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Corporate Speech in the Wake of *Citizens United v. Federal Election Commission*

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By
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This alternative plan paper has been examined and approved by the following members of the alternative plan paper committee.

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Introduction

In *Citizens United v. Federal Election Commission (FEC)*, the United States Supreme Court ruled that government could not limit corporate political spending in elections arguing that such limitations would violate the free speech rights of corporations. With this ruling, the Court has set a new standard for corporate First Amendment rights.

A corporation does not in and of itself speak to its own causes and interests. A corporation is grounded in the voices and actions of a revolving cast of board of directors and shareholders. By allowing corporations the freedom to use general treasury funds for near limitless electoral advocacy, the Court has single handedly rewritten campaign finance laws and *stare decisis*. As a result, individuals running corporations have been given a voice that carries far greater impact than that of their personal electoral voice due to the brand power of the corporation and the sizeable source of funds that corporations enjoy over that of individuals. Corporations both foreign and domestic now have the ability to influence elections and in effect, public policy at levels previously thought unattainable. The effect of this ruling will have a lasting impact on corporate speech in the United States.

The *Citizens United* case centers around the nonprofit corporation Citizens United and their attempt to distribute a documentary entitled, *Hillary: The Movie*. *Hillary*, released in 2008, is a “ninety-minute documentary about then-Senator and presidential candidate Hillary Clinton” (Gilpatrick, 2010). Citizens United intended to “pay cable

companies to make the film available for free through video-on-demand, which allows digital cable subscribers to select programming from various menus, including movies” (“Court Case Abstracts,” 2010). The documentary was to be released through on-demand services within 30 days of presidential primaries (“Court Case Abstracts,” 2010).

Citizens United’s position was that the timing of the documentary’s release would be in violation of the Bipartisan Campaign Reform Act of 2002 (BCRA) (Gilpatrick, 2010). BCRA “prohibits corporations and labor unions from using their general treasury funds to make electioneering communications or for speech that expressly advocates the election or defeat of a federal candidate” (“Court Case Abstracts,” 2010). Under BCRA, an “electioneering communication is generally defined as ‘any broadcast, cable or satellite communication’ that is ‘publicly distributed’ and refers to a clearly identified federal candidate and is made within 30 days of a primary or 60 days of a general election” (“Court Case Abstracts,” 2010). As a result, “Citizens United sought declaratory and injunctive relief against the Commission in the U.S. District Court for the District of Columbia, arguing that the ban on corporate electioneering communications at 2 U.S.C. §441b was unconstitutional as applied to the film and that disclosure and disclaimer requirements were unconstitutional as applied to the film and the three ads for the movie” (“Court Case Abstracts,” 2010). The preliminary injunction was denied by the District Court but they did grant the Commission’s motion for summary judgment (“Court Case Abstracts,” 2010).

Citizens United is a case centered on the corporate restrictions of BCRA. The Supreme Court ruling overturned the 1990 Court case, *Austin v. Michigan State Chamber of Commerce*, where “[t]he 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” (“COMMENTS: Citizens United,” 2010). Portions of the Court case *McConnell v. FEC* were also overturned in addition to provisions in BCRA that prohibit corporate expenditures on electioneering communications (“COMMENTS: Citizens United,” 2010). The *Citizens United* ruling allows “corporations and unions free to speak and spend independently of candidates during elections for the first time in decades” (“COMMENTS: Citizens United,” 2010).

The subsequent chapters will discuss the scope of the Court’s decision as well as the current state of corporate speech in light of *Citizens United*. The majority opinion and dissent will be framed in terms of free speech as liberty and free speech as equality. Further discussion will include current disclosure and disclaimer laws and what reform, if any, may come as a result of the *Citizens United* ruling.

The Majority

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 decision making 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

In writing for the majority, Justice Kennedy cites Justice Scalia's assertion from the case *FEC v. Wisconsin Right to Life, Inc. (WRTL)* that "*Austin* was a significant departure from ancient First Amendment principles" and speaking on behalf of the majority states that "[w]e agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*" (*Citizens United v. FEC*, 2010). Adding that "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether" (*Citizens United v. FEC*, 2010).

Justice Kennedy disagrees with *Citizens United*'s claim that *Hillary* is a documentary "[u]nder the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy" (*Citizens United v. FEC*, 2010). *Citizens United* contends that the method in which they intend to distribute *Hillary*, video-on-demand, does not qualify under §441b of BCRA due to a "lower risk of distorting the political process than do television ads" since each viewer is required to complete a series of steps confirming the intent to view (*Citizens United v. FEC*, 2010). Justice Kennedy contends, "[w]hile some means of communication may be less effective than others at

influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority" (*Citizens United v. FEC*, 2010).

