Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)

In *Citizens United*, the Supreme Court decided the First Amendment requires that corporations be afforded same right as human beings to make political campaign contributions. The *CU* majority reached that conclusion in the context of a substantial body of law, both legislative and judicial, which governed campaign spending. Since the Colloquy focuses on the issue of "corporate personhood", the discussion here will concentrate on those parts of the *CU* ruling that granted corporations the same rights as people. Issues that are peculiar to campaign finance law will be dealt with only to the extent they provide needed factual / legal background or otherwise illuminate how the Majority arrived at their decision to the equalize corporate and human rights.

I. Historical Background of the *Citizens Unite*d (*CU*) Decision

A. Restrictions on Political Contributions by Corporations before *CU*

Earlier Legislation and Legal Challenges

In 1907, the Tillman Act, signed into law by Teddy Roosevelt, prohibited corporations and interstate banks from making direct financial contributions to federal candidates. Weak enforcement mechanisms, however, made the Act ineffective.

In 1947, the Taft-Hartley Act, while overwhelmingly directed at regulating the activities of labor unions, also barred corporations from making independent expenditures in support of or in opposition to the election of federal candidates.

In 1971, the Federal Election Campaign Act (FECA) was enacted. It continued the ban on direct and independent political campaign contributions by corporations previously imposed under the Tillman and Taft-Hartley Acts, but it also provided an exception that allowed corporations to use money from the corporate treasury to establish and operate a separate segregated political fund and to solicit voluntary contributions for that fund. Under this exception, the separate corporate entity created to administer the fund was called a Political Action Committee or PAC. Voluntary donations made to a PAC could then be used to contribute to Federal races.

In 1974, Congress amended FECA to create the Federal Election Commission (FEC). Once it was up and running, the FEC banned independent expenditures by individuals, corporations, and groups that related "to a clearly identified candidate."

In 1976, in *Buckley v. Valeo,* 424 U.S. 1 (*Buckley*) where plaintiffs, the conservative John Buckley and the liberal Eugene McCarthy, challenged the Federal Election Campaign Act of 1971, the Supreme Court made a distinction between political expenditures and political contributions. In a highly unusual move for such a ground-breaking constitutional ruling, the Court issued its decision *per curiam*, i.e., the Majority opinion was attributed to the Court as a whole and was not signed by any individual justice. The Court upheld FECA's limits on individual direct contributions, ruling that limitations on direct donations to candidates were constitutional because of the compelling state interest in preventing corruption or the appearance of corruption.

On expenditures, however, the Court held that limiting independent expenditures unconstitutionally abridged freedom of speech under the First Amendment.

In 1978, the Supreme Court in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 *(Bellotti)*, finding "the inherent worth of speech . . . does not depend upon the identity of its source. . .", held that freedom of speech under the Fourteenth Amendment applies to corporations and struck down a Massachusetts law that prohibited corporations from making expenditures to influence referendum elections.

More Recent Legislation and Legal Challenges

In 1990, the Supreme Court in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 found "Corporate wealth can unfairly influence elections" and held that the Michigan Campaign Finance Act, which prohibited corporations from using treasury funds to make independent expenditures to support or oppose candidates in elections, did not violate the First and Fourteenth Amendments.

In 2002, the Bipartisan Campaign Reform Act (BCRA) amended FECA to address the proliferation of issue advocacy ads. It prohibited running any such ad paid for by a corporation or paid for by an unincorporated entity using corporate funds within 30 days of a primary or 60 days of a general election.

In 2003, the Supreme Court in *McConnell v. Federal Election Commission*, 540 U.S. 93 upheld (5-4) the key provisions of BRCA including the advocacy ad provisions.

II. The *Citizens United* Case

A. Factual Background of *CU*

In January 2008, Citizens United (CU), a non-profit corporation, released a documentary titled *Hillary: The Movie,* highly critical of Hillary Clinton, a candidate for the Democratic presidential nomination. As a non-profit corporation that did not engage in business activities and was formed for the sole purpose of promoting political ideas, CU would have been exempt from the provisions of BCRA, but for the fact that some of the funds to make *Hillary* were donated by for-profit corporations. Therefore, CU, worried about possible civil and criminal penalties under BRCA, sued the FEC seeking a declaration that BRCA was unconstitutional as applied to the *Hillary* movie.

B. Procedural Background of *CU*

On July 18, 2008, the U.S. District Court in Washington DC granted summary judgment against CU and in favor of the FEC relying on the Supreme Court's *McConnell* decision. CU took a direct appeal to the Supreme Court.

