

Connecticut Debate Association, State Finals

March 27, 2010. Wilton High School

Resolved: The U.S. should significantly limit corporate spending on federal elections.

Justices, 5-4, Reject Corporate Spending Limit

The New York Times, January 22, 2010

By [ADAM LIPTAK](#)

WASHINGTON — Overruling two important precedents about the First Amendment rights of corporations, a bitterly divided [Supreme Court](#) on Thursday [ruled](#) that the government may not ban political spending by corporations in candidate elections.

The 5-to-4 decision was a vindication, the majority said, of the First Amendment's most basic free speech principle — that the government has no business regulating political speech. The dissenters said that allowing corporate money to flood the political marketplace would corrupt democracy.

The ruling represented a sharp doctrinal shift, and it will have major political and practical consequences. Specialists in campaign finance law said they expected the decision to reshape the way elections were conducted. Though the decision does not directly address them, its logic also applies to the labor unions that are often at political odds with big business.

The decision will be felt most immediately in the coming midterm elections, given that it comes just two days after Democrats lost a [filibuster](#)-proof majority in the Senate and as popular discontent over government bailouts and corporate bonuses continues to boil.

[President Obama](#) called it “a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans.”

The justices in the majority brushed aside warnings about what might follow from their ruling in favor of a formal but fervent embrace of a broad interpretation of free speech rights.

“If the First Amendment has any force,” Justice [Anthony M. Kennedy](#) wrote for the majority, which included the four members of the court's conservative wing, “it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”

The ruling, [Citizens United v. Federal Election Commission](#), No. 08-205, overruled two precedents: [Austin v. Michigan Chamber of Commerce](#), a 1990 decision that upheld restrictions on corporate spending to support or oppose political candidates, and [McConnell v. Federal Election Commission](#), a 2003 decision that upheld the part of the [Bipartisan Campaign Reform Act of 2002](#) that restricted campaign spending by corporations and unions.

The 2002 law, usually called McCain-Feingold, banned the broadcast, cable or satellite transmission of “electioneering communications” paid for by corporations or labor unions from their general funds in the 30 days before a presidential primary and in the 60 days before the general elections.

The law, as narrowed by a [2007 Supreme Court decision](#), applied to communications “susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”

The five opinions in Thursday's decision ran to more than 180 pages, with Justice [John Paul Stevens](#) contributing a passionate 90-page dissent. In sometimes halting fashion, he summarized it for some 20 minutes from the bench on Thursday morning.

Joined by the other three members of the court's liberal wing, Justice Stevens said the majority had committed a grave error in treating corporate speech the same as that of human beings.

Eight of the justices did agree that Congress can require corporations to disclose their spending and to run disclaimers with their advertisements, at least in the absence of proof of threats or reprisals. “Disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way,” Justice Kennedy wrote. Justice [Clarence Thomas](#) dissented on this point.

The majority opinion did not disturb bans on direct contributions to candidates, but the two sides disagreed about whether independent expenditures came close to amounting to the same thing.

“The difference between selling a vote and selling access is a matter of degree, not kind,” Justice Stevens wrote. “And selling access is not qualitatively different from giving special preference to those who spent money on one’s behalf.”

Justice Kennedy responded that “by definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”

The case had unlikely origins. It involved a documentary called “Hillary: The Movie,” a 90-minute stew of caustic political commentary and advocacy journalism. It was produced by Citizens United, a conservative nonprofit corporation, and was released during the Democratic presidential primaries in 2008.

Citizens United lost a suit that year against the Federal Election Commission, and scuttled plans to show the film on a cable video-on-demand service and to broadcast television advertisements for it. But the film was shown in theaters in six cities, and it remains available on DVD and the Internet.

The majority cited a score of decisions recognizing the First Amendment rights of corporations, and Justice Stevens acknowledged that “we have long since held that corporations are covered by the First Amendment.”

But Justice Stevens defended the restrictions struck down on Thursday as modest and sensible. Even before the decision, he said, corporations could act through their political action committees or outside the specified time windows.

The McCain-Feingold law contains an exception for broadcast news reports, commentaries and editorials. But that is, Chief Justice [John G. Roberts Jr.](#) wrote in a concurrence joined by Justice [Samuel A. Alito Jr.](#), “simply a matter of legislative grace.”

Justice Kennedy’s majority opinion said that there was no principled way to distinguish between media corporations and other corporations and that the dissent’s theory would allow Congress to suppress political speech in newspapers, on television news programs, in books and on blogs.

