

Citizens United v. FEC: Eight Unanswered Questions

The country is abuzz about the United States Supreme Court's [decision](#) in *Citizens United v. Federal Election Commission*, soon to be known as "the case that launched a thousand law review articles." The implications of *Citizens United* are enormous, and commentators are bitterly divided. Did the Supreme Court untangle a vexatious doctrinal knot and strike a necessary blow for the First Amendment, or did the Court remove the last significant barrier between corporate monetary influence and the political process?

(For cheers, visit the [Volokh Conspiracy](#); for jeers, visit the [Huffington Post](#); for a sampling of positive and negative opinions, visit the [New York Times](#); for useful analysis of underlying issues, visit SCOTUSblog [here](#) and [here](#).)

While I can't answer the many questions the opinion raises, I have outlined some questions of my own, and I am eager to hear other people's opinions and predictions regarding these issues. (I note that moneyed interests, particularly PACs and wealthy individuals, already exert significant influence on the political process. The following questions are predicated on the assumption that *Citizens United* will result in a significant increase in the volume of spending on political advertising, and that such spending by corporations will be subject to less regulation than spending by PACs.)

1. Justice Kennedy certainly puts a lot of faith in the accuracy of corporate political speech. He takes for granted in his hypotheticals ("[t]he Sierra Club runs an ad . . . that exhorts the public to disapprove of a Congressman who favors logging in national forests") that the corporations in question are basing their opinions on proven facts. Kennedy's opinion states that the burden of regulation chills speech in advance of an election and that corporations should be able in essence to speak first and worry later about whether their speech accords with a given regulatory scheme. But what about situations where corporations spread half-truths or even outright falsehoods about candidates? Will candidates be able to get to court in time to stop the corporations before a given election? The law of defamation is not on the side of candidates in such a situation, and neither is the clock. Political candidates are considered "[public figures](#)," and, as such, they must plead and prove additional facts to win a defamation suit: knowledge of the statement's falsehood and/or knowing disregard for the truth, also known as "actual malice." This is, of course, a difficult standard to meet. Will an aggrieved candidate be able to do so before such a corporate-sponsored falsehood undermines an entire campaign? Will courts do anything to make it easier, at least procedurally, for candidates to obtain injunctive relief quickly?
2. In Section 3 of the opinion, Justice Kennedy dismisses the issue of whether the government has an interest in protecting dissenting shareholders from being compelled to fund corporate political speech, stating, "[a]ssume . . . that a shareholder of a corporation that owns a newspaper disagrees with the political views the newspaper expresses. . . . Under the Government's view, that potential disagreement could give the Government the authority to restrict the media corporation's political speech." Kennedy's hypothetical, however, focuses on a publicly held media corporation, despite the fact that both law and

tradition have treated the political speech of media corporations differently from that of non-media corporations. Wouldn't a shareholder in a media corporation, before purchasing his or her shares, understand that expressing political opinion, through an editorial board or similar means, is part of the traditional business of that corporation in a way that it isn't for, say, a plastics company?

3. Kennedy proceeds, "[t]here is, furthermore, little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'" He further states that "[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." Despite Kennedy's faith in the power of the Internet, will it really be possible for shareholders to express disagreement with corporate political speech through corporate democratic measures quickly enough to protect their own interests, especially if the mere production of the ad exposes the corporation to suit or harms its reputation?
4. Further, if shareholders can't quickly make their views known through traditional measures of corporate democracy, won't they find new ways to voice their disagreement? For example: if a corporate-sponsored political ad leads to a defamation lawsuit against the corporation, will that suit lead to an accompanying [shareholder derivative suit](#) against the corporate directors who approved the advertisement that exposed the corporation to liability? What if an advertising campaign is factually accurate but takes a wildly unpopular stance that ultimately hurts the corporation's bottom line?
5. Similarly, how will the [business judgment rule](#) apply to corporate decisions to fund political advertising? How will the decision to spend corporate funds on political advertising be weighed in terms of corporate directors' duties to act in good faith, act in the corporation's best interest, and not waste corporate resources?
6. Given the new potential legal risks of corporate political advertising described above, corporations will probably choose to limit their liability by forming separate corporate entities for political advertising. What will these entities look like? Will plaintiffs have any success in holding parent corporations liable for the acts of these separate entities?
7. Eugene Volokh [notes](#) that the new campaign spending paradigm may pump significant amounts of money into the media industry, since corporations will need places to run their ads. In the past, newspapers and other media outlets have refused to run certain political ads. For instance, a Virginia TV station [rejected](#) a candidate's ad for using misleading statistics; ; Fox News [refused to run](#) an ad from the Center for Constitutional Rights that opined that the Constitution was "being destroyed" by the Bush administration. But what about when a corporation that is already a big buyer of print ads contacts, say, the Washington Post and wants to include a political ad that contravenes internal advertising standards in a significant advertising buy? (I single out the Post because its publisher, Katherine Weymouth, has been under scrutiny recently for [allegedly meddling](#) with editorial content in search of advertiser-friendly stories.) Will media outlets maintain the same standards they have used to vet political ads in the face of a new onslaught of political ad spending, especially given that traditional media outlets are suffering an ongoing decline in advertising revenue?
8. Finally, it's notable that the concerns immediately raised by the opponents of the *Citizens United* decision are the same raised by opponents of the 1987 repeal of the [Fairness Doctrine](#) – namely,

monopolization of limited media resources and corporate resistance to liberal viewpoints. The Fairness Doctrine was repealed by Reagan appointees at the FCC who believed it violated the First Amendment. The end of the Fairness Doctrine is [credited](#) with creating the era of conservative talk radio. Will this new advertising paradigm have a similar effect on the structure and content of particular forms of media?

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