Justice Kennedy draws concern for "chilling protected speech" and cites Chief Justice Roberts's contention from *WRTL* that First Amendment standards "must give the benefit of any doubt to protecting rather than stifling speech" (*Citizens United v. FEC*, 2010). Justice Kennedy adds, "the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment" (*Citizens United v. FEC*, 2010). As a result, "the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin*" (*Citizens United v. FEC*, 2010).

In citing a corporations ability to create a PAC and the First Amendment concerns of §441b, Justice Kennedy contends that PACs are "burdensome alternatives" that are "expensive to administer and subject to extensive regulations" (*Citizens United v. FEC*, 2010). In regards to the Government's ability to regulate content of speech, Justice Kennedy writes that "[t]he Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration" (*Citizens United v. FEC*, 2010). Noting that "[t]he First Amendment protects speech and speaker, and the ideas that flow from each" (*Citizens United v. FEC*, 2010). The majority finds that there is "no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers" citing that "history and logic lead us to this conclusion" (*Citizens United v. FEC*, 2010).

Justice Kennedy discusses the issue of independent expenditure bans in *United States v. Automobile Workers*. The Court did not address the constitutional questions of the case and remanded for the trial to proceed (*Citizens United v. FEC*, 2010). The dissent, authored by Justice Douglas and joined by Chief Justice Warren and Justice Black, argued that the Court should have addressed “the constitutional question and that the ban on independent expenditures was unconstitutional” (*Citizens United v. FEC*, 2010):

Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitaly important—that all channels of communications be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.

In *First National Bank of Boston v. Bellotti*, the Court did not address “the constitutionality of the State’s ban on corporate independent expenditures to support candidates” (*Citizens United v. FEC*, 2010). In *Citizens United*, the majority contends the Court addressed the issue, “that restriction would have been unconstitutional under *Bellotti*’s central principle: that the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity” (*Citizens United v. FEC*, 2010). Justice Kennedy cites the Court’s view on the First Amendment rights of corporations as evidence “when it struck down a state-law prohibition on corporate independent expenditures related to referenda issues (*Citizens United v. FEC*, 2010):

We thus find no support in the First . . . Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. . . . [That proposition] amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

In *Austin*, Justice Kennedy states in the dissent that the case “up[eld] a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court’s] history” (*Citizens United v. FEC*, 2010). Justice Kennedy contends that the Court bypassed prior rulings in *Buckley and Bellotti* by identifying an antidistortion interest in limiting political speech (*Citizens United v. FEC*, 2010). The majority views this as “conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them” (*Citizens United v. FEC*, 2010). Justice Kennedy argues that the media exemption invalidates the antidistortion rationale (*Citizens United v. FEC*, 2010):

Again by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. The exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news. So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.

In overruling *Austin*, the majority found that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations” (*Citizens United v. FEC*, 2010). Adding that the Court is “further required to overrule the part of *McConnell* that upheld BCRA §203’s extension of §441b’s restrictions on corporate independent expenditures” (*Citizens United v. FEC*, 2010). Justice Kennedy cites *McConnell*’s reliance on the antidistortion rationale and refers to it as “unconvincing and insufficient” (*Citizens United v. FEC*, 2010).

Free Speech as Liberty

Professor Kathleen M. Sullivan frames the *Citizens United* case from the perspective of two concepts of freedom of speech: free speech as equality and free speech as liberty. The basis of free speech as liberty centers around the notion that speech is not defined by the source but by the speech itself, “[i]n this view, the Free Speech Clause serves the end of liberty, checking government overreaching into the private order” (Sullivan, 2010). Since the Free Speech Clause is open to be interpreted as protecting speech instead of persons, the clause “suggests that its core concern is negative rather than affirmative – to restrain government from ‘abridging...speech’ rather than to protect ‘rights’ that require the antecedent step of identifying appropriate right holders” (Sullivan, 2010). Under this interpretation, the clause is indifferent to who is speaking but “suggests that it protects a system or process of ‘free speech,’ not the rights of any determinate speakers” (Sullivan, 2010).

In contrast to the redistributive qualities of free speech as equality, free speech as liberty suggests that “the audience of citizen listeners is best situated to evaluate political speech without government intervention aimed at reshaping the dialogue of achieving some preferred distributional end state in which the government deems speaking power sufficiently diversified” (Sullivan, 2010). The *Citizens United* majority quotes from *Buckley v. Valeo* and in essence draws a clear distinction between both concepts of free speech, “[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment” (Sullivan, 2010).

