Legal Memorandum

Published by The Heritage Foundation

No. 50
February 17, 2010

Citizens United and the Restoration of the First Amendment

Hans A. von Spakovsky

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.[1]

Abstract: *The right to engage in free speech—particularly political speech—and the right to freely associate are two of this nation's most important founding principles. That is why the Supreme Court's recent decision in* Citizens United v. Federal Election Commission *is so important: It protects these principles against those, including President Barack Obama, who favor a federal ban on independent political advocacy by corporations. Critics of the* Citizens United *holding justify their opposition with two claims: that the decision will allow foreign corporations to affect American elections and that shareholders must be protected from political expenditures by corporations in which they own shares. Close scrutiny, however, reveals that all of these concerns are, to borrow from Shakespeare, much ado about nothing. Beyond that, the proposed remedies raise serious constitutional concerns.*

In the Supreme Court's landmark decision in *Citizens United v. Federal Election Commission*, Justice Anthony Kennedy and a majority of the Court upheld some of this nation's most important founding principles: the right to engage in free speech—particularly political speech—and the right to freely associate. Although corporations and unions still cannot contribute directly to political candidates, the Court

Talking Points

- In overturning a federal ban on independent political advocacy by unions and corporations, including nonprofit advocacy organizations, the Supreme Court in *Citizens United* restored the First Amendment and upheld the right to free speech and the right to freely associate.
- Foreign corporations will not be able to "spend without limit" in U.S. elections. Federal law bans foreign nationals, including foreign corporations, from participating directly or indirectly in American elections, and *Citizens United* did not overturn that ban.
- Concerns over the rights of shareholders are misplaced. Shareholders can influence the behavior of corporations through shareholder votes and can sell the shares of any company with whose political activities they disagree.
- Those expressing concern over shareholders do not seem to share the same concern over the rights of union members, who often have a much more difficult time in exercising their disapproval of union leaders' political activities.

This paper, in its entirety, can be found at:
www.heritage.org/Research/LegalIssues/lm0050.cfm

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

overturned a federal ban on independent political advocacy by corporations and unions.

Critics of this holding, including President Barack Obama, claim that the decision will "open the floodgates for special interests—including foreign corporations—to spend without limit in our elections"[2] and that shareholders must be protected from political expenditures by corporations in which they own shares. Neither of these criticisms is justified. Foreign nationals, including foreign corporations, are banned from participating directly or indirectly in American elections by federal statute and Federal Election Commission (FEC) regulations. The *Citizens United* decision did not even consider that ban, let alone overturn it.

Unlike shareholders who can walk out on any company they do not like, many union members cannot simply cancel their membership if they are unhappy with the political expenditure of millions of dollars by their union leadership.

Corporate shareholders can already influence the behavior of the corporations in which they own shares through shareholder votes. Moreover, they can vote with their feet by selling their stock and moving on to another company if they disapprove of their corporation's activities.

What is most telling about critics' supposed concern for shareholders' rights, however, is their lack of any parallel concern for union members. Unlike shareholders who can walk out on any company they do not like, many union members cannot simply cancel their membership if they are unhappy with the political expenditure of millions of dollars by their union leadership.

The *Citizens United* Decision

Citizens United (CU) is a nonprofit corporation that produced a documentary, *Hillary: The Movie*, that was critical of then-Senator Hillary Clinton when she was a presidential candidate in January 2008. The movie was released in theaters and on DVD, and CU wanted to make it available through video-on-demand to cable subscribers. CU produced several advertisements that it intended to run on broadcast and cable television to promote the film.[3]

As a nonprofit corporation, however, CU was prohibited under the challenged provision from using its general treasury funds to make independent expenditures for political speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate for federal office.[4] Pursuant to the challenged statute, such expenditures could be made only through a separate segregated fund or political action committee (PAC) established by the corporation or union that used funds voluntarily donated by stockholders and the executive and administrative personnel of a corporation or the members of a union.[5]

Not only did this ban apply to for-profit corporations, but it also applied to many nonprofit associations on both sides of the political aisle, from the

