Chapter 6

Civil Liberties: Is Corporate Spending on Elections the Equivalent of Free Speech?

Citizens United is a conservative advocacy group dedicated to restoring "traditional values" and the free market in American society. After producing a documentary film, *Hillary: The Movie*, highly critical of then-Senator Hillary Clinton, Citizens United sought to run television ads for the movie shortly before the Democratic primaries for president. According to the Bipartisan Campaign Reform Act (BCRA) of 2002, commonly known as McCain-Feingold (after the two senators who co-sponsored it), corporations may not spend money that expressly advocates the election or defeat of a candidate for 30 days before a primary (or 60 days before a general election). The Federal Election Commission (FEC) concluded that *Hillary* was being distributed for no other reason than to discredit Clinton in the upcoming presidential primaries and ruled that the ads could not be aired. This ruling was upheld by the U.S. District Court for the District of Columbia. Citizens United appealed the decision and the Supreme Court agreed to hear the case.

The Supreme Court could have ruled narrowly on the case, for example, by simply deciding whether television ads for distributing a film by DirectTV were prohibited under BCRA. Instead, the Supreme Court decided to broaden the case to examine the constitutionality of the system of campaign finance regulations established by BCRA. On January 21, 2010 the Supreme Court announced its momentous decision overturning over a century of law and declared that profit and nonprofit corporations can spend unlimited funds to elect or defeat candidates for public office. Corporate spending, the Court ruled in a close 5-4 vote, was free speech protected under the First Amendment: "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."

The announcement immediately unleashed a torrent of free speech for and against the ruling in *Citizens United v. Federal Election Commission*. Defenders extolled the Supreme Court for eliminating an egregious example of government censorship. As David Bossie, the president of Citizens United, put it, "The Supreme Court stopped a 100-year slide down a very slippery and dangerous slope last week, and I am proud to have played a role." The *New York Times*, on the other hand, attacked the decision in an editorial: "The Supreme Court has handed lobbyists a new weapon. A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election." In his weekly radio address, President Obama charged that the ruling "strikes at our democracy itself," adding "I can't think of anything more devastating to the public interest."

In order to evaluate this debate, you need to understand the system of campaign finance regulations that has grown up since the Watergate scandal of the Nixon administration. Congress has sought to limit the role of big contributors in elections by placing rules on who can give money for what purposes. The original legislation passed in 1974, the Federal Election Campaign Act (FECA), made a distinction between hard and soft money. If corporations wanted to contribute money directly to a candidate, they had to do it with hard money, which means money contributed to Political Action Committees (PACs), which are regulated by the FEC. However, soft money, or contributions that were independent of the candidate or party, were unregulated. The result was a flood of soft money into elections, supposedly independent of the campaign, but which might as well have been controlled by the party or the candidate because they had the effect of directly supporting the election of particular candidates. The 2002 BCRA, or McCain-Feingold Act, attempted to fill this hole by banning independent expenditures financing television advertising right before an election. Thus, before *Citizens United* corporations could not independently fund ads to defeat or elect specific candidates.

Citizens United makes it difficult for the government to regulate corporate spending on elections because it gives corporations the same free speech rights as individuals. By striking down the ban on independent corporate contributions the Court overturned federal law going back to the Tillman Act of 1907 that enabled the government to distinguish between expenditures by individuals and expenditures by corporations. The former were protected as free speech while corporate spending could be regulated. *Citizens United* eliminated this distinction, which had been upheld in *McConnell v. Federal Election Commission* (2003) and *Austin v. Michigan Chamber of Commerce* (1990), and equated corporate spending with individual free speech. The Supreme Court ruling potentially strikes down similar state laws, but at the same time that it strikes down limits on corporate spending it upholds the authority of government to require disclosure of who is paying for the ads.

What follow are excerpts from the majority opinion, written by Justice Anthony Kennedy, and from the minority dissenting opinion, written by Justice John Paul Stevens. We have edited out the extensive citations and footnotes that are found in the original opinions. (Readers are encouraged to read the

full original opinions which are easily accessible online.) Both opinions are splendid examples of careful reasoning on a crucial issue facing modern democracies—whether and how to regulate corporate spending on elections. Justice Kennedy argues that the Constitution does not allow the government to make a distinction between different types of speakers, regulating some and not regulating others. He sees no evidence that independent corporate expenditures will corrupt politicians. Justice Stevens, on the other hand, argues that there is no evidence that the framers of the Constitution wanted no distinctions between corporations and individuals. Clearly, Stevens argues, corporations are different from individuals and more dangerous to democracy; Congress has every right to regulate corporate expenditures.

