

John Headland

**Citizens United v. FEC, Freedom of Speech, and the Community Economic Development Movement**

**Equal Protection for Unequal Advantage?**

The United States Supreme Court decision *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2009) caused controversy among commentators, but the practical fallout from the decision remains unclear. In a 5-4 decision, the Supreme Court overturned twenty years of legal history and established that political speech in the form of independent political broadcasts during elections could not be limited without violating the First and Fourteenth Amendments of the United States. The direct result of the decision was the repealing of the 2002 Bipartisan Campaign Reform Act (BCRA), lifting an effective ban on "electioneering" broadcasts – broadcasts made within 30 days of an election or primary endorsing or critiquing a specific candidate – paid for by for-profit corporations, not-for-profit corporations, and unions. But it also overturned the earlier decision *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and ruled that the threat of political corruption is not a sufficient government interest to limit the speech of organizations based on their status as corporations. Because the decision has eliminated caps on political spending, for-profit corporations have arguably gained the most from the holding by allowing them a far more direct role in politics. Unions and non-profits focused on political advocacy, like the Citizens United group in the case, also have much to gain from a more direct role in politics. But non-profit entities focused on apolitical matters do not gain any direct benefit from this decision. Does the community economic development movement suffer at all as a result of the increased freedom for big corporations? Will these entities remain intact if the decision results in an increase in discourse from entities with different views? Will they be forced to spend more of their money than they had in the past to deal with the rising tide of influence? And what does it mean for poverty programs when the facts of political discourse force them to sacrifice funds for survival? If these groups are to maintain or increase their effectiveness, then they may need to push for laws that specifically advantage their speech but do not violate the Constitution. The answers to these questions, and the political outlets for community

development organizations, may lie in new developing legal situations, or the adaptation of older concepts of equal rights.

### **What's the Deal with Corporations?**

Corporations are legal entities, created and protected under the law with protections similar to those afforded to citizens and people in general under the Constitution. Corporations, particularly, are considered 'legal persons,'<sup>1</sup> which means they are considered to be people for a variety of purposes, such as for determining jurisdiction for civil suits.<sup>2</sup> However, corporations are not natural persons, and therefore are not granted rights identical to a person. Importantly, they cannot vote or hold public office. Thus, some regulation regarding their contributions to political campaigns has always been considered appropriate under the constitution.

The Corporate form existed at the time of the constitution, but it was severely limited in power as compared to its current existence. Similarly, charitable organizations existed, but they were very different organizations than they are today in form, function and scale. It is clear from political and legal history that the rights of corporations were expanded significantly in the late 19th and early 20th centuries. It wasn't until *Santa Clara County v. Southern Pacific Railroad* 118 U.S. 394 (1886) that legal persons were considered to be included under the Fourteenth Amendment as "persons". After *Gitlow v. New York*, 268 U.S. 652 (1925), the First Amendment was tied to the due process clause of the Fourteenth Amendment, and so corporations, read as persons under the law, had some measure of rights equal to those of natural persons.

As a note, The First Amendment is not considered to apply solely to individuals, and the importance of guaranteeing the liberties under the First Amendment has resulted in the protection of speech by legal entities. Of particular note are Unions and Media Corporations. Both types of organizations are primarily created as conduits for information and speech beyond the capabilities of individuals acting on their own. And

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<sup>1</sup> Unions are not considered legal persons, but collections of natural persons, usually employees. They have a specific set of laws regarding their rights and organization.

<sup>2</sup> Determining Jurisdiction is the process by which a court determines what law applies to a legal entity. Laws for personal jurisdiction regarding corporations are relatively settled. See generally *International Shoe Co. v. Washington* for more details. 326 U.S. 310.

both of these organization types are given protection because, despite emerging well after the drafting of the Constitution, their importance in serving the needs of Free Political Speech and Free Press have made them invaluable. Unions have become essential to employee bargaining with management, and media organizations have been traditionally protected because they have become the preferred method of obtaining information and the establishment of the press as defined in the first amendment. In *United States v. CIO*, 335 U.S. 106 (1948), a labor union endorsed a specific candidate in a newspaper ad. The statute under which the labor union was read to allow the newspaper ad, because the court felt that "the gravest doubt would arise in our minds as to the [federal expenditure prohibition's] constitutionality' if it were construed to suppress that writing. *Citizens United*, at 900. See also *CIO* at 900.

But the first amendment has also been found to apply to corporations generally, e.g. *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 (1978). In *First National Bank of Boston v. Bellotti*, it was found that the rights of a corporation under the first and fourteenth amendment, in general, could not be limited solely by reason of their corporate status.