In writing for the majority, Justice Kennedy argues against paternalism and views any corporate political ads, be it toxic or enlightening, are best left to the public: “The Government may not...deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration” (Sullivan, 2010). Justice Kennedy’s interpretation further distances the two concepts of speech on the Government’s role in protecting and restricting based on content or speaker.

Sullivan concludes her interpretation of the ruling by stating, “the majority opinion and concurrences in *Citizens United* see freedom of speech as forbidding the reordering of private political speech for redistributive or paternalistic reasons, reflecting a fear that government intervention is a more pernicious threat to the distribution of speech than is any supposed vast accumulation of private capital” (Sullivan, 2010). The perception being that the private, free market will regulate itself.

The Dissent

In the dissent, Justice Stevens questions the Court's interpretation of campaign finance precedent and referred to the decision as "a dramatic break from our past" and characterizes that majority opinion as "rest[ing] on a faulty understanding of *Austin* and *McConnell* and of our campaign finance jurisprudence more generally" (*Citizens United v. FEC*, 2010). Referring to the majority's contention that the Court was asked to reconsider *Austin* and *McConnell*, Justice Stevens states that it "would be more accurate if rephrased to state that 'we have asked ourselves' to reconsider those cases" (*Citizens United v. FEC*, 2010).

In District Court, *Citizens United* presented a facial challenge to BCRA §203, later abandoning that claim and advised the Court that it was raising "an as-applied challenge to the constitutionality of...BCRA §203" (*Citizens United v. FEC*, 2010). The distinction being that an as-applied challenge would affect *Citizens United* only. Justice Stevens writes that "[t]he jurisdictional statement never so much as cited *Austin*, the key case the majority today overrules" (*Citizens United v. FEC*, 2010). Adding "even in its merits briefing, when *Citizens United* injected its request to overrule *Austin*, it never sought a declaration that §203 was facially unconstitutional as to all corporations and unions; instead it argued only that the statute could not be applied to it because it was 'funded overwhelmingly by individuals'" (*CU Opinion*, 2011).

Justice Stevens contends that the majority's "unnecessary resort to a facial inquiry 'runs[s] contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding

it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied” (Citizens United v. FEC, 2010). The dissent refers to the majority’s decision to apply a facial ruling as based in pure speculation: “[h]ad Citizens United maintained a facial challenge, and thus argued that there are virtually no circumstances in which BCRA §203 can be applied constitutionally, the parties could have developed, through the normal process of litigation, a record about the *actual* effects of §203, its actual burdens and its actual benefits, on *all* manner of corporations and unions” (Citizens United v. FEC, 2010). Justice Stevens adds that “[i]n this case, the record is not simply incomplete or unsatisfactory; it is nonexistent” (Citizens United v. FEC, 2010).

The majority’s assumption is “that a facial ruling is necessary because anything less would chill too much protected speech” (Citizens United v. FEC, 2010). Justice Stevens argues that “this claim rests on the assertion that some significant number of corporations have been cowed into quiescence by FEC ‘censor[ship]’” (Citizens United v. FEC, 2010). The dissent references the standard set in *WRTL* that regulation of corporate communication under §203 is permissible as long as it was “susceptible of *no* reasonable interpretation other than as an appeal to vote for or against a specific candidate” (Citizens United v. FEC, 2010). Adding that “[t]he Court does not explain how, in the span of a single election cycle, it has determined THE CHIEF JUSTICE’s project to be a failure” (Citizens United v. FEC, 2010).

The majority asserts that despite Citizens United dropping its facial challenge at the District Court level, they “nevertheless preserved it—not as a freestanding ‘claim.’ but as a potential argument in support of ‘a claim that the FEC has violated its First

Amendment right to free speech” (Citizens United v. FEC, 2010). Justice Stevens rejects this argument (Citizens United v. FEC, 2010):

By this novel logic, virtually any submission could be reconceptualized as ‘a claim that the Government has violated my rights,’ and it would then be available to the Court to entertain any conceivable issue that might be relevant to that claim’s disposition. Not only the as-applied/ facial distinction, but the basic relationship between litigants and courts, would be upended if the latter had free rein to construe the former’s claims at such high levels of generality. There would be no need for plaintiffs to argue their case; they could just cite the constitutional provisions they think relevant, and leave the rest to us.

