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Organization Trends

Citizens United v. FEC: Protecting Free Speech for Nonprofit and For-Profit Corporations

By Karl Crow

Summary: *Since the U.S. Supreme Court decided* Citizens United v. FEC *on January 21, 2010 a robust debate has pitted defenders of free speech against their primarily left-wing opponents. The debate has been rife with deliberate mischaracterizations and apocalyptic predictions. While the actual holding simply upheld constitutional protections for political speech, there are sure to be many unanticipated and complex short-term consequences for American politics.*

The Citizens United film, *Hillary: The Movie*, prompted a court decision that changed the landscape of campaign finance. Citizens United president David Bossie is shown above.

It may have been the quietest public argument in American politics. During his January 27 State of the Union address, President Barack Obama directly attacked the U.S. Supreme Court for its ruling in *Citizens United v. FEC* (2010). Obama claimed the Court decision "reversed a century of law to open the floodgates – including foreign corporations – to spend without limit in our elections." Justice Samuel Alito, seated front and center alongside five of his colleagues, mouthed a silent "not true" to protest the president's characterization. The war of words became front page news—not for the president's erroneous characterization of the case, but for what the media treated as a breach of decorum.

In the months since the January 21 ruling, the media's focus has been on side issues such as whether money is speech and whether corporations are people. Largely ignored is the impact the decision will have on myriad nonprofit organizations, from 527 political organizations to tax-exempt charities, lobbies and associations that depend on individual and corporate money to achieve their mission. The conventional wisdom—and the belief of nervous progressives — is that *Citizens United* will flood federal elections with a torrent of corporate money. To underscore the point, the left-wing groups MoveOn.org, People for the American Way, and Alliance for Justice Action Campaign launched an attack ad in newspapers in May accusing the high court of becoming "corporate America's newest subsidiary."

But political candidates are unlikely to drown in an ocean of corporate money, at least not in 2010. It's likely that the imagined outpouring of corporate dollars will be stemmed by uncertainties about how the Federal Elections Commission (FEC) will react, efforts by incensed Democrats in Congress to overturn the ruling, and the existence of state election laws that are unaffected by the Court's ruling and continue to ban independent corporate and union expenditures.

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What *Citizens United* Really Means

To better understand what *Citizens United* means for nonprofit organizations, it is important to clarify what the case actually said. The case was brought in December 2007 by Citizens United, a 501(c)(4) advocacy organization led by David Bossie, a conservative activist who in the 1990s was chief investigator for the powerful House Committee on Government Reform and Oversight, the congressional panel most active in investigating misconduct in the Clinton administration. Citizens United wanted to advertise "Hillary: The Movie," a 90-minute film documentary critical of then-Sen. Hillary Rodham Clinton (D.N.Y.). The group sought to enjoin the FEC from regulating the movie by claiming the regulatory body lacked jurisdiction over its issue-oriented advertisement promoting the film.

In 2008 a lower court ruled otherwise. It had found that because the film's advertisement was political the Bipartisan Campaign Reform Act (known as McCain-Feingold) barred Citizens United from advertising the movie because it was financed by unnamed corporate donations.

Citizens United appealed the ruling to the U.S. Supreme Court, which ordered two separate arguments on the case, a rarity that signaled its potential importance. A who's who of political nonprofits filed supporting briefs on both sides of the case. The ACLU, AFL-CIO, U.S. Chamber of Commerce, Pacific Legal Foundation, Institute for Justice, National Rifle Association, Cato Institute, and Center for Competitive Politics supported Citizens United. The Sunlight Foundation, the Campaign Legal Center, Justice at Stake, and the Democratic National Committee supported the FEC. Court watchers eagerly awaited the decision, and it did not disappoint.

Writing for a 5-4 majority, Justice Anthony Kennedy found that McCain-Feingold's prohibition on corporate or union expenditures independent of a political candidate or campaign was unconstitutional: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." It is important to note that expenditures are different from contributions under the law; contributions are political donations made to a candidate or campaign, while expenditures are simply what a candidate or campaign spends. The U.S. Constitution permitted governments to place legal restrictions on campaign contributors and their contributions, but said individuals and groups could spend freely on political issues they cared about—until McCain-Feingold.