Justice Stevens responded that people who invest in media corporations know “that media outlets may seek to influence elections.” He added in a footnote that lawmakers might now want to consider requiring corporations to disclose how they intended to spend shareholders’ money or to put such spending to a shareholder vote.

On its central point, Justice Kennedy’s majority opinion was joined by Chief Justice Roberts and Justices Alito, Thomas and [Antonin Scalia](#). Justice Stevens’s dissent was joined by Justices [Stephen G. Breyer](#), [Ruth Bader Ginsburg](#) and [Sonia Sotomayor](#).

When the case was first argued last March, it seemed a curiosity likely to be decided on narrow grounds. The court could have ruled that Citizens United was not the sort of group to which the McCain-Feingold law was meant to apply, or that the law did not mean to address 90-minute documentaries, or that video-on-demand technologies were not regulated by the law. Thursday’s decision rejected those alternatives.

Instead, it addressed the questions it proposed to the parties in June when it set down the case for an unusual second argument in September, those of whether Austin and McConnell should be overruled. The answer, the court ruled Thursday, was yes.

“When government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought,” Justice Kennedy wrote. “This is unlawful. The First Amendment confirms the freedom to think for ourselves.”

Corporations Aren't People

by Jamie Raskin

National Public Radio, September 10, 2009

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In 2008, Exxon's Political Action Committee solicited Exxon executives and employees nationwide for cash donations to build a campaign war chest on behalf of federal candidates. The Exxon PAC raised less than \$1 million in voluntary individual contributions.

During the same election cycle, Exxon's corporate profits were \$85 billion, or more than 8,000 times as much. If the company's CEO could freely write checks from the corporate treasury account to spend on partisan campaigns or to contribute directly to candidates for federal office, a decision to spend a modest 1 percent of those profits — \$850 million — on political campaigns would have been more than five times what all corporate PACs in America raised to spend on congressional campaigns that year, which was \$150 million.

Such a reversal of more than a century of democratic laws passed to confine the political activities of private business corporations would send shock waves through our democracy. Although Exxon and other Fortune 500 firms could easily participate in every single federal and state race in the nation, even the decision to spend tens of millions of dollars to defeat five targeted candidates would successfully destroy any future political opposition in Congress or the states to corporate positions.

Some justices on the Supreme Court seem hungry to usher in a new "corporate democracy." This spectacular outburst of conservative judicial activism would enthrone corporations, diverting them from their job of generating wealth through economic activity and radically changing their role in law and society.

A corporation is not, nor has it ever been, a constitutional person with voting rights; it is not, nor has it ever been, a democratic citizen; nor has it ever been a constituent member of "We the People." The founders did not mention the word "corporation" in the Declaration of Independence or the Constitution, and only a handful of corporations were even in existence at the time the Constitution was written.

The corporation is not a membership organization but an "artificial entity," as the Supreme Court has called it, chartered by the state or federal governments to serve public purposes. Legally speaking, it has no independent constitutional standing outside of the rights of the people who own it — and they already have the right as citizens to contribute and spend on campaigns. The idea now being promoted that CEOs have a First Amendment right to take other people's money out of corporate treasuries to spend on politics is outlandish.

Chief Justice John Marshall wrote in the Dartmouth College case that, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence."

In our time, Justice Byron White pointed out that we endow private corporations with all kinds of legal benefits — "limited liability, perpetual life and the accumulation, distribution and taxation of assets" — in order to "strengthen the economy generally." But he emphasized that a corporation has no right to convert its economic resources into political power. As he put it, "The state need not permit its own creation to consume it." Chief Justice William Rehnquist agreed.

The sovereign actors of American democracy — we, the people — have also understood that business corporations, which are magnificent agents of capital accumulation and wealth maximization in the economic sphere, pose extreme dangers in the political sphere. Our best leaders have wanted business to prosper but never to govern.

We should be as clear-eyed today as Abraham Lincoln was in 1864 when he said that "as a result of the war, corporations have become enthroned, and an era of corruption in high places will follow. The money power of the country will endeavor to prolong its rule by preying upon the prejudices of the people until all wealth is concentrated in a few hands and the Republic is destroyed."

And we should be as passionate in defense of popular government as Thomas Jefferson, who wrote in 1816: "I hope we shall crush in its birth the aristocracy of our moneyed corporations which dare already to challenge our government to a trial of strength and bid defiance the laws of our country."