The dissent argues that the majority’s decision to overrule *Austin* and *McConnell* is founded in a disagreement of the results. Justice Stevens writes, “[v]irtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents” (Citizens United v. FEC, 2010). Adding that the “only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court” (Citizens United v. FEC, 2010). Justice Stevens characterizes the ruling as “striking at the vitas of *stare decisis*, ‘the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion’ that ‘permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals’” (Citizens United v. FEC, 2010).

Justice Stevens addresses the Court’s analysis of a “‘categorical ba[n]’ on corporate speech” noting that the majority references a “ban” on 29 of its 64 pages. Justice Stevens refers to this as “highly misleading, and need[ing] to be corrected” (Citizens United v. FEC, 2010). Provisions of *Austin* and *McConnell* have allowed corporations “exemptions for PACs, separate segregated funds established by a corporation for political purposes” (Citizens United v. FEC, 2010). Justice Stevens adds that “[u]nder BCRA, any corporation’s ‘stockholders and their families’ can pool their resources to finance electioneering communications” (Citizens United v. FEC, 2010).

Justice Stevens states that “[t]he Court invokes ‘ancient First Amendment principles,’ and original understandings to defend today’s ruling, yet it makes only a perfunctory attempt to ground its analysis in the principles or understandings of those who drafted and ratified the Amendment” (*Citizens United v. FEC*, 2010). To which Justice Stevens adds, “[t]o the extent that the Framers’ views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority’s position” (*Citizens United v. FEC*, 2010). Justice Stevens supports his position with a description of the role corporations played under the Framers (*Citizens United v. FEC*, 2010):

This is not only because the Framers and their contemporaries conceived of speech more narrowly than we now think of it, but also because they held very different views about the nature of the First Amendment right and the role of corporations in society. Those few corporations that existed at the founding were authorized by grant of a special legislative charter. Corporate sponsors would petition the legislature, and the legislature, if amenable, would issue a charter that specified the corporation’s powers and purposes and ‘authoritatively fixed the scope and content of corporate organization,’ including ‘the internal structure of the corporation.’ Corporations were created, supervised, and conceptualized as quasi-public entities, ‘designed to serve a social function for the state.’ It was ‘assumed that [they] were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare.’

Justice Stevens cites Thomas Jefferson’s concerns regarding corporations impact on the Republic, “I hope we shall...crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country” (*Citizens United v. FEC*, 2010). Adding that “[t]he Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare” (*Citizens United v. FEC*, 2010).

The dissent argues that the majority bases its rejection of *Austin* on “[s]elected passages from two cases, *Buckley* and *Bellotti*” (*Citizens United v. FEC*, 2010). The majority references Chief Justice Roberts from *Buckley* that “[t]he concept of government

may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment” (*Citizens United v. FEC*, 2010). Justice Stevens argues that the “Constitution does, in fact, permit numerous ‘restrictions on the speech of some in order to prevent a few from drowning out the many’” (*Citizens United v. FEC*, 2010). Justice Stevens questions the relevancy of the quote from *Buckley* stating that it was used in evaluating “the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections” (*Citizens United v. FEC*, 2010). Adding that “when we made this statement in *Buckley*, we could not have been casting doubt on the restriction on corporate expenditures in candidate elections, which had not been challenged as ‘foreign to the First Amendment,’ or for any other reason” (*Citizens United v. FEC*, 2010).

Addressing *Bellotti*, Justice Stevens states that the case was ruled “in an explicit limitation on the scope of its holding, that ‘our consideration of a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office’” (*Citizens United v. FEC*, 2010). And “[i]n the Court’s view, *Buckley* and *Bellotti* decisively rejected the possibility of distinguishing corporations from natural persons in the 1970’s; it just so happens that in every single case in which the Court has reviewed campaign finance legislation in the decades since, the majority failed to grasp this truth” (*Citizens United v. FEC*, 2010).

Free Speech as Equality

In Professor Sullivan's other concept of freedom of speech, free speech as equality, she states that "Free speech as equality embraces first an antidiscrimination principle: in upholding the speech rights of anarchists, syndicalists, communists, civil rights marchers, Maoist flag burners, and other marginal, dissident, or unorthodox speakers, the Court protects members of ideological minorities who are likely to be the target of the majority's animus or selective indifference" (Sullivan, 2010). Sullivan states that the dissent "relies centrally on the point that limitations on the use of general corporate treasuries for independent expenditures in support of or in opposition to political candidates are 'viewpoint-neutral regulations based on content and identity,' not embodiments of 'invidious discrimination or preferential treatment of a politically powerful group'" (Sullivan, 2010).

