizens United v. Federal Election Committee* resulted in a split vote, with the conservative and liberal justices advancing diametrically opposed views. The majority, which included Chief Justice Roberts and Associate Justices Kennedy, Scalia, Alito, and Thomas, agreed with the Citizens United complaint on First Amendment grounds. In the majority opinion, Justice Kennedy warns, "When government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought." In other words, he believes that *any* regulation restricting political activity by any entity is unlawful. "The First Amendment confirms the freedom to think for ourselves."<sup>3</sup> It is important to understand that this broad freedom can only be claimed by corporations if we are to consider them as entities that retain the same First Amendment rights as individual people.

The justices in the majority validated this claim by citing a line of United States Code, which defines the words "person" and "whoever" as they appear in legislation to include "corporations,

companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>4</sup> The legal concept of corporate personhood is nothing new: this definition of “person” is why corporations can own property, enter into contracts, sue, be sued, be subject to criminal and civil law, and so on. In the same way that you and I can enter into contracts and navigate our courts as individual citizens, so can John Q. Company.

Kennedy explicitly connects those definitions to the First Amendment by referring to Section One of the 14<sup>th</sup> Amendment, which stipulates that no “person” will be deprived “of the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>5</sup> By applying the 14<sup>th</sup> Amendment to corporations, the Justices make the statement that companies are “people” not just for the purposes of business interactions, but are also entitled to participate fully in our democracy as any individual citizen would.

However, this does not mean that corporations are exempt from any restriction. For example, the Tillman Act of 1907, which bans corporations from donating money directly to federal candidates above a certain amount, is still in force. Additionally, the ruling does not overturn the ban on uncapped donations to political parties.<sup>6</sup>

These two restrictions have led to the rise of a uniquely American institution: the Super PAC. Due to the abandoned precedents in *Citizens United*, these special political action committees can be run by corporate entities, collect infinite sums of money from corporate donors, and spend the money supporting a

chosen candidate and thrashing all the rest.<sup>7</sup> Because of restrictions like the Tillman Act, Super PACs are nominally forbidden from “coordinating” with individual candidates, although what that precisely means and how it is to be enforced is unclear.

This ambiguity leaves the door open to all kinds of chicanery. As Martha T. Moore of *USA Today* explains, “Staffed by former staff and funded by supporters of the candidate, [Super PACs] are essentially doing the same job from a different address. Like two chefs making the same recipe, the campaign and the Super PACs not only use the same ingredients, they used to work in the same kitchen.”<sup>8</sup> This is especially true of Mr. Romney, whose “Restore Our Future” Super PAC is run by a group of his former

staffers. This presents an opportunity for adverse effects on candidates’ accountability in campaigns. For example, while friends and former employees can spend Super PAC money to bury Romney’s opponents in negative advertising, this allows the candidates themselves to cry ignorance and avoid accountability



*The Courtroom of the Supreme Court of the United States. (Franz Jantzen)*

Source: [www.supremecourt.gov](http://www.supremecourt.gov)

for the tone of their aligned Super PAC.

Critically, Super PACs do not even need to disclose who donates to them, although Congress does have the power to compel them to do so. As Kennedy explains in the majority opinion, “The government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.” To summarize, corporations have the same rights as people, including speech, and as such they can raise money and finance as much political speech as they like. Money is therefore a form of *free* speech because it can *buy* speech.

Conservatives outside the Court were duly effusive about the decision. Senate Republican leader Mitch McConnell (KY) said the court “struck a blow for the First Amendment,” showing his apparent agreement with Kennedy’s rationale.<sup>9</sup> Likewise, commentators like Hans A. von Spakovsky of the conservative-leaning Heritage Foundation voiced their support of the First Amendment approach: “The Supreme Court has restored a part of the First Amendment that had been unfortunately stolen by Congress and a previously wrongly-decided ruling of the court.”<sup>10</sup> In a move that surprised many supporters, the American Civil Liberties Union filed an amicus brief on behalf of Citizens United. In it, the ACLU argued that restrictions on “electioneering communications,” laws that dictate when political messages can and cannot be aired, are “facially unconstitutional” and deserve to be struck down.<sup>11</sup> The sanctity of free speech, no matter what the cost, is the unassailable mantle for the majority opinion in this debate.

The more liberal Supreme Court justices reject their colleagues’ interpretation of corporate personhood and its implications out of hand. In his dissenting opinion, Justice John Paul Stevens makes his disdain for corporate interference in federal campaigns known, “While American democracy is imperfect, few outside the majority of this court would have thought its flaws included a dearth of corporate money in politics.”<sup>12</sup> His argument against the majority decision rests on two main beliefs: corporations are not entitled to First Amendment rights as “persons,” and the ability of a corporation to radically outspend virtually any individual American will lead to a situation in which grass-roots speech is crowded out by corporate messaging. In other words, your ability to exercise First Amendment rights is so thoroughly outweighed by corporate power as to constitute an infringement on *your* rights. As the justice explains:

*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. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.*<sup>13</sup>

Prominent Democrats and Progressives echo Stevens’ concerns about these “deleterious effects.” In his 2010 State of the Union Address, President Obama addressed the issue head-on, opining that “the Supreme Court reversed a century of law to open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. Well I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities.” Since making those statements, the President has yet to lay out a clear path for how he might undo *Citizens United*. Paradoxically, Mr. Obama has endorsed a Super PAC created on his behalf for the 2012 election cycle.<sup>14</sup>

