BY *Erwin Chemerinsky*
Erwin Chemerinsky is the dean and distinguished professor of law at the University of California, Irvine, School of Law. He can be reached at EChemerinsky@law.uci.edu.

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The Most Important Decision of the Term

No matter what else happens this term, the Supreme Court's decision in *Citizens United v. Federal Election Commission* almost surely will be its most important ruling.[1] In a 5–4 decision, the Court declared unconstitutional a provision of the McCain-Feingold Bipartisan Campaign Reform Act of 2002. The provision limited the ability of corporations and unions to run broadcast advertisements for or against an identifiable candidate 30 days before a primary or 60 days before a general election for a federal office.

The Court had upheld this provision in *McConnell v. Federal Election Commission* in 2003.[2] It had also previously upheld state laws limiting corporate spending in election campaigns in *Austin v. Michigan Chamber of Commerce*.[3] In *Citizens United*, the Court expressly overruled both decisions.

Citizens United arose out of the 2008 presidential election when a conservative political action corporation made a video-on-demand movie that was critical of then-Democratic candidate Hillary Clinton. The question presented to the Court was whether the provision of the McCain-Feingold Act limiting "electioneering communication" by corporations applied to a video-on-demand movie. Rather than deciding this issue, the Court asked for new briefing as to whether the provision should be declared unconstitutional and whether *McConnell* and *Austin* should be overruled.

By a narrow majority, the Court did exactly that, broadly holding that corporations have the same First Amendment rights as individuals and that restrictions on corporate campaign spending are unconstitutional. Disclosures of corporate spending are still required. The Court focused only on "independent expenditures" by corporations, or their ability to spend money on their own in election campaigns; the constitutionality of restrictions on corporate contributions to candidates was not at issue.

The Court was split along ideological lines, with Justice Anthony Kennedy writing for the Court, joined by Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito. Justice John Paul Stevens wrote a lengthy and vehement dissent.

What does this decision mean for the future? The implications, on many levels, are likely to be enormous.

Elections will never be the same. The Court has likely changed the nature of federal, state, and local elections across the country. The decision does not mean that corporations will spend large amounts in every election or that such spending will always be decisive. But corporations will spend heavily in some elections, and this may make a huge difference in their outcomes.

One aspect of the decision that has not yet been analyzed is its effect on judicial elections. In 38 states, state high court judges face some form of judicial election.[4] The costs of such elections in many states have already escalated tremendously; corporate spending will drive these costs even higher.

And more corporate spending in judicial elections will no doubt affect the number of judges who will have to recuse themselves from cases that come before them. Last year, in *Caperton v. A.T. Massey Coal Co.*, the Court held that due process required the recusal of

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a West Virginia Supreme Court justice after officials of a company with a case before that court spent $3 million to get him elected.[5]

Other campaign finance laws are vulnerable. *Citizens United* rested on two key premises: spending money in election campaigns is political speech under the First Amendment, and corporations have the same free speech rights as citizens. These assumptions and the Court's holding can be used to challenge other campaign finance laws, like those that govern union expenditures.

Even more unsettling is the possibility that the decision may affect laws that prohibit corporations from contributing money directly to candidates for elective office. *Citizens United* concerned only independent expenditures by corporations and not their right to make contributions directly to a candidate's campaign. But this distinction seems irrelevant given that the Court held that corporations are entitled to the same free speech rights as citizens, which include spending money to influence elections.

Likewise, the Court did not consider the constitutionality of restrictions on campaign spending by foreign corporations. But that, too, seems immaterial when one considers that foreign corporations, like American ones, have the capacity to inform the public and increase discussion and debate.

In fact, the Court implicitly rejected any notion that free speech is limited to citizens. Corporations obviously are not citizens. Yet, they are accorded First Amendment protection in *Citizens United*. This is in marked tension with earlier cases holding that the First Amendment protects only speech by citizens.

Just four years ago, in *Garcetti v. Ceballos*, the Supreme Court held that there is no First Amendment protection for the speech of government employees on the job acting in the scope of their duties.[6] As in *Citizens United*, the opinion was written by Kennedy and joined by Roberts, Scalia, Thomas, and Alito. Kennedy stressed that speech by government employees is not protected because it is not speech as "citizens." He wrote: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[7]

But if corporations have full First Amendment rights, then it makes no sense to limit free speech protection to expression by citizens. Indeed, the claim for free speech protection by government employees is even stronger than that for corporations; government employees do not relinquish their citizenship when they enter their workplace.

The Roberts Court reveals its disregard for precedent. In 2003, in *McConnell*, the Court upheld the constitutionality of the same provision that was invalidated in *Citizens United*. What changed in the intervening seven years? Justice Sandra Day O'Connor, who had been part of the majority to uphold the provision of the McCain-Feingold law, was replaced by Alito, who voted to strike it down.

In a concurring opinion in *Citizens United*, Roberts said that the Court should overrule the earlier decisions because they were "erroneous."[8] But what made them erroneous was simply that a majority of the current Court disagreed with them.

During their confirmation hearings, Roberts and Alito talked a great deal about respecting precedent and superprecedent. Now, it is clear that this was empty rhetoric. The Roberts Court obviously gives little weight to precedent, as evidenced last term when it overruled decisions that changed the standards for pleading in federal court,[9] created major new exceptions to the exclusionary rule,[10] and limited the protections of the Sixth Amendment right to counsel.[11] Not coincidentally, each of these decisions was 5–4, with the same five conservative justices in the majority.

The constant conservative attack on judicial activism is put to rest. By any measure, *Citizens United* was stunning in its judicial activism. The deference to the democratic process so often preached by conservatives in attacking liberal rulings that protect rights was nowhere in evidence.

Conservatives have lambasted court decisions protecting rights not stated in the Constitution or intended by its framers. But there is no evidence that the First Amendment's drafters contemplated the notion that spending money in election campaigns is a form of protected speech. Nor did they intend any provisions in the Bill of Rights to protect corporations. It was not until 1978, in *First National Bank of Boston v. Bellotti*, that the Court first found any First Amendment protection for speech by corporations.[12]

Few Supreme Court decisions are more important on as many different levels as *Citizens United*. It portends even greater changes in campaign finance laws in the years ahead, and it reveals much about the Roberts Court. By any measure, it will likely be the most significant decision of the 2009 term.

Notes

1. 130 S. Ct. 876 (2010).
2. 540 U.S. 93 (2003).
3. 494 U.S. 652 (1990).
4. Am. B. Assn. Standing Comm. on Jud. Indep., *Fact Sheet*, www.abanet.org/judind/jeopardy/fact.html.
5. 129 S. Ct. 2252 (2009).
6. 547 U.S. 410 (2006).
7. *Id.* at 421.
8. *Citizens U.*, 130 S. Ct. at 920 (Roberts, C.J., concurring).
9. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).
10. *Herring v. U.S.*, 129 S. Ct. 695 (2009).
11. *Montejo v. La.*, 129 S. Ct. 2079 (2009).
12. 435 U.S. 765 (1978).