

## National University of Ireland, Maynooth

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Seth Barrett Tillman



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# Policy Analysis

No. 724

April 23, 2013

## *Move to Defend* *The Case against the Constitutional Amendments* *Seeking to Overturn Citizens United*

by John Samples

### Executive Summary

Three years ago the U.S. Supreme Court decided the case of *Citizens United v. Federal Election Commission*. It found that Congress lacked the power to prohibit independent spending on electoral speech by corporations. A later lower-court decision, *SpeechNow v. Federal Election Commission*, applied *Citizens United* to such spending and related fundraising by individuals. Concerns about the putative political and electoral consequences of the *Citizens United* de-

cision have fostered several proposals to amend the Constitution. Most simply propose giving Congress unchecked new power over spending on political speech, power that will be certainly abused. The old and new public purposes cited for restricting political spending and speech (preventing corruption, restoring equality, and others) are not persuasive in general and do not justify the breadth of power granted under these amendments.

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The authors of several of these amendments recognize this implication; they respond by carving out an exception for “freedom of the press” to the general congressional powers to control spending and speech.<sup>96</sup> Some corporations and speakers are indeed more equal than others. Some are free of government control over their speech; others are subject to whatever restrictions and prohibitions Congress might wish to impose. However, making one kind of speaker “more equal” creates a new inequality between unregulated speakers and the regulated class. It also affirms the unequal influence over elections that media corporations would enjoy after rival speakers are silenced. Finally, this carve-out for the press suggests that the distinction between those who are permitted to speak and those who are not permitted to speak corresponds with a distinction between liberal/conservative or perhaps, in a polarized age, between Democrat/Republican. The amendments thus appear to write partisan or ideological advantages into the Constitution. Some may decry writing such private interests into a document meant to benefit all citizens. In any case, the authors of the amendments should be more explicit about their partisan intentions so citizens can assess the proposed changes in the basic law.

Finally, did *Citizens United* mean that some voices were “drowned out”? This complaint is often heard and rarely specified. Recent history raises doubts whether the rich and conservative dominate the funding of elections, thereby “drowning out” other voices and other interests. “Big Money” existed prior to *Citizens United*, and much of it went to the self-styled party of “the little guy.” For example, the financier George Soros and two friends gave \$75 million to the John Kerry campaign in 2004. Large contributions to 527 organizations—the Super PACs of that era—went four-to-one in favor of Kerry in 2004. In 2000, contributions in excess of \$100,000 went predominately to the Democrats.<sup>97</sup> More recently, a majority of individuals making over \$200,000 annually voted for President Obama in 2008. The left-leaning Obama also took half of the votes of those making over

\$100,000 annually.<sup>98</sup> In 2012, Obama did worse than in 2008 among those making over \$100,000; he nonetheless received 46 percent of their votes.<sup>99</sup> His supporters have ample funds to make their views known to voters. Moreover, in 2012, some evidence indicates that the Obama campaign used fundraising to actively involve voters in the campaign as well as raise money; the Romney campaign did not engage voters through fundraising.<sup>100</sup> In the end, what matters is who votes rather than who gives money, and in that regard Obama in 2012 seems to have done much better than his opponent. In general, wealthy people are more conservative than the average American. Rich liberals, however, put their money where their ideas are. In the end, both sides are heard. No one is “drowned out.”<sup>101</sup>

## Conclusion

Fears about the putative political and electoral consequences of the *Citizens United* decision have fostered several proposals to amend the Constitution. Most simply propose giving Congress unchecked power over political speech, power that will be certainly abused. The old and new public purposes cited for restricting political spending and speech are not persuasive in general and do not justify the breadth of power granted under these amendments. Americans should defend—not amend away—the freedom of speech recognized by the First Amendment.

## Notes

I would like to thank Professor Seth Barrett Tillman of the National University of Ireland, Maynooth for many helpful comments.

1. *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).
2. *SpeechNow.org v. Federal Election Commission*, United States Court of Appeals, DC Circuit, March 26, 2010.
3. Neil Munro, “Obama Floats Constitutional

Press, 2011), pp. 152-55.

49. J. Goodliffe, "Campaign War Chests and Challenger Quality in Senate Elections," *Legislative Studies Quarterly* 32 (2007): 135-56, doi: 10.3162/036298007X202010.

50. A list of defeated incumbents in 2010 may be found at <http://www.opensecrets.org/politicians/casualties.php?cycle=2010>. Spending by incumbents and challengers may be found at <http://www.opensecrets.org/bigpicture/stats.php>.

51. Zephyr Teachout, "The Anti-Corruption Principle," *Cornell Law Review* 94, no. 341 (2009): 347, n. 1. A concise summary of Teachout's argument and apt criticisms may be found in Seth Barrett Tillman, Opening Statement, "Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle," 107 *Northwestern Law Review Colloquy* 1 (2012): 399. See also Seth Barrett Tillman, Closing Statement, "The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout," 107 *Northwestern Law Review Colloquy* 1 (2013): 180, <http://ssrn.com/abstract=2012803>.

52. Teachout, 342.

53. *Ibid.*, 373-74.

54. *Ibid.*

55. Lawrence Solum remarks that "originalism means different things to different people." He offers four elements of a definition. See Lawrence B. Solum, "We are All Originalists Now," in *Constitutional Originalism, A Debate* (Ithaca: Cornell University Press, 2011): 2-4.

56. *Ibid.*, p. 2, fn. 3, and the citation to Gary Lawson therein.

57. Art. I, Sec. 6, Cl. 2: "... no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

58. Art. I, Sec. 6, Cl. 2: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time. . ."

59. Art. I, Sec. 9, Cl. 8: "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." Lessig also cites the clause. *Republic Lost*, 18.

60. 381 U.S. 479 (1965).

61. Teachout, 382.

62. United States Constitution, Article I, section 9, clause 8.

63. Tillman, 5.

64. *Ibid.*

65. *Ibid.*

66. Teachout, 393, n. 245.

67. Tillman, 6.

68. *Ibid.*, 12-18.

69. Teachout argues that the intention to use public means for private ends defines corruption, 382.

70. The anti-corruption principle might pose the greatest threat to the integrity of the incumbents. As Madison notes, "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." James Madison, "Federalist No. 10," in *The Federalist: The Gideon Edition*, ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), p. 44. Teachout, 380, speaks of limiting temptation of officials as a part of an anti-corruption strategy.

71. People who differ about much agree on this point. See Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy*, chaps. 1 and 2 (Cambridge: Harvard University Press, 1996); and Alasdair MacIntyre, *After Virtue*, 2nd ed., (Notre Dame: University of Notre Dame Press, 1984). Both authors rue the lack of a commitment to a common good. They both also affirm its absence.

72. Lessig, 128.

73. *Ibid.*

74. *Ibid.*

75. "There are two ways we might measure distortion. One maps the gap between what "the People" believe about an issue and what Congress does about that issue. Call this substantive distortion. The other way maps the gap between what Congress actually works on and what is important or, alternatively, what the people want them to work on. Call this agenda distortion." Lessig, 151.

76. Lessig, 109. Lessig arguably misunderstands the nature of a gift. He assumes the gift of a donation requires strict reciprocity from the recipient: a contribution requires a policy favor. The philoso-