In March 2009, the Supreme Court heard the parties' arguments on the appeal. According to a 2012 *New Yorker* article, during the post-argument conference, the justices considered only the narrow question presented by the parties: Can Citizens United show the film? And on that question, they voted 5–4 in favor of Citizens United, with Chief Justice John Roberts writing the initial opinion for the Court. But a draft concurring opinion written by Justice Kennedy argued that the court should go

much further. The other justices in the majority (Alito, Scalia, Thomas) agreed with Kennedy's reasoning and convinced Roberts to reassign the writing to Kennedy, effectively allowing his concurrence to become the majority opinion. Roberts withdrew his opinion and scheduled the case for reargument.

On June 29, 2009, the last day of the term, the Court issued an order directing the parties to re-argue the case on September 9, 2009 and to submit briefs addressing whether it might be necessary to overrule *Austin* and/or *McConnell v. Federal Election Commission.* On reargument, the "Questions Presented" were expanded to include the issues identified in Kennedy's opinion.

C. The Supreme Court's Decision in *CU*

In 2010, the Court ruled in a 5-4 decision that the provision of BCRA, which prohibited independent expenditures by corporations and unions, violated the First Amendment's protection of free speech. The Court overruled *Austin v. Michigan Chamber of Commerce* (1990), which had found that restrictions on speech-related spending based on corporate identity were constitutional, as well as a portion of *McConnell v. Federal Election Commission* (2003), which found that restrictions on corporate spending on electioneering communications were constitutional. The ruling effectively freed corporations to spend unlimited amounts of money on electioneering communications and to directly advocate for the election or the defeat of candidates.

D. Analysis of the *CU* Decision

The government justified BRCA's restrictions on corporate campaign spending by arguing that BRCA advanced three compelling state interests:

1. Leveling the playing field to prevent corporations, which could draw upon huge corporate financial resources to support politicians favoring corporate interests, from drowning out non-corporate voices.

2. Preventing political corruption and the appearance of political corruption.

3. Protecting the rights of those corporate shareholders who do not agree with the political positions their corporation is taking.

The Majority found the government's position on each of these points unpersuasive.

Majority on Leveling the Playing Field

The Court's decision in *Bellotti* was cited repeatedly by the Majority for the proposition that the First Amendment does not permit the regulation of speech based on the identity of the speaker. Accordingly, it found that treating corporations more restrictively than individuals is unconstitutional. In disposing of the government's "level the playing field" rationale, the Court stated: "*Belotti* reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity."

The Majority also cited *Buckley* as a basis for rejecting “the premise that the Government has an interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.”

To bolster its position that the Court’s prior decisions in *Austin* and *McConnell* were wrong and it was dangerous and unconstitutional to treat corporations differently from individuals, the Majority invoked the specter of potential press censorship. The Court dealt with the awkward fact that BRCA expressly exempted “media corporations” from its provisions by observing that: “There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.”

<u>Dissent on Leveling the Playing Field</u>

The Dissent argued that making distinctions based on the identity of the speaker was perfectly justified, emphasizing the significant differences between corporations and human beings.

> Unlike natural persons, corporations have “limited liability” for their owners and managers, “perpetual life,” separation of ownership and control, “and favorable treatment of the accumulation and distribution of assets . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments. Corporations have no consciences, no beliefs, no feelings, no thoughts, no desires . . . their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.

Regulating and restricting the rights of corporations, Stevens observed, had been the rule since the birth of the republic. And the distinction between corporations and individuals was particularly important in the context of electing candidates to public office.

> Corporations, as a class, tend to be more attuned to the complexities of the legislative process [than individuals] and more directly affected by tax and appropriations measures that receive little public scrutiny; they also have vastly more money with which to try to buy access and votes.

Stevens also noted that the Majority’s rule prohibiting distinctions based on the speaker’s identity was riddled with exceptions: Courts have upheld restrictions on the political speech of numerous speakers including: students, prisoners, Armed Forces members, government employees, foreigners, etc. Moreover, the First Amendment itself distinguishes between “freedom of the press” and “freedom of speech”. Consequently, the Constitution not only makes an express distinction based on a speaker’s identity, but contrary to the Majority’s assertion, also provides a solid constitutional basis for distinguishing between corporations which are “media corporations and those which are not.”

My Comment

Corporate Personhood

The Majority relied on the *Bellotti* decision throughout their opinion, but their most critical citation was for the proposition that the Fourteenth Amendment applies to corporations, Although it passed over the point quickly and never said explicitly that “a corporation is a person” under the Fourteenth Amendment, that, in fact, was the effect of its ruling, which in turn, was the basis for holding that corporations possessed extensive First Amendment rights relating to elections.