1. Citizens United v. Federal Election Commission, 558 U.S. _____ (2010), slip op. at 33.
2. President Barack Obama, State of the Union (Jan. 27, 2010). This claim was echoed by Rep. John Hall (D–NY), who claimed incorrectly that the decision will allow foreign companies "to spend unlimited amounts of money in U.S. elections." Press Release, Rep. John Hall (Jan. 21, 2010) *available at* http://johnhall.house.gov/newsroom.asp?ARTICLE3615=15311.
3. *Citizens United*, slip op. at 2–3.
4. 2 U.S.C. § 441b. This prohibition applies to corporations, labor unions, and national banks and also prohibits direct contributions to federal candidates for office. Under 2 U.S.C. § 434(f)(3), an "electioneering communication" is any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office even if there is no appeal to vote for or against the candidate that is made within 60 days of a general election or 30 days of a primary and that can be received by 50,000 or more persons. There is an explicit exemption to this prohibition for media corporations broadcasting or printing "any news story, commentary, or editorial" unless the broadcast facility is owned by a political party. *See* 2 U.S.C. § 431(9)(B). Even though "Hillary: The Movie" did not expressly advocate a vote against Clinton, the Court found that it was "the functional equivalent of express advocacy." *Citizens United*, slip op. at 8.
5. 2 U.S.C. § 441b(b)(2)–(4).

NAACP to the Sierra Club to the National Rifle Association, almost all of which are also corporations. Under penalty of criminal and civil sanctions, those corporate associations were prohibited from expressing their members' views with respect to which particular candidates should be elected to uphold favorable positions on important public policy issues unless they established a separate PAC or could qualify as a Massachusetts Citizens for Life (MCFL)–type corporation, defined as an ideological nonprofit organization that does not accept corporate or labor contributions.[6] The provisions governing PACs and MCFL corporations are so onerous that the Court concluded that they "function as the equivalent of prior restraint" on speech.[7]

The Court threw out the federal ban on independent political advocacy by corporations (and, thus, labor unions and national banks) by overturning its prior decision in *Austin v. Michigan State Chamber of Commerce*,[8] which had upheld a state ban on independent expenditures by a nonprofit trade association. The Court also overturned part of *McConnell v. FEC*,[9] which had upheld the "electioneering communications" provision that was added to federal law in 2002 as part of the McCain–Feingold law.

Banning independent political advocacy violates the First Amendment because it effectively limits speech. The Court rejected the idea that the government can decide who gets to speak and that the government can actually impose "federal felony punishment" on some for speaking at all,[10] particularly those who speak through associations of members who share their beliefs.

Banning independent political advocacy violates the First Amendment because it effectively limits speech.

The Court held that the First Amendment stands against attempts to distinguish among different speakers, which "are all too often simply a means to control content."[11] In so doing, the Court correctly held that the government cannot impose restrictions on certain disfavored speakers such as corporations.[12] The Court also found that First Amendment free speech rights do not depend on a speaker's financial ability to engage in public discussion: The fact that some speakers may have more wealth than others does not diminish their First Amendment rights.[13]

Finally, independent advertisements and expenditures, including "those made by corporations, do not give rise to corruption or the appearance of corruption," the basis for upholding other campaign finance restrictions.[14] Speech is an essential mechanism of democracy and the means to hold officials accountable to the people. As such, political speech must prevail against laws that would suppress it.

Foreign Corporations

The claim that foreign corporations will now be able to spend money to influence federal elections is completely false, and there is no need for further legislation on this issue. Federal law bans all foreign nationals from contributing either directly or indi-

6. FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986). The Supreme Court held that the federal ban on independent corporate expenditures could not be applied to nonprofit, ideological organizations that do not engage in business activities, have no shareholders, and do not accept corporate or labor union contributions. The FEC has codified this decision in its regulations. *See* 11 CFR § 114.10. Citizens United could not qualify for the MCFL exemption. *Citizens United*, slip op. at 10.
7. *Citizens United*, slip op. at 18.
8. 494 U.S. 652 (1990).
9. 540 U.S. 93 (2003).
10. *Citizens United*, slip op. at 15.
11. *Citizens United*, slip op. at 24.
12. *Id.* at 26.
13. *Id.* at 34.
14. *Id.* at 42.

rectly to any candidate or political party "in connection with a Federal, State, or local election."[15] It also bans all foreign nationals from making "an expenditure, independent expenditure, or disbursement for an electioneering communication."[16]

The claim that foreign corporations will now be able to spend money to influence federal elections is completely false, and there is no need for further legislation on this issue.