Corporations Are People, Too

by BRADLEY SMITH

National Public Radio, September 10, 2009

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This week, the U.S. Supreme Court considered whether to overrule the 1990 case of Austin v. Michigan Chamber of Commerce, in which the court held that the Constitution did not prevent a state from prohibiting corporate political speech. Those who would overrule Austin argue that it abridges First Amendment rights and is obviously a prohibition on corporate speech limits speech. But one question is whether corporations should have First Amendment rights to speech at all.

On Wednesday the Supreme Court reheard arguments in a case that could significantly change campaign finance laws and allow corporations to give much more money to political candidates. At the heart of the case is the long running debate over whether or not corporations should have the same freedom of speech protections as people.

For a century, courts have recognized that corporations have constitutional rights. That's where the law is. In that respect, *Austin* is an outlier in existing law. That doesn't answer the question of whether corporations *should* have constitutional rights, but it should set us to thinking.

Note that to deny constitutional rights to corporations would put at risk a great deal of speech protected by the First Amendment. Can corporate offices be searched without a warrant? Can a phone company withhold from the government call records of its subscribers, unless the government produces a warrant? Can the *New York Times* be censored because it is a corporation?

Indeed, in the case before the Supreme Court this week, the government has argued that it can ban books if they are published by corporations — as most are. It argues that it can prohibit a corporation from paying a writer to author a political book. This should be alarming. There may be arguments that such rights could be protected in other ways, or that distinctions can be made in the Constitution to protect them while prohibiting other corporate speech, but those eager to strip corporations of their rights need to at least consider such issues.

Corporations have rights because natural persons have rights. It is sometimes said that corporations are "creations of the state," but that's not really true. Corporations are created by people — they are merely recognized by the state. True, corporations get some benefits from the state, such as limited liability and perpetual life, but in our modern society, most people get benefits from the state.

Forty years ago, in *Goldberg v. Kelly*, the Supreme Court recognized that in modern society, government creates rights that are entitled to constitutional protection. A welfare recipient, the court ruled, had a property interest in receiving benefits to which he was entitled by law, and did not surrender his rights by accepting those benefits.

No one, I hope, would suggest that a cab driver can be made to surrender his First or Fourth or Fifth Amendment rights because the government has given him something of value — a cab license. Most of us do not, I think, believe that commercial stable owners must surrender their First Amendment rights because most every state grants them protection from traditional common law liabilities. If corporations can be denied rights because they receive benefits from the state, all our rights are in jeopardy.

Corporations are associations of individuals, with a right to defend their interests. For example, suppose a small manufacturer would be bankrupted unless it can receive government funds under the stimulus plan passed earlier this year. If the governor refuses to accept stimulus funds, shouldn't the corporation — as a corporation, an association of shareholders — be able to criticize that governor, and even advocate his defeat?

In the United States today, virtually every small business, college and charity is incorporated. To suggest that corporations lack speech rights would affect a great many rights and protections that we have come to rely on. Be careful what you wish for.

A Clear Danger to Free Speech

Editorial Board, National Review, March 27, 2009

From its conception, the McCain-Feingold campaign-finance law was an assault on the First Amendment. Signing that unconstitutional bill into law, knowing it to be unconstitutional, was one of the worst moments of George W. Bush's presidency. Yet this malignancy lurks in the legal code, widely accepted, even celebrated. Now Deputy Solicitor General Malcolm Stewart has gone before the Supreme Court arguing that McCain-Feingold gives the government the right to ban books and films. He's right, it does. And for that reason, McCain-Feingold should be nullified.

At issue is a film called *Hillary: The Movie*, a documentary produced by the nonprofit group Citizens United, which did not wish to see Senator Clinton elected president. Because McCain-Feingold prohibits so much as mentioning a candidate's name in pre-election communications paid for by certain disfavored groups — unions and "corporations" — the filmmakers were informed by a federal judge that showing their work would constitute a crime. The filmmakers sued, and the case is *Citizens United v. Federal Election Commission*. Mr. Stewart is defending the government's ban on this film; the same rules that apply to a campaign commercial apply to a documentary film, his reasoning goes. Justice Alito alertly pressed Mr. Stewart on that issue: If commercials and films are covered, how about books? How about campaign biographies? Yes, Mr. Stewart answered, the U.S. government is prepared to ban books, under certain circumstances, and is legally empowered by McCain-Feingold to do so. Jaws dropped, black robes fluttered.

