

CAMPAIGN FINANCE AND FREE SPEECH: FINDING THE RADICALISM IN *CITIZENS UNITED V. FEC*

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I want you to envision that you're in the United States Supreme Court. Some of you have probably been there; you've seen the room: it's got the marble engravings behind it and so on, and the Justices are up there in their black robes. Malcolm Stewart, Deputy Solicitor General, a very experienced man who's argued campaign finance cases before, is in the Supreme Court. He's arguing a case called *Citizens United v. Federal Elections Commission*.¹ There are a couple questions presented, but basically, it comes down to this: can the government prohibit a corporation from paying for a broadcast ad that mentions a candidate within sixty days of an election?² Here, the ad in question is one for a rather hackneyed documentary called *Hillary: The Movie*.³ *Hillary* refers to—well, you know.

And during oral argument, Justice Alito finally leans over and asks if the authority to ban this broadcast ad might also apply to the Internet?⁴ To DVDs that might be distributed?⁵ Could it be applied to providing the same mention of a candidate in a book?⁶ And Malcolm Stewart, I think, realized that he was in trouble because, while we may be amenable in the United States to prohibiting a corporation from spending a lot of money on a broadcast ad, we don't burn books. (Actually, there are a lot of people in America who would like to burn books,

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1. 558 U.S. 310 (2010).

2. *Id.* at 362.

3. *Id.* at 319.

4. Transcript of Oral Argument at 26–27, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205).

5. *Id.*

6. *Id.*

but we don't like to think of ourselves as people that want to burn books).

Eventually, under repeated questioning from Justice Alito, Mr. Stewart says that the Constitution would permit Congress to apply the law to a book.⁷ And there's this pregnant pause there in the courtroom. Then Justice Alito just says softly, "That's pretty incredible."⁸ And he goes on. He asks if a corporation that is a publisher could be prohibited from selling a book.⁹

And again, after quite a bit of hemming and hawing and saying the statute doesn't actually apply to books, and Alito saying, yeah, but what does the Constitution allow, Stewart says, yes, the government's reasoning could apply to banning a book.¹⁰

The bench begins to erupt, and Justice Kennedy asks, "Just to make it clear, it's the Government's position that under the statute, if this Kindle device"—remember, this is 2009, seven years ago, and Supreme Court justices aren't always known for being on top of the tech world—"if this Kindle device had a book, it could be prohibited under the Constitution, and perhaps under this statute?"¹¹

And again, Stewart says, essentially, yes.¹² Although, he did point out that a corporation could form a PAC, a political action committee, collect voluntary contributions from its employees and managers, and use the PAC to publish the book.¹³

At this point, Chief Justice Roberts specifically gets in to ask about banning a book: "So, it's a 500-page book, and at the end, it says 'so vote for x'; the government could ban that?"¹⁴ And again, after some hemming and hawing and insisting that the statute didn't really apply to books, and being challenged in

7. *Id.*

8. *Id.* at 27.

9. *Id.* at 27–28.

10. *Id.*

11. *Id.* at 28.

12. *Id.* at 28–29.

13. *Id.* at 29.

14. *Id.*

response about what the Constitution allows, Malcolm Stewart again says, “Yes.”¹⁵

And Chief Justice Roberts says, “Suppose a sign was held up in Lafayette Park”—this is a park across from the White House—“saying ‘vote for so and so.’ Under your theory of the Constitution, the prohibition of that sign would be constitutional?”¹⁶ And again, noting that, “Of course, you could form a PAC,” Stewart concedes that “otherwise, the answer would be yes.”¹⁷

So, Justice Souter chimes in. Justice Souter says, “Well, what if the union were to hire somebody to write a book or a pamphlet, and then later it was published close to an election, within sixty days of an election. Would it be constitutional to forbid that?”¹⁸ And Stewart says again, “I think it would be constitutional to forbid that.”¹⁹

That is the case of *Citizens United*. That is the case in which the Supreme Court said, we don’t think that’s constitutional.²⁰ And that is the case that has people all over the country horribly upset and thinking this is a crime against the Constitution and the common man.

