

## **The Supreme Court's Citizens United Ruling:**

### **First Amendment Victory or Blow to Representative Democracy**

#### **"By the People and For the People"?**

In January of 2010, a bitterly divided Supreme Court issued its 5-4 ruling in the case *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). In *Citizens United*, the Court overruled two of its own recent precedents (and more than a century of related law) that limited election spending by corporations and labor unions, ruling that corporations have a First Amendment right to unlimited political spending in elections as a form of free speech.

The majority opinion, written by Justice Anthony Kennedy and joined by Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas and Samuel Alito, held that the First Amendment rights of corporations were infringed upon by laws governing their spending in elections. The dissent, written by Justice John Paul Stevens, and joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer, and Sonia Sotomayor, contended that the majority was ends-driven and had committed a major error by treating corporate political speech as equivalent to speech by individual human beings.

The case arose when Citizens United, a political action committee (PAC), sought to air television ads for the video-on-demand documentary, "Hillary: The Movie." The documentary was highly critical of then-presidential candidate Hillary Clinton. The Federal Election Commission ruled that the ads would violate a section of the 2002 Bipartisan Campaign Reform Act (also known as the McCain-Feingold Act) that forbade corporations and unions from paying for ads mentioning a candidate in the 30 days preceding a primary election and the 60 days before the general election if the communications at issue were "susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Citizens United challenged the FEC's ruling and, as is now well-known, ultimately prevailed in the Supreme Court.

## **The Debate by Leaders and Scholars**

The Court's ruling in *Citizens United* has been extremely controversial. It has been both criticized and defended by leaders and scholars across the political spectrum. Justice Ginsburg has identified it as "the worst ruling the current Court has produced," and said

that "[i]f there was one decision I would overrule, it would be *Citizens United*. I think that the notion that we have all the democracy that money can buy strays so far from what our democracy is supposed to be." [Jeffrey Rosen, "Ruth Bader Ginsburg is an American Hero," *The New Republic*, Sept. 28, 2014]. Senator John McCain, sponsor of the McCain-Feingold law and 2008 Republican presidential nominee, reportedly called it "the worst decision ever." According to McCain, "They [the Court] said that money is free speech. Since when is money free speech? Money is money." [Nick Wing, "John McCain: Citizens United is 'Worst Decision Ever'. 'Money is Money', Not Free Speech," *The Huffington Post*, Oct. 12, 2012.] On the other hand, the decision has been defended as a vindication of the First Amendment by respected Constitutional lawyers such as Floyd Abrams and by groups as diverse as the Cato Institute and the American Civil Liberties Union (ACLU). [Floyd Abrams and Burt Neuborne, "Debating 'Citizens United: Was the Supreme Court's infamous decision a desecration, or only what the Constitution requires? A First Amendment scholar and civil liberties advocate debate," *The Nation*, Jan. 13, 2011].

## **The Reaction of the American People**

Notably, polls of the American people have shown that the majority of Americans disapprove of the decision. A July 2014 poll commissioned by the group Public Citizen and conducted by Democratic polling firm Lake Research Partners and Republican polling firm Chesapeake Beach Consulting found that 61 percent of those polled oppose the decision, with 61% of Democrats, 58% of Republicans, and 62% of Independents opposed to the ruling that allows corporations and labor unions to spend unlimited amounts of money on political campaigns. Further, even higher percentages disapprove of special interest lobbying and election spending; 76% of Democrats; 79% of Republicans and 74% of Independents believe such lobbying and spending negatively impacts American politics. [Karin Kamp, "Majority of Americans Want Money Out of Politics," Nov. 21, 2014, [billmoyers.com](http://billmoyers.com)].

## **The Impact of the Decision on Election Spending**

As reported by the Brennan Center for Justice at the New York University School of Law, the amount of outside election spending (meaning spending by people and groups

other than the candidates or political parties) has skyrocketed in the years since the decision, particularly spending by a small group of extremely wealthy individuals and their spouses. (Indeed, coverage of the 2016 Presidential Campaign, just underway, is already focused on each candidate's question for his or her "own billionaire" to bankroll the campaign.)

According to the Brennan Center, "fewer than 200 people and their spouses ... have bankrolled nearly 60 percent of all super PAC spending since 2010" while "for the first time in decades, the total number of reported donors has begun to fall, as has the total contributed by small donors (giving \$200 or less). In 2014, the top 100 donors to super PACs spent almost as much as all 4.75 million small donors combined." (In 2014, in a case called *McCutcheon v. FEC*, the same narrow majority of justices overruled aggregate limits on campaign spending by individuals.)

The Brennan Center's report also says that three other negative impacts of the *Citizens United* decision are "a tidal wave" of dark money influencing the outcome of elections, the weakening of contribution limits generally, and the trampling of employee and shareholder rights by those who control corporations. [Daniel I. Weiner, "Citizens United Five Years Later," Jan. 15, 2015, The Brennan Center for Justice].

## THE ESSAY QUESTION

Which side of the debate is correct, in your opinion? Which is most consistent with the core values of American democracy? Was *Citizens United* correctly decided by the majority? Why or why not? If you believe that it was, please explain your reasoning. If you are of the opinion that it was not, please explain that reasoning, too, and tell us what you believe should be done to improve the current situation.

## BACKGROUND MATERIAL

**The *Citizens United v. FEC* Ruling:** The Supreme Court's ruling (and the dissent) can be accessed by clicking here: [Citizens United v. Federal Election Commission Decision](#). Your essay should reflect that you have read and carefully considered the arguments in both the ruling and the dissent.