Under the law, it depends on who is paying for those communications, and here the government has two targets, one well defined and one less so. The first group whose speech is suppressed under McCain-Feingold is labor unions. We rarely find ourselves on the same side politically, but we would not see them stripped of their First Amendment rights. The second group is "corporations," a word that has practically become a term of abuse — good guys are *businessmen, employers, or entrepreneurs*, bad guys are *corporations* — but is in fact a common form of legal organization employed by a myriad of enterprises, including nonprofit advocacy groups, of which Citizens United is one. Let that sink in: The First Amendment was intended to protect political speech, the right to advocate causes and

criticize government officials, and McCain-Feingold holds that organizations incorporated for the express purpose of engaging in political speech are to be burdened with special restrictions. Put another way, a stripper pole-dancing in Vegas has more robust First Amendment protections under current practice than does a political-advocacy group organized as a nonprofit corporation.

There is a special exemption in McCain-Feingold for newspapers, which also are corporations engaged in political advocacy. (A plan in the Senate to “save newspapers” by having them reorganize as tax-exempt nonprofits is one step of the censor here: Participating newspapers would be forbidden from endorsing candidates.) Practically every media business and book publisher of any consequence is a corporation under the law. A Supreme Court decision in favor of McCain-Feingold threatens the free-speech rights of most of the organized enterprises engaged in political debate.

As Institute for Justice staff attorney Paul Sherman puts it, “What we saw was the Supreme Court grappling with the inevitable logic of these laws. If the Supreme Court decides this case correctly, media and nonprofits will be able to breathe a sigh of relief. If the Court sides with the government, nonprofits and media should be scared. . . . The ones who suffer are small grassroots groups. The big companies can hire lawyers and figure out ways to comply. Ordinary small groups of citizens end up silenced.”

McCain-Feingold was proffered to reduce the influence of money in elections, as though sidelining private citizens while the terms of political debate are set by members of the revolving-door government-media clique were a guarantee of integrity rather than its opposite. Citizens should have the right to make their views heard, to criticize the government, in print, on film, and on the airwaves — and to raise the funds necessary to do so. A documentary film criticizing a senator deserves at least as much constitutional protection as a work of pornography.

McCain-Feingold is a blight. The conservatives on the court are skeptical of it. McCain was wrong to champion it. President Bush was wrong to sign it; perhaps the justices he appointed will correct his error.

Decision may mean more foreign cash

By: Josh Gerstein

Politico.com, January 21, 2010 10:28 PM EST

Thursday's Supreme Court ruling clearing the way for corporations and unions to spend money in U.S. political campaigns will allow foreigners a greater role in American elections and could lead to a flood of foreign money into the system, analysts said.

On its face, the 5-4 ruling appears to permit the U.S. subsidiaries of foreign companies to take out or support ads for or against candidates, just as other U.S. corporations may now do.

In other words, even if Sony Corp. in Japan couldn't spend money directly for or against a candidate, the electronics company's American-based subsidiaries could. And that's got some conservatives upset, fearful of the influence of foreign money on U.S. politics.

“The court has, in effect, legalized foreign governments and foreign corporations to participate in our electoral politics,” said Pat Choate, an author and former Reform Party candidate for vice president. “It'll happen instantaneously. It'll happen in the 2010 elections. . . . The Japanese corporations, the European corporations will do it instantly through American subsidiaries.”

Several other analysts, however, cautioned that the fear was being overblown and that foreign companies would be reluctant to dabble in U.S. politics for the same reason some American companies steer clear, to avoid angering consumers.

“It is a plausible inference from the court's opinion that [foreign] money can't be restricted,” said Michael Dorf, a Cornell law professor who has backed giving foreigners the right to contribute to U.S. campaigns. “For me, that's not such a terrible thing.”

Dorf said it was unlikely that large multinational companies would want to weigh in in most elections. “If I'm the CEO of a major corporation, I'm going to be very leery of directly supporting or opposing a candidate. . . . It's just not good business to alienate potential customers,” he said.

Justice Anthony Kennedy's majority opinion suggests there could be an argument for “limiting foreign influence over our political process,” but he concludes that is not an adequate reason to allow the government to impose an across-the-board ban on direct expenditures by corporations in campaigns.

However, the main dissent, authored by Justice John Paul Stevens, argues that the majority's logic throws into question existing federal bans on political activity by foreigners.

“If taken seriously, our colleagues’ assumption that the identity of a speaker has no relevance to the Government’s ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by ‘Tokyo Rose’ during World War II the same protection as speech by Allied commanders,” Stevens wrote. “More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans.”