The 2002 Bipartisan Campaign Reform Act was created out of a concern that political discourse was being manipulated by the emerging practice of electioneering. Electioneering is the practice of using television and radio broadcasts to promote or attack specific candidates in a government election. Under the BCRA, federal law prohibited Corporations and Unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate through any form of media. 2 U.S.C. § 441b (2000 ed.). The act further limits electioneering, which is defined in the act as "any broadcast, cable or satellite communication that refers to a clearly identified candidate for Federal office." 441b(b)(2). The FEC's regulations allowed a company to make a "separate segregated fund," aka a "political action committee," for these purposes. Its funds were to be limited to donations from stockholders and employees (for corporations) or union members (for unions).

## **Equal Protection**

The BCRA provided a specific exception for "Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees...devoted exclusively to charitable, educational, or recreational purposes". I.R.C.§ 501(c)(4)(A). This exception is specifically spelled out for these groups. In *Citizens United*, The Supreme Court found this division (the unequal protection of free speech) unconstitutional, by violating the concept of Equal Protection. Equal Protection is the concept that individuals cannot be denied rights on the basis of being a member of some specific class. Usually, the classes of persons under consideration include members of a specific race, religion or gender. In this case, however, by treating legal entities as persons, the Court saw a violation of Equal Protection by specifically targeting "persons" who fell into the class of "legal entities".

However, Equal Protection is a complex concept. The government can deny rights to a person belonging to a specific class if there is a compelling state interest. The most obvious example of a class of individuals denied rights for a compelling state interest are convicted criminals, whose rights are denied for the protection of society as a whole. However, if there is a sufficiently compelling purpose, any individual can have her or his rights limited. The degree of limitation and the legitimacy of the government interest will be determinative. Because of the specific nature of corporations as legal persons, their rights are held to different standards, but mostly in very specific circumstances, such as election campaigns.

Prior to *Citizens United*, the Supreme Court found that legal entities could have their rights to speech limited under the First and Fourteenth Amendment in the case *Austin v. Michigan Chamber of Commerce*. *Austin* ruled against a corporation that made a direct contribution to a political campaign from the company's general treasury, which violated Michigan state law. The court found that there was a sufficient compelling purpose for the government in limiting corporate political speech, because of the corrupting effect such speech, especially in the form of campaign contributions, has on the democratic process.

The reasoning of this decision was already under attack prior to *Citizens United v. FEC*. The most notable portent of the *Citizens United* decision was the Supreme Court ruling in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449

(2007). Wisconsin Right to Life, Inc., a non-profit corporation, produced television advertisements naming then-senator Russell Feingold among a group of senators that the organization claimed were delaying the appointing of federal judges for political purposes. See *Wisconsin Right to Life*, at 458, 459. The FEC sought to prove that the ad violated the BCRA by naming a specific politician, who was running for reelection at the time. However, the plurality opinion, written by Chief Justice Roberts, concluded that the ad was in fact not an "electioneering communication", because it was an "issue-advocacy" advertisement. Since the ad was focused on a political issue independent of the election, the court concluded that it was outside the intended scope of the BCRA.

Justice Scalia wrote a concurring opinion, joined by Justices Kennedy and Thomas, that argued for the repeal of the BCRA in its entirety. His arguments for full free political speech for corporations directly addressed the issue that would become the focus of *Citizens United*. By the time of *Wisconsin Right to Life*, the BCRA was under considerable strain, and the conservative wing of the court was poised to declare it unconstitutional.

## Washington and Lee University

### What did *Citizens United* do?

The *Citizens United* Decision declared the Bipartisan Campaign Reform Act unconstitutional. The chilling effect on the right to free speech is cited, and the cumbersome nature of Political Action Committees as an alternative. The court found that the right to free speech expressed by the First Amendment is so expansive and strictly construed, that it includes corporations "and other associations." The concurrence in the earlier case *US v. CIO* found that "any 'undue influence' generated by a speaker's 'large expenditures' was outweighed by the loss for democratic process resulting from the restrictions upon free and full public discussion." Despite the fact that a Union was the actor in the events of *US v. CIO*, the court found that the same rules should apply to all corporations and unions, finding that since corporations are legal persons with rights under the law, the division between them and unions would be unjust.

