

THE PATH to THE ROAD to THE SUPER HIGHWAY OF CITIZENS UNITED v. THE FEDERAL ELECTION COMMISSION

This article chronicles the battles of the past that led to the Citizens United v the Federal Election Commission.

First Steps in Claiming that the Constitutional Rights of Citizens Apply to Corporations

In the 1886 case of *Santa Clara County v Southern Pacific Railroad Company*, lawyers successfully used the 14th Amendment to argue that corporations have the rights afforded to persons—specifically that the Southern Pacific Railroad had the same tax exemptions that persons of California have—in spite of the fact that the California State Constitution denied railroads "the right to deduct the amount of their debts [i.e., mortgages] from the taxable value of their property, a right which was given to individuals."¹ The text of the Supreme Court's decision includes:

"One of the points made and discussed at length in the brief of counsel for [Santa Clara County] defendants in error was that "corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United State."²

Before the Court began to hear the arguments of opposing council, Chief Justice Waite said:

"The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does."³

It was the Court's clerk who chose the following words as the heading of the record of the Court's proceedings: *"The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States"*⁴

Attack of American Free Enterprise System

The first fifty years of the 20th Century included many tumultuous events from world wars to the Great Depression and then the prosperity of the "post war years" of the 1950's. The 1960's brought a different kind of turmoil when many people questioned the war in Viet Nam, and the status of minority groups and women. This resulted in new legislation, particularly the Civil Rights Act⁵ and the "Great Society."⁶

¹ Syllabus *Santa Clara County v. Southern Pacific R. Co.* 118 U.S. 394 (1886)

<https://supreme.justia.com/cases/federal/us/118/394/case.html> , viewed 03/22/16

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ "Civil Rights Act", "History.com", <http://www.history.com/topics/black-history/civil-rights-act> , viewed 04/01/16

⁶ Tumulty, Karen, "The Great Society at 50", *Washington Post*, May 7, 2014,

<http://www.washingtonpost.com/sf/national/2014/05/17/the-great-society-at-50/> , viewed 04/01/16

Those changes were very controversial. In August 1971, Lewis Powell, Jr. wrote what he called a memorandum to the Chairman of Education of the American Chamber of Commerce. In that memorandum he listed his many concerns about the social and economic disarray he saw in the country and provided a very detailed list of recommendations to confront what he called “The Attack of American Free Enterprise System”.⁷ Powell’s memorandum identified the problem with the following words:

“No thoughtful person can question that the American economic system is under broad attack... what now concerns us is quite new in the history of America. We are not dealing with sporadic or isolated attacks from a relatively few extremists or even from the minority socialist cadre. Rather, the assault on the enterprise system is broadly based and consistently pursued. It is gaining momentum and converts.”⁸

He identified the “converts” as:

“The most disquieting voices joining the chorus of criticism come from perfectly respectable elements of society: from the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences, and from politicians.”⁹

He identified the essential freedoms that he believed were in need of defending:

“The essential freedoms remain: private ownership, private profit, labor unions, collective bargaining, consumer choice, and a market economy in which competition largely determines price, quality and variety of the goods and services provided the consumer.”¹⁰

And he listed just how the contest should be directed:

“. . . the lesson [is] that political power is necessary; that such power must be assiduously [sic] cultivated; and that when necessary, it must be used aggressively and with determination — without embarrassment and without reluctance.”¹¹

Mr. Powell’s memorandum consists of eight very detailed pages of recommendations for the launch of concerted operations to change the direction in which he feared the country was going. Two months later President Nixon appointed him to the Supreme Court of the United States. The Powell memorandum remained undisclosed throughout the hearings for his Supreme Court appointment. Long after his confirmation to the Court, it was given to Jack Anderson, a liberal syndicated columnist, who stirred interest in the document when he cited it as reason to doubt Powell’s legal objectivity. Anderson cautioned that Powell “might use his position on the Supreme Court to put his ideas into practice... on behalf of business interests.”¹²

⁷ Powell Memorandum: Attack on American Free Enterprise, http://www.lwvawacutoolkit.org/Powell_Confidential_Memorandum.pdf, viewed 03/22/16

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² “The Powell Memo”, *Reclaim Democracy*, http://reclaimdemocracy.org/powell_memo_lewis/, viewed 03/22/16

The Contest Between American Free Enterprise and The Rights of Citizens

While Mr. Powell wrote and disseminated his memorandum promoting free enterprise and essential freedoms, Congress was working to develop and pass the legislation that became the Federal Election Campaign Act (FECA) of 1971. FECA consolidated remnants of earlier legislative campaign finance reform efforts, instituted more stringent disclosure requirements for federal candidates, political parties and political action committees (PACs) established by corporations and labor unions, required full reporting of campaign contributions and expenditures, and limited spending on media advertisements.¹³

While FECA did not designate an administrative authority, it was an important weapon in the long on-going effort to limit the use of money in elections and in the governing process. In 1974, the Federal Election Campaign Act was amended. The amendments set greater limits on contributions by individuals, political parties and PACs. An additional amendment in 1975 established the Federal Election Commission (FEC), an independent agency to regulate campaign finance legislation. A provision of the FECA amendment describes the FEC's duties as: "to disclose campaign finance information, to enforce the provisions of the law such as the limits and prohibitions on contributions, and to oversee the public funding of Presidential elections."¹⁴

From Congress to the Supreme Court

By 1976, the forum for how political campaigns and the money flowing through them should be defined and managed moved from Congress to the United States Supreme Court. In *Buckley v Valeo*, the Court found that:

“. . . although the [Federal Election Campaign] Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contribution."¹⁵

In other words, some kinds of money—independent expenditures in campaigns, expenditures by candidates from their own personal or family resources, and total campaign expenditures - were ruled to be violations of the First Amendment. The Supreme Court majority determined that the potential that such expenditures could lead to corruption was not great enough to warrant a curtailment of free speech and association. Following the *Buckley v Valeo* decision, money and its relationship to corrupt practices began to be allied with concerns to protect First Amendment Rights to Free Speech. The Supreme Court of 1976 viewed the dangers of corruption from money as not of such great consequence that they should be restricted by legislation. At the same time, they viewed the ability to have and use money in the political process as a First Amendment right.

