

## RESPONSIVE PHILANTHROPY

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# Supporting Litigation and Legal Advocacy: The Lessons of Citizens United

By John F. Kowal

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Over the past four decades, conservative legal groups – funded by a handful of allied foundations and individual and corporate donors – have mounted a strategic effort to win social and policy change through the legal system. And those patient, long-term efforts have begun to bear fruit. In just the past few years, the courts have moved decisively to the right, upending

long-settled law in cases involving gun rights, affirmative action and the power of Congress to pass laws protecting workers and the environment.

Perhaps their most striking success in recent years was the Supreme Court's 2010 ruling in *Citizens United v. Federal Election Commission*

. A closely divided court held that the First Amendment prohibited the government from restricting independent political expenditures by corporations and unions. In striking down a key provision of the Bipartisan Campaign Reform Act of 2002 (commonly known as McCain-Feingold), the court tossed aside a longstanding ban on corporate spending in election campaigns. The court also ruled that independent expenditures by corporations would not lead to corruption – or even the appearance of corruption. That conclusion, stated as a matter of law, unloosed a torrent of secret political money, and gave rise to the SuperPACs that helped make the 2012 election campaign the most expensive in American history.

How did conservatives achieve these successes? They did it by spurring innovative thinking about the law, by mobilizing their constituencies around a concrete legal vision and by moving those ideas into the public discourse.

Specifically, conservatives deployed five interlocking strategies to reshape understanding of the law and achieve concrete policy victories.

**1) They supported legal policy centers and think tanks** to develop ideas to shape public discourse on legal topics and judicial decision making. These organizations provided a platform for the movement's public intellectuals and future leaders, whether fellows, academics or judges. By publishing their books and magazine articles, these organizations positioned them as credible experts in the press.

**2) They commissioned innovative legal scholarship and social science research** to reframe the debate within the academy, shape judicial decisions and advance their campaigns on strategically chosen issues of public policy.

**3) They established effective networks** to unite the conservative legal community around a shared vision of the law. The best known of these groups is the Federalist Society. These networks created vital personal connections and served as a training ground and pipeline for future leaders. They also provided a safe haven for judges and professors to connect to the world of activism.

**4) They developed coordinated litigation and advocacy strategies** to advance conservative legal theories, spearheaded by conservative legal foundations and public interest law firms.

**5) They focused on judges**, working tirelessly to populate the federal and state judiciaries with ideologically reliable nominees through Federalist Society vetting of federal judicial nominees

during Republican administrations and sustained corporate investment in state judicial races to elect “business-friendly” jurists.

It is important to note that conservative legal groups don’t merely advance their ideas below the radar through slow-moving court challenges. They partner with a sophisticated policy/media apparatus to identify a relatively small number of focus group-tested legal issues that resonate viscerally with their core constituencies.

Given this patient, long-term focus, it’s no surprise that the courts – and the law – have moved steadily in a conservative direction. This threatens to constrain the ability of progressive foundations and nonprofits to advance their social justice missions. But how can the progressive community respond most effectively?

Again, *Citizens United* provides an illuminating case history as well as some signposts for the path forward.

*Citizens United* was no bolt out of the blue. It was the culmination of a careful, well-funded, decades-long effort to allow unlimited campaign spending by corporations and moneyed interests. As Eric Lichtblau reported in *The New York Times*, “The opening of the floodgates has been many years in the making, the result of a carefully waged campaign ... to roll back Watergate-era campaign finance restrictions through attacks in Congress, in the courts, at the Federal Election Commission and in the court of public opinion.” Brad Smith, former chair of the Federal Election Commission and co-founder of the Center for Competitive Politics, described it as “long-term ideological combat.”

1

The campaign finance litigation effort, including the *Citizens United* case itself, was led by James Bopp Jr. of the James Madison Center for Free Speech in Terre Haute, Ind. Bopp has the backing of powerful allies, including the U.S. Chamber of Commerce, the Republican National Committee, the Right to Life Committee and the National Organization for Marriage. These organizations, along with other donors, contributed millions to the effort. And in the background, key conservative legal groups and scholars developed the legal theories and the public arguments to support a dramatic change in the law.