The Supreme Court in *Citizens United* overturned the *Austin* decision, and reaffirmed the ideas presented in *Bellotti v. First Natl. Bank of Boston* and *Buckley v. Valeo*, two decisions that struck down laws against campaign expenditure limits. The

Michigan statute used in *Austin* limited financing allowed for political speech by corporations. It also exempted unions and media corporations, for specific reasons: both groups were seen as having a fundamental need for political free speech by virtue of what they are. Unions, being tools for collective bargaining, need the right to speech to fulfill their purpose. Eliminating free speech for media organizations has very far-reaching consequences because of the importance of media corporations in all speech. Note that the statute at issue in the *Austin* decision did not include provisions about "electioneering."

The *Citizens United* court rejected the "corrosive influence" argument of the *Austin* court, saying that precedent as established both *Bellotti* and *Buckley* rejected the notion that independent expenditures "give rise to corruption or to the appearance of corruption." The *Citizens United* court declared 441(b) unconstitutional partly because the statute should affect both unions and media corporations, which was found to go beyond the scope of the *Austin* decision. But the Court also found that the *Austin* decision drew an unfair distinction between specific legal entities, and because Free Speech analysis relies on strict scrutiny, found that limiting speech of one entity over another (e.g. media corporations over regular corporations) was equivalent to limiting speech of one type of persons over another. Thus, the court claimed the *Austin* court was both too broad and too narrow in its reasoning, by limiting the speech of corporations as severely as it did, but also making those limitations apply only to specific groups.

By rejecting the previous decision, the *Citizens United* court rejected the idea that the "corrosive effect" of corporate-financed elections would have. While admitting that this sponsoring of independent publicity may influence politicians, the court concludes that this is not the same as corrupting them. Still, the court openly admitted that the success of campaigns by legal entities should be allowed to influence politicians based on their reading of the First Amendment. Because actual persons have the first amendment right to affect politicians' decisions, and because a major modern tool for this is the corporate form, the court reasoned that this was the best way to allow individuals in the modern age to exercise their first amendment right to political speech.

### **What is the Problem?**

The *Citizens United* opinion resulted in a 5-4 decision that harshly divided the court into its traditional conservative and liberal camps. Justice Stevens wrote a lengthy opinion, concurring in part and dissenting in part to the court's holding. Justice Stevens did agree that the corporation Citizens United had the right to use the ads it made, because they were proper under the BCRA. However, Justice Stevens found that the decision was widely and unnecessarily overreaching in scope, and that it threatened to undermine the democratic process in the country. Stevens points to case law before and after *Austin v. Michigan Chamber of Commerce*, referring to dozens of examples (pg 44) where the court did in fact hold that the limits on corporate speech were proper under the law. Specifically, he cites several cases made by the FEC under the BCRA, including *Wisconsin Right to Life v. FEC*, which uphold the constitutionality of the specific law in question. In addition, he criticizes the court majority for going beyond the scope of the original complaint, and for giving an overly broad remedy compared to the narrow options presented by both parties at trial. After reviewing the remedies offered by the parties, Stevens writes, "This brief tour of alternative grounds on which the case could have been decided is not meant to show that any of these grounds is ideal.... It is meant to show that there were principled, narrower paths that a Court that was serious about judicial restraint could have taken." *Citizens United*, at 938. And, of course, Justice Stevens criticizes the case for violating the principle of *stare decisis*.<sup>3</sup> Though Stevens does not consider himself an "absolutist" on the principle, he expresses concern that the court not only fails to give "some special reason over and above the belief that the prior case was wrongly decided," but ignores the "powerful prudential reasons to keep faith with [the Court's] precedents." See *ibid*, at 939. See also *Planned Parenthood of Southeastern Pa. v. Casey* 505 U.S. 833, 864 (1992).

Beyond the legal concerns of Justice Stevens, the philosophical implications of the majority's opinion in *Citizens United* caused Justice Stevens great alarm. He felt that the court's reading of *First Nat. Bank of Boston v. Bellotti*, which it used to justify its holding, was far broader than intended. Despite the wording of that case that the majority used to justify its decision, Justice Stevens points out that "the Government routinely

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<sup>3</sup> *Stare Decisis* is the judicial rule that a court is bound to honor its prior decisions unless there is some compelling reason to find that the prior case was wrongly decided.

places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems." See *Citizens United*, at 945-46. He points out that far from being an equal protection concern, restriction on the basis of speech is "'constitutionally suspect 'unless justified by some special characteristic' of the regulated class of speakers, and that the constitutional rights of certain categories of speakers, in certain contexts, "'are not automatically coextensive with the rights'" that are normally accorded to members of our society." *Morse v. Frederick*, 551 U.S. 393, 396-397, 404. (quoting *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682.) Stevens goes on to explain that, because of the compelling government interest in limiting corporate speech, and because corporate speakers are a class of speakers without rights normally accorded to members of society, the reasonable limiting of their speech, comporting with a compelling government interest, would not violate the First Amendment. Justice Stevens believes that the corrosive effect of this speech on elections, as explained in the BCRA, is sufficient justification to limit speech, and that the majority's decision was unnecessarily broad.

