Legislative Intervention in Corporate Governance Is Not a Necessary Response to Citizens United vs. Federal Election Commission

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Using *Citizens United vs. Federal Election Commission* as a Pedagogical Tool

From a student’s perspective, a legal environment of business course can be like looking into a harshly bright light. The students are expected to absorb a broad spectrum of new words, old words with new meanings, rules and exceptions to the rules. We expect the students to learn at least a little about a great many legal topics. There are relatively few unifying practical applications for us to use to tie the concepts together. At times, the “light” we offer can be nearly blinding.

Moreover, far too often, we as teachers of business law must also shrug our shoulders and say that we just cannot explain the reason for some rules, particularly those arising from court decisions. The absence of unifying practical applications and easily-understood reasons in some situations makes it difficult for students to anchor the concepts in their memories. Therefore, we need to strive for other means of helping our students retain and recall our course material.

The decision of the United States Supreme Court in *Citizens United v. Federal Election Commission* provides a rare pedagogical diamond with numerous facets through which to refract a large number of legal issues. The goal is not to spot issues for the sake of spotting issues, however. Rather the goal is

(Fn: I have successfully used tools other than cases as filters through which students can better understand material. For example, I have often used specific individuals to illustrate several legal concepts. If the students can then remember that one individual they perhaps can recall more than one concept. For example, I use O.J. Simpson for the following learning objectives:

- Understanding that a criminal law violation can also be a civil law violation;
- Understanding the difference between proving a case beyond a reasonable doubt vs. by a preponderance of the evidence;
- Understanding the criminal trial process;
- Understanding false imprisonment;
- Understanding the homestead exemption from laws protecting debtors; and
- Understanding the difference between obtaining a legal judgment and collecting on that judgment.

Similarly, I use Britney Spears to illustrate concepts such as the need to have a good reputation in order to be successful in a defamation action (fn), the right to privacy and the discovery process (fn). By recalling a
provide a means of anchoring multiple legal concepts to a single mnemonic device (fn). The case can be introduced early in the course when either constitutional law or the United States court system is introduced. Then, as the many other legal and political concepts present in the case are covered, the teacher can recall the case for the students, in order to illustrate new material. By doing so, the older material should also be reinforced.

As described below, *Citizens United* also is likely to remain in the news thereby allowing us as business law teachers to make note of a news story related to the case on a particular day even if not covering a *Citizens United*-related topic that day.

(This article summarizes *Citizens United* and takes inventory of the smorgasbord of legal and political issues raised in the case. Along the way, the article will suggest some likely news events over the next several years that might arise as a result of the decision or that might affect the decision, and that business law teachers could use to reinforce the case and the legal principles it illustrates. Also throughout, the article will suggest some specific “active learning” (fn) methods, including using online learning tools, that could be employed.)

**Summary of *Citizens United* and Federal Election Law**

On January 21, 2010, the U.S. Supreme Court issued its decision in *Citizens United v. Federal Election Commission*, (fn) holding that portions of the McCain-Feingold campaign finance law (fn) prohibiting corporate and union expenditures for certain political communications violated the First Amendment’s protection of free speech. The Court found that the government’s interests in restricting such expenditures were not important enough to justify the infringements on free speech. The Court’s decision sparked protests that the Court had overturned precedents to reach its ruling (fn e.g., NYT 4/18/2010), and that the Court had under-valued the government’s interests in restricting such expenditures.

Congress and state legislatures have attempted to rein in corporations’ ability to influence elections many times since at least the early 20th century. One important purpose of such laws has been to avoid corruption or the appearance of corruption (fn to CU opinion). In his dissenting opinion in *Citizens United*, Justice Stevens noted that the first such federal law was the Tillman Act, passed in 1907, which banned all corporate contributions to candidates. (fn) (Balanced against this are First Amendment concerns.)

By the mid-20th century, it had become apparent that corporations and labor unions could avoid the Tillman Act’s provisions by taking out ads in support of candidates, so
long as there was no “coordination.” (fn needed) The Taft-Hartley Act in 1947 was passed, among other reasons, to prohibit corporations and labor unions from using their “treasury” funds for “independent expenditures” to pay for “express advocacy” in a federal (check this) election. An “independent expenditure” is defined today as an expenditure for a communication “expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party or its agents." (fn 11 CFR 100.16(a)) . This concept of indirect, non-coordinated, campaign contributions was the central issue sixty years later in Citizens United’s Hillary movie as well.

Nearly a quarter century after Taft-Hartley, Congress again expressed its concern over the role of corporations in federal elections (both direct and indirect) when in 1971 it passed the Federal Election Campaign Act (FECA), which consolidated earlier election laws. FECA added more stringent disclosure candidates for federal candidates. (fn) However, due to continued perceived abuses during the 1972 federal elections, just three years after FECA became law, Congress amended FECA in 1974 and created the Federal Election Commission as a centralized enforcement agency for the law. The 1974 amendments also provided the mechanism for the first publicly-funded presidential election in 1976, and set limits on contributions by individuals, political parties and political action committees (PACs). (fn)

In response to the 1974 amendments to FECA, conservatives led by New York Sen. James Buckley challenged the restrictions on, among other things, indirect expenditures for political campaigns, using the argument that money is itself speech and the “quantity of expression” (fn) could not be limited under the First Amendment, Buckley v. Valeo. (fn) In 1976 the Supreme Court agreed with the plaintiffs that the 1974 FECA amendments had indeed violated the First Amendment when it limited the rights of individuals (not corporations) to make independent expenditures. (2 U.S.C. 431(17)). The Buckley Court held that the government’s “important government interest” in the prevention of corruption and the appearance of corruption was not sufficient to justify such a limitation on individuals. (fn)