Let’s back up and go back to the beginning. Campaign finance law is a very complex realm of law. I have found that it has become so complex that, really, I can no longer talk to students about it—not even law students, not even good law students like you folks, and especially trying to talk to undergrads and high school students. You almost can’t do it. I remember years ago, I was at the FEC, and we had a visiting delegation in from China; we were working through interpreters. And finally, the interpreter said to me, “You have to stop, because I cannot explain this anymore; I am out of words to define the difference between an ‘electioneering communication’ and speech ‘for the purpose of influencing of an election’ and speech ‘relative to a candidate’ and ‘generic electioneering.’” She said, “There’s no way to keep slicing this in my vocabulary.”

15. *Id.* at 29–30.

16. *Id.* at 33.

17. *Id.* at 30–33.

18. *Id.* at 37.

19. *Id.* at 37–38.

20. *Citizens United*, 558 U.S. at 365.

At the oral argument in *McCutcheon v. FEC*,²¹ a case from a couple years ago, Justice Scalia actually said at oral argument—and Justice Scalia was a reasonably smart justice—“This campaign finance law is so intricate that I can’t figure it out.”²² And he’s not alone; he’s only more honest than the other justices. During the same oral argument, Justice Kagan dismissed part of *McCutcheon*, the plaintiff’s, argument by offering various hypotheticals.²³ *McCutcheon*’s counsel responded by pointing out that even if the Court ruled in favor of *McCutcheon*, the hypotheticals suggested by Justice Kagan would still be illegal earmarking—a person still couldn’t do those things.²⁴ And Justice Kagan responded that she did not think any FEC would say that that is earmarking.²⁵ I remember sitting there thinking, “That’s very interesting because I voted at least four times to find earmarking in that situation, along with the majority of the commission, and I was ‘Mr. Deregulation’ on the commission.” I’ve seen that kind of error from other Justices in other campaign finance cases as well.²⁶ So it’s a complex area of law.

So let’s set out a few basics. Prior to 1974, there was almost no campaign finance regulation in the United States.²⁷ The earliest federal laws with a ban on corporate contributions to candidates date from 1907.²⁸ There were some laws at the state lev-

21. 134 S. Ct. 1434 (2014).

22. Transcript of Oral Argument at 17, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

23. *Id.* at 6–13.

24. *Id.*

25. *Id.* at 10.

26. *See e.g.*, Transcript of Oral Argument at 141–42, *McConnell v. FEC*, 540 U.S. 93 (2003) (No. 02-1674) (Chief Justice Rehnquist incorrectly interpreting law as allowing business PACs to solicit general public for contributions); Transcript of Oral Argument at 24–30, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (No. 00-191) (Justices Souter and Breyer repeatedly basing questions on incorrect understanding of law regulating “earmarking,” and offering as a “practical example” something that had never before occurred in twenty-five years under the law).

27. *See* Jaime Fuller, *From George Washington to Shaun McCutcheon: A brief-ish history of campaign finance reform*, WASH. POST: THE FIX (Apr. 6, 2014, 9:15 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon> [<https://perma.cc/8ESR-KG85>].

28. Tillman Act, ch. 420, 34 Stat. 864 (1907).

el that predate that by a decade or so.²⁹ But there wasn't much, and for the most part there was no viable enforcement mechanism for these laws.³⁰ Essentially, there was nothing that limited the ability of a person to do what he wanted.³¹ So a person could walk in and contribute whatever he wanted—in theory, millions of dollars—directly to a candidate campaign. And that's the system under which we elected Coolidge and Roosevelt and Truman and Eisenhower and Kennedy and so on, and that's the system under which we, you know, beat the Nazis and passed the Civil Rights Act and the Voting Rights Act and did all that sort of insignificant stuff.

