The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in *Citizens United v. FEC*

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Summary

In a 5-to-4 ruling, the Supreme Court in *Citizens United v. FEC* invalidated two provisions of the Federal Election Campaign Act (FECA), codified at 2 U.S.C. § 441b. It struck down the long-standing prohibition on corporations using their general treasury funds to make independent expenditures, and Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended FECA, prohibiting corporations and labor unions from using general treasury funds for "electioneering communications." The Court determined that these restrictions constitute a "ban on speech" in violation of the First Amendment. In so doing, the Court overruled its earlier holdings in *Austin v. Michigan Chamber of Commerce,* finding that it provided no basis for allowing the government to limit corporate independent expenditures. The Court also overruled the portion of its decision in *McConnell v. FEC* upholding the facial validity of Section 203, finding that the *McConnell* Court relied on *Austin.* The Court, however, upheld the disclaimer and disclosure requirements in Sections 201 and 311 of BCRA as applied to the movie that Citizens United produced and the advertisements it planned to run promoting the movie. According to the Court, while they may burden the ability to speak, disclaimer and disclosure requirements "impose no ceiling on campaign-related activities."

As a result of the Court's ruling, it appears that federal campaign finance law does not limit corporate and, most likely, labor union use of their general treasury funds to make independent expenditures for any communication expressly advocating election or defeat of a candidate, including broadcast and cablecast communications made immediately prior to an election. Corporations and unions may still establish PACs, but are only required to use PAC funds in order to make contributions to candidates, parties, and other political committees.

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Background

Citizens United, a nonprofit Internal Revenue Code Section 501(c)(4) tax-exempt corporation, produced a 90-minute documentary regarding a presidential candidate, then-Senator Hillary Clinton. The group released the film in theaters and on DVD, and planned to make it available through video-on-demand. In addition, Citizens United planned to fund three broadcast and cable television advertisements to promote the movie.

Concerned that both the film and its ads would be prohibited under the Federal Election Campaign Act (FECA),[1] which imposes civil and criminal penalties, Citizens United filed suit in U.S. district court. Specifically, the group sought a preliminary injunction to enjoin the Federal Election Commission (FEC) from enforcing Sections 203, 201, and 311 of the Bipartisan Campaign Reform Act of 2002 (BCRA).[2] These provisions of law amended the Federal Election Campaign Act (FECA) in order to regulate "electioneering communications." BCRA defines "electioneering communication" as any broadcast, cable, or satellite transmission made within 30 days of a primary or 60 days of a general election (sometimes referred to as the "blackout periods") that refers to a candidate for federal office and is targeted to the relevant electorate.[3]

Section 311 of BCRA, known as the disclaimer provision, codified at 2 U.S.C. § 441d, requires electioneering communications to include a statement identifying the funding source of the communication. Section 201, codified at 2 U.S.C. § 434, requires any person who spends more than $10,000 on electioneering communications in a year to file disclosure statements with the FEC. Section 203, codified at 2 U.S.C. § 441b, prohibits corporate and labor union treasury funds from being spent for electioneering communications. The group argued that Section 203 of BCRA violated the First Amendment on its face and as applied to its movie and advertisements. In addition, Citizens United maintained that Sections 201 and 311, requiring disclosure and identification of funding sources, were unconstitutional as applied to the television ads.

In a 2003 decision, *McConnell v. FEC*,[4] the Supreme Court upheld the constitutionality of Sections 203, 201, and 311 in a facial challenge. In a 2007 decision, *FEC v. Wisconsin Right to Life, Inc.* (WRTL II),[5] the Supreme Court limited the applicability of Section 203 by ruling that the prohibition could not constitutionally apply to advertisements that may reasonably be interpreted as something other than an appeal to vote for or against a specific candidate, and that such ads are not the functional equivalent of express advocacy.

Lower Court Opinion

The U.S. District Court for the District of Columbia denied the request by Citizens United for a preliminary injunction, finding that the BCRA provisions in question had previously been upheld

[1] *See* 2 U.S.C. § § 431 *et seq.*

[2] P.L. 107-155. This law is also known as "McCain-Feingold," in reference to the principal Senate sponsors of the legislation.

[3] 2 U.S.C. § 441b(b)(2).