The *Citizens United* case hinged in part on the special treatment the McCain-Feingold law afforded media corporations. Unlike Citizens United, McCain-Feingold said the New York Times Company and other media companies were free to endorse candidates without violating FEC restrictions. The Court majority felt this disparity was impermissible, and that the law's impact on Citizens United amounted to the regulation of core political speech. In dissent, Justice John Paul Stevens took the majority to task for overreaching, saying the Court could have resolved the case without throwing out the prohibition on independent expenditures.

Nonprofits weighed heavily in the Court's decision. Justice Kennedy's opinion noted that the vast majority of American corporations have fewer than 100 employees and less than $1 million in yearly income, a far cry from left-wing caricatures of business. Citizens United was a nonprofit corporation with a $12 million budget. That dichotomy between perception and reality, when coupled with McCain-Feingold's restrictions on independent expenditures, had the effect of preventing nonprofit groups and smaller corporations from raising "a voice to object when other corporations, including those with vast wealth, are cooperating with the Government." Small and nonprofit corporations would be "crowded out" from the marketplace of ideas by McCain-Feingold's unconstitutional prohibition on independent corporate political spending.

It is important to note also those issues on which the Court did not rule. While the decision struck down the prohibition on corporate independent expenditures, it upheld McCain-Feingold's requirements for disclosing who paid for the advertisement. The Court also expressly stated that restrictions on direct campaign contributions by corporations and unions were not at issue and remained in force. The majority also declined to address the question of expenditures by foreign individuals or corporations. Contrary to President Obama's claim, the Court left in place existing bans on foreign campaign contributions.

Politicians and Nonprofits React to the Decision

While the president's criticism in his State of the Union address received plenty of media attention, the most important debate over the *Citizens United* decision has occurred elsewhere, and it has revealed the ideological fault lines dividing individuals and groups over the role of corporations, money and the Supreme Court in American politics.

Longtime critics of the McCain-Feingold law like Senate Minority Leader Mitch McConnell (R-Ky.) and former FEC commissioner Bradley Smith applauded the decision. Smith said its effect would be to "empower small and midsize corporations—and every incorporated mom-and-pop falafel joint, local firefighters' union, and environmental group—to make its voice heard." First Amendment expert and UCLA law professor

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Eugene Volokh praised how the decision would increase political speech, allowing voters to hear "more messages from more sources."

Sens. John McCain (R-Ariz.) and Russ Feingold (D-Wisc.), architects of the law that bears their names, condemned the decision for increasing the role of corporate money in federal elections. Sen. Olympia Snow (R-Maine) lectured that "[t]oday's decision was a serious disservice to our country." And the White House issued a statement by President Obama prior to his address saying the decision "gives the special interests and their lobbyists even more power in Washington – while undermining the influence of average Americans who make small contributions to support their preferred candidates."

You might think self-professed "progressives" would support free speech and increased political advocacy, but for the most part you would be wrong. Hysterical non sequiturs prevailed. Both MSNBC talking head Keith Olbermann and firebrand Democratic Congressman Alan Grayson (D-Fla.) compared the decision to the infamous *Dred Scott* ruling that stripped African-Americans of their constitutional rights. Brennan Center for Justice Director Michael Waldman compared the Court's decision to *Bush v. Gore*. Green party officials charged the Court with judicial activism. David Cobb, the party's 2008 presidential candidate, accused the Court of legalizing the "corporate bribery of our elected officials." Public Citizen president Robert Weissman, complaining that "[t]he Supreme Court has lost its way," urged renewed support for the Fair Elections Now Act to "ensure corporate money does not overwhelm our democracy and clarify that the First Amendment is for people – not corporations."