Justice Stevens' argument suggests that as long as government is not regulating the content of what is said but instead the speaker, the First Amendment is not abridged: "speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms" (Sullivan, 2010). In defending Congress' differential treatment of corporations and "natural persons" the dissenting view maintains that corporations are compelled to "engage the political process in instrumental terms" as means to "maximize shareholder value" in contrast to the advancement of "any broader notion of the public good" (Sullivan, 2010).

The concerns of Justice Stevens' dissent center around the "drowning out of noncorporate voices" by "corporate domination of the airwaves prior to an election"

(Sullivan, 2010). Sullivan explains Justice Stevens' dissent as an embodiment of free speech as equality: "On this view, political equality is prior to speech: when freedom of speech enhances political equality, speech prevails; when speech is regulated to enhance political equality, however, regulation prevails" (Sullivan, 2010). The idea being that speech by the mainstream or majority will prevail over those of the minority to a degree that the government needs to protect the dissenting view from political suppression.

Current Disclosure and Disclaimer Laws

In the context of current disclosure and disclaimer laws, corporate speech can be divided into two relevant categories: independent expenditures and electioneering communications. A typical definition of independent expenditures is identified in Arkansas law (Winik, 2010):

An "independent expenditure" is any expenditure which is not a contribution and:
(A) Expressly advocates the election or defeat of a clearly identified candidate for office;
(B) Is made without arrangement, cooperation, or consultation between any candidate or any authorized committee or agent of the candidate and the person making the expenditure or any authorized agent of that person; and
(C) Is not made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of the candidate.

Electioneering communication is defined by speech that references a candidate and is within a timeframe prior to the election. Under federal law, electioneering communication must meet three standards. It must "refer[] to a clearly identified candidate for Federal office" and must be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" (Winik, 2010). It must also occur "within . . . 60 days before a general, special, or runoff election for the office sought by the candidate; or . . . 30 days before a primary or preference election, or a convention or caucus" (Winik, 2010). Lastly, "in a congressional race, it must be capable of being 'received by 50,000 or more persons' in the relevant jurisdiction" (Winik, 2010).

Regulation is broken into disclosure and disclaimer requirements. Speakers are required under disclosure regulations "to file with the government a public accounting of the money they have spent to support a given candidate" (Winik, 2010). Disclaimer regulations "require that speakers identify themselves in their communications rather than

merely in filings with an agency” (Winik, 2010). In contrast with disclosure regulations, “[d]isclaimers convey less information than disclosures – a few seconds in a television spot, rather than a detailed form – but they are more vivid and accessible” (Winik, 2010).

Federal law requires disclosures for “[e]very person . . . who makes independent expenditures . . . in excess of \$250 during a calendar year,’ as well as disclosure of ‘disbursement[s] for the direct costs of producing and airing electioneering communications in . . . excess of \$10,000 during any calendar year” (Winik, 2010). Although “disclosure is required only for express advocacy, except during the brief pre-election window – sixty days for a general election, thirty days for a primary – when it is required for speech ‘susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” (Winick, 2010).

In addition to federal law, “thirty-four states require disclosure of independent expenditures” (Winik, 2010). The states generally follow the language outlined in Arkansas law, “though some do not make explicit the requirement that advocacy be ‘express,’ and others do not mandate that the candidate in question be ‘clearly identified” (Winik, 2010). A few states “do not use the term ‘advocacy’ at all” (Winik, 2010).

Federal law requires the use of disclaimers for electioneering communications as well as independent expenditures. Only three states, Illinois, South Dakota, and West Virginia require disclaimers for both electioneering communications and independent expenditures (Winik, 2010). Two states “Louisiana and Vermont require disclaimers only for electioneering communications, while twelve states require disclaimers only for express advocacy” (Winik, 2010). There are nine states that “require disclaimers for all

independent advocacy regardless of whether the advocacy is ‘express’ (Winik, 2010).

While “[f]ive states purport to impose a much broader disclaimer requirement, covering even nonadvocacy communications” (Winik, 2010). Overall, “in the vast majority of states, and at the federal level, electoral communications that stay outside the bounds of direct advocacy or the narrow strictures of electioneering communications carry no disclaimer requirement at all” (Winik, 2010).

Citizens Informed

In the context of congressional reform, little has been done since the *Citizens United* ruling. In 2010, the United State House of Representatives passed the DISCLOSE Act “[b]ut the bill died in the Senate, and even had it passed, its scope would have been limited to electioneering communications and express candidate advocacy or its functional equivalent’ (Winik, 2010). The DISCLOSE Act “would have broadened slightly the definitions of those activities but done nothing to address the wider array of corporate political speech that neither ‘expressly advocat[es] the election or defeat of a clearly identified candidate’ nor ‘refers to a clearly identified candidate’ in such a way as to be susceptible of no reasonable interpretation other than as an appeal to vote for or against’ that candidate” (Winik, 2010). Any meaningful reform to corporate electoral speech should be designed to inform the public of the corporate speaker. The disclosure of the corporate speaker will allow citizens the opportunity to add context to the advocacy they are presented with.