[4] 540 U.S. 93 (2003).

[5] 551 U.S. 449 (2007).

by the Supreme Court as regulation that does not unconstitutionally burden First Amendment free speech rights.[6] Likewise, the court found that the group's as-applied claim would also fail on the merits because the movie did not focus on legislative issues, but instead took a position on the candidate's character, qualifications, and fitness for office, thereby falling within the FEC's regulatory definition of an electioneering communication.[7] The court concluded that Supreme Court precedent upholding Section 203 applied to Citizens United to the extent that it prohibited the group from funding electioneering communications that constituted the functional equivalent of express advocacy. The court also found that BCRA's disclosure requirements were constitutional.

Citizens United appealed. BCRA provides that if an action is brought to challenge the constitutionality of any of its provisions, a final decision from the district court shall be reviewable only by direct appeal to the U.S. Supreme Court. [8]

The U.S. Supreme Court heard oral argument in *Citizens United v. FEC* on March 24, 2009, and re-argument on September 9. For the re-argument, the Court ordered the parties to file supplemental briefs addressing whether the Court should overrule its earlier holdings in *Austin v. Michigan Chamber of Commerce*,[9] upholding the constitutionality of a state statute prohibiting corporate campaign expenditures, and the portion of its decision in *McConnell v. FEC*[10] upholding the facial validity of Section 203 of BCRA.

Supreme Court Ruling

Summary

In a 5-to-4 ruling, the Supreme Court in *Citizens United v. FEC*[11] invalidated two provisions of the Federal Election Campaign Act (FECA), codified at 2 U.S.C. § 441b. It struck down the long-standing prohibition on corporations using their general treasury funds to make independent expenditures,[12] and Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended FECA, prohibiting corporations from using their general treasury funds for "electioneering communications."[13] The Court determined that these prohibitions constitute a "ban on speech" in violation of the First Amendment.[14] In so doing, the Court overruled its earlier holding in *Austin v. Michigan Chamber of Commerce*,[15] finding that it provided no basis for allowing the government to limit corporate independent expenditures; and the portion of its

[6] Citizens United v. FEC, 530 F. Supp. 2d 274, 278-79 (D.D.C. 2008).

[7] *See* 11 C.F.R. § 114.15(b).

[8] *See* P.L. 107-155, § 403, 116 Stat. 113.

[9] 494 U.S. 652 (1990).

[10] 540 U.S. 93 (2003).

[11] No. 08-205, slip op. (U.S. Jan. 21, 2010).

[12] *See id.* at 20-51.

[13] *See id.*

[14] *Id.* at 22.

[15] 494 U.S. 652 (1990).

decision in *McConnell v. FEC*[16] upholding the facial validity of Section 203 of BCRA, finding that the *McConnell* Court relied on *Austin*.[17]

The Court, however, upheld the disclaimer and disclosure requirements in Sections 201 and 311 of BCRA as applied to the movie that Citizens United produced and the broadcast advertisements it planned to run promoting the movie.[18] According to the Court, while they may burden the ability to speak, disclaimer and disclosure requirements "impose no ceiling on campaign-related activities."[19]

It does not appear that the Court's ruling in *Citizens United* affects the validity of Title I of BCRA,[20] which generally bans the raising of soft, unregulated money by national parties and federal candidates or officials, and restricts soft money spending by state parties for "federal election activities."

Analysis

Writing for the Court,[21] Justice Kennedy began consideration of the case by examining whether Citizens United's claim, that the corporate expenditure prohibition was unconstitutional as applied to its film, could be resolved on other, narrower grounds. Disputing Citizens United's contention that the prohibition, codified at 2 U.S.C. § 441b, does not apply because its film does not qualify as an "electioneering communication," the Court found that the message of the film was the functional equivalent of express advocacy. [22] As explained by the Court in *FEC v. Wisconsin Right to Life (WRTL II)*, a communication is the functional equivalent of express advocacy "only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[23] Applying that standard, the Supreme Court determined that there is no reasonable interpretation of the film other than an appeal to vote against then-Senator Clinton for President. The movie is a "feature-length negative advertisement that urges viewers to vote against Senator Clinton for President," and therefore, the Court concluded, triggers the applicability of § 441b.[24]

[16] 540 U.S. 93 (2003).