When you read the democratic debate between Justice Kennedy and Justice Stevens you should consider a number of issues that have been raised. Conservatives pride themselves on upholding precedent in judicial decision making (called *stare decisis*) and judicial restraint (not overturning laws passed by Congress). In this case, the majority opinion overturns longstanding legal decisions and laws. Should the conservative justices have been more deferential to judicial precedent and the will of Congress? It is difficult to know the intent of the framers of the Constitution with regard to corporations because large private corporations, as we know them today, did not exist in 1789. If so, how does Justice Kennedy argue that the framers actually would have approved of regulating corporate spending on elections?

Corporate Spending on Elections Is Free Speech and Should Not Be Regulated (Excerpts from the Majority Opinion)

JUSTICE ANTHONY KENNEDY

The First Amendment provides that "Congress shall make no law… abridging the freedom of speech." Laws enacted to control or suppress speech may operate at different points in the speech process….

The law before us is an outright ban, backed by criminal sanctions. Section 441b[1] makes it a felony for all corporations—including nonprofit advocacy

1. The relevant section of the Bipartisan Campaign Reform Act of 2002.

corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under §441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U. S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate association from the corporation. So the PAC exemption from §441b's expenditure ban, does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with §441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.

And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur:

> These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed by 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation.

PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs.

PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed,

the depth of their exploration, and the size of the audience reached." Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. (Government could repress speech by "attacking all levels of the production and dissemination of ideas," for "effective public communication requires the speaker to make use of the services of others.") If §441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.") The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office… "

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter, the quoted language provides a sufficient framework for protecting the relevant First Amendment interests in this case. We shall employ it here.

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each…

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion…

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. If the antidistortion rationale were to be accepted, however, it would permit

Government to ban political speech simply because the speaker is an association that has taken on the corporate form. The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. The Government responds "that the FEC has never applied this statute to a book," and if it did, "there would be quite [a] good as-applied challenge." This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.

Political speech is "indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." ("[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….")

It is irrelevant for purposes of the First Amendment that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas…

Austin interferes with the "open marketplace" of ideas protected by the First Amendment.[2] It permits the Government to ban the political speech of millions of associations of citizens. Most of these are small corporations without large amounts of wealth…

This fact belies the Government's argument that the statute is justified on the ground that it prevents the "distorting effects of immense aggregations of wealth." It is not even aimed at amassed wealth.

The censorship we now confront is vast in its reach. The Government has "muffle[d] the voices that best represent the most significant segments of the economy." And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of "destroying the liberty" of some factions is "worse than the disease." The Federalist No. 10, p. 130 (B. Wright ed. 1961) (J. Madison). Factions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false….

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. This is unlawful. The First Amendment confirms the freedom to think for ourselves….

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2. Austin v. Michigan Chamber of commerce (1990) which upheld regulation of corporate spending on elections.

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse "to take part in democratic governance" because of additional political speech made by a corporation or any other speaker....

Austin is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws. Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.

Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. Today, 30-second television ads may be the most effective way to convey a political message. Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues. Yet, §441b would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.

When word concerning the plot of the movie *Mr. Smith Goes to Washington* reached the circles of Government, some officials sought, by persuasion, to discourage its distribution.[3] Under *Austin*, though, officials could have done more than discourage its distribution—they could have banned the film. After all, it, like *Hillary*, was speech funded by a corporation that was critical of Members of Congress. *Mr. Smith Goes to Washington* may be fiction and caricature; but fiction and caricature can be a powerful force.

Modern day movies, television comedies, or skits on Youtube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value" in order to engage in political speech. Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments

3. A 1939 film starring James Stewart as an idealistic young man who dramatically confronts corruption in Congress.

are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design.

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. "The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it."

The judgment of the District Court is reversed with respect to the constitutionality of 2 U. S. C. §441b's restrictions on corporate independent expenditures.