More interesting was the response of leftist groups that had always urged 501(c)(3) nonprofits to engage in political advocacy, going so far as to issue handbooks showing timid charities how to fight political battles without running afoul of IRS regulations. The Alliance for Justice, a coalition of left-wing nonprofits, made its reputation formulating attack strategies to derail Republican nominees to federal courts. Its longtime president Nan Aron recognizes that the ruling creates new opportunities for non-profit political activist groups. Nevertheless, she dutifully predicted a "flood of for-profit corporate money into elections." Likewise, Cathy Duvall, national political director of the Sierra Club, predicted a "tsunami of corporate cash whose purpose is to overrun the public's interests." Although the Sierra Club spends freely to pass environmental legislation and elect candidates it favors, it said *Citizens United* would "put today's 'pay-to-play' political culture on steroids."

The AFL-CIO actually submitted an amicus brief in support of Citizens United, arguing that independent political expenditures by unions should be treated differently from corporate expenditures. According to AFL-CIO president Richard Trumka, "[u]nions, unlike businesses, are democratically-controlled, nonprofit membership organizations representing working men and women across the country, and their independent speech should accordingly be given greater protection." Some on the left criticized the AFL-CIO brief for supporting the Citizens United group, but after the decision was handed-down Trumka protested that he was motivated to defend the union.

Not all reaction split neatly into traditional left-right camps. The ACLU, whose brief supported Citizens United, became ground zero for the debate over whether the First Amendment applies to corporations and whether government control over political spending is compatible with free speech. Progressive critics like civil rights attorneys David Gans and Burt Neubourne urged the ACLU to drop its longstanding support for absolute free speech. Free speech champions like attorney Floyd Abrams, who argued the case for Citizens United, countered: "The worst thing you could do – the absolutely worst thing you could do – is transform a civil liberties organization into a liberal political organization."

What *Citizens United* Means for Nonprofits

So far there has been little public discussion about one important aspect of the Supreme Court's decision: How will it affect nonprofits that want to engage in political advocacy?

Cleta Mitchell, an attorney for the law firm Foley & Lardner, notes that under the McCain-Feingold law as it was interpreted before the Supreme Court's *Citizens United* ruling, advocacy groups of all political stripes were subject to penalties if they engaged in political activities that violated FEC rules. In a Washington Post online discussion the day after the Court's ruling was announced, Mitchell pointed to a $28,000 fine imposed on the Sierra Club in 2004 for "distributing pamphlets in Florida contrasting the environmental records of the two presidential and U.S. Senate candidates." Mitchell believes the real victims of the independent expenditures ban are nonprofit political advocacy groups. She predicts the *Citizens United* decision will correct the law's imbalance and open the door for businesses to educate "their employees, vendors and customers about candidates and officeholders whose philosophies and voting records would destroy or permanently damage America's free enterprise system."

For many nonprofits the *Citizens United* decision creates a host of new political opportunities in the 2010 elections and beyond. Under the ruling, trade associations like the U.S. Chamber of Commerce, classified as a 501(c)(6) group by the IRS, and 501(c)(4) grassroots advocacy groups like Americans for Prosperity can now use general treasury funds to produce communications materials opposing or supporting specific candidates and legislation. In a memorandum Mitchell outlined the new communications possibilities for 501(c)(4)s and 501(c)(6)s. They include voter guides, candidate questionnaires, voting records and public advertising. Mitchell stresses that any expenditure by a non-profit or corporation must be independent of a candidate's campaign. FEC rules prohibiting expenditures "coordinated" with a campaign remain in force.

However, Mitchell notes that IRS rules for 501(c)(3) charitable organizations like the Heritage Foundation are still in place. While FEC campaign finance restrictions have been lifted by the Court ruling, "*No* funds of a 501(c)(3) organization may be used for candidate-related expenditures." She

also cautions that the IRS "major purpose" test for tax-exempt 501(c)(4) and 501(c)(6) organizations remains in force. This test means the majority of expenditures made by these organizations must be for its tax-exempt programs and purposes, and not for political candidates. The liberal Alliance for Justice largely agrees with this assessment in its own briefing materials on the effect of the decision.

As the new reality sets in, nonprofits are beginning to develop their political strategies. The U.S. Chamber of Commerce, on the heels of its success in supporting the Scott Brown Senate campaign in Massachusetts, has said it expects to spend $200 million in at least 22 states in 2010.