By contrast, the Buckley Court upheld a separate provision of the 1974 amendments that restricted an individual’s direct contributions to candidates, ruling that this provision was justified by the same anti-corruption government interest that was not sufficient for restricting independent expenditures. (fn) (see good blog http://nahmodlaw.com/2010/02/26/from-buckley-to-citizens-united-part-one/)

Two years later, in 1978, the Supreme Court once again looked at the political speech rights of corporations, this time in the context of a Massachusetts statute prohibiting contributions and expenditures by corporations for the purpose of affecting referendum votes. The Court held that such a prohibition violated the corporation’s First
Amendment rights, and agreeing that the First Amendment applied to corporations and applied to political speech. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). (see CU opinion syllabus too)

The first time that the Supreme Court had to apply the notion of an “independent expenditures” limitation to corporations was in 1990 when it took a different approach from *Buckley* and upheld a Michigan law that barred corporations from using treasury funds for independent campaign expenditures. *Austin v. FEC.* (fn) In *Austin*, the Court rested its decision on the new grounds that corporate political speech could be constitutionally limited in order to prevent “the corrosive and distorting effects of immense aggregations of (corporate) wealth that it said had ‘little or no correlation to the public’s support for the corporation’s political ideas.”  (fn to CU) (Justice Scalia was highly critical of the majority’s opinion in *Austin*, labeling the desire to equalize the resources available to different political groups as “Orwellian.” (fn))

By 2002, Congress once again believed that further revisions to federal election law were necessary, particularly in order to curb the rise of “issue ads” and to address the fact that election-related communications were occurring not only on broadcast television and radio but also on cable and satellite media. “Issue ads” were typically negative messages about candidates but were not covered by previous restrictions because they did not use the words “vote no” or “vote against.”  (fn) So, in BCRA Congress added a new election law term, “electioneering communications,” defined to include “any broadcast, cable, or satellite communication” that could be “received by at least 50,000 people,” that refers to a clearly identified candidate for federal office and that is publicly distributed shortly before an election. Corporations (and labor unions) were prohibited from making “independent expenditures” for “electioneering communications.” (fn) (Examples of electioneering communication could include ads or documentaries that are critical of a particular candidate.)

http://www.fec.gov/pages/bcra/rulemakings/ECs_WRTL_Exemption_Examples.shtml

Not long after McCain-Feingold was enacted, the first case challenging its effects on corporate political speech made its way to the Supreme Court, and the result was a defeat for corporations seeking to strike down the law so as to have the same rights as individuals under the First Amendment. The Court held in *McConnell v. FEC* (fn) that the new “electioneering communications” restrictions (on corporations) were necessary not only to prevent the anti-corruption purposes of election laws but also to prevent the “distorting” effect of the corporations’ aggregated wealth described in the 1990 *Austin* decision.

In 2007, the Supreme Court again addressed the constitutionality of McCain-Feingold (as applied to corporations), in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, (fn 551 U.S. 449 (2007). This time, the law did not survive entirely intact as it had in
McConnell, with the Court narrowing the definition of “electioneering communication” to one expressly advocating the election or defeat of a candidate. (fn)

So, in summary, by the time of Citizens United, the Court had zig-zagged several times, and the landscape for regulation of expenditures for candidates for elective office was as follows:

**Buckley (1974)** – indirect expenditures by *individuals* for federal elective office **could not** be regulated

**First National Bank of Boston (1978)** – contributions by *corporations* for state referenda **could not** be regulated

**Austin (1990)** – indirect expenditures by *corporations* in state elections **could** be regulated

**McConnell (2004)** – indirect expenditures by *corporations* for electioneering communications **could** be regulated

**WRTL (2007)** – indirect expenditures by *corporations* for electioneering communications **could** be regulated but such communications had to expressly advocate the election or defeat of a candidate.

With the above as backdrop, a nonprofit education, advocacy and grassroots corporation called Citizens United took center stage in federal election law during the 2008 presidential campaign. According to its Website, Citizens United’s mission is to “reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security.” The organization produced *Hillary: The Movie*, a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate for the Democratic party’s nomination in the 2008 campaign.

The movie was highly critical of Senator Clinton, including its advertisements that portrayed Ms. Clinton against a dark and cloudy sky with what appears to be a tornado forming above her head. (When introducing the movie for the first time, I suggest showing its short “trailer,” which is available online at sites such as YouTube. (fn [http://www.youtube.com/watch?v=PeGlzEavpTM]))

Citizens United distributed *Hillary* in theaters and on DVD, but also sought to distribute the movie through video-on-demand channels on digital cable networks. One cable company offered to make *Hillary* available on a video-on-demand channel called “Elections 08” for a payment of $1.2 million to Citizens United. (fn to S.Ct. opinion).
Recognizing the tenuousness of its position under the existing election law precedents, Citizens United requested a preliminary injunction in _____, 2008 from the United States District Court for the District of Columbia against the FEC from enforcing McCain-Feingold’s prohibition on “independent expenditures” on “electioneering communications” against Hillary (fn). The district court denied the organization’s request and Citizens United sought review by the Supreme Court.