In an apparent dig at the originalists in the majority, Stevens said throwing U.S. political campaigns open to foreigners would have upset the Founding Fathers. “The notion that Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers, whose ‘obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country,’” Stevens wrote, quoting a law review article from Fordham professor Zephyr Teachout.

Stevens also suggested some of his colleagues were refusing to address the green light the opinion could give to political activity by huge global enterprises. “The majority never uses a multinational business corporation in its hypotheticals,” the justice wrote.

Another possibility raised by Thursday’s ruling is that wealthy foreigners, who are currently banned by statute from spending “directly or indirectly” on U.S. elections, might start corporations in the U.S. solely or primarily to funnel money in to spend on U.S. elections.

Some analysts said such fears are exaggerated. “If it is a situation with a shell corporation, you won’t be able to do an end run around the rules,” said Kenneth Gross, a former Federal Election Commission lawyer. “People are working overtime interpreting this opinion beyond its boundaries.”

Today’s Supreme Court opinion left in place the U.S. government’s ability to require disclosure of donors — a requirement that might scare off some would-be foreign contributors.

The court’s major move today towards deregulation of the campaign finance system also points up a divide in the conservative movement. While the lawsuit that led to the justices’ decision was brought by a conservative group, Citizens’ United, the loudest complaints about foreign donations to U.S. campaigns have often come from conservatives.

When Democrats were accused of taking millions in illegal donations from Chinese and Indonesian interests in 1996, Republicans warned of the dangers of foreign influence. In 2003, the liberal group MoveOn.org came under fire for efforts by some foreigners to encourage donations to the group as part of efforts to defeat President George W. Bush. MoveOn later banned foreign donations, though it said such gifts were not illegal. In 2008, reports about alleged illegal foreign donations to Barack Obama’s presidential campaign got extensive play on conservative sites like Newsmax.com.

Choate, who has long warned about the influence of foreign money in U.S. politics, believes conservative groups now face a moment of truth where they must decide whether they truly favor complete deregulation of political financing, including an end to all limits on foreign cash.

“It’s one of the basic tenets of the conservative movement to want to keep the electoral process limited to Americans. You can’t have it both ways,” Choate said. He said he favors a constitutional amendment making explicit Congress’s right to regulate political donations and hopes that Tea Party activists will take up the cause. Indeed, while the GOP establishment touted the court’s decision as a triumph of freedom, some tea party figures sounded notably less enthusiastic about the court’s vindication of the rights of corporations.

Regardless of today’s ruling and any attempts to counteract it, those trying to keep foreign money out of American politics face an increasingly uphill battle because of rapid advances in technology.

“Because of the Internet all the traditional restraints on foreign involvement are out the window,” Teachout, the professor quoted in the dissent, said in an interview. “You can do the hard work of door-to-door campaigning from India. ... It makes it all the more important to support structures that encourage citizen involvement.”

How to Address Corporate Political Spending

Recent Supreme Court Ruling Calls For Response

Associated Press/Lauren Victoria Burke, February 3, 2010

By Alex DeMots

In *Citizens United v. FEC*, the Supreme Court late last month ruled that corporations are permitted to spend unlimited amounts of money on independent political advertising in U.S. elections. While conservatives and

libertarians are cheering the ruling as a victory for free speech, many progressives are warning of a coming flood of corporate money buying elections, and pushing for a legislative response.

The Court's ruling is simple: Laws that prohibit corporations from buying political advertising, simply because they are corporations, violate the First Amendment. Hence, the 63-year-old law prohibiting corporations from making "independent expenditures" expressly advocating the election or defeat of a federal candidate, as well as the prohibition of corporate "electioneering communications," enacted by the Bipartisan Campaign Reform Act of 2002, were struck down.

Corporations are now permitted to spend as much as they want to say whatever they want about candidates, at any time and in any medium, provided they do not coordinate their efforts with a candidate. The Court's holding applies with equal force to the mirror-image laws that had limited the electoral spending of labor unions.

Because the Supreme Court has the final word on whether a law violates the Constitution, Congress cannot simply undo *Citizens United*. Only a future Supreme Court, or a new constitutional amendment, can take political speech rights back from corporations. It is difficult to predict how much of an effect *Citizens United* will truly have on campaigns, but Congress does have a variety of options for proactively responding to the case. Specifically, Congress could:

- Strengthen disclosure
- Require new disclaimers
- Address coordinated spending
- Guard against foreign influence
- Enact shareholder protections
- Loosen political party campaign spending laws
- Provide public financing for elections

Let's examine each of these options in turn.

