

Executive Summary

Weaponized Personhood: Using Legal Personhood Doctrine to Dismantle *Citizens United v. FEC*

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Core Thesis

Citizens United v. FEC (2010) can be overturned by exposing the category error at its foundation: the Court conflated corporate **economic capacity** (*capacitas*—the ability to accumulate wealth for commercial purposes) with **political citizenship** (*civitas*—the constitutional status of membership in the democratic community reserved for natural persons).

Drawing on Roman law's two-millennia-old distinction between *capacitas* and *civitas*, this framework reveals *Citizens United* not as a "speech" case but as a **personhood misallocation**—the Court granted artificial entities political rights that enable concentrated capital to dominate electoral discourse, distorting democratic self-government.

The Personhood Framework

Roman law understood personhood as a **bundle of allocable capacities**, not a yes/no binary:

- **Persona**: Legal role or mask granted by the state for specific purposes
- **Caput**: Status bundle determining legal standing (freedom, citizenship, family independence)
- **Universitas**: Collective entity (corporation) with economic functions
- **Capacitas**: Economic capacity—ability to own property, contract, sue
- **Civitas**: Political citizenship—membership in the *demos* with rights of political participation

Romans maintained a **structural separation**: *universitates* (corporations) possessed *capacitas* for commercial purposes but were **explicitly denied** *civitas*. They could not vote, hold office, or exercise political rights reserved for natural persons.

Why? Political decisions require judgment, accountability, and mortality inherent to human existence. Corporations exist perpetually, face no death penalty, owe no military service, and cannot personally appear in assemblies—making political participation categorically inappropriate.

The Category Error in *Citizens United*

Citizens United grants corporations full *civitas* (unlimited political expenditures) based on their *capacitas* (legal personality permitting commercial activity). This conflates categories Romans carefully separated.

Justice Kennedy's opinion repeatedly frames corporations as "**associations of citizens**" (54 times), obscuring the distinction between:

1. **Natural persons** (shareholders, employees)—who already possess full political *civitas*
2. **The corporate entity**—the *universitas*, an artificial legal fiction created for economic coordination

The Court's reasoning: restricting corporate spending restricts the speech rights of "associations of citizens." But this ignores that:

- Citizens retain full First Amendment rights to speak, donate, and organize
- Corporate spending reflects **management decisions**, not shareholder democratic will
- Many shareholders **oppose** corporate political spending yet have no control

Result: *Citizens United* creates **super-personhood**—entities whose political voice is a function of accumulated capital, vastly exceeding ordinary citizens' influence.

Empirical Consequences: Democratic Capture

Fifteen years of data confirm the capacity framework's predictions:

Spending Explosion

- **2008** (pre-*CU*): \$574 million in outside spending
- **2024: \$4.5 billion** (688% increase)

Donor Concentration

- **Top 100 donors:**
 - 2008: \$81M (1.5% of total)
 - 2024: **\$2.5B (16% of total)**—10× increase in relative power

Billionaire Dominance

- **150 billionaire families:** \$1.9 billion (16.7% of total) in 2024
- **10 individual donors:** 44% of Trump's 2024 funding (\$481M of \$1.09B)

Dark Money

- **\$1.9 billion** in 2024 (spending with hidden sources)
- Transparency fell from 97% (2004) to ~50% (2012)

Small Donor Displacement

- Small donors (<\$200): declined from 26% (2008) to **16% (2024)**
- **21 families gave more than 3.7 million small donors combined** (2022)

This represents **structural displacement** of ordinary citizens' political voice by entities wielding economic power through legal fictions.

Four Remedy Pathways

Route A: Internal Doctrinal Reinterpretation (Fastest)

Shareholder approval requirements: Require publicly-traded corporations to obtain majority shareholder approval before political expenditures.

- Protects shareholder associational rights
- Regulates corporate governance, not speech content
- Prevents management self-dealing
- Avoids *stare decisis* obstacles

Enhanced disclosure: *Citizens United* explicitly permits transparency (8-1 vote). Require consolidated reporting of all political spending on corporate websites.

Route B: Explicit Overruling (Clean Resolution)

Build coalition of five justices recognizing *Citizens United* as:

1. **Wrongly decided:** Rests on fabricated history (Conkling's Fourteenth Amendment forgery)
2. **Unworkable:** Produced massive spending concentration and democratic capture
3. **Inconsistent:** Conflicts with "We the People" constitutional text and democratic theory

Precedent: Court has overturned major constitutional cases within 10-20 years (*Bowers* → *Lawrence*: 17 years; *Austin* → *Citizens United*: 20 years).