Thus, foreign nationals are banned not only from contributing directly to candidates, but also from making any political expenditures of any kind. This ban includes foreign corporations, since the term "foreign nationals" is defined to include individuals, foreign governments, foreign political parties, and corporations "organized under the laws or having [their] principal place of business in a foreign country."[17] The punishment for violating this provision can be severe: In addition to civil penalties, knowing and willful violations that aggregate $2,000 or more in a calendar year can result in up to one year in federal prison, and violations aggregating $25,000 or more can result in up to five years in federal prison.[18]

There is an exemption for foreign nationals who are lawful permanent residents of the United States.[19] The FEC has implemented congressional intent in this exemption with regard to corporations by issuing regulations that allow only American domestic subsidiaries of foreign corporations, not the foreign corporations themselves, to establish PACs. The regulation specifically provides that a "foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's Federal or non-Federal election-related activities."[20] Such PACs can operate only if their donations and disbursements do "not come from a foreign national" and "no foreign national participates in making decisions" on the PAC's election-related activities.[21] Under current law, there are multiple layers of protection to prevent foreign influence on U.S. elections.

This exemption makes perfect sense. Foreign corporations are prohibited from participating in American elections, but their American subsidiaries that employ American workers, have American officers, and pay American taxes are able to participate in the American election process to the same extent as other companies as long as all of the money comes from, and all of the decisions are made by, Americans.

Under current law, there are multiple layers of protection to prevent foreign influence on U.S. elections.

It is critical to note that the Court did not even review this ban on foreign nationals, specifically saying that it was not considering "the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process."[22] So the claim made by President Obama and others that foreign corporations will be able to spend without limit in U.S. elections is incorrect. The ban

15. 2 U.S.C. § 441e(a)(1).(A) and (B).
16. *Id.* § 441e(a)(1).(C).
17. 22 U.S.C. § 611(b).
18. 2 U.S.C. §§ 437g(d)(1)(A)(i)–(ii) and 437g(d)(1)(D)(i). *See also* U.S. DEP'T. OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES, 154 (2007).
19. 2 U.S.C. § 441e(b).
20. 11 CFR § 110.20(i).
21. 2006-15, Advisory Op. Federal Election Commission (May 19, 2006). There is a long line of FEC Advisory Opinions on this issue going back to 1978. *Id.*
22. *Citizens United*, slip op. at 47.

on direct contributions and independent expenditures by foreign corporations still stands.

The proposal released by Senator Charles Schumer (D-NY) and Representative Chris Van Hollen (D–MD) on February 11, which would ban corporations from spending money on U.S. elections if they have foreign ownership of more than 20 percent, presents a serious constitutional problem.[23] Since domestic subsidiaries of foreign corporations are already restricted from participating in U.S. elections unless all of the decision making on such expenditures is made by American nationals and all of the funding is generated in the United States, adding a foreign shareholder restriction for all domestic corporations would "only restrict the rights of U.S. nationals to associate for political involvement because of a non-controlling foreign shareholder."[24] Thus, in direct conflict with the *Citizens United* decision, the political speech of certain Americans (not foreigners) would be restricted.

It should be noted that while foreign shareholders are deemed to be a threat, apparently foreign union members are not. Indeed, there are U.S.-based unions with foreign members, including most prominently the Service Employees International Union, which claims it is "the fastest growing union in North America"—including its members in Canada.[25] And there are many nonprofit organizations like Greenpeace with non-U.S. members who apparently raise no concerns with Members of Congress since they are nowhere mentioned in any of these proposals.

Shareholders

The claim that shareholders of corporations must be "protected" from political expenditures with which they do not agree is equally baseless. The various proposals that are being made to "protect" shareholders are epitomized by a Brennan Center report recommending that federal law be changed to require that corporations obtain the consent of shareholders before making political expenditures and that corporate directors be held *personally liable* for violating this requirement. Supposedly, this "will empower shareholders to affect how their money is spent. It also may preserve more corporate assets by limiting the spending of corporate money on political expenditures."[26]

The first priority of all business corporations is to sell their goods and services and make a profit. It is highly likely that most businesses will avoid what may be perceived as partisan political activities that could upset their customers and hurt their sales. Corporations may very well speak about government regulations that affect their bottom line, but they *should* also have the ability to speak when government actions threaten to damage their business and the employment prospects of their employees.

23. See *Democrats Push Quick Fixes on Campaign Finance*, USA TODAY, Feb. 11, 2010, *available at* http://content.usatoday.com/communities/onpolitics/post/2010/02/democrats-push-quick-fixes-on-campaign-finance/1; Summary of Citizens United Legislation—Introduced by Senator Charles E. Schumer & Congressman Chris Van Hollen, *available at* http://electionlawblog.org/archives/schumer-vanhollen.pdf. This proposal would also ban corporations with a majority of foreign directors on its governing board, but such corporations are already barred by current federal law from making political expenditures.

24. Press Release, "Citizens United proposals a cynical attempt to corrode First Amendment," Center for Competitive Politics, Feb. 11, 2010, *available at* http://www.campaignfreedom.org/newsroomnnews_detail.asp?id=215&css=print.

