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political law alert

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Supreme Court Strikes Down Laws Banning Corporate Expenditures

By **Ronald M. Jacobs**

On January 21, the Supreme Court issued its long-awaited decision in *Citizens United v. FEC*. The Court struck down a federal ban on "independent expenditures" and "electioneering communications" made by nonprofit and for-profit corporations. A number of states have similar bans, and those too will likely fall. A related question is whether a similar ban on expenditures by labor unions will fall.

Not at issue in the case are the limits on contributions to candidates: those are still limited to $2,400 per election from individuals and $5,000 per election from PACs (direct corporate contributions are prohibited).

Brief Legal Background

The laws at issue in *Citizens United* prohibited two types of corporate expenditures:

1. ***Independent Expenditures:*** any expenditure—at any time, through any medium—that expressly advocated the election or defeat of a clearly identified candidate for federal office. Examples include television advertisements, newspaper advertisements, and postings on corporate blogs, which contain phrases such as "Re-elect Congressman Jones" or "Vote Against Smith."

2. ***Electioneering Communications:*** expenditures by corporations made within 60 days of a general election or 30 days of a primary election if the expenditure is used to fund a communication that is made by broadcast, cable, or satellite, and refers to a clearly identified candidate for Federal office. Prior to today's decision, the Supreme Court had already narrowed this definition to include communications that are the "functional equivalent" of express advocacy and the FEC has adopted a complicated 11-factor test to make such a determination.

Before today's decision, corporations could make these two types of communications only through their political action committees ("PACs"). In reality, this was a major limit on funding such expenditures, given the rules restricting who may be solicited for a PAC contribution and the relatively low limits on contributions to a PAC ($5,000 per year).

In 1990, the Court upheld a state ban on independent expenditures by corporations in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652. The Court has never directly considered the federal ban on corporate expenditures before *Citizens United*. Following the Bipartisan Campaign Reform Act in 2002, the Court upheld the ban on electioneering communications in McConnell v. FEC, 540 U.S. 93 (2003). That decision relied on *Austin*.

Conduct Permitted by the Decision

Relying on the First Amendment's protection for speech, the Court reversed *Austin* and portions of *McConnell* and struck down both restrictions. Accordingly, both for- and nonprofit corporations may now use their general treasury funds (as opposed to their PACs) to make independent expenditures and electioneering communications.

In short, the Court's decision will allow the following activities, which were previously prohibited:

1. For-profit companies may now make expenditures for express advocacy;
2. For-profit companies may now donate to nonprofits (e.g., 501(c)(4) advocacy organizations or 501(c)(6) trade associations) for the specific purpose of having those nonprofits make independent expenditures; and
3. Nonprofit corporations—other than 501(c)(3) organizations—may use their general funds, even if those include payments from corporations, to make independent expenditures.

As a result of today's decision, there are a number of specific activities now permitted, some obvious, some not so obvious:

1. Paying for print, internet, radio, television, satellite, and cable advertising;
2. Placing endorsements on corporate web sites;

3. Placing advertisements on corporate web sites;
4. Using corporate email lists to support candidates; and
5. Using corporate blogs to post messages of support for candidates

Any such activity, however, may not be coordinated with a candidate; coordinating such activity would change the independent expenditure into an in-kind contribution, which is still prohibited. The FEC is currently working on regulations defining what it means to coordinate with a candidate. The Court of Appeals for the District of Columbia Circuit has struck down two previous attempts at such regulations.

While it overturned a number of restrictions, the Supreme Court did, however, uphold certain disclosure obligations that apply to electioneering communications. Therefore, to the extent a corporation makes communications through broadcast, radio, satellite, or cable that refer to clearly identified candidates within 30 days of a primary election or 60 days of a general election, it will have to file disclosures with the Federal Election Commission revealing the corporation making the communication, the amount spent, and certain contributors. In addition, each electioneering communication must include a disclaimer stating "___ is responsible for the content of this advertising," and providing a name and address (or web address) for the entity making the communication.

The Broad Impact of the Decision

Although the specific legal impact of the decision is clear, it is not clear exactly how corporations will make use of their new right to make independent expenditures. Consider:

- Will a for-profit corporation be willing to spend money on a television advertisement for or against a candidate and risk alienating customers or employees?
- Will highly-regulated industries (e.g., banks, car manufacturers, government contractors, etc.) be willing to alienate an incumbent office holder?
- Will those highly-regulated companies feel compelled to support an incumbent office-holder, given the influence the government has over their business?
- Will for-profit corporations—in tough economic times—be willing to give larger sums to nonprofits that will then make independent expenditures?
- Will shareholders allow companies to make independent expenditures or give to groups that will do so? Several shareholder's rights groups have forced companies to disclose their political activities in an effort to limit such activities. Indeed, some companies specifically prohibit their trade associations from using their dues payments for political expenditures.
- Will PACs become a less-favored approach to participation in the political process?

The Court's Reasoning

The majority opinion—authored by Justice Kennedy, and joined by Chief Justice Roberts, and Justices Scalia, Thomas, and Alito—takes the First Amendment at face value: Congress shall make no law… abridging the freedom of speech." The Court succinctly explains that "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress speech altogether."

One of the key themes in the decision is that the campaign finance laws have become overly convoluted and complicated. "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing most salient political issues of our day." As a result, such laws silence permissible speech because they are so complicated. Unlike prior decisions in this area upholding additional rules and limits to avoid circumventing the rules already in place, the Court decided "informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights."

The Court explained that any restriction on speech—including corporate speech—must survive strict scrutiny, which requires a compelling governmental interest. The government advanced three such interests and the Court rejected them all.

Anti-Distortion: Under the Court's 1990 *Austin v. Michigan* decision, the Court had found that because corporations have perpetual existence and can amass great wealth, there is a compelling governmental interest in restricting their influence on elections. This theory ran counter to earlier precedents that had held that campaign finance laws cannot be used to balance the scales between the wealthy and less wealthy. In *Citizens United*, the Court held that "[t]he rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."

The Court went even further, recognizing that "[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The first Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas."

Finally, the Court reasoned that the idea of leveling the playing field actually hurt smaller corporations. For example, when big business communicates with the government directly, "the result is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with Government"

Anti-Corruption: The Court had previously held that campaign finance laws can legitimately be used to prevent both actual corruption (i.e., *quid pro quo* bribery) and the more nebulous "appearance of corruption." The Court made clear, however, that because it was addressing only independent expenditures, there was no threat of actual or perceived corruption. "[I]ndependent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption."

Dissenting Shareholders: Finally, the Court considered whether the law was a valid way to protect a shareholder who does not want the corporation to spend money on an election. It found this argument failed for three reasons. First, it would allow a law to limit the speech of any corporation, including a media corporation, solely to protect the shareholders who disagree with the editorial position of the company. Second, because the electioneering communications ban applied only during certain time periods, it was not an effective way to protect shareholders. Third, it applied to all corporations, including nonprofits and for-profits with a single shareholder.

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