Corporate Spending on Elections Is Not Free Speech and Can Be Regulated (Excerpts from Minority Opinion)

JUSTICE JOHN PAUL STEVENS

The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.

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. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races….

The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution….

The So-Called "Ban"

Pervading the Court's analysis is the ominous image of a "categorical ba[n]" on corporate speech. Indeed, the majority invokes the specter of a "ban" on nearly every page of its opinion. This characterization is highly misleading, and needs to be corrected….

Under BCRA, any corporation's "stockholders and their families and its executive or administrative personnel and their families" can pool their resources to finance electioneering communications. A significant and growing number of corporations avail themselves of this option; during the most recent election cycle, corporate and union PACs raised nearly a billion dollars. Administering a PAC entails some administrative burden, but so does complying with the disclaimer, disclosure, and reporting requirements that the Court today upholds, and no one has suggested that the burden is severe for a sophisticated for-profit corporation. To the extent the majority is worried about this issue, it is important to keep in mind that we have no record to show how substantial the burden really is, just the majority's own unsupported factfinding. Like all other natural persons, every shareholder of every corporation remains entirely free under *Austin* and *McConnell* to do however much electioneering she pleases outside of the corporate form.[1] The owners of a "mom & pop" store can simply place ads in their own names, rather than the store's….

So let us be clear: Neither *Austin* nor *McConnell* held or implied that corporations may be silenced; the FEC is not a "censor"; and in the years since these cases were decided, corporations have continued to play a major role in the national dialogue….

Identity-Based Distinctions

The second pillar of the Court's opinion is its assertion that "the Government cannot restrict political speech based on the speaker's … identity…."

"Our jurisprudence over the past 216 years has rejected an absolutist interpretation" of the First Amendment. The First Amendment provides that "Congress shall make no law … abridging the freedom of speech, or of the

1. McConnell v. FEC (2003) which upheld regulation of corporate spending on elections.

press." Apart perhaps from measures designed to protect the press that text might seem to permit no distinctions of any kind. Yet in a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems. In contrast to the blanket rule that the majority espouses, our cases recognize that the Government's interests may be more or less compelling with respect to different classes of speakers....

As we have unanimously observed, legislatures are entitled to decide "that the special characteristics of the corporate structure require particularly careful regulation" in an electoral context. Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also "furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information," Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the "speakers" are not natural persons, much less members of our political community, and the governmental interests are of the highest order....

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.[2] More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could "enhance the relative voice" of some (*i.e.*, humans) over others (*i.e.*, nonhumans). Under the majority's view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.

In short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.

Our First Amendment Tradition

The Framers took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they

2. The name given to Japanese broadcasters of anti-American propaganda during world war II.

constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind. While individuals might join together to exercise their speech rights, business corporations, at least, were plainly not seen as facilitating such associational or expressive ends. Even "the notion that business corporations could invoke the First Amendment would probably have been quite a novelty," given that "at the time, the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign."

In light of these background practices and understandings, it seems to me implausible that the Framers believed "the freedom of speech" would extend equally to all corporate speakers, much less that it would preclude legislatures from taking limited measures to guard against corporate capture of elections....

Having explained why ... *Austin* and *McConnell* sit perfectly well with "First Amendment principles," I come at last to the interests that are at stake. The majority recognizes that *Austin* and *McConnell* may be defended on anticorruption, antidistortion, and shareholder protection rationales. It badly errs both in explaining the nature of these rationales, which overlap and complement each other, and in applying them to the case at hand.

The Anticorruption Interest

Undergirding the majority's approach to the merits is the claim that the only "sufficiently important governmental interest in preventing corruption or the appearance of corruption" is one that is "limited to *quid pro quo* corruption...."[3] While it is true that we have not always spoken about corruption in a clear or consistent voice, the approach taken by the majority cannot be right, in my judgment. It disregards our constitutional history and the fundamental demands of a democratic society.

On numerous occasions we have recognized Congress' legitimate interest in preventing the money that is spent on elections from exerting an "undue influence on an officeholder's judgment" and from creating "the appearance of such influence," beyond the sphere of *quid pro quo* relationships. Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other's backs—and which amply supported Congress' determination to target a limited set of especially destructive practices....