25. SEIU—Service Employees International Union—Fast Facts, http://www.seiu.org/a/ourunion/fast-facts.php (last visited February 12, 2010). "Any legislation…must apply equally to non-profits with a majority of foreign *membership*, and to labor unions." *Examining the Supreme Court's Decision to Allow Unlimited Corporate Spending in Elections*," Hearing before the S. Comm. on Rules and Administration, 111th Cong. 2 (2010) (statement of Stephen M. Hoersting, Vice President, Center for Competitive Politics).

26. Ciara Torres-Spelliscy, Brennan Center for Justice, *Corporate Campaign Spending: Giving Shareholders a Voice*, Jan. 27, 2010, at 21. A similar proposal has been offered by Sen. Sherrod Brown in his "Citizens Right to Know Act" that would require shareholders of a corporation to vote to approve political expenditures in advance of spending. Press Release, "Sen. Brown Announces New Bill to Limit Influence of Special Interests in Washington," Feb. 4, 2010, *available at* http://brown.senate.gov/newsroom/press_releases/release/?id=F548D625-CB52-4BE2-971F-C8A9FF45A3DF.

Beyond that, why would the average shareholder want to direct corporate management through specific consent requirements for some expenditures but not for others? Many companies also make charitable donations that shareholders may not favor. In fact, corporate giants like Bank of America, Morgan Chase, and Citigroup infamously donated millions of dollars to ACORN, an organization whose corruption is now legendary. None of the critics of the *Citizens United* decision seem interested in ensuring that shareholders give their permission before these types of charitable donations are made.

Corporations may very well speak about government regulations that affect their bottom line, but they* should *also have the ability to speak when government actions threaten to damage their business and the employment prospects of their employees.

All expenditures made by a corporation can affect its assets, yet there are no proposals to require specific shareholder consent for other types of expenditures. The vast majority of shareholders probably do not want the time-consuming responsibility of approving all of the different types of expenditures made by their companies and also know that shareholder surveys and votes can be very expensive, thereby diminishing corporate assets. If shareholders do want a say in such expenditures, as the Court noted, there is "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"[27]

Moreover, what is especially revealing about these proposals and the supposed deep concern over shareholders' rights is the lack of concern for union members who face a much more difficult dilemma than shareholders. The Brennan Center's 40-page report contains no mention of any need to similarly protect union members. There is apparently no concern whatsoever about empowering union members "to affect how their money is spent."

Despite the tens of millions of dollars individual unions have spent in recent years on political activities, there is also apparently no concern about preserving union "assets by limiting the spending of [union] money on political expenditures." Unlike shareholders who can sell the stock of any company they do not like, many union members cannot simply cancel their membership. Indeed, less than half of the states have right-to-work laws under which workers cannot be forced to join a union.[28] Employees in some national industries like the airline and railway industries are also not protected by right-to-work laws.[29]

Union members do have certain rights under the Supreme Court's decision in *Communication Workers v. Beck*,[30] but those rights do not include the right to vote on each ad funded by their union. Unions cannot force members to pay the portion of their union dues that would be used for political purposes, but this right is notoriously difficult to enforce by union members that want to opt out of such political expenditures and falls far short of what is being sought for shareholders. For example, there is no secret ballot; union members must publicly declare to the union leadership that they want to exercise their *Beck* rights. It is also an all-or-nothing proposal; union members cannot object on a case-by-case basis to specific political expenditures that the union leadership wants to make on particular candidates or issues.

Many unions also deliberately make it very difficult for members to exercise these rights, working actively to frustrate and delay compliance, and there is considerable evidence of coercion, threats, ostracism, and abuse of union members who try to opt out.[31] There is a clear dichotomy between the

27. *Citizens United*, slip op. at 3 (citations omitted).

28. *See* Right to Work States, National Right to Work Legal Defense Foundation, http://www.nrtw.org/rtws.htm (last visited Feb. 3, 2010).

29. *Id.*

30. 487 U.S. 735 (1988).

views of union members and their leadership. This is dramatically demonstrated by the fact that "almost two in five union members [of the AFSCME and the AFL–CIO] voted for President George W. Bush in the 2004 election, [yet] both these unions gave over 97 percent of their donations to Democratic candidates."[32] Thus, it is really union members, not corporate shareholders, who are much more in need of a federal law that would force their leaders to get the approval of their members (by secret ballot to avoid intimidation) before making any political expenditures.

Union members, not corporate shareholders, are much more in need of a federal law that would force their leaders to get the approval of their members (by secret ballot to avoid intimidation) before making any political expenditures.