From the day it was issued, the *Citizens United* ruling has faced withering criticism. The decision is unpopular with the public, spurring outrage about how the system has been corrupted by special interests. Even lower court judges have piled on. The highly respected federal appeals judge Guido Calabresi, a former dean of Yale Law School, predicts *Citizen United*

will not stand long: “Whether this will happen through a constitutional amendment or through changes in Supreme Court doctrine, I do not know. But it will happen.”

Some believe the challenges *Citizens United* poses require an extraordinary response – amending the U.S. Constitution to reverse the court’s ruling. But the constitutional amendment

route is an arduous one, requiring two-thirds of Congress and three-quarters of state legislatures for passage. In the current, highly polarized political climate, this will be no simple undertaking.

In the meantime, there are other promising strategies to mitigate the threat of excessive corporate political spending, such as reforming campaign finance and corporate governance rules to increase transparency of corporate political donations and giving shareholders a greater voice in business political activity. The Brennan Center for Justice and Democracy <sup>21</sup> also have offered a plan to boost the voice of small donors in federal elections through a public financing system based on New York City's successful small donor matching fund.

But those concerned about *Citizens United's* destructive impact should take a page from the conservatives' playbook. Conservatives have long understood the value of investing in legal infrastructure for the longer term. Progressives can do the same.

A handful of foundations and individual donors have already helped to lead the way, supporting an emerging infrastructure of progressive legal organizations over the past decade. They fueled the rapid growth of the American Constitution Society, a progressive counterpart to the Federalist Society, and legal policy centers like the Brennan Center, Equal Justice Society and Constitutional Accountability Center.

## THE WAY FORWARD

Perhaps the simplest and most effective way to overturn *Citizens United* ruling is to commit to a multi-year effort to replace it with a new legal framework that paves the way for necessary reforms to be enacted – and stay on the books.

The Brennan Center launched such an effort in the weeks following *Citizens United*. We convened the country's top constitutional legal scholars to launch a jurisprudential drive to roll back *Citizens United*.

This initiative will serve as the nucleus of an ambitious new effort to develop and articulate a compelling progressive jurisprudence for the 21st century. Many of these scholars have already published law review articles pursuing these new legal theories.

We will enlist their participation in active cases before the courts, both to defend current campaign finance rules from continued assault and to chip away at the tottering edifice of *Citizens United*.

And we have partnered with the Open Society Foundations to convene social scientists to compile the needed research to refute the court's naïve assumption that expenditures made by supposedly independent SuperPACs pose no risk of corruption.

Put another way, the Brennan Center is working to “reverse engineer” the winning legal and factual case to convince the court to overturn *Citizens United* in the next few years.

The lesson for funders is that legal advocacy does not just happen in the courtroom. First, there needs to be funding for think tanks and scholars to incubate the ideas and policies necessary to persuade the courts, lawmakers and the public. Second, there needs to be support for the establishment of networking organizations so that ideas can be exchanged and personal ties formed. Third, there must be backing to craft a communications strategy that uses the media to not only confer legitimacy on ideas, but to broadcast them to the public. Fourth, there must be backing for efforts to ensure that sympathetic jurists and lawmakers are placed in office.

Nothing will happen overnight. But, as conservatives have shown in *Citizens United*, a sustained multipronged effort can bring about substantial change. It would be the most delicious of ironies if the true legacy of

*Citizens United*

was not a permanent distortion in politics due to big money, but as an inspiration for a successful counteroffensive.

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## Notes

1. Eric Lichtblau, "Long Battle by Foes of Campaign Finance Rules Shifts Landscape," *New York Times*, October 16, 2010.



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- [Boosting Philanthropic Impact Through Mission Investments](#)  
By Tracy Kartye
- [Member Spotlight: Bauman Foundation](#)
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