In 1974, Congress passed amendments to the Federal Election Campaign Act, sweeping amendments that provided for limitations in both contributions and expenditures.³² Now particularly of interest is the limitation that was passed on expenditures.³³ Expenditures are defined as when you spend money but you don't give it directly to the candidate or to the candidate's campaign.³⁴ You're just spending money on your own to voice your political beliefs, your political opinions. And Congress passed a law limiting those expenditures to \$1000.³⁵ There are two parts to the statute. One part defines expenditures as anything "relative to" a candidate for office,³⁶ and another part talks about expenditures being anything "for the purpose of influencing" an election.³⁷

Well, you can see those terms, of course, could apply to almost anything. They could apply to what we're talking about today; it might arguably be for the purpose of influencing an election if some of you are convinced to vote for or against cer-

29. See Comment, *Loophole Legislation—State Campaign Finance Laws*, 115 U. PA. L. REV. 983, 983 (1967).

30. See Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 282 (1991).

31. See *id.*

32. R. SAM GARRETT, CONG. RES. SERV., *THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS* 3–4 (2011).

33. The Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, sec. 101, 88 Stat. 1263, 1263–67 (1974).

34. *Id.* sec. 102(d), § 591(f), at 1270–71.

35. *Id.* sec. 101(b)(1), § 608(a)(1), at 1263.

36. *Id.* sec. 101(a), § 608(e)(1), at 1265.

37. *Id.* sec. 102(d), § 591(f)(1), at 1270.

tain candidates based on their campaign finance position. Relative to a candidate? You know, well, okay: Donald Trump. There. Now I've spoken relative to a candidate. We're on the hook, potentially, right? Because he's running for office. The thousand-dollar limit would have applied to groups like the National Education Association, the Sierra Club, the National Rifle Association, and the U.S. Chamber of Commerce. They would be limited to spending \$1000 "relative to" a candidate or to "influence" an election. But how far does \$1000 go these days? I don't think it goes too far.

So the Court was faced with this law. Plus, the statute as passed placed limits on what you could contribute directly to a candidate's campaign.³⁸ The Court took up the issue in several ways. First, it dealt with a fairly simple issue—one that still comes up and so is worth reviewing. This first question is, is money speech?³⁹ Sometimes, people say, "well, money isn't speech." Once you think about it, however, you realize very quickly that, sure, money isn't speech, but money isn't a lawyer either, and if you said to people, "well, you can't pay any money to hire a lawyer," we'd have some problems under the Constitution with your right to counsel.

Similarly—and it doesn't matter whether you're pro-*Roe v. Wade*⁴⁰ or anti-*Roe v. Wade*—if a legislature passed a law saying it shall be illegal to spend any money to procure or provide abortion services, I think most of us would recognize that that would infringe on any right that might exist to obtain an abortion. If we pass a law saying no money shall be spent to construct a Methodist church or a Muslim mosque, it would certainly raise a First Amendment problem regarding freedom of religion. In other words, if you try to limit the money to get at the underlying activity, we recognize that that's often, if not usually, a constitutional problem.⁴¹

So we've got a fundamental right that's being infringed, the First Amendment right, and for the legislature to do that re-

38. *Id.* sec. 101(a), § 608(b)(1), (3), at 1263.

39. See *Buckley v. Valeo*, 424 U.S. 1, 15 (1976).

40. 410 U.S. 113 (1973).

41. See, e.g., *McConnell v. FEC*, 504 U.S. 93, 251–54 (Scalia, J., concurring in part and dissenting in part).

quires a compelling governmental interest.⁴² The government offered up two. One is that we want to promote equality, and the other is that we want to prevent corruption.⁴³ On the equality side, the Court responded that while there may be a lot to be said for political equality—it’s a great thing; we like it in the United States—in the end, the First Amendment is built around the idea that the government cannot regulate speech, and it can’t do it on some kind of excuse like promoting equality.⁴⁴ It’s hard to envision any law that one could not argue, at some level, is intended to promote equality and make the system a little more fair for some particular speaker or speakers. The Court recognized that this is exactly what the First Amendment addresses.⁴⁵