### **Paid for Elections?**

The main concern of those opposed to the *Citizens United* decision is that the right to unlimited spending will explode, and the wealthiest corporations in the country, run by a relatively small number of individuals with similar views, will subvert the election dialogue, resulting in a *de facto* limitation on democracy. The last election cycle was certainly dynamic, and certainly favored a specific economic demographic. The election did not, however, result in such an overt oligarchy.

Spending by third party organizations did increase dramatically during the 2010 Midterm Elections. Many believe that the result in *Citizens United* had a direct effect on the increase in spending. In fact, The New York Times in October of 2010 reported "television spending by outside interest groups has more than doubled what was spent at this point in the 2006 midterms." Michael Luo, *Money Talks Louder than Ever in Midterms*, N.Y. Times, October 7, 2010. Multiple studies found that these independent advertising groups overwhelmingly favored Republicans, focused on a reducing



government spending and social welfare groups. *Ibid.* However, the correlation between *Citizens United* and the funding in the 2010 midterm elections is not as direct as the scenario above would assume. For-profit organizations still created very few campaign advertisements. While independent funding increased dramatically, the funding remained primarily in the sphere of politically focused non-profit corporations, formed under 501(c)(4). See generally *Ibid.* As noted by former chairman of the Federal Election Commission Trevor Potter, "To the casual observer, what they have heard is the court has gone from a world that prohibited corporate political speech and activity, even though that isn't actually the case, to suddenly for the first time that it's allowed. It's that change in psychology that has made a difference in terms of the amount of money now being spent." *Ibid.* The effect of *Citizens United* on the 2010 midterm was more psychological than legal.

The main concern during the 2010 election campaign was not from the direct or indirect donations of individuals and corporations, but that these persons have remained anonymous. These independent campaigns, as well as the anonymity associated with them, have created a wave of criticism that has persisted since the 2010 midterm elections. This suggests that, while the short-term effect seems to correlate with massive political victory for fiscally conservative Republicans, the nightmare scenario of a gradually homogenized election machine might be unrealistic, especially if the same criticism is remembered in 2012. Regardless of how much money is being used, the source or manner of these funds has remained the same.

### **501(c)(3) and 501(c)(4)**

Section 501(c) of the Internal Revenue Code categorizes companies and associations as different forms of non-profit organizations, and gives these groups partial or total tax-exempt status. See generally I.R.C. § 501(c) (for explanation of what organizations fit into this scheme.) Most organizations focused on direct community action are 501(c)(3) organizations, because the section allows for organizations to receive tax-exempt status when organized and operated exclusively for an "exempt purpose" under the provision. Exempt purposes include charitable purposes, such as "relief for the poor, the distressed, or the underprivileged...and combating community deterioration."

*Ibid.* These groups are not only tax-exempt, but donations to these groups are considered deductible charitable donations for corporations and individuals to avoid taxation on their income. As a tradeoff for both the exemption from taxes, and a powerful incentive for receiving donations, 501(c)(3) groups are forbidden from most political activity. They cannot launch political campaigns or influence elections under the act.

Section 501(c)(4) includes "civic leagues, social welfare organizations and local associations of employees." Citizens United is one such organization. These groups, unlike 501(c)(3) groups, are allowed to lobby for political action and participate in political campaigns, as long as this does not constitute their primary purpose. The tradeoff is that the funds spent on political activity are taxable, and donations made to these groups can be subject to a gift tax. The system is intended to encourage apolitical donations and discourage excessive political ones. Further, since only a portion of a 501(c)(4) organization's funds can go toward political speech purposes, the intended goal is to make the amount of politically biased donations as small as possible

The *Citizens United* decision was made with full knowledge that the Citizens United corporation was a 501(c)(4) organization. The main point of contention between the majority and the dissent emerged because all members of the court believed Citizens United was permitted to make the advertisements for its film, but they disagreed on the source of this ability. Whilst the majority felt the right springs from the constitution, and that the BCRA limited this right unconstitutionally, the dissent felt that this right, even if it did spring from the constitution, was not violated by the act, and that the act explicitly allowed 501(c)(4) groups to speak where other groups could not.

