

## COMMENTS

### *CITIZENS UNITED V. FEC:* CORPORATE POLITICAL SPEECH

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

— *First National Bank of Boston v. Bellotti*<sup>1</sup>

For more than one hundred years, Congress has prevented corporations from donating directly to candidates in federal elections.<sup>2</sup> Throughout the twentieth century, legislators and presidents from both sides of the aisle made the ban more robust. More than sixty years ago, the political branches banned campaign expenditures made by corporations and labor unions out of their general treasuries.<sup>3</sup> And the Supreme Court upheld such bans despite the adverse effects they had on political speech. In the foundational case *Buckley v. Valeo*,<sup>4</sup> the Court struck down election expenditure limits for candidates and individuals as First Amendment violations but left intact corporate and union expenditure bans.<sup>5</sup> In a 1990 case, *Austin v. Michigan State Chamber of Commerce*,<sup>6</sup> the Supreme Court specifically addressed the question of whether laws preventing corporations from spending funds from their general treasuries to independently support or oppose state-level candidates violated the First Amendment.<sup>7</sup> The Court affirmed the concept that curbing the capability of the corporate form to expend disproportionate resources to influence elections was a sufficiently important government interest to restrict speech.<sup>8</sup>

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<sup>1</sup> 435 U.S. 765, 777 (1978) (footnotes omitted).

<sup>2</sup> Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)).

<sup>3</sup> Taft-Hartley Act of 1947, Pub. L. No. 80-101, sec. 304, § 313, 61 Stat. 136, 159. The relevant section of Taft-Hartley was repealed and replaced by the Federal Election Campaign Act Amendments of 1976, but the ban was retained. Pub. L. No. 94-283, sec. 112, § 321, 90 Stat. 475, 490 (codified as amended at 2 U.S.C. § 441b).

<sup>4</sup> 424 U.S. 1 (1976) (per curiam).

<sup>5</sup> *Id.* at 143.

<sup>6</sup> 494 U.S. 652 (1990).

<sup>7</sup> *Id.* at 654.

<sup>8</sup> *Id.* at 660 (holding that “the State ha[d] articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations” because “[c]orporate wealth

Twelve years later, Congress followed suit in passing “McCain-Feingold,” the Bipartisan Campaign Reform Act of 2002<sup>9</sup> (BCRA), which, among other things, further entrenched the idea that corporations should be banned from participating in the electoral arena unless they participate through political action committees (PACs).<sup>10</sup> One provision of BCRA — 42 U.S.C. § 441b — closed a loophole that had allowed corporations and unions to fund advertisements regarding candidates near an election. The Supreme Court upheld this provision in *McConnell v. FEC*.<sup>11</sup> Since the Court considered the availability of speech through a corporation’s associated PAC an acceptable alternative to direct independent campaign expenditures, the BCRA provision banning direct expenditures by corporations and unions was considered only partially speech-restrictive.<sup>12</sup> Last Term, in *Citizens United v. FEC*,<sup>13</sup> the Supreme Court again addressed a First Amendment challenge to the ban on corporate electioneering activities. After two rounds of briefing and oral argument, a narrow majority of the Court overturned *Austin* and portions of *McConnell* and struck down the portions of BCRA that prohibited expenditures on electioneering communications<sup>14</sup> by corporations.<sup>15</sup> *Citizens United* leaves corporations and unions free to speak and spend independently of candidates during elections for the first time in decades.

In 2008, Citizens United, a conservative group organized as a non-profit corporation, produced and released a feature-length documentary film criticizing then-Senator Hillary Rodham Clinton, who was seeking the Democratic nomination for President of the United States.<sup>16</sup> Citizens United sought to release the film, entitled *Hillary: The Movie*, through “video on demand” via a digital cable provider

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can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions”).

<sup>9</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.).

<sup>10</sup> In fact, “closing the corporate loopholes” was one of the rallying cries for proponents of the new law. See, e.g., Seth P. Waxman, Op-Ed., *Free Speech and Campaign Reform Don’t Conflict*, N.Y. TIMES, July 10, 2002, at A21.