In *Citizens Informed*, Daniel Winik discusses the importance and constitutionality for the “broader disclosure and disclaimer of corporate electoral communications, extending to speech beyond direct advocacy” (Winik, 2010). The rationale being that “disclosure and disclaimer requirements might actually do *better* than outright prohibition in achieving the informational and anticorruption objectives that have long been central to reform efforts” (Winik, 2010). Winik limits the context within the confines of what “the Supreme Court has deemed constitutionally legitimate in this field, which notably do[es] not include equality” (Winik, 2010).

Any discussion of disclosure and disclaimer requirements must take note of the government's ability to regulate and whether any proposal would withstand judicial review in light of *stare decisis*. Regarding FECA's disclosure requirement the *Buckley* Court found that "compelled disclosure can always conceivably chill association or speech," but that "the First Amendment provides even greater protection for anonymity when a group or individual demonstrates a 'reasonable probability that the compelled disclosure . . . will subject them to threats, harassment, or reprisals from either Government officials or private parties'" (Winik, 2010). *Buckley* identified "three strong governmental interests against anonymity – informing the electorate, preventing corruption, and enforcing other regulations" (Winik, 2010). The Court held "that, except in instances of probable reprisal, the federal government's specific disclosure interests in FECA outweighed the inherent right to anonymity" (Winik, 2010).

In *McIntyre v. Ohio Elections Commission*, Margaret McIntyre distributed leaflets at a public meeting on a proposed school tax levy. No mention of the author was included on the leaflets and Mrs. McIntyre "was charged with violating an Ohio law against anonymous political publications" (Winik, 2010). The Court concluded that "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message" (Winik, 2010). In her concurring opinion, Justice Ginsburg wrote that this case did "not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity" (Winik, 2010).

Recently, the Court addressed the issue of anonymity in *Doe v. Reed* where they “considered the use of Washington’s Public Records Act to reveal the signers of petitions for a referendum against same-sex civil unions” (Winik, 2010). Winik states that “*Doe* does little to clarify how far the right to anonymity extends because the sort of political activity with which it dealt fell within the state’s prerogative to regulate elections” (Winik, 2010). Adding that “*Doe* may be notable for its 8-1 margin, with only Justice Thomas writing – as in *Citizens United* – to defend a broad right against disclosure” (Winik, 2010). Justice Scalia’s concurrence in judgment called for “an absolute mandate for disclosure regulations” (Winik, 2010).

According to Winik, “[t]he purpose of disclosure and disclaimer provisions is to facilitate the full and fair consideration of electoral advocacy after its entry into public discourse” (Winik, 2010). Justice Holmes wrote, “the best test of truth is the power of the thought to get itself accepted in the competition of the market” (Winik, 2010). If this is so, “then disclosure and disclaimer help the market to function” (Winik, 2010). Winik cites Alexander Meiklejohn’s theory of the First Amendment as support (Winik, 2010):

The importance of complete information in the public sphere is central to Alexander Meiklejohn’s theory of the First Amendment, which has profoundly influenced First Amendment jurisprudence. The purpose of the First Amendment, Meiklejohn writes, “is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.” To ensure “that all the citizens shall, so far as possible, understand the issues which bear upon our common life,” the First Amendment provides that “no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them.”

A way that corporate voices are informative in the electoral process is by notifying citizens of policies or candidates that would have an adverse impact, in their estimation, on the economy and job creation. A reasoned example of this was on display in the proposed advertisement at the heart of the *Austin* case, “[t]he Chamber of

Commerce not only disclosed its corporate interests but explained, in seven paragraphs of reasoned prose, why its proposals (in Mr. Badstra's hands) would benefit all Michiganders by 'making Michigan more competitive for business investment and job creation'" (Winik, 2010). While this is not representative of corporate political advocacy, it must also be considered alongside more negative or misleading advocacy.

Disclosure and disclaimer requirements benefit voters in the sense that "the affiliation of a candidate with particular interest groups – just like the candidate's party affiliation – can be a powerful heuristic for voters" (Winik, 2010). In *Austin*, "[t]he very fact that the Chamber of Commerce endorses Richard Bandstra means something to voters, regardless of what the Chamber says about him" (Winik, 2010). Endorsements are an integral part of elections and "time-starved voters really do inform themselves by such basic cues as which corporation stands behind which candidate" (Winik, 2010).