The Supreme Court granted certiorari on the case in 2008, and the case was argued in March of 2009. (fn) In June 2009, however, after oral arguments that had focused on narrow questions of how to interpret BCRA in the context of Hillary, the Court instructed the parties to brief and argue whether it should overrule its decisions in Austin and McConnell, (which had upheld restrictions on independent expenditures by corporations). (fn to S Ct at 5)

On January 21, 2010, in a majority opinion joined in by the justices viewed by most as the “conservative” members of the Court (Chief Justice Roberts and Justices Kennedy, Alito, Scalia and Thomas), the Court decided that indeed it should overrule Austin and McConnell and expand the First Amendment rights of corporations. Writing for the Court, Justice Kennedy said, “Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient government interest justifies limits on the political speech of nonprofit or for-profit corporations.” (fn)

Justice Stevens was joined in a vigorous 90-page dissent by the other justices most often viewed as “liberal” (Ginsburg, Breyer and Sotomayor). Justice Stevens decried the departure from the Court’s earlier respect for the government’s anti-corruption and anti-distortion interests in Austin and McConnell. In particular, he criticized the unwillingness of the majority to draw distinctions based on the speaker’s identity when interpreting the First Amendment, noting that it has routinely done so in the past. (fn)

The Court’s Citizens United decision sparked a firestorm of commentary, pro and con, from a wide variety of sources, from bloggers to columnists, from law professors to shareholder activists and from all levels of elected officials. President Obama himself made a very public criticism of the case during his State of the Union remarks just one week after the decision was handed down, when he stated, “I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities.” (fn to White house press release) Justice Alito, a member of the majority on the opinion was televised mouthing the words “that’s not right” in response to the president’s remarks. (fn) The topics covered in the various commentaries were as varied as the identities of the commentators, revealing the richness of the subject matter at issue in the case, from election law itself, to the possibility of an amendment to the Constitution to reverse the result.

Using Citizens United in a Legal Environment Class
The following is a summary of the legal and related issues raised by *Citizens United*, along with some suggested “active learning” opportunities related to these issues that might be used by teachers of the legal environment of business. Not all of these exercises could be employed, and perhaps not even all of the legal topics could be covered, in a one-semester survey course. However, using more of these topics and exercises might be feasible for a longer or more specialized course on business law. Moreover, the use of the online exercises might be more feasible in a shorter course.

The summary below is organized in the same manner as many legal environment textbooks are organized. The issues raised by *Citizens United* are scattered throughout a typical textbook. Soon, the case will itself appear in textbooks, most likely in the sections on constitutional law. However, this article suggests additional ways to use the case to provide a unifying theme and to provide active learning opportunities, as described below.

Most legal environment textbooks begin with the foundations for the legal environment of business, such as the role of business in society, ethics, the structure of our court system and the ways by which the United States Constitution applies to business. *Citizens United* provides a great many learning opportunities in these areas. *(fn to representative textbook)*

Following their coverage of the foundations of the law for business, most business law textbooks then cover the various areas of the law that apply to all parts of society, not just business. Included here would be administrative law, tort law and criminal law. Again, *Citizens United* provides learning material.

Next in most textbooks come topics that are unique to business, such as business organizations, corporate governance and contract law. While no contract law issues were raised directly by *Citizens United*, instructors might use hypothetical examples based on the case such as a contract between a business and a filmmaker for production of a documentary critical of a particular elected official. As noted below, there are a number of corporate law and corporate governance issues raised by the case.

Finally, most legal environment textbooks cover the regulatory environment for business, particularly regulation by federal agencies. *Citizens United* is at its core an appeal of a decision on whether to apply the rules of the federal agency established to enforce the federal election laws, the FEC, to a particular organization. While the *Citizens United* organization is not itself a for-profit business, one of the widely-anticipated consequences of the case is that it will significantly alter the behavior of for-profit businesses and that it is a reflection on the role of for-profit businesses generally in our society. *(fn)*
“Active learning” is a model of instruction that emphasizes the role of the learner. It is premised on the notion that the more students can be actively engaged with learning material, the more likely it is that they will recall that material. (fn to Bonwell) One widely-cited source for the application of active learning to higher education is Active learning: creating excitement in the classroom, by Charles C. Bonwell and James A. Eison. (fn) Taking the form of a report to the Association for the Study of Higher Education (ASHE) in 199_, (fn) the report defines “active learning” as “instructional activities involving students in doing things and thinking about what they are doing.” (fn to Bonwell at iii) Bonwell and Eison’s report suggests a number of methodologies for active learning. Because the report was written before the arrival of online education, several works have offered “active learning” opportunities for either a course which “blends” face-to-face and online features or a purely online course. (fn)

Foundations of Business Law

*Citizens United* provides an excellent opportunity to introduce the concept that the legal environment of business is a two-way street. Most of the course will be devoted to the many ways that society’s laws and other actions affect business. However, at the start of a course, it is helpful to remind students that businesses’ actions affect society too. One of the most common predictions for the consequences of *Citizens United* is that it will lead to much more spending by business on political campaigns, many more political documentaries and advertisements for them, like *Hillary*, and may well lead to the election of more candidates who will favor business over other interests. (fn)

**Active learning exercise:** Ask students to write down on a slip of paper whether there are more political ads on a particular date in the future after a few election cycles have occurred and place the slip in their wallets with a note “Do Not Open Until (Date).” Suggest that they not take the slips out until the specified date. Every time they spy that slip of paper in their wallets they will be reminded in a small way about the importance of the case and perhaps some of its teachings.