### **Community Economic Development and Politics**

Despite the potentially massive shifts described in the *Citizens United* decision, 501(c)(3) groups have seen little immediate change in how they interact with the political system. While they are unable to actively engage in political campaigns, these groups can set aside a small amount of money for lobbying purposes. This is limited, because the government may tax any money used for this purpose, and it cannot go against the primary purposes of the 501(c)(3). Unless the law or the court's interpretation of it

change, this puts a large limitation on the amount such organizations can truly say in politics.

The Federal Government already does support a wide array of non-profit, apolitical corporations and organizations. Numerous federal and state laws give monetary aid to these corporations currently. However, much of that money must be used for specific purposes, and misappropriation of government funds, especially for political purposes, is prohibited. This is even more applicable to non-profit organizations. Because these corporations must usually be formed with a specific company goal or mission, the mere participation in politics may run contrary to their goals. On top of the limitations in the form of 501(c)(3) organizations, the leaders of these organizations are bound by duty, to a large extent, to keep private political views.

By contrast, for-profit companies are usually allowed to take nearly any action<sup>4</sup> that is aimed at benefiting the interests of the shareholders of the company. For large, publicly held corporations, this can mean that a partisan action like specific endorsement of a candidate may prove impossible, but for many corporations with smaller groups of shareholders, endorsement may be considered directly related to the economic gains of shareholders. Unlike publicly held companies, private corporations may be under the control of a relatively tiny group of shareholders yet control capital assets equivalent to or greater than those of a non-profit consisting of millions. Because 501(c)(3) groups are limited by how they can use their finances, they are now significantly disadvantaged, especially compared to the for-profit corporations and 501(c)(4) groups they would theoretically compete with.

There are remedies besides government and direct corporate funds to remedy non-profit corporations, however. Despite the hardship in shifting the corporate mission, these groups could in fact reorganize to a for-profit corporate form, become privately held, and retain a limited number of shareholders. But being publicly held means such a drastic shift would require approval of a large number of shareholders who might not be interested in such a shift.

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<sup>4</sup> Corporate board members and officers cannot commit fraudulent or other criminal acts to benefit the shareholders, as well as some specific other exceptions.

The most obvious transition for members of a 501(c)(3) group would be to organize a 501(c)(4) corporation friendly to their cause, either eliminating their current 501(c)(3) organization, or creating a parallel or subsidiary organization that functions as a 501(c)(4). However, with the lack of a tax incentive for donating to such an entity, the common 501(c)(4) corporation might struggle to find an effective source of finances without providing some goal that interests enough lucrative for-profit groups to provide them with money. Depending on their goals, the success of this option varies. Many groups with a focus largely on building up community welfare and independence might easily get funds from a large corporation interested in pushing to make their community a viable market. But organizations wishing to deter the invasion of big companies into their local commerce will likely remain short of cash if they eliminate the tax incentive for donations. This seems largely to be the best option currently available under the law for groups wishing to enter the political field, but it might not remain so.

The chief concern voiced by critics of the *Citizens United* decision is that it will seriously undermine the fairness of the electoral process by allowing for-profit corporations, which assumedly have significantly more economic resources to funnel into electioneering campaigns than charitable non-profits. But the mere use of funds toward political goals is not the primary concern. Rather, the problem arises from the assumption that for-profit corporations all hold beliefs on one side of the political spectrum, and that their speech will inappropriately drown out the speech of companies and persons who do not share that view.

This assumption is based largely on the form of for-profit companies, and the duties of officers in those companies. Most for-profit corporations are incorporated with a primary purpose of profitable business. *See* Model Bus. Corp. Act, § 3.01 (2002).<sup>5</sup> The Officers of a corporation owe a duty of good faith,<sup>6</sup> and within the best interests of the corporation. *See* MBCA at § 8.42. The interest of the corporation is assumed to be equal to the interests of the shareholders, since they hold shares in the company. This leads to

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<sup>5</sup> The Model Business Corporation Act (2002) is not actual law, but a model set of laws considered to be authoritative, and adopted by 24 states.

<sup>6</sup> "Good faith" and "Bad faith" are terms of art describing the mental state of a wrongdoer: the actor was in good faith if they did not intend harm, bad faith if they did intend the harm.

the assumption that the shareholders want to protect or increase the value of their investment. If the most profitable course of action involves promoting specific candidates in elections, it seems likely that officers these corporations will support the candidates that aids their corporate profits the most. The candidates assumed to be most friendly to corporate profits are those who promote deregulation of the market, reduction of corporate taxation, and increase of monetary incentives for profitable corporations. Whether or not the individuals managing these corporations actually hold these views is irrelevant. Even without this extrapolation, businesses have the power "to make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation." MBCA at § 3.02(15).