An outright ban of corporate electoral advocacy would only provide a "deceptive sense of insulation from corporate influence" (Winik, 2010). Doing so would only encourage corporations to keep their influence hidden from the public. Winik adds that "one of the potential benefits of a more open regime: when corporations contribute to public discourse through mass advertising, rather than back-channel influence, 'all can judge' the 'content and purpose' of their speech" (Winik, 2010). This is not to assume that private discourse will not take place between corporations and politicians but "to the extent that their public priorities align with those they communicate in private, the electorate will at least glimpse what its representatives are seeing behind closed doors" (Winik, 2010).

In defending the constitutionality of broader disclosure and disclaimer regulations, Winik describes corporations as “inherently public entities” and that they “are public actors because they exist only through a publicly granted privilege” (Winik, 2010). A counterargument would be “that the requirement for corporations to act publicly in the economic market place does not, on its own, legitimate market pressures on their political speech” (Winik, 2010). The implication being that the corporation has two voices, an economic voice that is inherently public and a political voice that is inherently private. This rationale would argue that corporations, like individuals, have a public life and a subsequent private life in which they are allowed to retreat into anonymity. Winik believes that “[c]orporations have no constitutive interest in privacy, just as they have no constitutive interest in speech” (Winik, 2010). As stated by then-Justice Rehnquist, “To ascribe to [corporations] an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor with reality” (Winik, 2010).

Winik states that a starting point for reform would be “a standard that would cover all (1) public communications that (2) any corporation (3) funds and that (4) can reasonably be expected to (5) influence an election” (Winik, 2010). Public communication “concerns whether a regulation covers all corporate speech or only public speech” (Winik, 2010). Any corporation speaks to whether exemptions would be allowed or if it would be all encompassing. Funds “concerns whether a regulation covers communications funded by corporations or only those ‘spoken’ by corporations in the most immediate sense” (Winik, 2010). The fourth parameter, “can reasonably be expected to,” covers “whether a regulation is enforced objectively or subjectively” (Winik, 2010). Winik describes the final parameter as “the most important” and defines

“what political communications are covered” (Winik, 2010). Beyond direct advocacy, this is difficult to define. As Winik states, “legislators would court constitutional peril by intruding in the domain of corporate speech not tied to any electoral consequence” (Winik, 2010).

Sullivan's Reform Options

Sullivan provides four possible political reforms that could arise from the *Citizens United* ruling: “first, invalidating limits on political contributions directly to candidates; second, allowing independent electoral expenditures by nonprofit but not for profit corporations; third, increasing disclosure and disclaimer requirements for corporations making expenditures in connection with political campaigns; and fourth, conditioning receipt of various government benefits to corporations on their limiting political campaign expenditures” (Sullivan, 2010). The first and fourth options would favor those inclined to agree with the *Citizens United* majority while the second option would favor those who side with the dissent and lastly, the third option may appeal to both sides.

In the first option, Sullivan suggests getting rid of hard money contribution limits to candidates. To do so would be repealing federal campaign laws that stretch back to the “Tillman Act of 1907 that prohibit corporations from giving directly to political candidates from their own treasuries” (Sullivan, 2010). In addition, “Congress could eliminate the amount of limitations on contributions to candidate campaigns from any source, corporate or otherwise” (Sullivan, 2010). Sullivan defends her point by addressing the inherent discrepancy in allowing seemingly unlimited funds directed to non-candidate electioneering but not directly to the candidates themselves. By “[a]llowing unfettered contributions directly to candidates, who are accountable to voters, might also decrease the concern of free speech as equality proponents that corporate-funded ads will be particularly toxic, debasing public dialogue and undermining a desirable end state of diverse political ideas” (Sullivan, 2010).

Sullivan's first proposal merits consideration but would ultimately struggle to pass muster with a skeptical electorate and a liberal Senate and president. As campaign spending reaches previously unthinkable levels, candidates may soon have to defend their coffers to an economically struggling electorate who could resent the level of corporate campaign donations when their jobs are being laid off. This point could be argued on both sides of the debate but given recent trends, election spending has not crested.

Another critique of this proposal would be, "why?" Why would a corporation give directly to a candidate when they have much more anonymity circumventing candidates in order to reach the same end game? Corporations may have their agendas to push but they tend to favor the issue over the candidate. It is far simpler to separate themselves from the shortcomings of candidates when they can retreat in their support of a particular issue.