3. Corruption in which someone pays off a politician in exchange for political favors.

Our "undue influence" cases have allowed the American people to cast a wider net through legislative experiments designed to ensure, to some minimal extent, "that officeholders will decide issues … on the merits or the desires of their constituencies," and not "according to the wishes of those who have made large financial contributions"—or expenditures—"valued by the officeholder." When private interests are seen to exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns, the result can depart so thoroughly "from what is pure or correct" in the conduct of Government….

At stake in the legislative efforts to address this threat is therefore not only the legitimacy and quality of Government but also the public's faith therein, not only "the capacity of this democracy to represent its constituents [but also] the confidence of its citizens in their capacity to govern themselves." "Take away Congress' authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance…."

In short, regulations impose only a limited burden on First Amendment freedoms not only because they target a narrow subset of expenditures and leave untouched the broader "public dialogue," but also because they leave untouched the speech of natural persons….

In addition to this immediate drowning out of noncorporate voices, there may be deleterious effects that follow soon thereafter. Corporate "domination" of electioneering, can generate the impression that corporations dominate our democracy. When citizens turn on their televisions and radios before an election and hear only corporate electioneering they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders "call the tune" and a reduced "willingness of voters to take part in democratic governance." To the extent that corporations are allowed to exert undue influence in electoral races, the speech of the eventual winners of those races may also be chilled. Politicians who fear that a certain corporation can make or break their reelection chances may be cowed into silence about that corporation. On a variety of levels, unregulated corporate electioneering might diminish the ability of citizens to "hold officials accountable to the people," and disserve the goal of a public debate that is "uninhibited, robust, and wide-open." At the least, I stress again, a legislature is entitled to credit these concerns and to take tailored measures in response….

All of the majority's theoretical arguments turn on a proposition with undeniable surface appeal but little grounding in evidence or experience, "that there is no such thing as too much speech." If individuals in our society had infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; and if broadcast advertisements had no special ability to influence elections apart from the merits of their arguments (to the extent they make any); and if legislators always operated with nothing less than perfect virtue; then I suppose

the majority's premise would be sound. In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process.

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 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. It is a strange time to repudiate that common sense. 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.

Discussion Questions

1. Do you think that *Citizens United* will unleash a torrent of corporate spending that will corrupt the political process? Will elected officials now be afraid to vote against the interests of large corporations?
2. Opponents of *Citizens United* argue that corporations spend funds that ultimately belong to shareholders without getting the permission of shareholders. Is this a problem? If you owned stock in a corporation, would you object to that company spending money to defeat an elected official whom you supported?
3. Do you think full disclosure of who paid for an ad, including the name of the chief elected officer (CEO), will cause corporations to limit their campaign spending for fear of offending customers or investors?
4. Do you favor a system of public financing of elections in which candidates who receive a minimum of support can opt for public funding of their campaigns, paid for by voluntary dues checked-off on income tax returns, and thus avoid all private contributions?

Suggested Readings and Internet Resources

For a comprehensive examination of campaign finance laws before *Citizens United* see Michael Malbin, ed., *Life After Reform: When the Bipartisan Campaign Finance Reform Act Meets Politics* (New York: Rowman and Littlefield, 2003). Revealing examinations of the effects of private money on electoral politics are found in Charles Lewis, *The Buying of the President, 2004* (New York: Perennial, 2004) and in Robert G. Kaiser, *So Damn Much Money: The Triumph of Lobbying and the Corrosion of American Government* (New York: Alfred A. Knopf, 2009). For

a critical analysis of attempts to regulate campaign finance, see Bradley Smith, *Unfree Speech: The Folly of Campaign Finance Reform* (Princeton, N.J.: Princeton University Press, 2001).

Federal Election Commission (FEC)
www.fec.gov
The FEC's official government site provides access to data on campaign contributions and information on campaign regulations.

Center for Responsive Politics
www.opensecrets.org
This site provides accessible data, based on FEC reports, on campaign contributions to candidates across the country.

Campaign Finance Institute
www.cfinst.org
The Campaign Finance Institute is a non-partisan, non-profit institute, affiliated with George Washington University, that conducts research and makes recommendations for policy change in the field of campaign finance.