

Citizens United: how the US Supreme Court struck down limits on corporate electioneering on the grounds of free speech

Max Harris analyses the case and the applicability of US First Amendment rights to corporations.



In 2010, the United States Supreme Court handed down its decision in *Citizens United v Federal Election Commission*, perhaps the most widely criticised decision of the Supreme Court since *Bush v Gore* in 2000.

The case is about the Bipartisan Campaign Reform Act of 2002, which prohibited corporations and unions from spending money on express advocacy or an electioneering communication. An electioneering communication is, according to the law, essentially any communication referring to a political candidate within 30 days of a primary or 60 days of a general election, which is publicly distributed (i.e. capable of being received by 50,000 or more people). The law allowed corporations and unions to create Political Action Committees (PACs), but imposed specific disclosure, disclaimer and reporting requirements on PACs.

Citizens United, a not-for-profit organisation, had released a documentary, *Hillary: The Movie*, critical of Senator Hillary Clinton during the Democratic Party's presidential primaries in 2008. Citizens United wanted to produce television advertisements to promote the documentary, and to

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make the documentary available on video-on-demand. However, the Bipartisan Campaign Reform Act blocked Citizens United's ability to spend money on those advertisements. Citizens United said the regime set up by the Act was unconstitutional.

The Court found by a 5–4 majority that the Bipartisan Campaign Reform Act's prohibition on "electioneering communication" by corporations and unions was unconstitutional.

Justice Kennedy, giving the majority judgment, first rejected the argument that *Hillary: The Movie* was not an electioneering communication. It was publicly distributed and it offered express advocacy against Hillary Clinton (though it contained "more suggestions and arguments than facts"). Justice Kennedy declined to be less strict on the documentary because it was delivered through video-on-demand. He also noted that it was irrelevant that Citizens United was funded mainly by individuals.

The key question was whether the Bipartisan Campaign Reform Act violated the First Amendment of the US Constitution: "Congress shall make no law ... abridging the freedom of speech".

The law created a ban on speech, "backed by criminal sanctions". Allowing Political Action Committees (PACs) still left a ban on corporations' speech in place, since PACs involved "a separate association" and were "burdensome" to set up and administer. Justice Kennedy called speech "an essential mechanism of democracy": "the means to hold officials accountable to the people" and "a precondition to enlightened self-government".

The law had to be subject to strict scrutiny: that is, it had to further a compelling interest and be narrowly tailored to achieve that interest. Justice Kennedy noted in this regard that it may be a constitutional wrong for certain speakers to be preferred by legislation. He pointed to many past cases where it had been held that political speech by corporations should not be treated differently under the First Amendment than other political speech.

Justice Kennedy then noted that the Supreme Court had supported limits on electioneering communications in an earlier decision, *McConnell v Federal Election Commission* (2003), which had upheld the principle (laid down in a 1990 case, *Austin*) that political speech could be banned based on the corporate identity of a speaker. Justice Kennedy proceeded to reconsider both decisions on behalf of the Court, saying there were "conflicting lines of precedent".

Justice Kennedy said that it would be wrong to assume that corporations distort political debate: media corporations, for example, are not thought to distort debate. There was also no evidence that banning independent expenditure by corporations was necessary to prevent corruption. Anti-bribery laws provide protection, and corporations were not "monolithic" and often possessed "valuable expertise". Furthermore, Justice Kennedy dismissed the argument that corporate electioneering should be banned to protect dissenting shareholders. The question of foreign corporations could not be considered in isolation, since the law restricted all forms of corporation.

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Accordingly, the earlier decision of *Austin* (and part of *McConnell*) would have to be overruled.

The Bipartisan Campaign Reform Act's prohibition on corporate electioneering was hence found to be unconstitutional. Justice Kennedy found, however, that the disclaimer, disclosure and reporting requirements of the Act were constitutional, since they allowed "the electorate to make informed decisions".

Justice Scalia (in a concurring judgment) excoriated the dissenting judgment's "corporate-hating quotations", disagreed that the framers of the Constitution despised corporations and said the law in front of the Court would "muzzle the principal agents of the modern free economy".

The dissenting judgment by Justice Stevens defended a legislative distinction between corporate and human speakers. Corporations "cannot vote or run for office". Justice Stevens said the Supreme Court had gone far beyond what it needed to do in the case and should have upheld its past precedents. The Bipartisan Campaign Reform Act had not imposed an absolute ban on speech. The framers' views of the Constitution did not preclude regulatory distinctions based on speakers. And there were important interests – in anticorruption and protection of shareholders – upheld by the law.

Justice Thomas would have gone further than the majority and found that the law's disclosure, disclaimer and reporting requirements were also unconstitutional.

Published on: May 2, 2016