Sullivan's second proposal involves drawing the line between for-profit and non-profit organizations. Under this proposal, only non-profit organizations would benefit from the *Citizens United* ruling. This would be a departure from the Court ruling in which both sides appeared unwillingly to differentiate what constitutes a corporation. The majority defines speech as not being limited to who the speaker is while on the dissent, speech is left alone to persons while excluding all corporations regardless of size, type or affiliation. Based on this understanding and the opinion of the Court in *Citizens United* regarding "chilling speech," this proposal would likely face judicial scrutiny.

The third proposal would make "disclosure and disclaimer rules for corporate electoral expenditures more robust, as embodied in portions of legislative proposals like the eponymous DISCLOSE Act, would appear to align the libertarian and egalitarian

visions of free speech” (Sullivan, 2010). Disclosure requirements are likely to be more appealing to free speech as equality advocates due to interest group monitoring that would serve as a deterrent to large corporations disproportionately supporting particular issues over others.

Support from free speech as liberty advocates is probable but inherently more complicated. For one, “liberty” proponents are against government oversight to begin with. While disclosure requirements do not directly relate to oversight, it does remove the autonomy in which no disclosure requirements would allow corporations to push their agenda without reprisal. Although, disclosure requirements may be the closest compromise that liberty proponents get without additional government intervention as to additional restrictions to corporate speech.

The final proposal would “make restrictions on corporate electoral speech a condition of the receipt of government benefits” (Sullivan, 2010). While similar practices are used as a safeguard against misappropriation of government funds, there are serious questions about this proposal. On one side, you have “liberals who, on free speech as equality grounds, dislike government’s use of its leverage to exact conformity as the price of reliance upon government resources” (Sullivan, 2010). While conservatives may view the restrictions as being, “so burdensome as to amount to a ‘ban’ on political speech” (Sullivan, 2010). Given the bureaucratic nightmare such a restriction would cause, this proposal would likely lack a modicum of support needed to even pass its way out of committee.

Conclusion

The issues addressed in *Citizens United* are crucial to the public due to the impact they have on electoral speech but also the protections granted to corporations. The case provides a unique interpretation to the First Amendment whose ramifications are not limited to electoral speech but may extend into the commercial speech doctrine (Piety, 2010).

The opinion in *Citizens United* is replete with rhetoric identifying corporations as “citizens,” as if they were real persons. This characterization bolsters arguments for treating commercial speech like fully protected speech because it trains the analysis on the speaker instead of the listener. The majority of the Court is sympathetic to the argument for more protection for commercial speech and *Citizens United* reflects that sympathy. It suggests that with the proper case, there is an increased likelihood the Supreme Court will either do away with the commercial speech doctrine altogether and declare the commercial speech should be treated as fully protected speech, or it will nominally retain the doctrine but apply strict scrutiny review.

Professor Tamara R. Piety’s stance is that by extending First Amendment rights to corporations we are providing a host of legal arguments for additional freedoms, “if a for-profit corporation is entitled to First Amendment protection when it engages in political speech—speech which is in some sense peripheral to its existence—then it would seem full protection for its *core* expressive activity should follow” (Piety, 2010). The issue that Piety raises brings to light the unintended (or perhaps intended) consequences of court rulings. By bringing corporations into the First Amendment fold, a number of other protections are certain to be tested in court cases for the foreseeable future.

The Court’s opinion in *Citizens United* has stirred controversy among campaign finance scholars and advocates ranging from outrage to complete agreement. The decision was at center stage during the 2010 State of the Union address when President Obama criticized the ruling and cameras caught Justice Alito verbally disagreeing with the president. Instead of trying to jam the proverbial genie back into the bottle, perhaps,

as Daniel Winik states, legislators should “set their sights on a different path, not only reinforcing disclosure and disclaimer regulations within the previously regulated sphere but expanding those regulations beyond direct candidate advocacy to a broader range of corporate political speech” (Winik, 2010). Winik contends that this approach would not only be “constitutionally legitimate; it also might turn out to be more effective than the pre-*Citizens United* regime in informing the electorate” (Winik, 2010).

It is too soon to draw any lasting impressions from the *Citizens United* ruling. As it stands, the ruling provides corporations the opportunity to influence elections outside of any significant disclosure and disclaimer requirements at an unprecedented level. The full impact of *Citizens United* may not be felt for years to come. Much like a recession, you are not fully aware that it has begun until you are already in it. To truly understand the impact of this decision, additional research will be needed in the election cycles to come as well as monitoring of any legislative and judicial challenge to current disclosure and disclaimer laws.

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