<sup>11</sup> 540 U.S. 93, 2003-09 (2003). Though the vote in the case was 5-4, Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas concurred in the judgment regarding the portions of the opinion dealing with corporate expenditures. See *id.* at 110-11.

<sup>12</sup> *Id.* at 204.

<sup>13</sup> 130 S. Ct. 876 (2010).

<sup>14</sup> An “electioneering communication” is defined under BCRA as “‘any broadcast, cable, or satellite communication’ that ‘refers to a clearly identified candidate for Federal office’ and is made within 30 days of a primary or 60 days of a general election.” *Id.* at 887 (quoting 2 U.S.C. § 434(f)(3)(A) (2006)).

<sup>15</sup> *Id.* at 913-16.

<sup>16</sup> *Id.* at 887.

and market the movie with television advertising.<sup>17</sup> This release of the documentary and the accompanying television advertisements would have occurred during the thirty-day window before a primary election in which corporations and unions were barred by BCRA from using general treasury funds for electioneering communications. To avoid potential sanctions under BCRA for these expenditures, Citizens United brought suit seeking declaratory and injunctive relief against the Federal Elections Commission (FEC) in December 2007, before the scheduled release of the film in the television format.<sup>18</sup> The suit rested on three theories: (1) BCRA section 203, which prohibited corporations and unions from funding electioneering communications, was facially unconstitutional; (2) section 203 was unconstitutional as applied to Citizens United's marketing and release of the film; and (3) sections 201 and 311's disclosure and disclaimer requirements for advertisements were unconstitutional.<sup>19</sup>

A three-judge panel of the D.C. District Court<sup>20</sup> denied the preliminary injunction.<sup>21</sup> The district court determined that Citizens United had no chance of prevailing on its facial challenge to the law because a successful facial challenge would require overturning *McConnell*.<sup>22</sup> Likewise, the as-applied challenge would fail under *FEC v. Wisconsin Right to Life, Inc.*<sup>23</sup> Finally, the court dismissed the claims based on the disclosure rules because "the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment."<sup>24</sup>

Citizens United appealed the district court's ruling directly to the Supreme Court.<sup>25</sup> The Court initially dismissed the appeal for want of jurisdiction.<sup>26</sup> The case returned to the district court, which subsequently granted summary judgment for the FEC on all counts based

<sup>17</sup> Citizens United had also released *Hillary: The Movie* on a limited basis in theaters and on DVD. *Id.*

<sup>18</sup> *Id.* at 888.

<sup>19</sup> See *Citizens United v. FEC*, 530 F. Supp. 2d 274, 277 (D.D.C. 2008) (per curiam).

<sup>20</sup> Because Citizens United challenged the law under BCRA, it was entitled to a three-judge district court panel. 2 U.S.C. § 437h (2006). The panel issued a per curiam opinion. *Citizens United*, 530 F. Supp. 2d at 275. Serving on the panel were Circuit Judge Raymond Randolph and District Judges Royce Lamberth and Richard Roberts.

<sup>21</sup> *Citizens United*, 530 F. Supp. 2d at 282.

<sup>22</sup> *Id.* at 278.

<sup>23</sup> 127 S. Ct. 2652 (2007) (holding that BCRA's express advocacy ban applied only to those communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *id.* at 2667); see *Citizens United*, 530 F. Supp. 2d at 279–81.

<sup>24</sup> *Citizens United*, 530 F. Supp. 2d at 281 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259–62 (1986)).

<sup>25</sup> See *Citizens United v. FEC*, 128 S. Ct. 1471 (2008) (mem.). Under 28 U.S.C. § 1253 (2006), decisions of a three-judge district court panel are immediately appealable to the Supreme Court.

<sup>26</sup> *Citizens United v. FEC*, 128 S. Ct. 1732 (2008) (mem.).

on its previous finding that *Hillary: The Movie* was subject to no reasonable interpretation other than that it was an electioneering communication — a call for viewers to vote against Hillary Clinton.<sup>27</sup>

Citizens United again appealed, and the Supreme Court noted probable jurisdiction<sup>28</sup> and agreed to hear the case in October Term 2008. Initially, the parties on appeal briefed four questions: two on disclosure provisions and two as-applied challenges to BCRA's application to *Hillary: The Movie*.<sup>29</sup> After reviewing the briefs and holding oral argument on these issues in March 2009, the Supreme Court ordered supplemental briefing and reargument on a constitutional question not addressed in the first round of arguments: "For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce* and the part of *McConnell v. Federal Election Comm'n* which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002?"<sup>30</sup> The Court heard reargument in the first sitting of October Term 2009.

