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U.S. Supreme Court Strikes Down Limits on

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Yesterday, the United States Supreme Court ruled in Citizens United v. Federal Election Commission that corporations (and labor unions) may make unlimited expenditures to directly advocate for the election or defeat of a Federal candidate at any point in the election cycle. The crux of the Court's decision is that the First Amendment prohibits Congress from banning certain types of political speech based on the corporate identity of the speaker. The decision opens the way for greatly increased participation by corporations—large and small, for-profit and non-profit—in the election process.

Prior to yesterday's decision, federal law, as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA," informally referred to as the McCain-Feingold law), prohibited corporations and labor unions from purchasing ads that either expressly advocate the election or defeat of a Federal candidate or amount to an "electioneering communication"—that is, a communication that (1) "refers to a clearly identified candidate for Federal office," (2) is made within 30 days of a primary election or within 60 days of a general election, and (3) is publicly distributed. Since BCRA, corporations and labor unions have been permitted to engage in express advocacy and electioneering communications only through their political action committees (PACs).

The Supreme Court previously upheld the ban on corporate electioneering communications in 2003 in McConnell v. Federal Election Commission, relying on its holding in an earlier case, Austin v. Michigan Chamber of Commerce, that restrictions on corporate political speech are permissible in light of the Government's interest in preventing "the corrosive and distorting effects of immense aggregations of wealth" by corporations.

In January 2008, Citizens United, a non-profit corporation, released a documentary entitled "Hillary: The Movie" about then-Senator Hillary Clinton, a candidate in the Democratic Party's 2008 Presidential primary. Citizens United wished to make the documentary available through video-on-demand service within 30 days of the 2008 primary elections but feared that the film (and a series of three advertisements encouraging viewers to purchase the film through the on-demand service) would trigger the BCRA ban on electioneering communications because the film and ads "referred to" a Presidential candidate. Citizens United sued in federal court seeking a declaration that the BCRA ban on electioneering communications is unconstitutional. After a three-judge panel of the federal district court denied Citizens United's requests for relief, Citizens United sought review in the Supreme Court.

U.S. Supreme Court Strikes Down Limits on Corporate Political Speech on First Amendment Grounds

The Supreme Court, in a 5-4 decision, yesterday held that "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." In so holding, the Court overruled Austin (which allowed the Government to restrict corporate political speech) and invalidated BCRA's ban on electioneering communications. Citizens United reflects the Court's adherence to the principle that the Government cannot suppress political speech based on the speaker's corporate identity.

Beginning with the premise that BCRA erects an outright ban on core political speech by corporations and unions, the Court applied "strict scrutiny" to the ban, requiring the Government to demonstrate that the law furthers a compelling interest. The BCRA ban did not withstand that scrutiny: the Court found "no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers," including corporations.

The Court addressed and rejected all three "interests" proposed by the Government to support the electioneering communications ban: (1) the "anti-distortion" theory adopted by Austin, (2) an interest in preventing corruption, and (3) and an interest in protecting "dissenting shareholders."

The Court first declared that First Amendment protections cannot turn on a speaker's financial ability (that is, "immense aggregations" of corporate wealth) to engage in political speech. On that point, the majority was particularly troubled by the prospect that the anti-distortion rationale for the BCRA ban could be used to prohibit political speech by media corporations, which are currently exempted from the ban on electioneering communications. The Court likewise rejected the anti-corruption rationale because independent expenditures simply do not present the same risk of quid pro quo corruption (or the appearance of corruption) as do direct contributions to candidates and parties. And it rejected the shareholder protection rationale—that shareholders should not be compelled to fund corporate political speech with which they disagree—as both underinclusive (because the statute only bans some corporate speech at certain times) and overinclusive (because it applies even to single-shareholder corporations).

The Court concluded that "the First Amendment does not permit Congress to make categorical distinctions based on the corporate identity of the speaker and the content of the political speech." With Austin thus set aside, the Court rejected the ban on corporate independent expenditures (for both electioneering communications and for express advocacy), because the law's "purpose and effect are to silence entities whose voices the Government deems to be suspect." Given the primacy of political speech in our representative democracy, the Court said, "political speech must prevail against laws that would suppress it."

The Court did not go so far as to strike down the BCRA disclaimer and disclosure requirements. In the Court's view, while more political speech enhances the political process, that speech should be transparent, so that the public can better evaluate the political message and the potential bias of the speaker.

The Citizens United decision is breathtaking in scope.

First, the content of political expenditures by corporations and unions is no longer at issue, because corporations and unions are no longer limited to engaging in so-called "issue advocacy." Rather, they may now purchase advertising that includes a direct appeal to vote for or against a Federal candidate. The distinction between "issue" and "express" advocacy by corporations and unions—which has muddled campaign finance law for so long—is dissolved.

Second, the timing of political expenditures by corporations and unions is no longer at issue. After the Supreme Court held that corporate and union political expenditures are no longer limited to issue advocacy, it also struck down the BCRA prohibition on "electioneering communications"—and, with it, the 30- and 60-day windows that governed corporate political ads. As a result, the Supreme Court's test for distinguishing between permissible and prohibited electioneering communications articulated in 2007 in Federal Election Commission v. Wisconsin Right to Life is already a relic of campaign finance law.

Third, the number of entities that benefit from the decision is enormous. The decision applies to all corporations and unions regardless of size or tax status. This means that both traditional for-profit corporations and tax-exempt political organizations—e.g., Section 527 organizations such as Moveon.org and Club for Growth—may make unlimited political expenditures to expressly advocate for the election or defeat of a Federal candidate.

Fourth, the Court's reasoning calls into question similar campaign finance laws enacted by nearly half the States.

Yesterday's ruling does not, however, alter the longstanding bar on direct corporate contributions to federal political candidates. Corporations and unions continue to be prohibited from making contributions to federal candidates from their general treasuries.

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The Citizens United decision has already generated a massive volume of commentary, some positive, some negative. President Obama, for his part, has vowed to "develop a forceful response" to the decision, which he asserted gives "a green light to a new stampede of special interest money

in our politics." The U.S. Chamber of Commerce hailed the ruling, stating that it "protects the First Amendment rights of organizations across the political spectrum, and is a positive for the political process and free enterprise."

As the Court itself acknowledged, the decision undoubtedly ushers in a new era of campaign finance in America, namely pairing corporate independent expenditures with disclosure requirements. It remains to be seen whether Congress will make a renewed effort to limit participation in the political process by corporations.