The spectacular collapse of the U.S. savings and loan industry in the 1980s and early 1990s, brought fraud charges against Charles Keating, chair of Lincoln Savings and Loan. Five senators requested that the charges against Keating not be pursued. Keating had been a major contributor to each of their campaigns, donating close to \$1.4 million dollars total. These senators became known as the Keating

¹³ Federal Election Campaign Act – Wikipedia, https://en.wikipedia.org/wiki/Federal_Election_Campaign_Act, viewed 03/22/16

¹⁴ "About the FEC", *Federal Election Commission*, <http://www.fec.gov/about.shtml>, viewed 03/22/16

¹⁵ *Buckley v Valeo*, <http://caselaw.findlaw.com/us-supreme-court/424/1.html>, viewed 03/22/16

Five.¹⁶ When these revelations were made public, there was a surge in awareness of the issues of money in the political process. However, it was not until 2002 that Congress responded with The Bipartisan Campaign Reform Act (BCRA), more commonly referred to as the “McCain-Feingold Act.” BCRA banned unrestricted (“soft money”) donations made directly to political parties (often by corporations, unions, or wealthy individuals), the solicitation of those donations by elected officials, and disallowed certain kinds of political advertising in defined periods before elections.¹⁷

When the Bipartisan Campaign Reform Act was challenged in 2003 in *McConnell v the Federal Election Commission*, the Supreme Court ruled that BCRA only marginally impacts the ability of contributors, candidates, officeholders and parties to engage in effective political speech, and the provisions of the law were upheld.¹⁸

[Justice Anthony] Kennedy, dissenting in part in the 2003 *McConnell v. FEC* stated, “*Buckley made clear, by its express language and its context, that the corruption interest only justifies regulating candidates’ and officeholders’ receipt of what we can call the ‘quids’ in the quid pro quo formulation.*”¹⁹

The debate about regulating campaign contributions continued for the rest of the decade of the 2000’s.

Along Comes *Citizens United*

The presidential election of 2008 was conducted under the restrictions legislated in BCRA. During that election campaign the political action committee (PAC) named Citizens United,²⁰ produced and intended to broadcast on television “Hillary,” a documentary that was critical of candidate Hillary Clinton. The Federal Election Commission, using BCRA regulations about types of political advertising within proscribed times, ruled that the documentary could not be shown on television right before the 2008 Democratic primaries. That year, Citizens United sued the Federal Election Commission.²¹

In 2009, Chief Justice John Roberts chose the suit brought by Citizens United as the case to bring definitive closure to that question of money and politics and free speech. After first hearing arguments in 2009 in the limited question of whether the restrictions on political advertising in proscribed times before elections was constitutional, Chief Justice Roberts ordered the claimants to return with new arguments. In 2010, five of the nine justices ruled that the spending limits in the McCain-Feingold Act were unconstitutional.²²

¹⁶ Fetini, Alyssa, “The Keating Five”, *Time Magazine*, <http://content.time.com/time/business/article/0,8599,1848150,00.html> , viewed 03/22/16

¹⁷ Campaign Finance Law Quick Reference for Reporters, http://www.fec.gov/press/bkgnd/bcra_overview.shtml, viewed 03/22/16

¹⁸ *McConnell v. Federal Election Commission* by Casebriefs.com, <http://www.casebriefs.com/casebriefs/mcconnell-v-federal-election-commission> , viewed 03/22/16

¹⁹ Teachout, Zephyr, “What John Roberts Doesn’t Get About Corruption”, *Politico Magazine*, <http://www.politico.com/magazine/story/2014/04/what-john-roberts-doesnt-get-about-corruption-105683#ixzz3Q8Mvbsf7>, viewed 05/26/16
, viewed 03/22/16

²⁰ Citizens United, <http://www.citizensunited.org> , viewed 03/22/16

²¹ McElroy, Lisa, “*Citizens United v. FEC* in plain English” *SCOTUS blog*, www.scotusblog.com/2010/01/citizens-united-v-fec-in-plain-english, viewed 03/22/16

²² *Citizens United v FEC*, *Supreme Court of the United States*, <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> , viewed 03/22/16

Five of the appointed nine justices wrote to confirm that money does equal free speech, that corporations are merely “associations” of individuals and, therefore, have the rights of First Amendment protection, that political advertising is the most essential kind of speech and that the only definition of corruption is “quid pro quo,” the actual and overt exchange of money for a vote then cast.²³

The argument between those who can and do give as much money as they choose to candidates and issues in political campaigns and those who believe that money corrupts the process by enhancing the influence of wealth at the cost to the rights of all voting citizens is ongoing, questioning whether human beings have rights equal to the incorporated businesses that make up the Free Enterprise System.

²³ *Citizens United v FEC*, Supreme Court of the United States, <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf> , viewed 03/22/16