A host of new conservative and libertarian groups have been formed since *Citizens United* was announced. Liberty Central, whose president is Ginni Thomas, wife of U.S. Supreme Court Justice Clarence Thomas, hired its first staffers and plans to be an online resource for energizing citizens around America's founding principles. It will be a 501(c)(4) grassroots non-profit. The venerable Heritage Foundation announced the formation of its own (c)(4) in April, seeking to better engage and activate its own large membership.

Progressive and Democratic Party groups have been more guarded about their plans. Rather than take advantage of the new independent expenditure rules, left-wing groups are more likely to use their access to Obama political appointees to secure government grants for their policy preferences while working to reinstate the old restrictions on free speech.

What Will the FEC Do?

While the Court's ruling opens doors to more political engagement, the FEC keeps trying to close doors through regulation. Marc Elias, a former general counsel to the Kerry-Edwards campaign and the current counsel to the DNC and Democratic Senate and Congressional Campaign Committees, was on the Washington Post online panel with Cleta Mitchell. It was his view that the Supreme Court had only overturned FEC regulation of "independent" corporate campaign spending. He suggested that perhaps the FEC should start to reconsider the meaning of "coordinated" political activity, which was still banned. Indeed, even before the *Citizens United* decision in January, the FEC had announced that it would develop new rules to decide when independent communications could be considered to be "coordinated" with a candidate or campaign.

The FEC feels it needs new rules on coordination because most of its past restrictions on independent advertising have been overturned. Under various proposed new rules, the FEC could say an independent advertisement or communication is "coordinated"—and hence subject to FEC authority—if its content is "functionally equivalent" to something produced by a party or candidate. Thus, a Chamber of Commerce flier endorsing a candidate who supports a business issue might be considered "coordinated" if it was similar to that candidate's own fliers, even if there were no actual coordination between the Chamber and the candidate. Alternatively, the FEC has proposed a draconian "promote, attack, support, or oppose" (or "PASO") standard. It would treat as "coordinated" any communication that promotes, attacks, supports or opposes a candidate by name. If the FEC rules succeed, perhaps it can still regulate "Hillary: The Movie" as coordinated speech.

Obviously, these approaches promise to chill free speech and may subject independent campaign expenditures to FEC fines if they are deemed "coordinated." Even some in the FEC recognize the potential absurdity of the agency's own regulations, and so the agency has come up with a regulatory "safe harbor" standard for 501(c)(3) non-profits that produce public service announcements that may seem like the political communications that the FEC says it has the authority to regulate.

To sort out what constitutes "coordination" in the context of the *Citizens United* decision, the FEC held two days of hearings in March. Cleta Mitchell and Marc Elias were there. So were representatives from the U.S. Chamber of Commerce, Public Citizen, Alliance for Justice, the Sierra Club, AFL-CIO, and Bradley Smith's Center for Competitive Politics as well as the Republican and Democratic House and Senate campaign committees.

The Democrat-aligned groups did not agree on the best way to regulate independent campaign spending. The Alliance for Justice, the Sierra Club, and the AFL-CIO supported a functional equivalency test and safe harbor rules. But both the Naderite Public Citizen and the Campaign Legal Center, an affiliate of the George Soros-funded Democracy 21, argued for a stricter PASO content standard. The Campaign Legal Center was the only group along the political spectrum opposed to safe harbor rules for 501(c)(3) nonprofits.

While the FEC has not indicated when it will announce its decision, the Democrat-controlled commission will be closely watched by conservative and libertarian nonprofits that want to avoid fines during the 2010 election cycle.

Congress on the Attack

The *Citizens United* decision is also being challenged in Congress.

Ohio Democratic Rep. Marcy Kaptur has introduced a bill to outlaw foreign individual and corporate contributions, something already banned, and three members of Congress—Sen. Chris Dodd (D-Conn.), Rep. Leonard Boswell (D-Iowa) and Rep. Donna Edwards (D-Md.)—have proposed amendments to the Constitution affirming Congress's power to regulate elections. *Citizens United* opponents, like Public Citizen and the labor unions, are promoting the Fair Elections Now Act. It would provide public financing and reduced advertising prices to congressional candidates who have at least 1,500 individual contributors in their district. The bill was introduced in 2007 by Sens. Dick Durbin (D-Ill.) and Arlen Specter (D-Penn.) and Reps. John Larson (D-Conn.) and Walter Jones (R-N.C.).