Template: Justice Stevens's dissent—"Corporations are not themselves members of 'We the People' by whom and for whom our Constitution was established."

Route C: Statutory Frameworks (Immediate)

DISCLOSE Act: Require disclosure of donors \$10,000+, 24-hour reporting, "stand by your ad" showing top 5 funders, ban shell corporations concealing foreign donations.

SEC requirements: Mandate publicly-traded corporations disclose political spending as securities regulation.

Public financing: Small-donor matching to amplify individual voices.

Limitation: Works within *Citizens United* constraints; cannot ban or cap independent expenditures.

Route D: Constitutional Amendment (Ultimate Authority)

Status: 22-23 states + 800 municipalities support amendment

Public support: 70-80% favor overturning *Citizens United* (bipartisan)

Model text (capacity-based):

> "Rights protected by this Constitution attach primarily to natural persons. Artificial entities created by law possess only such rights as necessary to serve the interests of natural persons and to facilitate economic coordination, and shall not possess rights enabling them to distort democratic self-governance."

Timeline: 5-15+ years; requires $\frac{2}{3}$ of Congress or state legislatures to propose, $\frac{3}{4}$ of states to ratify.

Comparative Context

Every advanced democracy except post-*Citizens United* America operationalizes the *capacitas/civitas* distinction:

- **France:** Complete ban on corporate/union contributions (natural persons only)
- **Canada:** Third-party spending caps; corporate/union contribution ban
- **UK:** "Permissible sources" doctrine—donations limited to those with genuine stake in democracy
- **Germany:** Transparency requirements; immediate disclosure of donations >€50,000

These systems prove corporate restrictions are **compatible with robust democracy and free expression**.

Strategic Recommendation

Pursue **all four routes simultaneously**:

1. **Litigation**: File cases requiring shareholder approval, challenging specific applications as personhood misallocations
2. **Legislation**: Pass DISCLOSE Act, SEC disclosure rules, public financing
3. **Amendment**: Build state-level momentum toward constitutional amendment
4. **Education**: Transform 1L curriculum to teach personhood as allocable capacity framework

Timeline:

- Statutory gains: 1-3 years
- Court reinterpretation: 3-7 years
- Explicit overruling: 5-10 years (requires Court composition change)
- Amendment: 10-20 years

Why the Capacity Framework Wins

The *capacitas/civitas* distinction provides what courts and advocates currently lack:

1. **Precise vocabulary** to distinguish commercial rights from political powers
2. **Historical legitimacy** (maintained for two millennia; operative globally)
3. **Doctrinal coherence** (aligns with "We the People," democratic theory, original understanding)
4. **Empirical validation** (predicts and explains observed democratic capture)
5. **Adversarial robustness** (survives strongest objections)

Unlike "money isn't speech" or "corporations aren't people" critiques, the capacity framework:

- Works **within** existing personhood doctrine
- Offers **affirmative theory** of proper capacity allocation
- Provides **constitutional vocabulary** courts can operationalize
- Avoids **metaphysical debates** courts cannot resolve

The Kill Switch

Once the category error becomes visible—once courts and the public understand that *Citizens United* conflates **economic capacity** with **political citizenship**—the decision loses its air of inevitability.

Corporations are tools, not citizens. They are *universitates* created for economic purposes, endowed with *capacitas* but never with *civitas*.

Restoring that boundary—preventing artificial entities from weaponizing concentrated capital to acquire super-personhood—is the central constitutional task of the next two decades.

The vocabulary exists. The doctrine can be built. The precedent can be overturned.

Next Steps for Policymakers and Advocates

Immediate (0-2 years)

1. Introduce shareholder approval legislation in Congress
2. File test cases in circuits receptive to capacity framework
3. Draft SEC petition for political spending disclosure rules
4. Launch public education campaign on *capacitas/civitas* distinction

Medium-term (2-5 years)

1. Build record in lower courts of *Citizens United's* democratic harms
2. Pass DISCLOSE Act with bipartisan support
3. Reach 34 states supporting constitutional amendment (trigger convention)
4. Integrate capacity framework into law school constitutional law curricula

Long-term (5-15 years)

1. Supreme Court grants cert on shareholder approval case
2. Five-justice majority distinguishes or overrules *Citizens United*
3. Constitutional amendment ratified by 38 states
4. Capacity-based personhood becomes settled doctrine

For further information: www.executiongap.org

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