And by characterizing CU as a unitary “speaker”, the Majority was implicitly adopting the Artificial Person theory of corporate personhood. Although, as is not unusual in Supreme Court corporate rights decisions, they proceeded to muddy the waters by going on to state the Government has no legitimate interest “in equalizing the relative ability of individuals and groups to influence . . . elections.” (Emphasis added.)

In articulating an apparently categorical rule forbidding distinctions based on the speaker’s identity, the Court, as pointed out by the Dissent, failed to address the many long-accepted restrictions on the political speech of certain classes of individuals, e.g., students, prisoners, foreigners, etc. Although not mentioned by the Dissent, municipal corporations and government-owned corporations are also entities subject to restrictions on their political speech.

To bolster its position that treating corporations differently from human beings is unconstitutional, the Majority warned that ruling otherwise would create a danger of press censorship. Since BRCA excludes “media corporations” from its provisions, the Court ended up addressing an issue that was not before it and, in order to knock down this particular straw man, it was reduced to counterfactually imagining what could happen if BRCA were extended to cover media corporations.

More fundamentally, the First Amendment prohibits abridging “freedom of the press” separately from its prohibition of abridging “freedom of speech” clearly distinguishing between some speakers, namely those constituting the press, and other speakers.

Preventing Political Corruption and the Appearance of Political Corruption

Majority

In ruling that “independent” contributions will not lead to political corruption or its appearance, the Court relied heavily on the reasoning of the *Buckley* decision:

> 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.

The Court goes on to conclude “the anticorruption interest is not sufficient to displace the speech here in question . . . independent contributions [by corporations] do not give rise to corruption or the appearance of corruption . . . and the appearance of influence or access, furthermore, will not cause the electorate to lose faith in democracy”.

Dissent

Stevens found that corporations enjoyed a profound advantage over individuals in the political arena and that corporate efforts to maximize shareholder value would lead to both political corruption and the appearance of political corruption.

> Business corporations must engage the political process in instrumental terms if they are to maximize shareholder value. The unparalleled resources, professional lobbyists, and singleminded focus they bring to this effort . . . make quid pro quo corruption and its appearance inherently more likely.

My Comment

Corporate Personhood

On the issue of corporate campaign contributions intended to procure favorable governmental treatment the Majority, once again, treated the corporation as primarily a unitary actor and accordingly subscribed to the Artificial Person theory of corporate personhood.

In addressing political corruption and the appearance of political corruption, the Court did not cite any evidence supporting its conclusion that independent contributions would not result in *quid-pro-quo* arrangements or that the voting public would not become disillusioned. In reaching its decision, it ignored the extensive testimony concerning political corruption gathered by Congress before it enacted BRCA. With respect to quid-pro-quo arrangements based on direct contributions the *Buckley* court noted “the scope of such pernicious practices can never be reliably ascertained”. But it’s not obvious that independent contributions are immune from quid-pro-quos arrangements which “can never be reliably ascertained.”

Although the Majority continually cited *Bellotti* to justify their prohibiting distinctions based on speaker identity, they ignored that portion of *Bellotti* which recognized the potential for political corruption arising from campaign spending by corporations: “The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. . . The importance of the governmental interest in preventing this occurrence has never been doubted.”

Finally the Majority’s unsupported assertion that people will not lose confidence in government has proven to be totally baseless - - an alarmingly large number of Americans, pointing to the unfair influence of money in politics, no longer trust the political process or the government.

Protecting the Rights of Dissenting Shareholders

Majority

Although BRCA expressly excluded media corporations from its restrictions, the Majority rejected protecting dissenting shareholders as a basis for sustaining BRCA, finding that protecting the rights of media corporation shareholders would "restrict the media corporation's political speech."

In addition, the Majority expressed a belief that "corporate democracy" would provide a sufficient recourse for shareholders who dissented from the corporate political line.

Dissent

Stevens argued that BRCA safeguards the integrity of the electoral process by protecting the rights of shareholders from "a kind of coerced speech", namely, corporate spending to elect candidates whom the shareholders do not support. Stevens found the Majority's cursory dismissal of the interests of dissenting shareholders was based on an illusion - - that "abuses of shareholder money can be corrected through the procedures of corporate democracy". "Corporate democracy", he concluded "is so limited as to be almost non-existent."

My Comment

Corporate Personhood

In addressing the rights of dissenting shareholders both Majority and Dissent were forced to look behind the corporate façade and, accordingly adopted the Aggregate theory of corporate personhood.

The Majority's second reason for dismissing the rights of dissenting shareholders was "There is furthermore, little evidence of abuse that cannot be corrected by shareholders through the procedure of corporate democracy."