More serious legislation was announced on February 11 by Sen. Charles Schumer (D-N.Y.) and Rep. Chris Van Hollen (D-Md). Calling *Citizens United* "one of the worst de-

cisions the Supreme Court has ever issued," Schumer urged quick congressional action to prevent "an immediate and devastating impact on the 2010 elections." Their bill requires corporate-funded ads to conclude with company CEOs saying they "approve of this message." It also requires non-profits that receive corporate contributions to disclose the identities of their top five corporate donors. In addition, the legislation requires increased disclosure of political expenditures and contributions exceeding $1,000 by all nonprofits, including 501(c)(3), (c)(4), (c)(6) and 527 organizations. And if television and radio broadcasters run an independent group's advertisements they will have to give candidates and incumbents discounted advertising rates.

In effect, the Schumer-Van Hollen proposal would insulate all campaigns for federal offices from independent advertising. Progressive netroots groups love the idea, which has been blasted by First Amendment scholars like law professor Lawrence Lessig who says "[t]he package the Democrats are proposing is filled with ideas that either won't work or that, if they worked, would only invite the Supreme Court to strike again."

Van Hollen and Schumer formally introduced the DISCLOSE ("Democracy Is Strengthened by Casting Light On Spending in Elections") Act at the end of April. The House billed is currently co-sponsored by Reps. Robert Brady (D-Penn.), Walter Jones (R-N.C.) and Michael Castle (R-Del.), the Republican nominee for the Senate in Delaware. Schumer's Senate bill was co-sponsored by 42 Senate Democrats.

Impact on State Campaign Finance Laws

The liberal advocacy group People for the American Way counts 23 states that introduced new laws to limit the impact of *Citizens United*. Although the decision pertains to federal campaign law, it could be argued that it applies as well to state election laws. As noted in a January 23 New York Times story, 24 states have election laws banning corporate and union independent expenditures. The constitutionality of these laws, many of which date back over 100 years to the Progressive era, are now in question, although the Court ruling is unlikely to affect them before the November elections.

Some state legislatures, eager to protect their election laws, have noticed that the Court's ruling overturned restrictions on independent expenditures but did not overturn financial disclosure rules. According to the Boston Globe, states as diverse as West Virginia, Alaska, Minnesota, Kentucky, Arizona, Tennessee, Wisconsin, and Maryland are pursuing new campaign finance disclosure rules. Legislators in Democrat-controlled Maryland, whose state law does not ban independent expenditures, have proposed laws to require shareholder approval for any corporate independent campaign expenditures. Iowa, New York, and South Dakota also are considering shareholder-control measures.

What Happens Next?

Despite *Citizens United*, it may well be that there is less independent corporate spending during the 2010 elections than might be expected. At the January Washington Post online panel former FEC associate general counsel Kenneth Gross predicted that trade associations "will not find many deep, willing pockets among corporate members." A weak economy and increased scrutiny on corporate activity will deter corporate spending even though trade associations will be eager to increase their activity and budgets.

By contrast, many nonprofit 501(c)(4) grassroots organizations will exploit their new right to engage in political advocacy by pointing to the record of particular candidates on specific issues. However, they will need to keep one eye on the FEC, which will want to decide how closely corporate communications mimic those of their preferred candidates.

Conservative and libertarian nonprofits seem more eager to take advantage of the new reality, while the Left is more divided. Most liberal groups went on record in opposing the *Citizens United* decision. Moreover, they are torn between wanting to constrain political speech by corporations while also wanting to expand their own capacity to support political progressives and attack conservatives. During the next year, the FEC, Congress, the courts and the states will face many questions, including the definition of "coordination" and the constitutionality of state bans on corporate independent expenditures.