In January 2010, the Supreme Court reversed the district court and overturned *Austin*, portions of *McConnell*, and portions of BCRA that prohibited electioneering communications by corporations.<sup>31</sup> Writing for the Court, Justice Kennedy<sup>32</sup> concluded that the Court could not decide the case on any of the narrower grounds offered by the parties.<sup>33</sup> Abandoning *McConnell's* characterization that BCRA was only partially speech-restrictive because corporations and unions could speak via their PACs,<sup>34</sup> Justice Kennedy wrote that "Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban does not allow corporations to speak."<sup>35</sup> Having held that BCRA's restriction was a full ban on speech, and not just partially speech-restrictive, Justice Kennedy reasoned that BCRA's ban on corporate

<sup>27</sup> Citizens United v. FEC, No. 07-2240, 2008 WL 2788753, at \*1 (D.D.C. July 18, 2008).

<sup>28</sup> Citizens United v. FEC, 129 S. Ct. 594 (2008) (mem.).

<sup>29</sup> Jurisdictional Statement at i, *Citizens United*, 130 U.S. 876 (No. 08-205), 2008 WL 3851546, at \*i. The two as-applied challenges asked (1) whether a communication lacking a clear call for a vote could be considered an electioneering communication under BCRA and *Wisconsin Right to Life*, and (2) whether a feature-length movie such as *Hillary: The Movie* could be treated as a broadcast advertisement under BCRA and *McConnell*. *Id.*

<sup>30</sup> Citizens United v. FEC, 129 S. Ct. 2893 (2009) (mem.) (citations omitted).

<sup>31</sup> *Citizens United*, 130 S. Ct. at 913.

<sup>32</sup> Chief Justice Roberts and Justices Scalia and Alito joined Justice Kennedy's opinion in full. Justice Thomas joined as to all but Part IV, which upheld BCRA's disclosure requirements. Justices Stevens, Ginsburg, Breyer, and Sotomayor joined only Part IV.

<sup>33</sup> *Citizens United*, 130 S. Ct. at 892.

<sup>34</sup> Previously, *McConnell* had characterized this system as not constituting a complete ban on corporate speech. *McConnell v. FEC*, 540 U.S. 93, 204 (2003).

<sup>35</sup> *Citizens United*, 130 S. Ct. at 897 (citations omitted).

speech violated the principle of *First National Bank of Boston v. Bellotti*,<sup>36</sup> that “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.”<sup>37</sup>

Further, the Court held that *Austin*’s identification of a legitimate antidistortion interest — an interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas”<sup>38</sup> — was an aberration unable to be sustained.<sup>39</sup> Justice Kennedy noted the long line of precedent focusing not on distortion concerns, but rather on the concern that certain types of expenditures could lead to corruption or the appearance thereof.<sup>40</sup> *Citizens United* thus overturned *Austin*’s holding that the government has an interest in preventing distortion of the electoral system through limiting the political speech of certain speakers and restored the *Buckley v. Valeo* holding that preventing quid pro quo corruption or the appearance thereof constitutes the *only* government interest strong enough to overcome First Amendment concerns regarding political speech.<sup>41</sup> Overruling *Austin* “effectively invalidate[d] . . . BCRA Section 203 [and] 2 U.S.C. 441b’s prohibition on the use of corporate treasury funds for express advocacy.”<sup>42</sup> But the Court decided 8–1<sup>43</sup> to leave intact the challenged disclosure requirements in BCRA previously upheld by *McConnell*.<sup>44</sup>

Justice Stevens concurred in part and dissented in part.<sup>45</sup> He vehemently disagreed with the majority on all issues except its treatment of BCRA’s disclosure requirements.<sup>46</sup> Justice Stevens denied that BCRA’s pre-election bans were bans on speech at all, given that a corporation’s associated PACs were still allowed to spend on electioneering communications.<sup>47</sup> He further expressed grave concern about

<sup>36</sup> 435 U.S. 765 (1978).