This does not mean that the only way to allow corporations to balance their political views is to eliminate the duties officers have to their company. This would have the effect of making corporate officers unaccountable to the company shareholders, which the concept of fiduciary duty was introduced to combat. Instead, the Model Business Corporate Act, as well as various state-specific corporate statutes, give corporations the power "to make donations for the public welfare or for charitable, scientific, or educational purposes." MBCA at § 3.02(13). Despite the concerns created by the shared interests of for-profit corporations, they remain a diverse group, and legal precedent shows that the fiduciary duty of officers to take reasonable care to act in the shareholders best interests is taken quite broadly by courts. See generally *Shlensky v. Wrigley* 237 N.E.2nd 776, (where a complaint about mismanagement of a for-profit sports team was dismissed for failure to state a claim.) If an officer in a for-profit corporation is acting in any way other than direct, bad-faith motivation to damage the company, he or she can act in a way that seems fitting to justify the ends of pursuing financial gain for the betterment of the shareholders. The broad provisions of the Model Business Corporation Act point toward an abandonment of the old legal concept of *Ultra Vires*, which allowed a company to "be challenged on the ground that the corporation lacks or lacked power to act." MBCA at § 3.04(a). Though companies generally act in forms obviously beneficial to their shareholders, the exact characterization of what is and is not beneficial can be read widely under the law today.

Entering into politics as a Community Development group should not be exclusively driven by a fear that corporations will never donate to them. The tax benefits of giving money to a 501(c)(3), and the political benefits of giving money to a 501(c)(4), are both major incentives for a corporation to give money to either group. The choice of form for a Community Development group largely depends on the motivations of each group.

### **Donor Anonymity**

The main controversy of the 2010 Midterm Elections was perceived to be a lack of transparency by donors to political action committees and corporations. " Some Democrats attributed their loss of the House majority in November to the flood of largely anonymous spending by conservative groups." Eric Lichtblau, *Democrats Sue to Force U.S. Election Agency to Review Political Donations*, N.Y. Times, April 21, 2011. Corporations and individuals did not disclose their identities when donating to groups running political advertisements, and thus these groups could make their voices heard without exposing themselves to criticism from the media and from voters.

The Supreme Court has "written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment." *Citizens United*, at 888. Despite this, 501(c)(4) organizations still don't require donors to disclose their identities with donations. Any realistic attempt at requiring disclosure will have to modify the IRS statute. If challenged, such a change would probably be accepted by the court, given their understanding as described in the *Citizens United* decision. The effect of this on 501(c)(3) groups would likely be comparable to the effect on 501(c)(4) groups, since their rights to free political speech, even if they were expanded, would probably only increase to the level exercised by those organizations. While there may or may not be major benefits to the greater political process in such a decision, the specific benefits to Community Development groups are probably not significant. Other factors, like the expansion of their free speech rights, and the interests of for-profit companies resulting from a lifting of anonymity, would be determinative.

### **Arizona's Solution**

Currently, the State of Arizona is arguing a case before the Supreme Court that could represent the solution for political organizations without financial backing from corporations or unions. In 1998, the Arizona legislature passed a law creating a fund for these organizations, giving them an option either to accept corporate donations, or to cut themselves off from donations and instead rely on state funds. Under this law, "Arizona allocates additional money to publicly financed candidates when their privately financed opponents spend more than a specified amount." Charles Fried et. al., *Free Speech Worth Paying For*, N.Y. Times, March 25, 2011. The current lawsuit against the Arizona government maintains that providing these groups with government funding limits the speech of organizations with corporate donors. Charles Fried and Cliff Sloan write in the New York Times that no limitation exists, because this provision merely allows more speech. In fact, as they rightly point out, "the notion that more speech inhibits or corrupts public debate contradicts the very premises of the Citizens United decision that government has no business limiting the source, content or quality of the speech deployed in debate." *Ibid.* Realistically, the Arizona statute will likely be upheld, as the overall purpose behind the *Citizens United* decision was to introduce as much speech as possible into the political forum. Aside from the pure Free Speech claim, Arizona's rights as a state exceed those of the Federal government in regulating activities of its residents, and it is conceivable that the court could decide the case on narrower grounds, simply stating that the state can act where the federal government could not under the BCRA.