**The Oral Arguments in *Citizens United*:** While Wikipedia is generally frowned upon as a scholarly source, and you are not encouraged to rely on the substance of the entry, the Wikipedia page on the *Citizens United* decision, [https://en.wikipedia.org/wiki/Citizens\\_United\\_v.\\_FEC](https://en.wikipedia.org/wiki/Citizens_United_v._FEC), includes a link to the oral argument in the Supreme Court. You should click on the link labeled "Reargument" (September 9, 2009) to listen to the argument most directly connected to the ultimate ruling.

**Federalist No. 57**, by James Madison. [http://avalon.law.yale.edu/subject\\_menus/fed.asp](http://avalon.law.yale.edu/subject_menus/fed.asp).

**The Brennan Center Report:** The Brennan Center for Justice Report by Daniel I. Weiner, "[Citizens United Five Years Later](#)," may be accessed by clicking on the link. You may also visit the Brennan Center's web page by going to <http://www.brennancenter.org>.

**Various Articles:** While there are thousands (if not millions) of articles to be found on this topic, for general background purposes, you may wish to read the following articles:

**Adam Liptak, "Justices, 5-4, Reject Corporate Spending Limit," *The New York Times*, January 21, 2010,** may be accessed by going to: [http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?pagewanted=all&_r=0)

**Jeffrey Toobin, "Annals of Law: Money Unlimited," *The New Yorker*, May 21, 2012,** may be accessed by going to: <http://www.newyorker.com/magazine/2012/05/21/money-unlimited>. This article includes an excellent summary of the history of more than a century of campaign finance law in the United States, as well as an analysis of the *Citizens United* ruling and how it came about.

**Floyd Abrams and Burt Neuborne, "Debating `Citizens United: Was the Supreme Court's infamous decision a desecration, or only what the Constitution requires? A First Amendment scholar and civil liberties advocate debate," *The Nation*, Jan. 13, 2011,** may be accessed by going to: <http://www.thenation.com/article/157720/debating-citizens-united> .

**Jeffrey Rosen, "Ruth Bader Ginsburg is an American Hero,"** *The New Republic*, Sept. 28, 2014, may be accessed by going to: <http://www.newrepublic.com/article/119578/ruth-bader-ginsburg-interview-retirement-feminists-jazzercise> .

**Karin Kamp, "Majority of Americans Want Money Out of Politics,"** Nov. 21, 2014, may be accessed by going to: <http://billmoyers.com/2014/11/21/majority-americans-want-money-politics/>.

**Gabrielle Levy, "How Citizens United Has Changed Politics in 5 Years,"** *U.S. News & World Report*, Jan. 21, 2015, may be accessed by going to: <http://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics>.

**Heather K. Gerken, Wade Gibson and Webb Lyons, "Rerouting the flow of `dark money' into political campaigns,"** *The Washington Post*, April 3, 2014, may be accessed by going to: [http://www.washingtonpost.com/opinions/rerouting-the-flow-of-dark-money-into-political-campaigns/2014/04/03/1517ac6e-b906-11e3-9a05-c739f29ccb08\\_story.html](http://www.washingtonpost.com/opinions/rerouting-the-flow-of-dark-money-into-political-campaigns/2014/04/03/1517ac6e-b906-11e3-9a05-c739f29ccb08_story.html).

**Additional Research.** Of course, you can do additional research to support your arguments. You must be sure that all of your research is properly cited and can be located and verified by the contest judges. At all times, you should be cognizant of your Marshall "information literacy" learning outcomes as you evaluate the appropriateness of source material.

## **RULES AND PRIZES**

This contest is open to any Marshall University student who will be enrolled full-time and in good academic standing in September of 2015. A suggested length for a standard academic essay is 10-15 pages, but there is no required length or page limitation.

Winning entries should demonstrate a thorough understanding of the reasoning and thoughtful consideration of each side of this debate. Careful proofing to ensure that there are no typographical or grammatical errors is **strongly** recommended. All entries should be typewritten, double-spaced, and submitted on standard-size 8.5 x 11 inch

paper. Your entry should be mailed to the address below. It must be postmarked by July 31, 2015.

**Deadline for submission for the 2015 contest is July 31, 2015 (postmarked).**

The winners will be recognized in a special awards ceremony dedicated to the Essay Competition as part of the celebration of Constitution Week in September. First Prize is \$1,000; Second Prize is \$500.

**Submit entries to:**

Patricia Proctor, Director  
Simon Perry Center for Constitutional Democracy  
Marshall University, Old Main Room 230L  
One John Marshall Drive  
Huntington, WV 25755

patricia.proctor@marshall.edu

## **HISTORY OF THE CONTEST**

The Dan O'Hanlon Essay Competition was established in 2009, after an anonymous donor requested that Marshall find a way to promote scholarship related to the Constitution and simultaneously honor retired Cabell County Circuit Court Judge Dan O'Hanlon. Prior to his long career on the bench, Judge O'Hanlon served as professor and chair of the Marshall University Criminal Justice Department. In 2007, he was selected by the West Virginia Justice Association as Judge of the Year. The awards for the winners of the competition are presented in a public ceremony each year during the week in September that Marshall University celebrates the birthdays of both the United States Constitution and Chief Justice John Marshall, for whom the university is named.