The kinds of laws and pre-publication prohibitions and so on that the Founders were concerned about would not have not been justified if the King had said, “Well, we’re trying to make sure that everybody’s equal, that people are heard properly.” We recognize that that’s a recipe for government abuse, and so that can’t last. In one of the most famous passages of the case called *Buckley v. Valeo*,⁴⁶ the Court says, “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁴⁷

But the government offered the second interest, preventing corruption, and the Court, acting in the immediate aftermath of Watergate, declared that to be a compelling government interest.⁴⁸ We can’t have people essentially taking bribes. And to the argument that campaign contributions aren’t bribes, the Court said, in essence, well, they’re not bribes, but sometimes they’re going to get awfully close.⁴⁹ It’s very tough to tease out. Most campaign contributors aren’t trying to bribe anybody, but it’s pretty tough to tease out the person who says, “Because you

42. See *Buckley*, 424 U.S. at 24–25.

43. See *id.* at 25–26.

44. See *id.* at 54.

45. See *id.* at 48–49.

46. 424 U.S. 1 (1976).

47. *Id.* at 48–49.

48. See *id.* at 26–28.

49. See *id.*

support this tariff that really benefits my industry, I'm going to give your campaign a bunch of money," from the guy who says, "If you support this tariff, I'm going to give you a bunch of money," and we're concerned about that latter case.

So the Court allowed limits on contributions, because contributions to a candidate or his campaign offers that opportunity, where people will talk directly to one another, for that sort of direct *quid pro quo*.⁵⁰ Most contributors never talk to the candidates directly, of course, but still, the Court allowed this sort of prophylactic blanket limiting the size of contributions.⁵¹ And it should be noted that the Court really views that issue as a bit less of a speech issue and more of an association issue.⁵² As long as you can have independent expenditures, you can speak as much as you want, and the Court strikes down limits on independent expenditures.⁵³ It says you can't limit people speaking. That, the Court says, you just cannot do. And people who are just making expenditures independently, by definition, don't have that opportunity to discuss favors with the candidates.

So the Court makes that split: you can limit contributions, but you cannot limit expenditures, and that's the basic framework.⁵⁴ The Court looks on that contribution as more of an associational issue.⁵⁵ It reasons that even if there are limits on contributions, you can still associate with people; you can still join together in a group, contribute your \$1000 or whatever your limit is, and if you really want to speak more, you can go speak independently.⁵⁶

Now, although the plaintiffs in *Buckley* included various corporations, the plaintiffs had not specifically challenged the provision prohibiting corporations from making expenditures; they just challenged the general limit on the amount of expenditures.⁵⁷ So the FEC—and here I think the Agency was inten-

50. *See id.* at 26–27.

51. *See id.* at 27–29.

52. *See id.* at 23.

53. *See id.* at 51.

54. *See id.* at 143.

55. *See id.* at 23.

56. *See id.* at 28.

57. *See id.* at 11.

tionally frustrating the Supreme Court's intent—continued to enforce the limit on corporate expenditures.⁵⁸

But in fact, it really didn't matter much, because there was a pretty easy workaround; if you were at all good, you could work around it without too much trouble.⁵⁹ This is because the Court had also said that the statutory phrases, "for the purpose of influencing the election" and "relative to" a candidate—were way too vague.⁶⁰ Who knows what that means? "Relative to a candidate," who knows what that is? It is way too vague. So the Court said, unless you're specifically advocating for the election or defeat of a candidate, it's not going to be regulated.⁶¹

This meant that you could run some interesting ads—and some of you may remember these. You don't see these as much anymore, but if you're a little bit older, you might remember these. They'd begin typically with dark cello music, you know, playing a single low note, like just before someone is murdered in a slasher movie, so you knew that this was a very serious event. And then somebody would come on, and they would say, "Judge Sullivan has been called an *ass* by a major daily paper. He's known to steal Social Security checks out of mailboxes and hates small dogs. Call Judge Sullivan and tell him we don't need his agenda in Washington." And you'd be like, "Whoa, I'm not going to vote for him," right? But that was in fact not a campaign ad; you were never told to vote for or against him, only to give him a call. So corporations and unions could fund those kinds of ads.⁶²

These were cut off in 2002 by a law called the Bipartisan Campaign Reform Act,⁶³ more commonly known as McCain-Feingold, and that's the law that said, if an ad even mentions a candidate in the sixty days before an election, then it cannot be

58. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 203 (2003).