Strengthen disclosure

Though it can no longer prohibit corporate political spending, the federal government *is* allowed to require corporations to publicly disclose their political spending. The Court upheld laws mandating the reporting of independent expenditures and electioneering communications to the Federal Election Commission.

These disclosure laws, however, were not originally designed to deal with corporate spending, and they may not be up to the task of providing real transparency. Under current law, many types of entities will be able to run political ads without disclosing the identity of any donors, unless a donor gave money *specifically* for the purpose of funding independent expenditures or electioneering communications. Even where disclosure of contributors is required, it may be difficult to discern the identity of corporations whose money has passed through one or more intermediaries.

Finally, existing disclosure requirements are a patchwork of provisions that vary in application depending on the content, timing, and medium of the ad, and the identity of its sponsor. This will make following the money, and compliance with the law, a complicated affair.

Congress now has the opportunity to enact a unitary reporting system for independent spending on elections. The ideal system would be simple to understand and comply with, and would take advantage of the Internet to get accurate and relevant information to the public on a real-time basis. For reporting to be effective, Congress would have to take steps to prevent corporations from circumventing reporting requirements and hiding their identities as ad funders. But Congress should also make sure that true, low-dollar grassroots efforts are not swept up in unnecessary and burdensome regulation.

Require informative disclaimers

As with disclosure requirements, the Supreme Court left the laws requiring political advertising disclaimers intact. Under current law, corporate ads will bear a disclaimer like "Paid for by Acme Inc., and not authorized by any candidate or candidate's committee."

But a "paid for by" disclaimer only works if the named organization is one familiar to the public, such as the National Rifle Association, the Sierra Club, or Bank of America. If the ad is run by a corporate-funded and ambiguously named organization such as "Americans for Good Things," the public gains no useful information.

Several states address this issue by requiring ad disclaimers to also include the top few donors to the organization running the ad. Under this model, the disclaimer would look something like "Paid for by Americans for Good Things, with support from Mining Inc., Drilling Inc., and Power Inc." This kind of disclaimer provides the public with a context in which to evaluate the ad.

Disclaimer requirements like this might also deter some corporations from funding political ads in the first place, either because the disclaimer undermines the ad's effectiveness, or because it tarnishes the corporation's brand. This Supreme Court, however, would likely view corporate deterrence as an impermissible justification for such a law.

For this reason, Congress should focus on the public information benefits of new disclosure and disclaimer requirements, rather than their likely deterrent effect.

Independent vs. coordinated spending

The Court made clear that its ruling applies only to *independent* political spending by corporations. Corporations are still prohibited from buying political ads in coordination with a candidate. The distinction has its origin in the Supreme Court's long-held view that independent spending, unlike direct campaign contributions or spending coordinated with a candidate, presents no danger of candidate corruption.

The issue of what exactly qualifies as prohibited coordination, however, is unresolved. In fact, the Federal Election Commission and the courts have been fighting over the definition of coordination for years. The fact that corporations are now able to engage in independent spending, but not coordinated spending, lends even greater significance to the final details of this definition. The FEC recently announced its third attempt since the enactment of the Bipartisan Campaign Reform Act at writing coordination regulations. But partisan entrenchments at the FEC make it unlikely that the agency will be able to issue effective regulations any time soon.

This area is ripe for congressional action. Congress should legislate, with specificity, what types of coordination between candidates and ad buyers are permissible, and what types are not. Such legislation could ensure that independent ads are truly independent, and could even target potential abuses, such as lobbyists attempting to leverage lawmakers with threats of corporate campaign spending.

Foreign money prohibition

The issue of whether *Citizens United* will allow foreign money into U.S. elections was brought to the fore by the President Obama's State of the Union address. While *Citizens United* did not open a direct path for foreign spending, it has certainly widened some loopholes.

The Supreme Court explicitly declined to invalidate the law that prohibits "foreign nationals," which by statute includes corporations organized in other countries, as well as foreign and political parties, from making contributions or expenditures in connection with U.S. elections. So this prohibition remains on the books. But it is too simplistic to say that only "American" corporations are allowed to spend politically. This ignores the complex structure of large multinational corporations, which are often significantly owned, controlled, or influenced by non-American individuals and entities.

Additionally, as Justice John Paul Stevens points out in his dissent, it is not immediately clear why the majority's reasoning, which brought a new literalism to the phrase "marketplace of ideas," would not extend to any person or entity spending independently of a candidate.