If the Court upholds the statute, Community Economic Development groups in Arizona might do well to accept their state's financial option. This solution effectively protects the independence of non-profit groups that do not have access to regular donations from rich donors. Possibly the most advantageous element of the statute is that it allows for either option. Groups wishing to remain more autonomous, or with more interest in encouraging business growth from high-profile businesses, can and should avoid accepting the government finances. Groups using the funds for the statute will most likely be those with an interest in avoiding debts or duties to act in the interests of corporate donors, or those directly opposed to corporate donations in general. It is also possible that other states will seek to adopt similar statutes after this decision, if the court decides in favor of *Arizona*. As with deciding between 501(c)(3) and 501(c)(4) forms,

deciding between these two options for political funds will largely depend on the specifics of the Community Development organization in question.

### **Is *Citizens United* Set in Stone?**

*Citizens United v. Federal Election Commission*, like the decisions before it, will not be immune to modification or even overruling in the future. *Austin v. Michigan Chamber of Commerce* itself challenged the decisions of *Bellotti v. First Natl. Bank of Boston*, which struck down a law against campaign expenditure limits. The twenty years between *Austin* and *Citizens United* are a very brief space in the history of the US Supreme Court, and the space between *Bellotti* and its challenge in *Austin* were even closer together.<sup>7</sup> Further challenges brought under modern jurisprudence will, at the very least, result in modifications to the ruling as it currently stands.

Even under *Citizens United*, the government can still limit direct donations to political candidates by legal entities. This means that while these groups can do as much independent advertising as they wish, they cannot make direct donations to a political candidate. Where and how that line is drawn could determine future rulings. If the country eventually moves to an exclusively or almost exclusively corporate-run election campaigns, the dangers of political corruption may become too critical to ignore, or they may simply be considered a fact of life. It all depends on the leadership of the Supreme Court as time passes.

The Court also has not made clear its opinion on how 501(c)(3) groups fall into the scheme that *Citizens United* creates. Further decisions or laws may result in lifting the restrictions placed on 501(c)(3) groups by the tax code. Since the Law still explicitly prevents these groups from contributing to political discourse, further lawsuits could be brought, citing *Citizens United* that would challenge the constitutionality of this limitation on political speech. That hypothetical decision would depend entirely on the court's characterization of the government's interest in limiting the speech of 501(c)(3) non-profits. Since the *Citizens United* court found the "corrosive effect" of political speech by to be an insufficient interest by the government, it remains to be seen whether

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<sup>7</sup> *Bellotti* was decided in 1978, little more than a decade before *Austin* in 1989.



the limitation on non-profits represents a push to avoid a "corrosive effect" on elections, or if it is meant for some other compelling interest.

The development of the Supreme Court members in the coming decades will undoubtedly have an effect on future decisions. Justice Kennedy wrote the chief dissent in the *Austin* decision, and wrote the majority opinion for *Citizens United*. Justice Kennedy's eventual departure from the court, and his particular understanding of the First Amendment, may greatly alter future decisions. It is impossible to know how the replacements will change jurisprudence, and the approaching departure of more politically aligned court members like Justice Ginsburg and Justice Scalia may result in changes nearly as dynamic as the more centrist Kennedy, it is certain that *Citizens United* will not stand forever in its current form.

### **Did the Rules Really Change?**

Though the *Citizens United* ruling may appear to create a new, harmful brand of corporate entanglement in the political machine, the reality suggests that *Citizens United* merely continues business as usual. The Citizens United Corporation was itself involved with an earlier, sobering controversy regarding the nature of political advertisement.

Four years prior to the events directly leading to *Citizens United v. FEC*, the historically successful documentary *Fahrenheit 9/11* was released in theaters. In response, Citizens United filed a complaint with the FEC for the specific reason that commercial advertisements for the film on television were electioneering advertisements, criticizing then-President George W. Bush, within the prohibited timeframe for primaries and the election. The FEC reacted with a dismissal of two separate complaints by reasoning that the commercials created by the distributors of *Fahrenheit 9/11* were part of a "bona fide commercial endeavor." Further, they stated that "The Commission found no reason to believe the respondents violated the law because the film, associated trailers and websites were not distributed by broadcast, cable or satellite, did not air within the electioneering communications period, or did not refer to a clearly identified candidate." Fed. Election Commission MUR 5474, (2005).

In fact Citizens United suggests their creation of advertisements for *Hillary: The Movie* was sparked by the belief that they were created under the same authority as those

created for *Fahrenheit 9/11*. The FEC pressed their claim, saying that unlike the prior advertisements, those for *Hillary: The Movie* could only be interpreted to "inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a Hillary Clinton world, and that viewers should vote against her." *Citizens United*, at 888. Regardless of what this implies about the political leanings of the Federal Election Commission's agents, it does suggest that the BCRA was a law that emphasized the style of political advertisement over the substance of it.