<sup>37</sup> *Citizens United*, 130 S. Ct. at 903.

<sup>38</sup> *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990).

<sup>39</sup> *Citizens United*, 130 S. Ct. at 913.

<sup>40</sup> *Id.* at 908–11; *see, e.g., McConnell v. FEC*, 540 U.S. 93, 296–98 (2003).

<sup>41</sup> *See Citizens United*, 130 S. Ct. at 908–12.

<sup>42</sup> *Id.* at 913 (quoting Brief for the Appellee at 33 n.12, *Citizens United*, 130 S. Ct. 876 (No. 08–205), 2009 WL 406774, at \*33 n.12).

<sup>43</sup> Only Justice Thomas dissented from the majority on the issue of disclosure requirements. *See Citizens United*, 130 S. Ct. at 980 (Thomas, J., concurring in part and dissenting in part) (“The disclosure, disclaimer, and reporting requirements in BCRA §§ 201 and 311 are also unconstitutional.”).

<sup>44</sup> *Id.* at 914–16 (majority opinion).

<sup>45</sup> Justice Stevens was joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Stevens’s lengthy opinion addressed the majority’s arguments on a number of points not addressed in this short summation.

<sup>46</sup> *Citizens United*, 130 S. Ct. at 931 (Stevens, J., concurring in part and dissenting in part).

<sup>47</sup> *Id.* at 929, 942–45; *accord McConnell v. FEC*, 540 U.S. 93, 203–10 (2003).

the potential for corruption and distortion of the American electoral system at the hands of corporate speakers and argued that there are important distinctions between the personal right to political speech and a corporate right to make unlimited electioneering communications.<sup>48</sup> Justice Stevens also took issue with the majority's characterization of existing jurisprudence on campaign finance,<sup>49</sup> its decision not to decide the case on an available narrower basis,<sup>50</sup> and what he considered its abandonment of the principle of stare decisis.<sup>51</sup>

Chief Justice Roberts<sup>52</sup> filed a concurrence arguing that the majority opinion correctly applied principles of stare decisis in the case.<sup>53</sup> The Chief Justice's opinion also reiterated the importance of overruling *Austin*, not only because *Austin* posed a threat "to First Amendment rights generally,"<sup>54</sup> but also because "continued adherence to *Austin* threaten[ed] to subvert the 'principled and intelligible' development of our First Amendment jurisprudence."<sup>55</sup>

Justice Scalia<sup>56</sup> wrote a separate concurrence to provide his interpretation of the original understandings of corporate law and corporate speech. He reasoned that "[t]he [First] Amendment is written in terms of 'speech,' not speakers . . . [and] offers no foothold for excluding any category of speaker."<sup>57</sup> Among other evidence for this proposition, Justice Scalia cited the First Amendment's inclusion of "the press" as evidence that artificial legal entities were included in the scope of First Amendment protections.<sup>58</sup>

*Citizens United* sparked an immediate firestorm of commentary and debate, with many commentators lamenting the expansive ruling, culminating in a rare criticism by the President of a Supreme Court decision that came in President Obama's State of the Union address less than one week after the decision was released.<sup>59</sup> Though the Court ruled that corporations have the same First Amendment rights

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<sup>48</sup> *Citizens United*, 130 S. Ct. at 931, 945–48, 961–77 (Stevens, J., concurring in part and dissenting in part).

<sup>49</sup> *Id.* at 942–61. This critique included what he considered to be a mischaracterization of the original understanding of the First Amendment and corporate law. *Id.* at 948–53.

<sup>50</sup> *Id.* at 931–38. One of the possible narrower grounds Justice Stevens suggested was to distinguish between for-profit and nonprofit issue-based entities. *Id.* at 937.

<sup>51</sup> *Id.* at 938–42.

<sup>52</sup> Chief Justice Roberts was joined by Justice Alito.

