

DEMOCRACY IS FOR PEOPLE



A Public Citizen project

A Constitutional Amendment to Keep Corporate Money out of Elections: Overturning the “Money=Speech” Doctrine

Even before its disastrous 2010 ruling in *Citizens United v. Federal Election Commission*, the U.S. Supreme Court had already developed a flawed reading of the First Amendment that struck down reforms designed to prevent corruption and to ensure that the voices of the powerful did not drown out “We the People” in the halls of our democratic institutions. Although the extraordinary threat of unlimited corporate money in elections is a new expansion of the doctrine that “money is speech”, decisions of the Court since the Watergate era have enabled the richest one percent of society to buy outsized influence in our government.

How could money equal speech?

For over a hundred years, democratic representatives have listened to public outcry to stop the super-wealthy and big businesses from buying our elections. Reform efforts in the first half of the 20th Century prohibited corporate and union contributions to candidates.ⁱ In the wake of the Watergate scandal and allegations of illegal contributions in the 1972 election, Congress passed sweeping campaign finance reforms in the Federal Election Campaign Act (FECA). FECA enacted comprehensive limits on campaign fundraising and spending, expanded disclosure requirements, established public financing for Presidential elections, and created the Federal Elections Commission to enforce the law.

However, FECA was challenged in the 1976 Supreme Court case *Buckley v. Valeo*. In the *Buckley* decision, the Court upheld contribution limits, disclosure requirements, and presidential public financing. However, the Court struck down limits on “independent” expenditures and established the controversial idea that spending money for political campaign purposes is a form of speech protected by the First Amendment. This idea became known colloquially as “money equals speech.” The Court reached this conclusion by treating “the distribution of the humblest handbill or leaflet” the same as expensive, professional advertising in a nation “dependen[t] on television, radio, and other mass media,” and by refusing to acknowledge the corrupting power of unlimited money being used to support and attack candidates.ⁱⁱ This paved the way for huge increases in political spending by groups that only need to avoid a technical definition of “coordination” with candidate campaigns.

Subsequent Court rulings weakened or did away with other restrictions on campaign spending. *Citizens United* marked the culmination of this trend, taking an errant reading of the Constitution and a broken campaign-finance system to an extreme conclusion: that corporations should have a First Amendment right to spend limitless amounts to influence election outcomes.



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The legal arguments for treating money as speech are not sound

Buckley and the cases that follow it, including *Citizens United*, rest on a number of flawed assumptions about money and politics. In particular, the *Buckley* Court assumed: ⁱⁱⁱ

- That each dollar spent directly leads to some increased “quantity of speech,” and therefore placing any limits on campaign spending is the same as placing limits on political speech as a whole.
- That politicians are less indebted to or corrupted by people who “independently” spend huge amounts of money to elect them than to those who contribute money directly to their campaign.
- That government has no compelling interest in fostering equal participation in the campaign process or stopping the corrosion of democratic ideals that results when election costs spiral out of control and only the super-wealthy have influence.

Money is not speech, but a way to fund and amplify speech

Spending money in election-related contexts helps people express themselves and can lead to political speech. But money itself is **not** the equivalent of political speech. ^{iv} A system that allows corporations and the wealthiest among us to drown out the voices of others, and ensures unequal access to and leverage over elected officials, undermines the First Amendment’s core purpose – to foster and protect a flourishing marketplace of democratic ideas.

When money equals speech, the 1% funds our elections

Even before *Citizens United*, American elections and candidates were increasingly shaped by a small, wealthy, relatively homogeneous “donor class.” With *Citizens United* in effect, the problem has become much worse.