*Citizens United* also raises the ethical issue of whether it is appropriate for business managers to attempt to have a role in the political process. Does giving such a role to business overall help more people or hurt more people? Is this the right way to analyze an ethical issue? Should a wealthy individual or business have more of a role in the political process than an individual or business with limited resources? (fn)

The case also provides a springboard for discussion of corporate social responsibility. Should a business’s decision to participate in the political process be directed solely by whether the decision is good for shareholders, as might have been argued by Milton Friedman, (fn) or should a business have a responsibility to other stakeholders in society
to try to influence public policy through the political process, such as its employees, communities and vendors? (fn)

Even Justice Stevens in his *Citizens United* dissent recognizes the important role of business in society. While believing that corporations should be treated differently than individuals in their First Amendment rights and are not “actual members” of society, he at least acknowledges that they “make enormous contributions to our society.” (fn to opinion at 2)

Several commentators on *Citizens United* have complained that the case represents the ascendancy of big business as the most powerful force in our society overall (fn to Gans). For example, shareholder activist Robert Monks has described the period from the late seventies through 2008 as America’s “Thirty Glorious Years” during which corporate power increased yet co-existed with a well-functioning democracy. He believes that the financial crisis of 2007-2010 has shown that coexistence not to be possible and that Citizens United has created a “compelling need” for “preemptive federal action” to reverse the consequences of such power. (fn to Harvard Law School Forum on Corp Gov)

Engaging students in a discussion about the perceived rise in the power of business early in a legal environment course is particularly important because of the sheer volume of material about to be directed at them which makes it appear that business is hyper-regulated. As each week goes by in our course we add more and more examples of how businesses have misbehaved in some way and how the three branches of government have responded in order to protect the public with new laws and regulations and new judicial principles. *Citizens United* provides a counterpoint to show that business is far from a victim.

Others might see the case as just another chapter in the cyclical rise and fall over time of business’s influence (fn to article used in MBA 612). This discussion might be combined with the topic of the varying ways that the Constitution has been applied to business in the United States, including business’s successful use of the Fourteenth Amendment to fight off government regulation prior to the New Deal, as described below.

**Active learning exercise.** Ask students to do an online search (outside of class) to see who reportedly told the United States Chamber of Commerce in 1971 that “political power is necessary” for corporations and “must be assiduously cultivated” including by looking to the courts for relief. The answer is Lewis Powell, who at the time was a Virginia corporate lawyer but who shortly thereafter was nominated to the United States Supreme Court. As a Supreme Court justice, Powell wrote the majority’s 5-4 opinion in 1978 in *First National Bank of Boston v. Bellotti* holding that limits in a Massachusetts law on a corporation’s
ability to oppose a ballot initiative violated the First Amendment. (fn to case and to Capitalist Joker)

Finally, *Citizens United* allows a discussion of so-called government bailouts, such as those in the automotive and financial services industries during 2009. (fn) Some commentators have suggested that the result in *Citizens United* raises the possibility that taxpayer money might be used by bailed-out businesses to help ensure “the reelection of politicians who treated the corporation or executives favorably.” (fn to Polling Yale L Rev article and to later discussion).

**Stare Decisis**

The common law tradition of *stare decisis*, deciding new cases with reference to already-decided cases, is another foundational concept covered early on in most legal environment of business classes. As noted above, the Supreme Court took the highly unusual step of asking the parties in *Citizens United* to weigh in on whether to overrule the precedents applicable to the case, *Austin* and *McConnell*. Of course, the result in the majority opinion is that these two cases were in fact overruled.

Not surprisingly, then, a great deal of the various opinions in *Citizens United* are spent on the subject of *stare decisis*. Justice Kennedy’s conclusion is that the four factors to be used in deciding whether to adhere to *stare decisis* in a particular case -- workability, the precedent’s antiquity, the reliance interests at stake and whether the decision was well reasoned -- required overturning precedent. (fn to opinion) Justice Kennedy’s analysis is remarkable because unlike most opinions which will painstakingly attempt to distinguish prior cases that do not support a desired result in a new case, Justice Kennedy says that 1990’s *Austin* contravened earlier precedents to it and was not well-reasoned. (fn) Justice Kennedy also argued that *Austin* should be overturned because it had been “undermined by experience; namely, that rapid changes in telecommunications technology had enabled speakers to find ways around campaign finance laws written in earlier telecommunications eras.” (fn to opinion)

That Chief Justice Roberts wrote a concurring opinion that addresses *stare decisis* is also noteworthy. First, it illustrates the arcane (to students) working of the Supreme Court opinions, with a majority, two concurring and one dissenting opinion (three of which directly discussed *stare decisis*). Second, the stated sole purpose of Justice Roberts’s concurring opinion is to address the *stare decisis* issue: “I write separately to address the important principles of judicial restraint and *stare decisis* implicated in this case.” (fn) Although perhaps too fine a point for a legal environment course, Chief Justice Roberts actually uses the importance of *stare decisis* to overturn *Austin*, by arguing that slavish respect for the doctrine might case courts to “invent and adopt new principles of constitutional law solely for the purpose of rationalizing past errors.” Such firm rejection of the *Austin* precedent is reminiscent of the case usually used by
legal environment of business teachers to explain the limits of stare decisis, Brown v. Board of Education of Topeka. (fn)

Active learning exercise. Ask students to look up the Austin decision to determine whether anyone in the majority on that 1990 opinion was still on the Court twenty years later to decide Citizens United, and perhaps be offended by such a stinging rebuke. The answer is that of the six Justices in the majority in Austin, only one was still on the Court to decide Citizens United, and that was Justice Stevens who wrote the dissenting opinion in Citizens United.

Judicial Review

The principles of judicial review and separation of powers are firmly on display in Citizens United. We can discuss with students what must have been the frustration felt by Senators McCain and Feingold, along with all the other senators and representatives who voted in favor of BCRA, when their hard-fought legislative efforts were undone by nine Supreme Court Justices, years after the legislation went into effect. The judicial branch’s power of review over the legislative branch is never questioned in the case, unlike the application of the concept of stare decisis. (move to fn: Indeed, the majority in Citizens United even cites Marbury v. Madison for the proposition that mere legislative action at the state level to restrict corporate political speech does not constitute the type of “reliance interest” that might require application of the stare decisis principle.)