This rule would certainly have interesting and potentially complex application to shareholders of media corporations such as the Washington Post Company, which owns a newspaper that constantly engages in political speech opposing and endorsing candidates for federal office. As the Court pointed out, under such a provision, shareholders' disagreement with the political views that a newspaper expresses would give "the Government the authority to restrict the media corporation's political speech. The First Amendment does not allow that power."[33]

It should also be noted that there are proposals being made to bar for-profit corporations that have contracts with the government from making independent political expenditures.[34] Such contractors are already prohibited from making contributions to candidates and political parties.[35] None of those proposals includes unions, such as the American Federation of Government Employees, whose members are federal government employees. These proposals also do not include nonprofit corporations, like Planned Parenthood, that receive millions of dollars in government grants. Any such unions or nonprofit associations would have the same potential conflict of interest as government corporate contractors with regard to the receipt of appropriated funds from Congress.

Moreover, the Supreme Court specifically ruled in *Citizens United* that independent political expenditures "do not give rise to corruption or the appearance of corruption," which would be the only rational basis for barring such spending by government contractors. Constitutional questions would also be raised by a ban on political speech just because an entity receives public funding,[36] particularly a ban that applies to certain corporations that receive government contracts and benefits but not other corporations and organizations that receive government contracts and benefits.

Much Ado About Nothing

Given that federal law and regulations already ban foreign corporations from participating in American elections, either directly through contributions or indirectly through independent political expenditures, there is no need for further legislation. Some of the proposals being made to restrict

31. *See* "Workers' Experiences in Attempting to Exercise Their Rights Under *Communications Workers v. Beck* and Related Cases," Before the House Comm. on Education and the Workforce, Subcomm. on Workforce Protections, May 10, 2001 (statement of Raymond J. LaJeunesse, Jr., National Right to Work Legal Defense Foundation); *see also* James Sherk, "What Do Union Members Want? What Paycheck Protection Laws Show About How Well Unions Reflect Their Members' Priorities," HERITAGE FOUNDATION CENTER FOR DATA ANALYSIS REPORT NO. 06-08, August 30, 2006, *available at* http://www.heritage.org/Research/Labor/upload/CDA_06-08.pdf.
32. James Sherk at 3.
33. *Citizens United*, slip op. at 46. There is, according to the Court, "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'" *Id* (citations omitted).
34. *See, for example*, End Political Kickbacks Act, H.R. 4434, 111th Cong. (2d Sess. 2009). Sen. Schumer and Rep. Van Hollen's legislative proposal would bar government contractors from making political expenditures as well as any corporations that received bailout funding under TARP.
35. 2 U.S.C. § 441c.

domestic corporations that have foreign shareholders also raise other constitutional concerns.[37]

Given the obvious lack of consistency in the claims being advanced on behalf of shareholders and the pointed exclusion of unions and nonprofit associations, it seems clear that these proposals for shareholder "rights" are best suited to the advancement of partisan politics rather than the actual rights of shareholders. There is no need for legislation on behalf of shareholders who are already protected through the shareholder voting process and who can sell the shares of companies whose policies they dislike. All of these concerns are, to borrow from Shakespeare, much ado about nothing.

—Hans A. von Spakovsky is a Senior Legal Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation and a former commissioner on the Federal Election Commission.

36. *See* Legal Services Corporation v. Velazquez, 531 U.S. 533 (2001). This decision struck down restrictions on recipients of LSC funds from engaging in efforts to amend or challenge existing welfare laws as a violation of the First Amendment, distinguishing it from *Rust v. Sullivan*, 500 U.S. 173 (1991), in which the Court upheld a restriction on federally funded family planning clinics discussing abortion. The Court concluded, however, that the *Rust* counseling activities amounted to governmental speech, sustaining viewpoint-based funding decisions in instances in which the government is itself the speaker or is funding the speaker. *Velazquez* at 541. S*ee also Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006) (federal government can withhold funding from universities that refuse to allow military recruiters on campus because it is regulating conduct, not speech). It would be difficult for Congress to argue that banning all government contractors from engaging in political speech is a necessary function of the government's right to speak. The government can continue to speak on many public policy issues regardless of what others say.

37. The proposal by Sen. Schumer and Rep. Van Hollen would also require broadcasters to provide candidates with the lowest possible advertising rate to respond to corporate political ads. This raises serious constitutional issues under the Supreme Court's decision in *Davis v. Federal Election Commission*, 554 U.S. ___ (2008), which overturned the "Millionaires Amendment" in the Federal Election Campaign Act that gave certain candidates higher contribution limits then self-funded opponents.