[17] *See* Citizens United, slip op. at 50. For further discussion of *McConnell v. FEC* and *Austin v. Michigan Chamber of Commerce, see* CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by (name redacted).

[18] *See id.* at 50-57.

[19] *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976)).

[20] *See* 2 U.S.C. § 441i(a).

[21] Justice Kennedy wrote the majority opinion, joined by Chief Justice Roberts, and Justices Scalia and Alito. Justice Thomas joined the majority opinion with the exception of the part upholding the disclaimer and disclosure requirements. The part upholding the disclaimer and disclosure requirements was joined by Justices Stevens, Ginsburg, Breyer, and Sotomayor. Chief Justice Roberts wrote a concurring opinion, joined by Justice Alito. Justice Scalia wrote a concurring opinion, joined by Justice Alito and in part, by Justice Thomas. Justice Stevens filed an opinion concurring in part and dissenting in part, joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Thomas wrote an opinion concurring in part and dissenting in part.

[22] *See* Citizens United, slip op. at 7-8 (citing McConnell, 540 U.S. at 206).

[23] *Id.* at 7 (quoting FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007)).

[24] *Id.* at 7-8.

Rejecting Citizens United's argument that video-on-demand has a lower risk of distorting the political process than television ads, the Court cautioned that the judiciary must decline to make determinations as to which modes of communication are preferred for particular types of messages and speakers. Such determinations, the Court cautioned, would require protracted litigation and risk chilling protected speech.[25] In response to Citizens United's request for the Court to carve out an exception to § 441b's expenditure prohibition for nonprofit corporate political speech funded primarily by individuals, the Court determined that such a holding would result in courts making "intricate case-by-case determinations," an interpretation it also declined to adopt.[26] Accordingly, the Court concluded that it could not resolve the case on a narrower ground without chilling political speech that is "central to the meaning and purpose of the First Amendment."[27]

The First Amendment to the U.S. Constitution provides that "Congress shall make no law ... abridging the freedom of speech."[28] Citing several of its precedents that have invalidated restrictions on First Amendment free speech—such as laws requiring permits and impounding royalties—the Court contrasted those restrictions with the "outright ban" on speech imposed by § 441b, which also imposes criminal penalties.[29] Furthermore, the Court determined that even though FECA permits a corporation to establish a political action committee (PAC) in order to make expenditures, § 441b nonetheless constitutes a complete ban on the speech of a *corporation*. "A PAC is a separate association from the corporation," the Court observed, and allowing a PAC to speak does not "somehow" translate into allowing a corporation to speak.[30] Enumerating the "onerous" and "expensive" reporting requirements associated with PAC administration, the Court announced that even if a PAC could permit a corporation to speak, "the option to form a PAC does not alleviate the First Amendment problems associated with § 441b."[31] In addition, in view of the fact that a PAC must comply with such burdensome restrictions "just to speak," the Court found that a corporation may not have sufficient time to establish a PAC in order to communicate its views in a given campaign.[32]

As a law that bans free speech, the Court explained that it is subject to a "strict scrutiny" analysis, requiring the government to demonstrate that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."[33] Employing that analytical framework, the Court first observed that in its jurisprudence, it has previously determined "that First Amendment protection extends to corporations."[34] Furthermore, the Court noted, this protection has been extended in its

[25] *See id.* at 9.

[26] *Id.* at 12.

[27] *Id.*

[28] U.S. CONST. amend. I.

[29] Citizens United, slip op. at 20. According to the Court, the following actions would constitute a felony under § 441b: the Sierra Club running an ad within 60 days of a general election exhorting the public to disapprove of a Congressman who supports logging in national forests; the National Rifle Association publishing a book urging the public to vote for the challenger to an incumbent U.S. Senator who supports a handgun ban; and the American Civil Liberties Union creating a website telling the public to vote for a presidential candidate because of the candidate's defense of free speech. Such prohibitions, the Court concluded, "are classic examples of censorship." *Id.* at 21.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 22.

[33] *Id.* at 23 (quoting Wisconsin Right to Life, 551 U.S. at 464 (opinion of Roberts, C.J.))