This is not a surprising development. Despite rhetoric or intentions, all campaigns need money to function. Campaign funds pay for staff salaries, posters, buttons, office space, ad production, TV airtime, candidate travel, vans to drive supporters to the polls, and so on. If a candidate can successfully outspend his opponent, he can out-campaign him. This is crucial in the zero-sum game of two-party elections: a Democrat loss is a Republican gain, and vice versa. This arms-race mentality is why campaigns are getting inexorably more expensive. The projected cost of the presidential contest and all other races for federal posts is projected to shatter previous records, jumping from \$5 billion in 2008 to as high as \$7 billion by election day in 2012. By contrast, the 2000 federal election cost just \$3 billion.<sup>15</sup> This explosive competition for cash leads Super PACs to depend almost exclusively on wealthy donors. As *The New York Times* reports, 96 percent or more of Super PAC funds raised on behalf of the major presidential candidates come from donors who give at least \$25 thousand, with many donations ranging in the

multi-millions.<sup>16</sup> Sheldon Adelson, a billionaire casino tycoon, has already given \$5 million to Newt Gingrich's Super PAC. If it is true that people work for who pays them, all voters should be concerned about what effect these kinds of donations have on public policy.

While concern for the political impact of *Citizens United* seems to be universal across the Left, only some are taking action to undo the Supreme Court's decision. Senator Bernie Sanders (I-VT) and Representative Ted Deutch (D-FL) have proposed the "Saving American Democracy Amendment" to the Constitution, which would, in Sanders' words, "make clear that corporations are not entitled to the same constitutional rights as people and that corporations may be regulated by Congress and state legislatures."<sup>17</sup> Furthermore, this 28<sup>th</sup> Amendment would also "preserve the First Amendment guarantee of freedom of the press. It would incorporate a century-old ban on corporate campaign donations to candidates, and establish broad authority for Congress and states to regulate spending in elections."<sup>18</sup> Assuming that the Supreme Court will not reverse its own decision anytime soon, a Constitutional amendment is the only way to undo the effects of the *Citizens United* decision. These efforts are complimented by grass roots movements such as Wolf PAC, an initiative launched by Current TV host Cenk Uygur to convince the states to convene a constitutional convention aimed at the abolition of corporate personhood.<sup>19</sup>

Ultimately, the complexities of campaign finance in modern America present a true dilemma for our democracy. On the one hand, we could be relatively safe from outsized corporate influence in politics if we pass a constitutional amendment that allows Congress to limit campaign expenditures. However, this would make Congress the arbiter of who participates in our elections and to what extent. On the other hand, unrestrained corporate influence in campaigns makes back-room deals and influence peddling a near-guarantee, as many politicians will be willing to trade favors in exchange for corporate donations. This could be tempered, Justice Kennedy tells us, by laws that

would require Super PACs to disclose who their donors are, thus revealing a candidate's potential biases to the electorate. House Democrats have repeatedly introduced the DISCLOSE Act, a bill that would force political action committees and electoral campaigns to release much of this information. However, the act seems doomed in the face of Republican opposition.

Either way, we are stuck with the worst of both worlds in the status quo. We do not have the protections against unaccountable Super PAC influence outlined in McCain-Feingold because the Supreme Court overturned them. Yet, we also do not have the systemic transparency to know which candidate is receiving help from which corporation. This presents a problem for our democracy: how can the voter be vigilant against influence-peddling lawmakers when he has no way of knowing which corporation or union is attempting to buy influence? Surely, you are more likely to vote against a candidate who is backed by a corporation you loathe, but in the status quo you have no way of knowing which corporation is spending for which candidate. Because we have not yet settled on an adequate solution to our campaign finance conundrum, this legal debate will rage on into future election cycles.

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*Notes*

<sup>1</sup> Greg Stohr, “Corporate Campaign Spending Backed by US High Court,” *Bloomberg News*, January, 21 2010, Internet (accessed February 2, 2012).

<sup>2</sup> Stephen Dinan, “Divided Court Strikes Down Campaign Money Restrictions,” *The Washington Times*, January 21, 2010, Internet (accessed February 2, 2012).

<sup>3</sup> Supreme Court Record.

<sup>4</sup> 1 U.S.C. §1.

<sup>5</sup> US Constitution, 14<sup>th</sup> Amendment.

<sup>6</sup> Ed Rollins, “Another Shock to the Washington System,” CNN, January 21, 2010, Internet (accessed February 2, 2012).

<sup>7</sup> It is important to note that wealthy individuals (often corporate executives) who faced restrictions on how much they could donate to political action committees under McCain-Feingold enjoy similar benefits as corporations. Indeed, most of the Super PAC donations to date have been from such individuals.

<sup>8</sup> Martha Moore, “Pro-Mitt Romney Super PAC Seems to Parallel His Campaign,” *USA Today*, January 27, 2012.

<sup>9</sup> Stohr, “Corporate Campaign Spending.”

<sup>10</sup> Dinan, “Divided Court Strikes Down Campaign Money Restrictions.”

<sup>11</sup> “Citizens United v. Federal Election Commission,” American Civil Liberties Union, July 29, 2009, Internet (accessed February 2, 2012).

<sup>12</sup> Supreme Court Record

<sup>13</sup> Ibid.

<sup>14</sup> “The Super PAC President,” *The Wall Street Journal*, February 9, 2012, Internet (accessed February 15, 2012).

<sup>15</sup> “Estimated Cost of 2012 Campaign,” Public Radio International, April 8, 2011, Internet (accessed February 15, 2012).

<sup>16</sup> “Who’s Financing the ‘Super PACs’?” *The New York Times*, February 20, 2012, Internet (accessed March 1, 2012).

<sup>17</sup> “Saving American Democracy Amendment,” U.S. Senator Bernie Sanders, December 8, 2011, (accessed February 2, 2012).

<sup>18</sup> Ibid.

<sup>19</sup> “Wolf PAC Home Page,” Wolf PAC, 2011, Internet (accessed February 2, 2012).