

## The court's decision in *Citizens United v. Federal Election Commission*

Thursday, January 28, 2010

*Editor's note:* The following are excerpts of the Supreme Court's ruling on *Citizens United v. Federal Elections Commission*, January 21, 2010. The editor's explanations appear in brackets.

SUPREME COURT OF THE  
UNITED STATES

### Majority Opinion

Justice Kennedy delivered the opinion of the Court. [He was joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito.]

[Summary: The Court holds unconstitutional section 441b of the 2002 McCain-Feingold federal campaign finance law (Bipartisan Campaign Reform, BCRA) which prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. 2 U.S.C. §441b.

### Facts

*Citizens United* is a nonprofit corporation. It brought this action in the United States District Court for the District of Columbia. A three-judge court later convened to hear the cause. The resulting judgment gives rise to this appeal.

*Citizens United* has an annual budget of about \$12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.

In January 2008, *Citizens United* released a film entitled *Hillary: The Movie*. We refer to the film as *Hillary*. It is a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Hillary* mentions Senator Clinton by name and depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton. *Hillary* was released in theaters and on DVD, but *Citizens United* wanted to increase distribution by making it available through video on-demand.

Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program. In December 2007, a cable company offered, for a payment of \$1.2 million,

to make Hillary available on a video-on-demand channel called “Elections ‘08.” Some video-on-demand services require viewers to pay a small fee to view a selected program, but here the proposal was to make Hillary available to viewers free of charge.

To implement the proposal, Citizens United was prepared to pay for the video-on-demand; and to promote the film, it produced two 10-second ads and one 30-second ad for Hillary. Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie’s website address. Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.

## Decision

The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People “of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.” *Connally v. General Constr. Co.*, 269 U.S.385, 391 (1926).The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation.

... [S]ubstantial time would be required to bring clarity to the application of the statutory provision on these points in order to avoid any chilling effect caused by some improper interpretation ... It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others. A speaker’s ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on, even if they could establish that the case is not moot because the issue is “capable of repetition, yet evading review.” *WRTL*, *supra*, at 462 (opinion of ROBERTS, C. J.) (citing *Los Angeles v. Lyons*, 461 U.S.95, 109 (1983); *Southern Pacific Terminal Co. v. ICC*, 219 U.S.498, 515 (1911)). Here, Citizens United decided to litigate its case to the end. Today, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary – long after the opportunity to persuade primary voters has passed.

## Corporations protected same as individuals

The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech.” Laws enacted to control or suppress speech may operate at different points in the speech process. The following are just a few examples of restrictions that have been attempted at different stages of the speech process – all laws found to be invalid: restrictions requiring a permit at the outset, *Watchtower Bible & Tract Soc. of N. Y., Inc. v. Village of Stratton*, 536 U.S.150, 153 (2002);

imposing a burden by impounding proceeds on receipts or royalties, *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S.105, 108, 123 (1991); seeking to exact a cost after the speech occurs, *New York Times Co. v. Sullivan*, 376 U.S., at 267; and subjecting the speaker to criminal penalties, *Brandenburg v. Ohio*, 395 U.S.444, 445 (1969) (per curiam) [A per curiam decision is issued in the name of the Court rather than by specific judges, so usually a non-controversial decision]. The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations – including nonprofit advocacy corporations – either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under §441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent US Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate’s defense of free speech. These prohibitions are classic examples of censorship. Section 441b is a ban on corporate speech notwithstanding the fact that a PAC [Political Action Committee] created by a corporation can still speak. See *McConnell*, 540 U.S., at 330–333 (opinion of KENNEDY, J.). A PAC is a separate association from the corporation. So the PAC exemption from §441b’s expenditure ban, §441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak – and it does not – the option to form PACs does not alleviate the First Amendment problems with §441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. See *id.*, at 330–332 (quoting *MCFL*, 479 U.S., at 253–254).

And that is just the beginning.