Recently, in *Speechnow.org v. FEC*, the U.S. Court of Appeals for the District of Columbia Circuit reinforced the *Citizens United* decision when it struck down a different provision in the McCain-Feingold law. This was the provision that prohibits *contributions* to independent expenditure committees.

By expanding the logic of *Citizens United* from expenditures to contributions the lower court seems to say that there is an essential connection between the freedom of speech and the ability to enable others to hear it. That will not be the last word on the topic. Suffice to say, Justice Alito won the first round when he answered President Obama's condemnation of the *Citizens United* decision by silently saying "Not true."

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President

BrieflyNoted

ACORN, which has been making much ado about its feigned withdrawal from the national political stage, continues doing business as usual. Proof comes in the form of an email, which went out to ACORN supporters on April 16, two weeks after its faked dissolution. “ACORN is not dead!” wrote chief organizer **Bertha Lewis** in the email. “ACORN is alive because you are alive and still fighting for justice.”

ACORN’s District of Columbia and Maryland chapters have rebranded themselves under one new name: **Communities United**. The new group, a registered D.C. nonprofit corporation, operates out of ACORN D.C.’s office and held a secret organizing meeting there during the week it incorporated.

Joining entertainers **Lady Gaga** and **Elton John**, Time magazine has named Sister **Carol Keehan**, president and CEO of the **Catholic Health Association of the United States**, to its list of the 100 most influential people in the world. Keehan betrayed her church’s pro-life beliefs, notes CRC president **Terry Scanlon**, and endorsed Obamacare, which contains abortion coverage and barely squeaked through Congress. Adding insult to injury, **Victoria Reggie Kennedy**, widow of the late Sen. **Ted Kennedy** (D-Mass.), wrote a tribute to Keehan containing an unintentional irony: “She fought for those who couldn’t fight for themselves.”

Once a hypocrite, now a scapegoat. Just two months before the offshore oil spill at its facilities in the Gulf of Mexico, **BP America** quit the **U.S. Climate Action Partnership** (USCAP), a coalition of corporations and environmental groups that supports government-imposed “cap and trade” regulations to cut global warming. BP was once the poster boy of “green” energy producers—the company had the gall to say its initials stood for “beyond petroleum.” But now under it’s under heavy political fire as a reckless polluter. What goes around, comes around.

The most recent filings on 2010 election campaign funding (available on the **OpenSecrets.org** website) support the view that conservative political activism is on the rise. The top five 527 political committees receiving the greatest contributions are the conservative group **American Solutions** ($17 million), the **SEIU** labor union ($6.3 million), liberal **America Votes** ($6.3 million), conservative **Citizens United** ($5.8 million), and the **College Republican National Committee** ($4.5 million.) However, the top five groups giving money are SEIU ($6.6 million), **Friends of America Votes** ($1.9 million), **Operating Engineers Union** ($1.5 million), **Laborers Union** ($1.1 million) and **United Food and Commercial Workers Union** ($1 million).

The **Phillips Foundation** has announced the 2010 winners of its Robert Novak Journalism Fellowship awards. The $50,000 top prizes went to **Aleksandra Kulczuga**, a reporter for **Tucker Carlson**’s Daily Caller whose project will focus on Poland’s contribution to the War on Terror, and **Maura O’Connor**, a reporter at the New York Post, who will examine free market policy alternatives to foreign aid.

A compliment of sorts came from the Washington Post on May 3. Staff blogger **David Weigel** cited our report on **Organizing for America** which appeared in the May issue of *Organization Trends*. Weigel referred to **Capital Research Center** senior editor Matthew Vadum as someone “who writes some of the harder-edged and more influential briefings in the movement.” Vadum’s work on ACORN is also cited in **Newt Gingrich**’s new book, *To Save America: Stopping Obama’s Secular-Socialist Machine* (Regnery).

ACORN chief organizer Lewis praised socialism and said the Tea Party movement was a “bowel movement” filled with racists. The comments came during a March speech to the **Young Democratic Socialists**, which is the youth arm of the radical **Democratic Socialists of America** (DSA). DSA is closely tied to the **Congressional Progressive Caucus**, an 80-plus member group of left-wing Democratic lawmakers.