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# FREE SPEECH & ELECTION LAW

## ILLUMINATING *CITIZENS UNITED*: WHAT THE DECISION REALLY DID

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In January 2010, the U.S. Supreme Court issued one of its most controversial decisions in decades, *Citizens United v. FEC*.<sup>1</sup> The response among politicians supporting restrictions on campaign finances was immediate and fierce. President Obama said he could not “think of anything more devastating to the public interest” and criticized it during the State of the Union address with members of the Court present.<sup>2</sup> Senator Al Franken called it “an incredible act of judicial activism,”<sup>3</sup> while Rep. Chris Van Hollen called it “a very, very sad day for American democracy,” and a “radical, radical decision.”<sup>4</sup>

Politicians were not the only ones to denounce *Citizens United*. One law professor compared it to *Plessy v. Ferguson*<sup>5</sup> and *Dred Scott*.<sup>6</sup> A *Huffington Post* writer compared the five Justices in the majority to concentration camp prisoners who cooperated with the Nazis and called the beneficiaries of the decision “vampires” who treat humans “as sources of profit, with zero consideration for their humanity.”<sup>7</sup>

The decision remains a sore spot for many. A cable-TV-talk-show-host for the cable channel MSNBC, Dylan Ratigan, is attempting to lead an effort to amend the U.S. Constitution to reverse *Citizens United*,<sup>8</sup> while a recent “Occupy DC” event concentrated on undoing the decision.<sup>9</sup>

Many of the assumptions underlying this opposition are simply incorrect, however. If the arguments employed against *Citizens United* are any indication, the opponents’ positions are based on an erroneous understanding of the American constitutional system and a fundamental misreading of the First Amendment itself. Indeed, the most common critiques of *Citizens United* are based on beliefs about what the decision did—recognizing corporate personhood and ignoring that the Founders never meant to “give” free speech rights to corporations—that are either entirely false or, at the least, reflect a serious misunderstanding of American government. Read correctly, with an accurate understanding of history and Supreme Court precedent, *Citizens United* is a decision consistent with both the words and intent of the First Amendment.

### What Did *Citizens United* Actually Say?

*Citizens United* concerned a provision in the U.S. Code, Section 441b of Title 2, that made it a crime for corporations and unions to use general treasury money to make “independent expenditures” (that is, spending that is not coordinated with candidates) that expressly advocated the election or defeat of a federal candidate.<sup>10</sup> Prior to *Citizens United*, corporations and unions could only participate in the political process by creating separate political action committees (PACs). PACs operate

under complex and expensive administrative requirements, however, and these associations could not use general treasury funds for political purposes, so this was an “alternative” of which very few corporations availed themselves.<sup>11</sup>

*Citizens United* is a nonprofit corporation that wished to use its general treasury funds to distribute a film about Hillary Clinton—then a candidate for the Democratic Party’s nomination for President in 2008—via video-on-demand. *Citizens United* sued the Federal Election Commission to enjoin Section 441b’s application to their distribution of the film. *Citizens United* lost at the trial court and then sought review at the U.S. Supreme Court, which took up the case in 2009.

In an unusual move, the U.S. Supreme Court held oral argument twice in the case. In the first argument, the U.S. Solicitor General’s office admitted that “a corporation could be barred from using its general treasury fund to publish [a] book . . .”<sup>12</sup> In other words, the position of the government was that, if a group of citizens pooled their money in a corporate form, the government could fine or imprison them if they published a book, or made a film, about politics. During the second oral argument, then-Solicitor General Elena Kagan attempted to back away from this statement, saying that the FEC had never applied the provision to a book, to which Chief Justice Roberts responded, “But . . . we don’t put our First Amendment rights in the hands of FEC bureaucrats . . .”<sup>13</sup>

In January 2010, a five-Justice majority struck down Section 441b. The Court stated unequivocally that the First Amendment restricts the ability of the government to abridge the freedom of speech of corporations. The Court found that Section 441b was an outright ban on speech and that the PAC alternative was not a real alternative for corporations because PACs are separate associations and expensive and difficult to establish and administer.

The Court also noted that the government’s reasoning would also allow it to ban media publications, but that it had so far exempted media corporations from the law’s broad reach. The Court rejected the government’s proffered justifications for the law. It overturned two relatively-recent decisions, *Austin v. Michigan Chamber of Commerce*<sup>14</sup> and portions of *McConnell v. FEC*,<sup>15</sup> which held that the government may ban the independent expenditures of corporate and union entities.

Justice Stevens, joined by three other Justices, filed a lengthy dissent, arguing that Congress could constitutionally make it a felony for corporations and unions to pay for political advertisements using money from their general treasury.