Citizens United illustrates that judicial review can occur in a piecemeal fashion and sometimes years after legislation has been on the books. As noted above, McConnell was decided in 2003, shortly after McCain-Feingold became law in 2002. The law withstood that constitutional challenge. Four years later, the law was challenged again in Wisconsin Right to Life, where the definition of “electioneering communication” was narrowed. Finally, the 2008 decision in Citizens United ruled the provision unconstitutional in its entirety. In short, the prohibition on independent expenditures for electioneering communications was attacked in 2003 but survived; was wounded in 2007; and then killed in 2008.

The electioneering provisions were not the only provisions of BCRA challenged by Citizens United. The organization also challenged the disclaimer provision in 2 U.S.C Section 441d(a)(3) which requires a person or organization that funds a political advertisement to identify itself and its address in the script of the ad, and certain reporting requirements regarding members of an organization and their sources of funding. By an 8-1 majority (Justice _____ voting against), the Court rejected these challenges as constitutional. (fn) So, (even in the same lawsuit), a plaintiff can win some and lose some.

Nor is this likely the end of the constitutional challenges to BCRA. Some commentators have suggested, for example, that if presented with the appropriate case, the Court
might strike down BCRA’s ban on contributions of “soft money” to political parties. (fn to Jenner piece) “Soft money” is defined as money given to a political party to be spent on grass-roots organization, recruitment and advertising as opposed to “hard money” given directly to a presidential or congressional candidate. (fn)

**Equitable Remedy**

Another concept usually addressed early on in a legal environment course is the concept of equitable remedies. *Citizens United* was itself an appeal from a decision by a lower federal court exercising its equitable powers. (fn) *Citizens United* wanted to make *Hillary* available within the time periods proscribed for “electioneering communications” in the 2008 primary elections. (fn to page 4 of S Ct op). Fearing that it would be subject to the civil and criminal penalties of FECA, it sought declaratory and injunctive relief against the FEC that it would not be so subject. (fn) The District Court denied *Citizens United*’s motion for a preliminary injunction (fn to case cite in S Ct op). Thus, students can learn that federal courts today, unlike English courts of the past, have power to grant both legal as well as equitable remedies, and that one type of equitable remedy sometimes available to private parties is a declaration by a court that a government agency may not impose certain penalties against a private citizen.

**Active learning exercise.** Ask students to think through, perhaps as an extra credit question in an online assessment, how the result might have been different if *Citizens United* had chosen to air *Hillary* and then waited to be sued by the FEC for legal damages. One result of that approach might have been a much longer time period for the case to reach the Supreme Court and therefore a delay in reaching the organization’s goals.

**Courts**

All legal environment courses cover in their early weeks the procedures of our federal and state courts (usually at the same time as *stare decisis*, judicial review and equitable remedies noted above). There are at least two court-related topics raised by *Citizens United*: (1) Supreme Court jurisdiction and procedure and (2) the selection process for Supreme Court justices and the importance of that process to the outcome of cases.

The foregoing summary of the case illustrates the certiorari process of the Court, where on a purely discretionary basis the Court may decide to hear a case if at least four of the nine justices approve of it. (fn) The case demonstrates the level of national importance necessary for the Court to exercise this discretion. (fn) *Citizens United* is somewhat unusual in that the case went straight to the Supreme Court from the United States District Court for the District of Columbia, without first being appealed to the United States Court of Appeals for the District of Columbia, (fn) and that as noted above the Court requested that the parties expand the scope of the appeal to include whether to overrule earlier election law cases. (fn)
What has greater potential for both active learning and interest among students is the selection process for Supreme Court justices and the importance of that process when applied to what was at stake in *Citizens United*. The legal procedure for appointing a justice is provided for by the Constitution in only a few words, in the “Appointments Clause” (Article II, Section 2, clause 2), which states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court.” (fn) Of course, the political process attendant to the selection of a Supreme Court justice is even more important than the legal process, because it is that process that leaves its imprint on the actual decisions of the Court regarding the constitution. (fn to CRS report generally)

The importance of the choice of Supreme Court justices on constitutional issues is clearly shown in the Buckley-Bellotti-Austin-McConnell-Citizens United series of cases beginning in 1974 and ending about a quarter century later. While Justice Stevens was on the Court at the time the Buckley decision was announced in January 1976, he had joined the Court in December 1975 after the case had been argued, having been nominated by Republican president Gerald Ford and approved 98-0 by a Democratic-controlled Senate. (fn)

Justice Stevens was the only justice on the Court at the time of both the *Bellotti* and *Citizens United* decisions. Interestingly, just a few years after having been appointed by a Republican president he joined the conservative majority (Powell, Burger, Stewart, Blackmun, Stevens) in *Bellotti* finding that a Massachusetts law prohibiting the expenditure of funds by corporations for the purpose of influencing voter referenda violated the First Amendment. Yet two decades later he took the opposite view in his dissent in *Citizens United* when the issue was not voter referenda but actual elections of individuals to public office. Stevens explained in his *Citizens United* dissent that the government’s interests in restricting expenditures in a referendum are weaker than in an election because “(a) referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation’s retaliation.” (fn to page 53 of dissent).

Thus, by comparing *Bellotti* to *Citizens United*, students can learn the concept of a judge distinguishing one case from another so as not to be bound by *stare decisis*. In addition, Justice Stevens’s journey during the two decades between the two cases illustrates how the long term judicial philosophy of a particular justice might not emerge immediately and can sometimes surprise and disappoint the president and political party who originally supported him or her. (find an article on the evolution of Stevens to a liberal justice.)
The Austin opinion about ten years after Bellotti provides a good illustration of how a justice’s label as a “conservative” might not be a good predictor of his or her vote on a particular case. As noted above, the majority in Austin upheld the constitutionality of a Michigan law that prohibited corporations from using treasury money to support or oppose political candidates in elections, introducing the anti-corruption line of reasoning. The majority opinion was written by the liberal lion Justice Marshall and was joined by the “predictable” liberals Brennan, White and, by this time, Stevens. What is notable is that conservative chief justice Rehnquist, nominated by President Nixon and joining the Court as an associate justice in 1972, participated in the majority opinion.