<sup>53</sup> See *Citizens United*, 130 S. Ct. at 917–22 (Roberts, C.J., concurring).

<sup>54</sup> *Id.* at 923.

<sup>55</sup> *Id.* at 924 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

<sup>56</sup> Justice Scalia's concurrence was joined by Justice Alito in whole and by Justice Thomas in part.

<sup>57</sup> *Citizens United*, 130 S. Ct. at 929 (Scalia, J., concurring).

<sup>58</sup> *Id.* at 927.

<sup>59</sup> President Barack Obama, State of the Union Address (Jan. 27, 2010), in 156 CONG. REC. H414–20 (daily ed. Jan. 27, 2010).

as natural persons regarding independent political expenditures, the same corporations still do not have the same panoply of rights as natural persons, even after *Citizens United*. Corporations and unions are still precluded from making donations directly to candidates' campaigns.<sup>60</sup> And *Citizens United* left intact systemic safeguards, namely the FEC's strict disclosure and reporting requirements.<sup>61</sup> The debate continues, with several bills percolating through Congress<sup>62</sup> to "fix" *Citizens United*, but exactly what that legislative fix would look like and which aspects of the ruling it could constitutionally address remain to be seen.

In *Corporate Political Speech: Who Decides?*, Professors Lucian Bebchuk and Robert Jackson consider the implications of *Citizens United* for corporations and corporate governance. They argue that political speech decisions — whether and how to engage in corporate political speech — differ significantly from and should not be subject to the rules governing ordinary business decisions for which corporate decisionmaking structures were designed. Professors Bebchuk and Jackson develop proposals for corporate law rules designed to align political speech decisions with shareholder interests and protect dissenting minority shareholders.

In *On Political Corruption*, Professor Samuel Issacharoff revisits the central paradigm of the country's now-frayed campaign finance regulation regime by presenting two competing concepts of corruption. One concept is based on *Buckley*'s declaration that preventing the possibility or appearance of quid pro quo corruption constitutes a sufficient government interest to regulate political speech, and on *Citizens United*'s holding that the quid pro quo corruption interest is now the *only* interest that justifies imposition on the First Amendment in this area. The other concerns ensuring the integrity of the outputs of government policy. He argues that it is this possibility of subverting public goals to the whims of powerful special interests — rather than changing the outcomes of elections — that we should be most concerned about. Professor Issacharoff concludes with an appeal to re-

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<sup>60</sup> *Citizens United*, 130 S. Ct. at 909 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.").

<sup>61</sup> *Id.* at 914, 916.

<sup>62</sup> See, e.g., Democracy Is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), H.R. 5175, 111th Cong. (2010); Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010); Prevent Foreign Influence in our Elections Act, H.R. 4540, 111th Cong. (2010); Corporate and Labor Electioneering Advertisement Reform Act, H.R. 4527, 111th Cong. (2010); Save Our Democracy from Foreign Influence Act of 2010, H.R. 4523, 111th Cong. (2010); Prohibiting Foreign Influence in American Elections Act, H.R. 4522, 111th Cong. (2010); Freedom from Foreign-Based Manipulation in American Elections Act of 2010, H.R. 4517, 111th Cong. (2010); Pick Your Poison Act of 2010, H.R. 4511, 111th Cong. (2010); End the Hijacking of Shareholder Funds Act, H.R. 4487, 111th Cong. (2010).

think the incentive structures of our current system in order to formulate appropriate and coherent campaign finance reforms in the wake of *Citizens United*.

Finally, in *Two Concepts of Freedom of Speech*, Professor Kathleen Sullivan observes that *Citizens United* tracks the philosophical divide between competing conceptions of free speech. The “free-speech-as-equality” camp reads the First Amendment to allow speech regulations that promote political equality, while the “free-speech-as-liberty” camp views the Amendment as a negative constraint on any speech regulation, regardless of its motivation. This dichotomy is important not only for analyzing the forces at play in *Citizens United*, but also for understanding the changing alliances of Justices in other First Amendment cases. Professor Sullivan argues that any political reforms that may arise from *Citizens United* would be well-served by accounting for and accommodating both conceptions of free speech.