### What *Citizens United* Did Not Say

Many critics of the decision argue that *Citizens United* hinge on the assumption that the decision granted corporations the same constitutional rights as individuals and that this grant of rights was incorrect because the First Amendment only applies to individuals. For instance, in one of its criticisms of

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assault on the freedom of political expression guaranteed by the First Amendment.”<sup>23</sup>

The critics of *Citizens United* too often ignore what the case actually said and disregard the meaning and intent of the First Amendment. Justice Kennedy and Justice Douglas recognized that the right of free speech is not a privilege dispensed by the Court or the government, but an inherent right that the First Amendment protects from government action. When viewed correctly, *Citizens United* was perfectly consistent with the wording, spirit, and intent of the First Amendment.

21 *Citizens United*, 130 S. Ct. at 905-07.

22 *Id.* at 917 (Roberts, C.J., concurring).

23 *United States v. UAW-CIO*, 352 U.S. 567, 597 (1957) (Douglas, J., dissenting). In an earlier case, Justice Rutledge, joined by Justices Black, Douglas, and Murphy, also dissented from the Court’s refusal to consider the ban. Justice Rutledge argued, “A statute which, in the claimed interest of free and honest elections, curtails the very freedoms that make possible exercise of the franchise by an informed and thinking electorate, and does this by indiscriminate blanketing of every expenditure made in connection with an election, serving as a prior restraint upon expression not in fact forbidden as well as upon what is, cannot be squared with the First Amendment.” *United States v. CIO*, 335 U.S. 106, 155 (1948) (Rutledge, J., dissenting).

## Endnotes

1 130 S. Ct. 876 (2010).

2 Quoted in Darlene Superville, *Obama Weekly Address VIDEO: President Blasts Supreme Court over Citizens United Decision*, ASSOCIATED PRESS, Jan. 23, 2010, available at [http://www.huffingtonpost.com/2010/01/23/obama-weekly-address-vide\\_n\\_434082.html](http://www.huffingtonpost.com/2010/01/23/obama-weekly-address-vide_n_434082.html).

3 Press Release, Charles E. Schumer, U.S. Senator, Senate Democrats Unveil Legislation to Limit Fallout from Supreme Court Ruling that Allows Unlimited Special-Interest Spending on Elections—Announce Plan for Senate Passage by July 4 (Apr. 29, 2010), available at [http://schumer.senate.gov/new\\_website/record.cfm?id=324343](http://schumer.senate.gov/new_website/record.cfm?id=324343).

4 Press Release, Chris Van Hollen, Member, U.S. House of Representatives, Van Hollen Remarks on Supreme Court Ruling in *Citizens United* Case (Jan. 21, 2010), available at <http://vanhollen.house.gov/News/DocumentSingle.aspx?DocumentID=167326>.

5 163 U.S. 537 (1896).

6 *Scott v. Sanford*, 60 U.S. 393 (1857).

7 Rob Kall, *Real Vampires, Their Human Cattle and Supreme Court Capos: Time to Declare War on Corporate Personhood*, HUFFINGTON POST, Jan. 25, 2010, [http://www.huffingtonpost.com/rob-kall/real-vampires-their-human\\_b\\_434612.html](http://www.huffingtonpost.com/rob-kall/real-vampires-their-human_b_434612.html).

8 Get Money Out, <http://www.getmoneyout.com/> (last visited Nov. 14, 2011).

9 Arin Greenwood, *OccupyDC Protest: Group Pushes Repeal of Citizens United, Corporate Personhood*, HUFFINGTON POST, Oct. 1, 2011, [http://www.huffingtonpost.com/2011/10/01/occupydc-citizens-united-corporate-personhood\\_n\\_989690.html](http://www.huffingtonpost.com/2011/10/01/occupydc-citizens-united-corporate-personhood_n_989690.html).

10 2 U.S.C. 441b.

11 2 U.S.C. § 441b(b)(2).

12 Transcript of Oral Argument at 20, *Citizens United v. FEC*, 130 S. Ct. 876 (2010), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-205.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf).

13 Transcript of Oral Argument at 65-66, *Citizens United v. FEC*, 130 S. Ct. 876 (No. 08-205), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-205%5D.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5D.pdf).

14 494 U.S. 652 (1990).

15 540 U.S. 93 (2003).

16 Editorial, *The Court’s Blow to Democracy*, N.Y. TIMES, Jan. 21, 2010, available at [http://www.nytimes.com/2010/01/22/opinion/22fri1.html?\\_r=1](http://www.nytimes.com/2010/01/22/opinion/22fri1.html?_r=1).

17 Van Hollen, *supra* note 4.

18 *Citizens United*, 130 S. Ct. 876, 950 n.55 (Stevens, J., dissenting).

19 *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

20 See *Barron v. Baltimore*, 32 U.S. 243, 250 (1833) (The amendments “demanded security against the apprehended encroachments of the general government . . .”).