[34] *Id.* at 25-26 (citing First National Bank of Boston v. Bellotti, 435 U.S. 765, 778, n. 14) (citing Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Doran v. Salem Inn, Inc., 422 (continued...)

holdings to political speech. Quoting from its 1978 decision in *First National Bank of Boston v. Bellotti,* the Court announced, "[u]nder the rationale of these precedents, political speech does not lose First Amendment protection 'simply because its source is a corporation.'"[35] "The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"[36]

Examining whether the prohibition furthers a compelling governmental interest, the Court noted that in its landmark 1976 decision, *Buckley v. Valeo,* it found that while large campaign contributions create a risk of *quid pro quo* candidate corruption, large independent expenditures do not. In *Buckley,* the Court noted, it "emphasized that 'the independent expenditure ceiling ... fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process.'"[37] Indeed, the Court remarked, if the ban on corporate and labor union independent expenditures had been challenged in the wake of *Buckley,* "it could not have been squared with the reasoning and analysis of that precedent."[38]

Less than two years after its decision in *Buckley*, the Court decided a case that "reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity."[39] In *Bellotti*, the Court struck down as unconstitutional a state law prohibiting corporate independent expenditures related to referenda. It is important to note that *Bellotti* did not consider the constitutionality of a ban on corporate independent expenditures to support *candidates*,[40] but if it had, the Court announced, such a restriction would have also been unconstitutional in order to be consistent with the main tenet of the *Bellotti* decision, "that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity."[41]

According to the Court, it was not until its 1990 decision, *Austin v. Michigan Chamber of Commerce,* that it squarely evaluated the constitutionality of a direct restriction on independent expenditures for political speech in a candidate election.[42] In *Austin*, the Court upheld a Michigan

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U.S. 922 (1975); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam); Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254; Kingsley Int'l Pictures Corp. v. Regents of Univ. of N. Y., 360 U.S. 684 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)); Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997); Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622; Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board, 502 U.S. 105 (1991); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989); Florida Star v. B. J. F., 491 U.S. 524 (1989); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6 (1970)).

[35] *Id.* at 25-26 (quoting Bellotti, 435 U.S. at 784).

[36] *Id.* at 26 (quoting Bellotti, 435 U.S. at 776).

[37] *Id.* at 29.

[38] Id. (citing Wisconsin Right to Life, 551 U.S. at 487 (opinion of Scalia, J.))

[39] *Id.* at 30.

[40] *See id.* at 31.

[41] *Id.*

[42] *See id.*

state law prohibiting and imposing criminal penalties on corporate independent expenditures that supported or opposed any candidate for state office. "To bypass *Buckley* and *Bellotti*, the *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest."[43] In *Austin,* the Court identified a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth ... accumulated with the help of the corporate form," with "little or no correlation to the public's support for the corporation's political ideas."[44] As a result, the Court in *Citizens United* faced "conflicting lines of precedent."[45] One did not allow for restrictions on political speech that were based on the corporate identity of the speaker, while the other did.

Rejecting the antidistortion rationale that it had relied upon in *Austin,* the Court announced that it could not support the ban on corporate independent expenditures.[46] According to the Court, the antidistortion rationale would have the "dangerous" and "unacceptable" result of permitting Congress to ban the political speech of media corporations.[47] Although media corporations are currently exempt from the federal ban on corporate expenditures, the Court announced that upholding the antidistortion rationale would allow their speech to be restricted, which First Amendment precedent does not support.[48] In addition, the Court determined that the *Austin* precedent "interferes with the 'open marketplace' of ideas protected by the First Amendment," permitting the speech of millions of associations of citizens—many of them small corporations without large aggregations of wealth—to be banned.[49]

Accordingly, the Supreme Court overruled its holding in *Austin v. Michigan Chamber of Commerce* and the portion of its decision in *McConnell v. FEC* upholding the facial validity of Section 203 of BCRA, finding that the *McConnell* Court relied on *Austin*.[50] In so doing, the Court invalidated not only Section 203 of BCRA, but also § 441b's prohibition on the use of corporate treasury funds for communications expressly advocating election or defeat of a federal candidate.[51]

The Court upheld the disclaimer and disclosure requirements in Sections 201 and 311 of BCRA as applied to the movie that Citizens United produced and the broadcast advertisements it planned to run promoting the movie.[52] According to the Court, while they may burden the ability to speak, disclaimer and disclosure requirements "impose no ceiling on campaign-related activities,"[53] and

[43] *Id.*

[44] *Id.* at 31-32.

