CITIZENS UNITED v. FEDERAL ELECTION COMMISSION

No. 08-205

Argued March 18, 2009

Reargued September 9, 2009

Decided January 21, 2010

In 1990, the Supreme Court handed down its decision in Austin v. Michigan Chamber of Commerce, determining that corporations could be prohibited from using treasury money to support or oppose candidates in elections without violating the First and Fourteenth Amendments. In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA), usually called the McCain-Feingold law. In part, this law banned the broadcast, cable or satellite transmission of "electioneering communications" paid for by corporations in the thirty days before a presidential primary and in the sixty days before the general election. In 2003, in McConnell v. FEC, the Court upheld the central provisions of the law.

Citizens United, a conservative nonprofit corporation, with an annual budget of about $12 million, gets most of its funds from donations by individuals. But it also accepts a small portion of its funds from for-profit corporations.

A documentary entitled Hillary: The Movie, was produced by Citizens United and released during the Democratic presidential primaries of 2008. It expressed opinions about whether Senator Hillary Rodham Clinton would make a good president. The movie was shown in theaters and on DVD, and the group sought to advertise it on television and distribute it through video-on-demand.

Citizens United sought an injunction against the Federal Election Commission to prevent the application of the Bipartisan Campaign Reform Act, arguing that the BCRA violated the First Amendment when applied to The Movie and its related advertisements.

The United States District Court denied Citizens United's injunction, saying the BCRA was constitutional because the Supreme Court in McConnell v. FEC had already reached that determination. The court ruled that the film had one purpose, and it was to attempt to inform voters that Senator Clinton was unfit for office.

The case was first heard in the U.S. Supreme Court in March, 2009. But instead of deciding the case before the end of that term, the Court scheduled a rare re-argument in September. The Court asked the parties to address the issue of corporate spending to support or oppose political candidates, along with part of the McConnell v. FEC decision which upheld the central provisions of the BCRA.

The case, on re-argument, was the first to be heard by Justice Sotomayor and the first case to be argued in the Supreme Court by Solicitor General Elena Kagan.

• ISSUES: Should a documentary about a candidate for political office be regulated as a campaign advertisement or protected under the First Amendment? Does the McCain-Feingold provision barring corporate-funded broadcasts that mention a federal candidate shortly before an election constitutionally apply to corporate-funded broadcasts offered through a cable television video-on-demand service?

CITIZENS UNITED v. FEDERAL ELECTION COMMISSION (2010) Decision

In a five-to-four decision, the Supreme Court held that corporate funding of independent political broadcasts in candidate elections cannot be limited under the First Amendment, which overruled portions of McConnell v. FEC. The ruling was a vindication, according to the majority, of the First Amendment's most basic free speech principle. Justice Kennedy, for the majority, wrote, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." He also noted that since there was no way to distinguish between the media and other corporations, these restrictions would allow Congress to suppress political speech in newspapers, books, television and blogs. Kennedy wrote, "The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation."

Addressing the section of the BCRA in question, Kennedy wrote:

… It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage of the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others. A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. … Today, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary—long after the opportunity to persuade primary voters has passed.

Kennedy concluded by stating:

When Government seeks to use its full power … 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. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

…

Some members of the public might consider Hillary to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation's course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make. …

Chief Justice Roberts, with whom Justice Alito joined, emphasized the care with which the Court handles constitutional issues and its attempts to avoid those issues when at all possible. Here, he explained, the

Court had no narrower grounds upon which to rule, except to handle the First Amendment issues embodied within the case. He explained, “The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer.” The Chief Justice concluded:

We have had two rounds of briefing in this case, two oral arguments, and 54 amicus briefs to help us carry out our obligation to decide the necessary constitutional questions according to law. We have also had the benefit of a comprehensive dissent that has helped ensure that the Court has considered all the relevant issues. This careful consideration convinces me that Congress violates the First Amendment when it decrees that some speakers may not engage in political speech at election time, when it matters most.

Justice Scalia joined the majority but wrote a separate concurrence to address Justice Stevens’ dissent. Scalia criticized Stevens’ understanding of the Framer’s view towards corporations. He principally argued that the First Amendment was written in “terms of speech, not speakers” and that the dissent “never shows why ‘the freedom of speech’ that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form.” He was joined by Justice Alito and in part by Justice Thomas.

Justice Thomas wrote a separate opinion concurring in most of the Court’s decision. In order to protect the anonymity of contributors to organizations exercising free speech, Thomas would have struck down the reporting requirements of BCRA as well, rather than allowing them to be challenged only on a case-specific basis. Thomas’ primary argument was that anonymous free speech is protected and that making contributor lists public makes the contributors vulnerable to retaliation. Thomas also expressed concern that such retaliation could extend to retaliation by elected officials.

Justice Stevens read part of his 90-page dissent from the bench. He argued that corporations are not members of society and that there are compelling governmental interests to curb the ability of corporations to spend money during elections. He said the majority in this case had committed a grave error in treating corporate speech the same as that of human beings. Stevens wrote:

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. …

Stevens concluded his dissent with:

In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. … At bottom, the Court’s opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt… While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.