59. See Daniel B. Roth, *Campaign Finance Reform, Electioneering Communications, and the First Amendment: Resuscitating the Third Exception*, 38 J. MARSHALL L. REV. 1315, 1326 (2005).

60. *Buckley*, 424 U.S. at 41.

61. See *id.* at 44.

62. See *id.*

63. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

funded by corporate funds.⁶⁴ They would have to—as Malcolm Stewart emphasized repeatedly—form a PAC and do it through their PAC. So that’s what set the stage for *Citizens United*.

By the time of *Citizens United*, the law had become incredibly complex. In that case, I organized a group of former Federal Election Commissioners to file a brief on the side of Citizens United.⁶⁵ We noted in the course of this brief that the FEC had separate rules regulating seventy-one different types of people or entities that might participate in politics,⁶⁶ and regulating thirty-three different types of speech that people might engage in.⁶⁷ How many combinations can you get from seventy-one entities and thirty-three types of speech? It’s 7422.

It’s been said by Alfred North Whitehead that all Western philosophy consists of a series of footnotes to Plato’s *Republic*.⁶⁸ Well, the Federal Election Campaign Act is 244 pages; the regulations alone are 568 pages.⁶⁹ This is before you get to all the FEC interpretations and guidelines and advisory opinions. Just the regulations and the statutes themselves are approximately seventy-five percent longer than Plato’s *Republic*, the rock of all Western philosophy.

It’s worth looking at the background of *Citizens United*. In 2004, some of you remember, a filmmaker—he’s still around; Michael Moore—made a documentary called *Fahrenheit 9/11*.⁷⁰ And he said openly that he hoped it would help to defeat George W. Bush, and it was a very critical documentary of President Bush.⁷¹ People complained to the Federal Election

64. *Id.* sec. 201(a), § 434(f)(3)(A)(II)(aa), at 89.

65. Brief Amici Curiae of Seven Former Chairmen & One Former Commissioner of the FEC Supporting Appellant on Supplemental Question, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2349018.

66. *See id.* at *11–12.

67. *See id.* at *15 n.10.

68. ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY* 39 (The Free Press 1978) (1929).

69. Federal Election Campaign Act of 1971, Pub.L. 92–225, 86 Stat. 3 (1972).

70. *FAHRENHEIT 9/11* (Dog Eat Dog Films 2004).

71. Martin Kasindorf & Judy Keen, “*Fahrenheit 9/11*”: Will it change any voter’s mind?, *USA TODAY* (June 24, 2004), https://usatoday30.usatoday.com/news/politicselections/nation/president/2004-06-24-fahrenheit-cover_x.htm [<https://perma.cc/GSZ4-RWE7>].

Commission about this, and we dodged these complaints on a number of bases.⁷² But in the end, the fact is that, legal reasons aside, we mainly dodged them because I think we all thought, “Look, we’re just not going to sensor a movie by a major filmmaker. We’re just not going to do that.” So we gave Michael Moore and the various corporations that worked to produce and distribute his film an administratively created exemption for business, like if you want to sell t-shirts—you know, “Make America Great Again!”—you can sell t-shirts and that’s not considered a campaign finance violation.⁷³ So that’s what we did.