#### Limits on expenditures unconstitutional

“The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.” *Buckley*, 424 U.S., at 47; see *ibid.* (independent expenditures have a “substantially diminished potential for abuse”). Limits on independent expenditures, such as §441b, have a chilling effect extending well beyond the government’s interest in preventing quid pro quo corruption. The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 states do not restrict independent expenditures by for profit corporations. The government does not claim that these expenditures have corrupted the political process in those states ...

For the reasons explained above, we now conclude that independent expenditures, including those that are made by corporations, do not give rise to corruption or the appearance of corruption ...

Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws. See, e.g., *McConnell*, 540 U.S., at 176–177 (“Given BCRA’s tighter restrictions on the raising and spending of soft money, the incentives ... to exploit [26 U.S.C. §527] organizations will only increase”). Our nation’s speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.

Rapid changes in technology – and the creative dynamic inherent in the concept of free expression – counsel against upholding a law that restricts political speech in certain media or by certain speakers ... Today, 30-second television ads may be the most effective way to convey a political message. See *McConnell*, *supra*, at 261 (opinion of SCALIA, J.). Soon, however, it may be that Internet sources, such as blogs and social networking websites, will provide citizens with significant information about political candidates and issues. Yet, §441b would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. See 2 U.S.C. §441b(a); *MCFL*, *supra*, at 249. The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech ...

Conclusion: limits on expenditures unconstitutional, disclosure requirements valid

The judgment of the District Court is reversed with respect to the constitutionality of 2 U.S.C. §441b’s restrictions on corporate independent expenditures. The judgment is affirmed with respect to BCRA’s disclaimer and disclosure requirements. The disclaimer and disclosure requirements are valid as applied to *Citizens United*’s ads. They fall within BCRA’s “electioneering communication” definition: They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy.

Dissent

By Justice Stevens, joined by Justices Breyer, Ginsburg and Sotomayor

Corporations v. individuals

The majority’s approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907, ch. 420, 34 Stat. 864. We have unanimously concluded that this “reflects a permissible assessment of the dangers posed by those entities to the electoral process,” *FEC v. National Right to Work*

Comm., 459 U.S.197, 209 (1982) (NRWC), and have accepted the “legislative judgment that the special characteristics of the corporate structure require particularly careful regulation,” *id.*, at 209–210. The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty ...

Consider just one example of the distortions that will follow: Political parties are barred under BCRA from soliciting or spending “soft money,” funds that are not subject to the statute’s disclosure requirements or its source and amount limitations. 2 U.S.C. §441i; *McConnell*, 540 U. S., at 122–126. Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates, whereas national parties will not be able to spend a dime of soft money on ads of any kind. The Court’s ruling thus dramatically enhances the role of corporations and unions – and the narrow interests they represent – vis-a-vis the role of political parties – and the broad coalitions they represent – in determining who will hold public office.

The same logic applies to this case with additional force because it is the identity of corporations, rather than individuals, that the Legislature has taken into account. As we have unanimously observed, legislatures are entitled to decide “that the special characteristics of the corporate structure require particularly careful regulation” in an electoral context. *NRWC*, 459 U.S., at 209–210. Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also “furthest from the core of political expression, since corporations’ First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information,” *Beaumont*, 539.

In short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.

#### Regulation of corporate ‘speech’

By the time Congress passed FECA in 1971, the bar on corporate contributions and expenditures had become such an accepted part of federal campaign finance regulation that when a large number of plaintiffs, including several nonprofit corporations, challenged virtually every aspect of the Act in *Buckley*, 424 U.S.1, no one even bothered to argue that the bar as such was unconstitutional. *Buckley* famously (or infamously) distinguished direct contributions from independent expenditures, *id.*, at 58–59, but its silence on corporations only reinforced the understanding that corporate expenditures could be treated differently from individual expenditures ...

In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority’s rejection of this principle “elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon

established economic interests.” Bellotti, 435 U.S., at 817, n. 13 (White, J., dissenting). At bottom, the Court’s opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. 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.

I would affirm the judgment of the District Court.