Rehnquist’s stance against corporate free speech in Austin can perhaps be explained by an overriding strong vision of states’ rights. (look for article or book on Rehnquist explaining his vote here but switching to other side in McConnell) Yet states’ rights cannot explain why thirteen years later in McConnell, the chief justice was in a fractured majority in McConnell upholding the constitutionality of most of BCRA, a federal law.

McConnell also demonstrates just how complex can be the definition of a “majority” in a Supreme Court opinion. There were actually three separate “majority” opinions, one authored by Rehnquist and the other two authored by Justices Stevens and Breyer. Significantly to the Citizens United opinion, Justice O’Connor joined in all three majority opinions upholding BCRA in McConnell. In addition, there were three separate concurrences and two separate dissents in McConnell, for a total of eight opinions in one case. Chief Justice Rehnquist joined in one of the concurrences and one of the dissents. The intricacies of Justice Rehnquist’s views in the case are likely beyond the scope of a legal environment class but nonetheless provide a useful window into Supreme Court opinion-writing for students. The lack of consensus in McConnell can perhaps also be discussed as a predictor for a case’s eventual overruling.

Also notable in the election law timeline in the Supreme Court is that Justice O’Connor was in the dissenting minority in Austin which would have struck down the Michigan law’s restrictions. But in 2003’s McConnell decision, Justice O’Connor voted to uphold BCRA’s restrictions. Her support of restrictions on corporate political speech would be missed by the dissenters in Citizens United, as discussed below.

The macro effect of the composition of the Court on the outcome of an opinion can most clearly be seen in the dichotomy of the McConnell-Citizens United opinions which were decided just seven years apart and with just three justices differing between the two opinions. Chief Justice Rehnquist was replaced in 2005 by Chief Justice Roberts, nominated by President Bush. Justice O’Connor, nominated by President Reagan, was replaced in 2006 by Justice Samuel Alito, nominated by President George W. Bush.
Justice David Souter, nominated by George H.W. Bush, was replaced in 2009 by Justice Sonia Sotomayor, nominated by President Obama. (fn to notorious switch)

The replacement of O’Connor with Alito on the Court is considered by many to have been the crucial change that resulted in the differing results in *McConnell* and *Citizens United*. As noted above, Justice O’Connor had been in the majority of the *McConnell* Court, upholding restrictions on corporate political speech. However, her replacement, Justice Alito, took the opposite view and joined with the majority in *Citizens United*, and indeed was the lightning rod for President Obama’s attack on the case in his January 2010 State of the Union address when he responded by mouthing the words, “That’s not right.” (fn) Had Justice O’Connor still be on the *Citizens United* Court, it is entirely possible that her vote would have shifted the result the other way. (find article that says this.) Indeed, she was quoted from retirement following the case expressing concern that the *Citizens United* result might cause further politicization of the election of state judges. (fn) [http://abcnews.go.com/Blotter/oconnor-citizens-united-ruling-problem/story?id=9668044](http://abcnews.go.com/Blotter/oconnor-citizens-united-ruling-problem/story?id=9668044)

**Active learning experience.** The steps to the exercise are set forth below. Some historical and political commentary from the instructor would be appropriate throughout the exercise. A visual of the ominous advertisement used for Hillary might be an appropriate visual aid.

1. Prepare 14 two-sided 8-1/2x11 inch sheets that identify the holder on the front and provide a short “script” on the back, as shown in the attached handouts.

2. Write “strike down” and “uphold” about ten feet apart on the classroom’s chalk board or white board.

3. Invite 14 students to come to the front of the classroom. Which students are selected or volunteer to “play” which parts can make for some humor!

4. One student holds the sign that he or she is President George W. Bush and another holds the sign that he or she is President Obama. The student who is not president at the time in the exercise stands away from the rest of the students.

5. Nine students hold the signs indicating that they are the members of the *McConnell* Court (one of the cases that was struck down in *Citizens United*).

6. Tell the class that it is 2003 and ask the nine *McConnell* students how they vote in upholding the constitutionality of McCain-Feingold in *McConnell*: “Do
you vote to uphold or strike down the provision of the McCain-Feingold Act which restricts independent expenditures for electioneering communications?" Have the students group themselves in “uphold” or “strike down” groups, using the labels on the chalk or white board and the instructions on the sheets.

7. Tell the students it is now 2005, and have the student portraying President Bush nominate Chief Justice Roberts to replace Chief Justice Rehnquist, with the Roberts student taking his or her place in the line-up, but not part of either of the existing two clusters.

8. Tell the students it is 2006, have the President Bush student nominate Samuel Alito to replace Justice O’Connor, and have the Alito student join the new undecided group.

9. Tell the students it is 2009 and Barack Obama is now president and have the student portraying President Obama nominate Justice Sotomayor to replace Justice Souter, also joining the undecided group.

10. With the Citizens United panel in place (but maintaining the three groups), ask them, one by one how they vote in that case: “Do you vote to uphold or strike down the provision of the McCain-Feingold Act that restricts the expenditure of funds for electioneering communications taking the form of “Hillary: The Movie”?”