The foreign money issue obviously has the president's attention, and some members of Congress are already introducing legislation targeting foreign influence. Drawing a line between corporations that are sufficiently domestic to spend freely and those that are not could be a very complicated task. But it is also one that could, potentially, bring many corporations back within the ambit of campaign finance regulation.

Shareholder protection

Some campaign finance watchers are discussing the need to give shareholders a say in corporate political spending decisions. One justification for such a move is the general proposition that shareholders, as owners of the company, should have a say in how their money is spent.

Another potential justification would be a shareholder's right *not* to subsidize political speech with which he or she disagrees. Notably, the Supreme Court endorsed just such a right for nonunion-member duespayers who have an ideological opposition to supporting union political spending in *Communications Works v. Beck*. Under *Beck*, these individuals are allowed to ask for a refund of the portion of their dues that goes to fund union political spending.

Corporations could arguably be required to offer stockholders the same option, in the form of a dividend tied to the corporation's political spending. This kind of protection is especially important for shareholders who are unable to divest themselves of particular companies because they hold their shares through retirement plans or mutual funds.

Loosen party coordinated spending limits

Political parties are currently limited in the amount of money they may spend in coordination with their own candidates. A political party may spend only about \$44,000 in coordination with a House candidate, or between \$87,000 and \$2.4 million in coordination with a Senate candidate, depending on the size of the state. If a political

party wants to spend any more than that on a given race, the spending must be undertaken without consulting the candidate.

This oddity, that parties are sometimes prohibited from discussing campaign ads with their own candidates, once led to the bizarre spectacle of a national party chairman disclaiming the authority to discontinue an ad being run by his own committee. Apart from being counterintuitive, the limits on party coordinated spending will make it very difficult for political parties to respond effectively when their candidates are targeted by corporate spending campaigns. Removing or raising the coordinated party expenditure limits would give candidates and parties greater flexibility to respond to influxes of corporate money into a given race.

Public financing

Many progressive groups are calling for Congress to respond to *Citizens United* by passing the Fair Elections Now Act, which would provide Congressional candidates with the option to forgo large private campaign donations, and instead fund their campaigns using a combination of public money and small private donations. While the Court's First Amendment analysis will prevent the Fair Elections Now Act from prohibiting corporate spending, it could give candidates the option to run a different kind of campaign—one that perhaps has a better chance of breaking through the noise of independent spending.

Candidates that opt to take public financing and matching funds under the proposed new law could spend less time soliciting campaign contributions and more time soliciting votes. The Fair Elections Now Act might also give participating candidates a way to stand apart from the rest of the money-driven campaign system.

None of these seven responses can entirely blunt the impact *Citizens United* will have on federal campaigns. But each has the potential to play a role in limiting harm from the decision.

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SLATE: JURISPRUDENCE

Money Isn't Speech and Corporations Aren't People

The misguided theories behind the Supreme Court's ruling on campaign finance reform.

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Go back almost a century, to the time when the modern corporation was created, and you'll find laws that prohibit or limit the use of corporate money in elections. And yet this week, a 5-4 Supreme Court struck down the limits that Congress passed in 2002 in this tradition in the case *Citizens United v. FEC*.

The majority's ruling unleashes a new wave of campaign cash and adds to the already considerable power of corporations. The court's main rationale is that limits on using corporate treasuries for campaigns are a "classic example of censorship," as Justice Anthony Kennedy wrote for the majority. To get there, Kennedy depends on two legal theories that blossomed as constitutional principles in the mid-1970s: money is speech and corporations are people. Both theories are strange, if not simply wrongheaded—why, according to the Constitution or common sense, would money be speech or corporations be people? The court has also employed theories not uniformly but, rather, as constitutional cover for dominance of the electoral system by corporations and by the wealthy.

The first theory appeared in a 1976 decision, *Buckley v. Valeo*, which invalidated some campaign-finance reforms that came out of Watergate. The Court concluded that most limits on campaign expenditures, and some limits on donations, are unconstitutional because money is itself speech and the "quantity of expression"—the amounts of money—can't be limited.

