

**The *Citizens United* Case and Corporate Free Speech:
Democratic Liberty or Democratic Liability?**

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1. Corporations

- Although an early form of corporation existed in Roman times and the British developed corporations and royal charters, the United States is credited with creating the modern corporation.
- There are four types of corporations:
 - a. For profit
 - b. Nonprofit
 - c. Municipal (city)
 - d. Quasi-public (utility)
- For profit corporations come in two forms:
 - a. Closely held
 - b. Publicly held - its shares are listed on an exchange and publicly traded
- For profit corporations possess five basic characteristics. Nonprofits possess all but number five.
 - a. Perpetual existence
 - b. Centralized control
 - c. Limited liability
 - d. Artificial legal personality
 - e. Free transferability of shares
- American corporations operate under the entity theory. This allows corporations to own property in the corporate name, to enter into contracts and be liable for its torts.
- Partnerships generally operate under the aggregate theory, which means legally it is a group of individuals acting and the partnership is not a legal person in its own right.
- James Madison twice proposed at the Constitutional Convention that drafters include in Article I a federal incorporation power. It was rejected and corporations largely became a province of state law.
- Federal law that impacts corporations today involves either taxation or regulation.
- Federal regulation is generally derived from the Commerce Clause power.
- Examples of federal regulation of state chartered corporations:
 - a. Federal Securities Act of 1933

- b. Federal Securities and Exchange Act of 1934
- c. Glass Stagall Act
- Corporations created before the Civil War were largely created by special legislation in the state legislative.
- General incorporation statutes
 - a. North Carolina (1795) enacted the first general incorporation statute for corporations to cut canals.
 - b. Connecticut (1837) enacted the first general incorporation statute for any business venture.
 - c. After the Civil War the states all generally adopted this legislative scheme
- With the advent of the Industrial Revolution, the corporate form of business became the perfect entity for large scale, interstate business activity.
- Model codes of corporate law have been created in the 20th Century and adopted by all the states.
 - a. Uniform Business Corporation Act (1928)
 - b. Model Business corporation Act (1953)
- These codes are considered to be more favorable to business than their more regulatory and paternalistic predecessors.

2. The Corporation as a Person

- *County of Santa Clara v. Southern Pac. R. Co.*, 118 U.S. 394 (1886). This case first describes a corporation as a person under the law.
- *Wheeling Steel Corporation v. Glander*, 337 U.S. 562 (1849). Justice Douglas criticizes the doctrine that a corporation is a person.
- The majority opinion in *Citizens United* assumes that a corporation is a person under the law. The dissent does not question this underlying principle, but only disputes the expansion of the right of a corporation under the 1st Amendment, as a person.

3. Citizens United

- *Citizens United v. Federal Election Commission*, No. 08-205 (2010). This case deals with one part of the Bipartisan Campaign reform Act of 2002 (BCRA), also described as the McCain-Feingold Act.

BRAC limited two methods used by wealthy donors and corporations to influence federal elections.

- a. Soft money was prohibited for national political parties and their committees.
 - b. Prohibited corporations and unions from using their general treasury funds for express advocacy ads or for issue ads, which target a particular candidate near election time. This is a new category called electioneering communication. This was the subject of the *Citizens United* case.
- Majority opinion (57 pages)
 - a. Kennedy - author
 - b. Roberts
 - c. Scalia
 - d. Alito
 - e. Thomas (except for Part IV)
- Concurring (14 pages)
 - a. Roberts - author
 - b. Alito
- Concurring (9 pages)
 - a. Scalia - author
 - b. Alito
 - c. Thomas (joined in part)
- Concurring in part and dissenting in part (90 pages)
 - a. Stevens - author
 - b. Ginsburg
 - c. Breyer
 - d. Sotomayor
- Concurring in part and dissenting in part (6 pages)
 - a. Thomas - author
- Part I, II, III and V
 - a. 5-4 vote
 - b. Finds 2 U.S.C. sect. 441 b unconstitutional as to a criminal prohibition on corporations (for profit and nonprofit) and unions from using their general treasury funds for an electioneering communication in federal elections within 30 days of a primary or within 60 days of a general election.
 - c. The decision leaves intact the federal prohibition on corporations and unions from using their general treasury funds:

1. to make direct campaign contributions to candidates, or,
 2. to expressly advocate the election or defeat of a candidate through any form of media
 3. or to donate to a PAC.
- d. Foreign corporations and nationals are still prohibited from involvement in U.S. elections. A problem may arise, when an American corporation has a large shareholder, which is a foreign person, corporation or entity.

Examples would be sovereign wealth funds, which invest in U.S. stocks, and CITGO, which is owned by Petroleos de Venezuela, the state-owned oil company of Venezuela.

- Part IV

- a. 8-1 vote (Thomas dissenting)
- b. Finds BCRA sects. 201 and 311 constitutional. This requires corporations and unions to fully disclose who purchased the electioneering communication that is now constitutional.
- c. BRAC did not prevent a corporation or union from setting up a PAC or paying for its administrative costs. A corporation may not contribute to a PAC, but its managers, directors and shareholders may. An individual may contribute \$5,000 a year to a PAC. A PAC under federal law is considered a separate association from the corporation or union. Also, a corporation can run issue ads without regulation, if the ad doesn't advocate for or against a particular candidate.

This may be a tempest in a teapot. A large, wealthy for profit corporation may choose to continue to speak through a PAC. To speak directly with the disclosure requirements still intact may invite an attack by customers, shareholders, the public, political parties and regulators, who disagree with the position of the corporation.

This case led to the controversial criticism of the U.S. Supreme Court in the 2010 State of the Union Address by President Obama and the equally controversial reaction of Justice Alito.

Retired Justice Sandra Day O'Connor has criticized the *Citizens United* decision and seemed to regret the retirement decision, which allowed Alito to take her seat on the Court.

4. The Current Financial Crisis

- The issue at the heart of the matter may be the question of why the Court would continue to empower corporations on the heels of a financial crisis created largely by publicly traded financial corporations.
- Collateral Debt Obligation - an asset-backed security, which include mortgage-backed securities.
- Subprime Mortgages
- Credit Default Swap
- Banking Act of 1933 - commonly known as the Glass-Steagall Act. Created the FDIC and put a wall between investment and commercial banking.
- Gramm-Leach-Blinley Act - November 12, 1999. Allowed a bank holding company to own other financial companies.
- Commodities Futures Modernization Act of 2000
- Moral Hazard - financial institutions tend to take greater risks, if they will be bailed out by the taxpayer or insurance
- Agency Problem