11. Instruct the six continuing justices to walk around a bit but ultimately stay put in their existing group (Stevens, Ginsburg and Breyer with the “strike down” group and Kennedy, Scalia and Thomas with the “uphold” group), and note that it is a three-three tie.

12. Then ask the three new justices one-by-one to join one of the two groups, narrating with each student which president nominated him or her.

The result, of course, is that there are now five students (portraying Kennedy, Scalia, Thomas, Roberts and Alito) in the “strike down” group and four students (portraying Stevens, Ginsburg, Breyer and Sotomayor) in the “uphold” group.

13. The final act in this short play might be for the teacher to ask the student portraying President Obama to state how he feels about the result, and then
have the student read President Obama’s State of the Union remarks, printed on the back side of the Obama student’s sign.

14. The student portraying Justice Alito might end things by stating for all to read his lips, “That’s not right!”

This exercise can be updated as the identity of the president and the identities of the Court members change, and as a new case is announced that involves corporate political speech.

**Constitutional Law**

_Citizens United_ presents one of the best vehicles for a business law teacher to explore the intersection of the United States Constitution and business, from both ends of the intersection. First, the case provides an excellent opportunity to examine the contours of the First Amendment’s protections for speech generally, including what is and is not “speech.” Second, the case addresses the applicability of the First Amendment to a business that takes the form of a “corporation.” Sometimes called “corporate personhood,” this dimension of _Citizens United_ also gives instructors a vehicle for investigating the topic of constitutional interpretation.

The case also allows discussion of three other constitutional law-related topics: the use of the Constitution by business to avoid regulation, the process for constitutional amendment and the constitutional requirement for a presidential state of the union address.

**First Amendment Analysis**

_Citizens United_ first provides an example of the principle that the First Amendment guarantee of free speech applies only to government’s restrictions on speech. (fn) Had the ban on expenditures for “electioneering communications” been made by a private enterprise of some sort, there would be no First Amendment issue.

Second, _Citizens United_ provides excellent reinforcement for the principle that “speech” can take various forms and still be protected by the First Amendment, including the expenditure of money. (fill in starting with _Buckley_)

Next, the case clearly sets forth the analysis that courts must employ when faced with a First Amendment dispute. 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.” (fn to majority opinion) The majority in _Citizens United_ suggested that rarely if ever will such government interests exist for corporate restrictions on speech, stating that most laws that “identify(y) certain preferred speakers” at the expense of others will be
constitutionally suspect” (fn) Thus, they stated, the First Amendment will rarely allow “political speech restrictions based on the speaker’s corporate identity.” (fn)

The majority rejected all of the government’s purported government interests that might justify the restrictions on “electioneering communications” in BCRA. In particular, it was critical of the “anti-distortion” interest set forth in Austin, where the court held that Michigan was justified in targeting corporate speech to prevent “the corrosive and distorting effects of immense aggregations of wealth.” (fn) The majority also rejected justifications based on the need to prevent quid pro quo corruption (fn). Finally, as discussed below, the majority rejected a government interest in protecting dissenting shareholders or union members from the actions of the organization’s management. (fn) (add fn that court left open possibility that it might in properly presented case find that government did have a sufficient interest in preventing foreign entities from participating in the political process. – Jenner case at 34)

The Citizens United dissenters did not disagree with the “compelling government interest” standard for deciding First Amendment cases. Rather, they argued that the government had such an interest in light of the “special characteristics” of the corporate structure in “the electoral context.” (fn at 66) The dissenters would have reaffirmed the holding in Austin that limitations on corporate and union electioneering are justified by the need to “preserve () the integrity of the electoral process, prevent () corruption, (and) sustain the active, alert responsibility of the individual citizen’s confidence in government.” (fn at 73) The dissenters also would have upheld the restrictions as necessary to protect dissenting shareholders and union members. (fn at 94)

Corporate Personhood

Both the majority and the dissenting opinions devoted considerable space to analysis of whether the identity of a speaker – in this case a non-profit organization – should affect First Amendment analysis. As noted above, the majority said that identifying “preferred speakers” (fn) will be constitutionally suspect. (fn at 19) They gave a long list of First Amendment protections that have been given to corporations, dating back more than fifty years. (fn to p. 25) They noted that corporations and other associations are similar to individuals in a free speech context because they too “contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.” (fn to opinion at p. 26)

The dissent accused the majority of ignoring the long history in American law allowing differing treatment under the First Amendment depending on the identity of the speaker, noting the special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees that have passed constitutional muster. (fn to page 32 of dissent) The dissent noted that the same
distinction applies with even “additional force” to corporations because not only are they not “speakers” like natural person, but because they are also not truly “members of our political community.” (fn) Commentators critical of the Citizens United result have argued that it is inconsistent to allow corporations to participate in the political process through electioneering while not (properly, they argue) permitting them to vote in elections, run for office or serve as elected officials.

Active learning exercise. Create a true-false or matching assessment online that allows students to determine whether or not First Amendment protections have been extended to the speakers noted in the Stevens dissent.

Active learning exercise. Ask students to search for news stories on the Website created for Murray Hill, Inc., an incorporated Washington, D.C. area public relations firm, to run for Congress in response to the Citizens United decision: http://murrayhillincforcongress.com/. If corporations are “persons” for purposes of the political process, then why can they not run for Congress?!