But in subsequent cases, the conservative justices who had emphatically embraced the money-is-speech principle didn't apply it to money solicited by speakers of ordinary means. For example, the court limited the First Amendment rights of Hare Krishna leafleters soliciting donations in airports to support their own leafleting. The leafleting drew no money-is-speech analysis. To the contrary, the conservative justices, led by Chief Justice Rehnquist, found that by asking for money for leafleting—their form of speech—the Hare Krishnas were being "disruptive" and posing an "inconvenience" to others. In other words, in the court's view, some people's money is speech; others' money is annoying. And the conservative justices have raised no objection to other limits on the quantity of speech, such as limits on the number of picketers.

The money-is-speech theory turns out to be a rhetorical device used exclusively to provide First Amendment protection for all money that wealthy people and businesses want to give to, or to spend, on campaigns. It also doesn't make sense under long established free-speech law. Spending or donating money to support or facilitate

speech is expressive and deserves some protection. But money simply doesn't make it into the category of things that are and embody speech, such as books, films, or blogs. Traditional speech-law analysis would separate the speech from the conduct (or "nonspeech") elements of campaign spending and donation and allow considerable leeway to regulate the latter. Even as to "pure" speech, "compelling" government interests are overriding. And spending and donating money seem, among the traditional speech-law categories, a "manner" of speaking that the court has said usually can be "reasonably regulated."

The other basic theory supporting the ruling in *Citizens United*—the court's claim that, for some purposes, corporations are constitutionally, if not actually, people—comes out of the long history of the development of corporations. But the extension of corporate personhood to campaign speech is a controversial innovation of the conservative justices over the last few decades.

Corporations needed some rights usually reserved for people to function as legal entities, so that they could, for instance, make enforceable contracts and sue or be sued. But despite the common cultural personification of corporations—we can easily say "GM was embarrassed today"—they obviously don't and shouldn't have all the rights of people. For example, they don't have the right to vote.

In *Citizens United*, Justice Kennedy discusses business corporations as if they were clubs or political associations with political viewpoints and elected leaders. But corporate managers don't function as representatives or employees of shareholders, who have no say, no shared political views, and no expectation that their investments will be used for political ends. In the wake of the court's ruling this week, will some corporations pick a party or politics while others channel unheard of amounts of money to both major parties? Will investors be influenced by a corporation's political portfolio?

The *Citizens United* decision will make it harder to achieve reforms opposed by major corporations and change business as well as politics. Increasing the constitutional rights of corporations beyond their business purposes is really about increasing the rights and power of corporate managers. Government has enabled corporate managers to control huge accumulations of wealth without any personal risk—an arrangement that contributes to wild, bubble-producing economic swings and collapses. *Citizens United* invites that arrangement directly into politics and elections.

Both of these theories—that money is speech and that corporations are people—have an easier time than they should in courts and with the public, too, because they are posed as counters to censorship. Many of us, including me, haven't seen a free-speech argument we don't like, at least initially.

But some perspective: We limit speech—when it has nothing to do with wealthy people spending money—in many ways. (It wasn't protected at all until the mid-1930s.) You famously can't shout fire in a theater. You not-so-famously can't break the theater's rules, including rules about speaking, because you don't really have any First Amendment rights in a privately owned theater or at work. The First Amendment limits only government. And even where it is fully protected, free speech has not been absolute; it's subject to regulation when it undermines basic societal interests and functions, like voting and democracy. In the last few decades, the conservative justices dominating the court have also limited speech rights for demonstrators, students, and whistle blowers. They have restricted speech at shopping malls and transit terminals. Taken as a whole, the conservative court's First Amendment jurisprudence has enlarged the speech rights available to wealthy people and corporations and restricted the speech rights available to people of ordinary means and to dissenters.

In a largely unnoticed rewriting of speech law, the conservative justices have applied their theories and doctrines inconsistently and selectively, as they have money-is-speech. Some of the conservatives' recent innovations would seem to validate campaign finance laws. The "secondary effects" doctrine, for example, allows government to restrict speech if government can suggest a general, non-speech-related purpose, even if the real purpose is speech-related. The court ignored this doctrine in *Citizens' United* and other campaign finance cases—even though campaign finance reform is aimed not at speech itself, but at large amounts of money that skew, corrupt, and undermine elections.

The court's invalidation of campaign finance reforms over the last few decades isn't about censorship or suppressed speakers or viewpoints. At its core, this line of cases is about dominance of the political and electoral system by wealthy people and corporations and about legitimizing a political and electoral system that is unrepresentative, money-driven, corrupt, outmoded, and dysfunctional. Wealthy people and corporate managers shouldn't dominate politics or have more and better speech rights than the rest of us. That seems like an obvious truth. And yet the Supreme Court's recent decisions move us away from it.

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