In a way, *Citizens United v. FEC* merely legitimizes the political mudslinging Americans have witnessed in the past. For Community Development groups, the solution might not lie with entering this arena, but by limiting its power.

### **The Internet: Big Solution, or Bigger Problem?**

A large part of the *Citizens United* decision rested on the notion that the BCRA did not anticipate the kind of pay-per-view documentaries *Hillary: The Movie* represents, and that it had simply become obsolete due to technology. How much more can this be said for the Internet? Even with the BCRA intact, Internet advertisement, even political advertisement, was relatively immune to limitation. Now that corporations are given free speech rights, political Internet advertisements are certain to increase. But since these advertisements are so much simpler to produce than electioneering ads, will it make it easier for less wealthy organizations to make them? Or will the torrent of advertising from larger groups drown their voice, just as on television?

Generally, the poor lack proper access to the Internet. A recent study found that "no less than 44-percent of people living below the poverty line depend on their local public libraries to access the internet." Amar Toor, *Nearly Half of Poor Americans Rely on Library for Internet Access* (2010) <http://www.switched.com/2010/03/26>. The Federal Communications Commission has argued that access to the Internet is "a necessity for anyone seeking to climb the rungs of society." *Ibid*. Petitioning the government for internet access to the poor might be an appropriate topic for political involvement of Community Development groups, because it might be the key to getting more impoverished Americans involved in the political system as it now stands. But it also might be an opportunity for greater involvement with large corporations.

In March of 2011, Google chose Kansas City, Kansas as the subject of its experimental, high-speed broadband network. *See Generally* Nathan Olivarez-Giles, *Google picks Kansas City, Kan., to debut its super fast Internet service*, L.A. Times, Mar. 31, 2011. Anywhere in the city, people will be able to access the Internet at unprecedented high speed. Google has made clear that it intends this availability to be available regardless of economic status: local for-profit companies, schools, government buildings and community development groups are all working together with the company to gain full access to the digital world.

Optimistically, this could lead to the development of an independently minded community throughout the socio-economic strata of Kansas City. This optimism rests mainly in the proclaimed goals of Google for access to information. But Google is still a single corporation, and the amount of power resting in their hands may be dangerous, even an illegal monopoly. As explored earlier, this might be found to be against anti-trust laws, if lawmakers are willing to dust off those provisions and push forward with a lawsuit. This all depends on how the government determines Internet usage and control in the future.

Washington and Lee University

### **Conclusion**

In some ways, the community economic development movement has little to gain from involvement in political speech. Organizations are forced to choose between the more effective, tax-free but apolitical 501(c)(3) form, and the less practically effective, but more politically capable 501(c)(4) form. Either way, there is something to gain or lose.

*Citizens United* may cause elections to be influenced by the highest bidder, but this does not mean that all hope is lost for the impoverished voter, or the institutions working to uplift them. *Citizens United* lifts upper limits on campaign donations and on independent promotion campaigns for all corporations and unions, but does not allow unlimited direct donations to politicians. The option has been left open to permit government funding for non-profit groups, to keep them on a relatively equal footing with corporate-financed political groups.

The decision has left more questions than answers in its wake. Despite appearing to broadly protect speech, it leaves the question nebulous enough that it is unclear where that freedom ends and legal limitation begins. Does the freedom to speak require more honesty and accountability than before? Is this just business as usual for the big economic interests?

Despite all these concerns, there is an undeniable truth here: investment in commercials does not equal votes. Exposure of a view does not always result in its popularity. Perhaps no example of this is clearer than the community economic development movement itself. In the Great Society years of the 1960s, community economic development was emphasized as the solution to the problems of impoverished neighborhoods around the country. However, as numerous programs were deemed failures, Americans lost interest and many community economic groups vanished. *See Simon, The Community Economic Development Movement*, 3-11 (for discussion of the drop in public interest and support for government involvement in urban renewal).

Overexposure of the programs in the minds of the public made their lackluster performance all the clearer as time went on. And, of course, despite now being deemed as a failure, the community economic development movement has slowly regained ground, despite the conventional attitude against it. Political campaign advertisements will never be irrelevant, but they certainly are not the sole determinative factor in any election. There is no reason to believe that hope is gone for the impoverished American after *Citizens United*, but the community economic development movement, and charitable organizations in general, may face a longer and more complex challenge in the coming decades due to the fallout of the decision. With any luck, the true goal of *Citizens United* to allow the most speech possible, will allow even the relatively quiet Community Development Movement to speak a little louder in the next century.

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