- Repeated studies have shown less than **less than a quarter of one percent** of the US population (0.24%) makes financial contributions over \$200 to federal candidates. ^v
- Yet, these contributions represent the bulk of campaign fundraising. In 2010, **more than 90% of the money** raised by candidates and committees – roughly **\$1.3 billion** – came from this fraction of 1%.
- Nearly **two-thirds of the total money** raised (64%) came from people who doled out \$2,300 or more to candidates or committees. That’s one in every 2,000 Americans, or **0.004% of the population**. ^{vi}
- *Citizens United* and later rulings gave rise to “Super PACs” – specially registered organizations that can receive unlimited money from corporations and wealthy individuals in order to fund supposedly “independent” election advertising. As of September 2012, nearly 60% of money the Super PACs have raised – **\$206 million** – came from **just the top 100 people, businesses and organizations** that have contributed nationwide. ^{vii}



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- An election system in which unlimited political spending is protected speech replicates the systemic inequalities found in society.
 - Even though women represent half the U.S. population, male donors to political candidates outnumber female donors by a ratio of 2.5 to 1.
 - A 2004 national study found that 89.4% of the money contributed to political campaigns in 2000 and 2002 came from predominantly non-Hispanic white zip codes, while the remaining 10.6% came from primarily minority zip codes. Yet, more than one in three Americans is a person of color.
 - The median income of the top five donor zip codes in 2010 was approximately twice the national rate. The ethnic and racial background of those zip codes was also 80-90% white.

When money equals speech, Big Money wins elections – and we lose

Despite claims by defenders of *Buckley* and *Citizens United* that more money leads to more democratic participation, massive campaign spending distorts our elections, diminishes the voices of ordinary people, and corrupts the governing process itself.

In the wake of *Citizens United*, political observers have begun talking about a “shadow class” of donors and Super PACs, whose electioneering acts as a proxy campaign that could eclipse the influence of even the candidates themselves – leaving voters behind.

- **Big Money decides elections:** In 2010, spending by outside groups fueled by big money favored the winning candidate in 60 of 75 federal election contests in which power changed hands.^{viii}
- **Money in politics is spiraling out of control:** When money equals speech, it takes a lot more money to be heard, and the democratic process turns into a financial arms race.
 - In the wake of *Citizens United*, spending by outside groups on political ads skyrocketed. Outside spending made an unprecedented jump from about \$70 million in the 2006 mid-term elections to nearly \$300 million in 2010 mid-terms – **an increase of 328%**.^{ix}
 - Sheldon and Miriam Adelson have given \$36.3 million to Super PACs and outside groups in the 2012 cycle. In comparison, it would take more than 321,000 average American families donating an equivalent share of their wealth to match the Adelsons’ giving.^x
 - 2012 promises to be the most expensive election season yet, with an **estimated \$8 billion spent on federal elections** by candidates and outside groups in 2012.^{xi}



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- **Big Money distorts political debate by drowning out the voices of ordinary people:** The wealthy few that are able to fund election advertising tend to have political priorities that are out of step with the views and interests of everyday Americans. A Russell Sage Foundation survey^{xii} of high-earners conducted in 2011 revealed that:
 - Wealthy respondents were nearly 2.5 times more likely than average Americans to list deficits as the most important problem facing our country.
 - In spite of consistent majority public support for raising taxes on millionaires, among wealthy respondents, “[t]here was little sentiment for substantial tax increases on the wealthy or anyone else.”
 - In spite of recent scandals on Wall Street, “more than two thirds of [survey] respondents said that the federal government ‘has gone too far in regulating business and the free enterprise system.’”
- **Big Money depresses voter turnout and engagement:** Recent polling shows that the rise of Super PAC spending has sapped voter enthusiasm. Many Americans now believe their vote counts for less than it did before, and the same polling suggests people are less likely to vote as a result of this phenomenon. The results were even more pronounced among low-income households.^{xiii}
- **Big Money slants policy-making for the 1%:** Due to the spiraling cost of elections, fundraising pervades the legislative process. By some estimates, members of Congress spend between 30 and 70% of their time in office or more raising money for campaigns.^{xiv}
 - An informal survey^{xv} of Congressional staff conducted by Public Citizen in May 2011 reported that nearly three in five respondents felt that *Citizens United* had “strengthened the influence of lobbyists in the policymaking process.”
 - Staff members reported they were less likely to take a stance in support of a bill opposed by a major company, knowing that the company or its lobbyists could easily spend millions on attack ads against their Member of Congress during the next election cycle.