So next along comes this organization, Citizens United, a group that people join specifically to advocate for their political ends. And they say, well, we produced a movie, and it’s called *Celsius 41.11*,⁷⁴ and it’s a rebuttal of *Fahrenheit 9/11*. I’m told—I don’t know this to be true—that Celsius 41.11 is the temperature at which the human brain melts. So that was their theory, and it was an anti-Kerry documentary that was supposed to support George W. Bush. And we at the FEC got it and said, you can’t do that; you’re not really filmmakers. I mean Michael Moore, he’s won at the Cannes Film Festival and stuff. But you, Citizens United, you’re just an advocacy group.

So Citizens United said, okay, we’ll show you. And they spent the next four years making documentary movies. You name a subject that people want to get going about on talk radio, and they probably made a documentary about it—the United Nations, immigration, whatever it is.⁷⁵ And they come up in 2008 and they said, so now we’ve got a movie, and we call it *Hillary: The Movie*, and we want to publicly show this movie, and we want to run ads for this movie. And the FEC said, nope, you can’t do that, because we still don’t really think you’re filmmakers. By the way, Citizens United had even en-

72. See, e.g., *Citizens United v. Moore*, MUR Case #5467 (2004), <http://eqs.fec.gov/eqsdocsMUR/00001764.pdf> [<https://perma.cc/EAX7-THUZ>].

73. The Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, sec. 102(d), § 591(f)(4)(D), 88 Stat. 1263, 1269 (1974).

74. CELSIUS 41.11 (Citizens United 2004).

75. See, e.g., *BROKEN PROMISES: THE UNITED NATIONS AT 60* (Citizens United 2005); *BORDER WAR: THE BATTLE OVER ILLEGAL IMMIGRATION* (Citizens United 2006).

tered some of their films in film festivals. They won an award in the Best Documentary category at, I think it was the Houston Film Festival.⁷⁶ I'm not in the industry, I don't think that's one of the big ones, but still, they could honestly say they were award-winning filmmakers. So they were doing pretty good. And this was how the case comes to the United States Supreme Court.

What is amazing to me is, in the days before that decision, I got these calls from journalists, and they'd say, "Is it going to be five-four? Is Kennedy the swing vote?" They were very excited; you know, you could tell just by their voices. This is a little bit of a digression, but it's interesting. "Is Kennedy the swing vote?" they'd ask. It just shows how journalists think, right? Kennedy's always the swing vote, so he's got to be the swing vote in this case. And I'd say something like, "Look, Kennedy's been on the court for a quarter-century and has voted against the government in every campaign finance case.⁷⁷ He is not the swing vote. If there's a swing vote, it's not him." It just shows how the press analyzes things.

But here's where I was wrong. I'd tell the journalists, this will be a nine-zero; maybe it'll be eight-one. I said there will be different opinions, and some of the Justices would go much further than others. But none of the Justices are going to say you cannot run a documentary movie about a presidential candidate in an election year; no Justice is going to say that's a permissible statute under the First Amendment. But in fact, four of them did.⁷⁸ Four Justices of the Supreme Court said that the United States government can ban a documentary movie about a political candidate in an election year if at any point in the process of production or distribution or sales there's a corporation involved—as there always is, as there's been in every mov-

76. See *Remi Award Winning Entries for the 44th Annual WorldFest*, WORLDVEST, <https://worldfest.org/remiwinners/2011.xls> [<https://perma.cc/CC42-Z5YW>] (last visited Aug. 21, 2017).

77. There is one exception, *FEC v. Beaumont*, 539 U.S. 146 (2003), a relatively low stakes case in which he concurred in the judgment on the grounds that Court was following its clear precedents, while suggesting that perhaps that precedent was wrong. *Id.* at 163–64 (Kennedy, J., concurring). He was not the decisive vote in the case.

78. See *Citizens United v. FEC*, 558 U.S. 310, 316 (2010).

ie you've ever seen in your life, except home movies. And that's *Citizens United*.

In conclusion, I think the decision is wholly welcome, wholly within the norms of First Amendment law, and quite clearly correct. Yet that's the controversy that has roiled the world for the last several years.