In October 2015, after analyzing the *CU* decision, the Chief Justice of the Delaware Supreme, a court that is the principal source of American corporation law, concluded the Majority's view of corporate democracy was hopelessly unrealistic: "So-called stockholder democracy provides little restraint on management's political spending."

Further Comments

CU is a Radical Departure from Prior Law

In dissent, Stevens emphasized how radical a departure the Majority was making from prior law.

> The majority's approach to corporate electioneering marks a dramatic break with the past. Congress has placed special limitations on campaign spending ever since the passage of the Tillman Act in 1907 . . . We have unanimously

> concluded that this “reflects a permissible assessment of the dangers posed by those entities to the electoral process . . . and have accepted the “legislative judgment that the special characteristics of corporate structure require particularly careful regulation . . . The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of Austin.

Corporate Personhood: Corporations as Disadvantaged Minorities

When it was convenient, the Majority relied on the Aggregate Theory as a basis for its recognizing corporate First Amendment rights. Characterizing corporations as “disadvantaged persons” not only equated corporations with people, but painted a picture of contemporary society where corporations are “disadvantaged” and penalized as “disfavored associations of citizens.” The *McConnell* decision, which *CU* overruled, is depicted as banning “the speech rights of millions of associations of citizens.” In referring to “disadvantaged” and “disfavored“ corporations that are striving “to establish worth, standing and respect”, the Court used language more appropriate to the description of individual members of a minority suffering unlawful discrimination. With this emotive language the Court not only toggled away from the Artificial Person theory to the Aggregate Theory of corporate personhood, but also painted a picture of a socio-economic power structure far different from the one that actually exists in the United States.

Although the Majority’s choice of language seemed to characterize corporations as something akin to the “discrete insular minorities” whose rights the Court has traditionally sought to protect, they never said outright that corporations are entitled to the same rights as human beings. Instead, they flipped back and forth between two incompatible theories of corporate personhood based on which advanced the desired decisional outcome. As shown above, the Majority embraced the Artificial Person theory, conceptualizing a corporation as a unitary “speaker”, in holding that the First Amendment prohibited the Government from discriminating among speakers. But it then switched to the Aggregate Theory in characterizing corporations as “disadvantaged persons” and “disfavored associations of citizens - - those that have taken on the corporate form - - [who] are penalized for engaging in political speech” when that suited its purposes.

Striking down legislative measures to control campaign spending because they unfairly disadvantage corporations by discriminating against their shareholders is a *Through the Looking Glass* take on the realities of a modern corporation. As the Chief Justice of the Delaware Supreme Court convincingly explained, such a view totally fails to recognize the way actual corporations are owned and governed. In its solicitude for shareholder rights and its failure to recognize a corporation as an entity separate and distinct from its shareholders, the Court ignores the fact that shareholders have virtually no say in the corporation’s decisions on which political candidates to support financially. Those

choices are made solely by the corporation's upper management - - corporate officers, the Chairman and the inside directors - - who may not even be shareholders.

This approach, which is echoed in the *Hobby Lobby* case, allows corporations to have the best of both worlds, they are accorded the First Amendment rights of human beings, but unlike natural persons, they also enjoy limited liability, perpetual life, separation of ownership and control, and favorable treatment for the accumulation and distribution of assets. This Constitutional interpretation also benefits a corporation by amplifying its voice - - well-compensated corporate management can back their favorite candidates with contributions that have no legal limit and then direct their corporation to back the same candidates with contributions that also have no legal limit.

Update: Different Strokes for Different Folks

Janus v. AFSCME. On June 27, 2018, in a 5–4 decision the Court ruled that a public sector union's requirement that nonmembers pay union dues violated "the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." The Majority recognized that losing these dues would weaken unions by cutting off a source of union funds while still requiring the unions to incur the expense of representing nonmembers in negotiations with management. But Justice Alito concluded that such "free riding" was an insufficient justification for continuing those payments when weighed against the nonmembers' free speech rights.

No doubt, there are particular differences between dissenting workers forced to pay dues to a union whose political positions they do not support and dissenting shareholders forced to forego dividends (or stock buy-backs) so their corporation can fund political positions they do not support. Yet the legal interest involved seems very similar. Despite that similarity, the Majority's willingness to intervene to protect the First Amendment rights of dissident workers in *Janus* and their perfunctory dismissal of the First Amendment rights of dissident shareholders in *CU* is striking. The two decisions, however, share one obvious feature, the Majority's readiness to disregard stare decisis. Writing for the majority, Justice Alito felt no compunction in discarding precedents that for years had been relied on as settled law: in *CU*, Justice Alito overruled *Austin* (1990) and *McConnell* (2002) and in *Janus*, he overruled *Abood v. Detroit Board of Education* (1977).