Conclusion

Elections are the greatest opportunity for “We the People” to make our voices heard and influence the course of our nation, but they should not become an auction block for corporations and the super-wealthy to buy the government of their choice. The First Amendment exists to give voice to all Americans, not to allow a powerful few to undermine the integrity of our democratic process.

That’s why we need to build support for a constitutional amendment that would overturn both *Citizens United* and the “money equals speech” doctrine, and help restore sorely needed balance to our democracy.



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A constitutional amendment that overturned *Citizens United* and *Buckley v. Valeo* would:

- Empower the states and Congress to set reasonable limits on contributions and spending in our elections.
- Enable more effective public financing of electoral campaigns.
- Stop the flood of corporate and Super PAC money that distorts the political debate and corrupts our representatives.

Tackling not just *Citizens United* alone, but the underlying doctrine that unlimited spending on elections should be considered ‘free speech,’ is an essential component of the movement for a constitutional amendment to make it clear democracy is for people, not corporations.

ⁱ See *United States v. Automobile Workers*, 352 U.S. 567, 579-83 (1957).

ⁱⁱ *Buckley v. Valeo*, 424 U.S. 1, 19, 47 (1976).

ⁱⁱⁱ See Burt Neuborne, *Buckley’s Analytical Flaws*, 6 J.L. & POL’Y 111, 115-17 (1997).

^{iv} David Kairys, *The Contradictory Messages of Rehnquist-Roberts Era Speech Law: Liberty and Justice for Some*, U. Ill. L. Rev., Forthcoming, at 106-07 (revised Aug. 18, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635319&download=yes.

^v Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. Penn. L. Rev. 73, 106-07 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=569021; Americans for Campaign Reform, “Money in Politics: Who Gives?,” <http://www.acrreform.org/wp-content/uploads/2010/12/Fact-Sheet-Who-Gives.pdf>.

^{vi} <http://www.acrreform.org/wp-content/uploads/2010/12/Fact-Sheet-Who-Gives.pdf> (Dec. 9, 2010).

^{vii} Center for Responsive Politics, “2012 Super PACs: How Many Donors Give? | Open Secrets,” http://www.opensecrets.org/outsidespending/donor_stats.php?cycle=2012&type=B, accessed Sept. 10, 2012 (based on Sept. 3, 2012 FEC reports).

^{viii} Public Citizen, “Citizens United: One Year Later,” <http://www.citizen.org/documents/CU-One-Year-After.pdf> (Jan. 21, 2011).

^{ix} See Center for Responsive Politics, “Total Outside Spending by Election Cycle, Excluding Party Committees | Open Secrets,” http://www.opensecrets.org/outsidespending/cycle_tots.php, accessed Sept. 10, 2012.

^x Demos, “Million-Dollar Megaphones: Super PACs and Unlimited Outside Spending in the 2012 Elections,” <http://www.demos.org/publication/million-dollar-megaphones-super-pacs-and-unlimited-outside-spending-2012-elections> (Aug 2, 2012)

^{xi} Peter Gorenstein, “2012 election spending likely to top \$8B,” Yahoo! News, <http://news.yahoo.com/blogs/exclusive/2012-election-spending-likely-top-8b-173748683.html> (Apr. 14, 2012).

^{xii} Demos, “Auctioning Democracy: The Rise of Super PACs and the 2012 Election,” <http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election> (Feb. 8, 2012).

^{xiii} Brennan Center for Justice, “Poll: Super PACs Leave Americans Less Likely to Vote,” http://www.brennancenter.org/content/resource/poll_super_pacs_leave_americans_less_likely_to_vote/ (Apr. 24, 2012).

^{xiv} Lessig, Lawrence. “More Money Can Beat Big Money.” New York Times. http://www.nytimes.com/2011/11/17/opinion/in-campaign-financing-more-money-can-beat-big-money.html?_r=0 (Nov. 16, 2011)

^{xv} Public Citizen, “Cause for Concern,” <http://citizen.org/documents/Cause-for-Concern.pdf> (May 2011).



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