

# Corporations and Unions Gain 1<sup>st</sup> Amendment Rights

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On January 21, 2010 a divided United States Supreme Court issued its much anticipated decision in *Citizens United v. Federal Election Commission*. By a 5-4 vote breaking along familiar, ideological lines, the high Court overturned two recent precedents, including its 1990 ruling in *Austin v. Michigan Chamber of Commerce*, which found state restrictions on corporate independent expenditures to be constitutional. In *Austin*, the Supreme Court found the State of Michigan had a compelling state interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” In the twenty years since that ruling, many state and local campaign finance regulations have relied on *Austin*’s holding to limit direct advocacy by corporations, unions and other nonprofit advocacy groups, such as a federal rule limiting corporate speech immediately before elections.

At issue in *Citizens United* was whether a conservative group’s 90-minute film highly critical of Hillary Clinton could be barred from broadcast immediately before the 2008 presidential primary elections under federal campaign finance laws. Under a statute commonly referred to as McCain-Feingold, corporations, unions and nonprofit issue-advocacy organizations may not spend money directly from their treasuries (as opposed to via political action committees or PACs) on “any broadcast, cable or satellite communications” advocating for or against a specific candidate within 30 days of a primary

election and within 60 days of a general election. Thus, corporation-sponsored independent expenditure campaigns are restricted in the immediate run-up to an election. The case was argued on narrower grounds last term (before Justice Souter retired and Justice Sotomayor was seated), but the Court called for further briefing on whether *Austin* should be overturned and the matter was reargued on September 9, 2009.

Conservative Justices Kennedy, Roberts, Scalia, Thomas and Alito found McCain-Feingold unconstitutional and overturned *Austin*. The Court majority found the purpose of the independent-expenditure limit was to “silence entities whose voices the Government deems to be suspect.” The majority reasoned that the government may not impose restrictions on certain disfavored speakers, especially in the context of political speech. They disagreed with *Austin*’s premise that the government interest in preventing the corrosive effects of aggregated wealth in the corporate form is stronger than as to regulation of the speech of individuals, and further noted that the government does not have a legitimate interest in equalizing the ability of individuals to influence an election — what supports of McCain-Feingold would call “leveling the playing field.”

Although the Court invalidated McCain-Feingold’s pre-election ban on corporate electioneering, it upheld McCain-Feingold’s disclaimer and disclosure requirements that require ads to identify who funded them. (Justice Thomas alone dissented from this conclusion, citing alleged intimidation of proponents of California’s anti-gay-marriage initiative.) The

Court also limited its holding to independent expenditures and explicitly noted the decision does not extend to the constitutionality of limits on corporations’ direct contributions to candidates. Thus, the far more common rules that limit campaign contributions and require reporting of contributions and expenditures by candidates, ballot measure committees and those making independent expenditures all remain good law.

The practical effects of *Citizens United* are far-reaching. Although California law has not limited corporate speech in state elections (hence recent controversies over last-minute largesse from tobacco companies, for example), federal and local rules along these lines are no longer enforceable. Certainly, we can expect to see more extensive corporate electioneering in future elections with the 2012 Presidential Election likely to see a wave of new independent expenditures. Analysts expect more negative campaigning from sources not tied to candidates along the lines of the “Swiftboat Veterans for Truth” attacks on John Kerry in the 2004 Presidential Election.

Further, municipalities that restrict corporate expenditures that directly advocate for or against a named candidate in local campaigns should review their ordinances in light of this ruling. The basic premises of local controls on direct expenditures by unions, corporations and other nonprofit organizations have been swept away and such ordinances require fundamental review.

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