[45] *Id.* at 32.

[46] *See id.* at 33.

[47] *Id.* at 35.

[48] *See id.* at 35-36.

[49] *Id.* at 38.

[50] *See id.* at 50. Referencing Justice Scalia's concurrence in *Wisconsin Right to Life,* the Court agreed with the conclusion that "*Austin* was a significant departure from ancient First Amendment principles," and held "that stare decisis does not compel the continued acceptance of *Austin*." *Id.* at 1 (quoting Wisconsin Right to Life, 551 U.S. at 449 (Scalia, J. concurring in part and concurring in judgment)).

[51] Upholding the constitutionality of this statute, the Court found, would suppress speech "in the realm where its necessity is most evident: in the public dialogue preceding a[n] ... election." *Id.* at 56.

[52] *See id.* at 50-57.

[53] *Id.* at 51 (quoting Buckley, 424 U.S. at 64).

"do not prevent anyone from speaking."[54] Citizens United argued that the disclosure requirements could deter donations to the organization because donors may fear retaliation. In response, the Court, relying on its holding in *McConnell v. FEC*, reiterated that such requirements would be unconstitutional as applied to an organization if there were a reasonable probability that its donors would be subject to threats, harassment or reprisals. In this case, however, the Court found that Citizens United offered no evidence of such threats.[55]

Dissent

In a strongly worded dissent, Justice Stevens criticized the Court's opinion, arguing that its decision to overrule *Austin v. Michigan Chamber of Commerce* and to find Section 203 of BCRA facially unconstitutional was made "only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring the rules of judicial restraint."[56] The dissent disagreed with the Court's conclusion that the avoidance of corruption and its appearance does not justify the regulation of corporate expenditures in candidate elections. Rather, the dissenting justices would have upheld the regulation because "the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules."[57]

Impact on Federal Campaign Finance Law

In brief, before the Court's ruling, corporations and labor unions were prohibited from using their general treasury funds to make expenditures for communications expressly advocating election or defeat of a clearly identified federal candidate.[58] In addition, 30 days before a primary and 60 days before a general election, corporations and unions were prohibited from using general treasury funds to finance electioneering communications.[59] However, corporations and labor unions were permitted to use political action committees (PACs), financed with regulated contributions from employees or members, to make independent expenditures for express advocacy communications and to fund electioneering communications within the restricted time periods.[60]

As a result of the Court's ruling, it appears that federal campaign finance law does not restrict corporate and, most likely, labor union[61] use of their general treasury funds to make independent

[54] *Id.* (quoting McConnell, 540 U.S. at 201).

[55] *See id.* at 54-55 (quoting McConnell, 540 U.S. at 198).

[56] *Id.* at 89-90 (Stevens, J., dissenting).

[57] *Id.* at 90 (Stevens, J., dissenting). The dissent further argued that the majority's rejection of the principle that corporate spending needs to be limited "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." *Id.* (Stevens, J., dissenting) (quoting Bellotti, 435 U.S. at 817, n. 13 (White, J., dissenting).

[58] *See* 2 U.S.C. § 441b(a).

[59] *See* 2 U.S.C. § 441b(b).

[60] *See* 2 U.S.C. § 441b(b)(2)(C).

[61] Although the issue before the Court was limited to the application of 2 U.S.C. § 441b to Citizens United, a corporation, the reasoning of the opinion would also appear likely to apply to labor unions. "The text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech, even if the speaker is a (continued...)

expenditures for any communication expressly advocating election or defeat of a candidate, including broadcast and cablecast communications made immediately prior to an election.[62] Corporations and unions may still establish PACs, but are only required to use PAC funds in order to make contributions to candidates, parties, and other political committees.

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corporation or union." Citizens United, slip op. at 5 (Roberts, C.J., concurring).

[62] In addition to impacting federal campaign finance law, it appears that the Court's ruling in *Citizens United v. FEC* may also affect numerous state laws prohibiting corporate expenditures. *See, e.g.*, Ian Urbina, *Consequences for State Laws in Court Ruling*, N.Y. TIMES, Jan. 23, 2010.