Constitutional Interpretation – Corporate Personhood

Citizens United allows for discussion of the separation of politics from the law and how that separation affects a judge’s interpretation of the constitution. Thomas Jefferson was highly critical of the intrusion of politics into judicial decision-making. Jefferson wrote the following in response to the Supreme Court’s 1803 decision, while he was president, in Marbury v. Madison, holding that the Supreme Court’s nine justices (all of whom had been nominated by the opposing political party) had the power to determine the meaning of the Constitution:

“To consider the judges as the ultimate arbiters of all constitutional questions is a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.” (fn) (Fn also to Stevens’s reference to Jefferson’s concern that corporations would subvert the government – dissent at 36)

Students can be introduced to the two traditional ideological sides in constitutional interpretation, the politically conservative right which traditionally has favored “strict construction” or “originalism,” on the one hand, and the politically liberal left where judges are often thought of as “judicial activists,” on the other hand.

Judges who favor strict construction believe that public policy should best be left to the elected branches of government and that the role of judges is only to interpret the constitution. Moreover, these judges would say that the Constitution should be interpreted as it was when it was written and not taking into account new rights not created by the elected branches. (fn)
By contrast, judicial activists are those judges who view the constitution as a “living document” that should be interpreted over time as public policy issues arise and not in its largely eighteenth century context. (fn)

The debate in the election cases, including up to and including *Citizens United*, over “corporate personhood” and “money as speech” are prime examples of the debate between interpreting the constitution as it was meant to be interpreted by its drafters and interpreting it as a living document in light of changing social needs.

The framers of the Constitution left any mention of “corporations” out of the document. Moreover when the framers used the word “speech” they were not contemplating expenditures of money, particularly not for cable television movies. (fn) The history of the Constitution shows that James Madison favored the federal government to control the granting of corporate charters. Opponents believed, however, that this authority would concentrate too much power with the central government. Benjamin Franklin proposed a compromise under which the federal government would only have the authority to charter certain corporations to operate the postal service and otherwise to facilitate interstate commerce. (fn to Flank). The final result was that any mention whatsoever was deleted from the document. (fn).

Active learning exercise. Ask students to search for the Constitution online and then utilize the word search feature of their browsers to search for the term “business” (one reference, but referring to the business of each House of Congress) or “corporation” (no references).

*Buckley* is commonly regarded as the first case in which the Supreme Court equated money with speech, when it limited the rights of individuals to make “independent expenditures.” (fn) Writing for the majority, Justice ______ used the analogy, often repeated (fn), that “Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.” (fn 424 U.S. 1, 19 n.18 (1976)) Various commentators have criticized this analogy (fn), and Justice Breyer himself has expressed the principle for protecting expenditures as speech this way: “a decision to contribute money to a campaign is a matter of First Amendment concern not because money is speech (it is not); but because it enables speech.” (fn) (*concurrence cited in November, 2008* 118 Yale L.J. 379)

Active learning exercise. Ask students either face to face or online to discuss whether advances in technology have rendered *Buckley’s* equation of speech and money obsolete because speech can be considerably less expensive today than it was in 1976. In 1976, political advertising consisted largely of advertisements on broadcast television and newspapers and advertisements delivered by the U.S. Postal Service. Today, however, the Internet has provided
not only email as a vehicle for political speech but also technology such as YouTube, at a considerably lower per-advertisement cost. (fn to Seattle blog.)

The fact that five conservative justices found themselves giving corporations First Amendment rights for expenditures on movies to be shown on cable television, even though doing so requires adapting the constitution’s language to current times, and that liberal justices took the opposite approach, shows that there are many nuances in the so-called dichotomy between “originalist” and “judicial activist,” most of which are best left to a course in constitutional law. However, at least students might make note of the risk of using such labels and the fierce criticism that has resulted. (fn) For example, the votes by justices Roberts and Alito in Citizens United were described by some commentators as representing the “zenith” of a strategy by conservatives “to (pack) the Supreme Court with ideological appointees.” (fn to Aron article in Politico), notwithstanding the fact that conservatives are usually identified as critics of judicial activism. (fn to Gans blog).

(Fn to Result in animal cruelty case just three months later, providing First Amendment protection to an animal cruelty video, reinforces that perhaps conservatives have become the new activists (fn to WSJ article).

Citizens United also allows students to witness a debate between two justices over exactly how to be an originalist. In his dissent, Justice Stevens writes in detail of the framers’ views about the “role of corporations in society” and concludes that they did not like corporations and therefore would not have granted them First Amendment rights (fn). In a separate concurring opinion addressing just this issue, Justice Scalia fires back that just because the drafters of the Constitution might not have liked corporations does not mean that they would deny them First Amendment right (fn). Rather, Justice Scalia noted that there is nothing in the text of the First Amendment indicating that the drafters intended to exclude corporations from protection (fn). Moreover, he distinguishes between the state-controlled corporations that were the object of distrust by the framers from the private corporations that eventually became so common (fn). (x-ref to later discussion of history of corporations.)

Whether Justice Roberts will continue to be an activist as a justice, notwithstanding the usual link between activism and liberalism, will provide ample fodder for future discussion with students in the years ahead. So long as the President and Congress are in the opposite political camp at least, activism by the Court will not be greeted warmly. Cite to NYT article on Obama vs. Roberts.

State of the Union Address

Another facet of the pedagogical diamond for teaching constitutional law created by Citizens United is presented by the controversy created a week after the decision was handed down when President Obama criticized the decision in his 2010 state of the
union address. The very fact that we hear such an address is derived from (Article II, Section 3) of the constitution that provides that the president “shall from time to time give to the Congress Information of the State of the Union.” (fn to articles in which Roberts criticizes politicization of the address.)

**Business Use of the Constitution to Avoid Regulation**

A darker view of the intersection of the Constitution and business is that business has over the years actively used the Constitution as a shield against government regulation. (fn) Various writers have noted that business successfully challenged a rising wave of state and federal regulations beginning in the late nineteenth century first by using the fourteenth amendment. This dimension of *Citizens United* allows students to consider the opposition of business to government regulation and the creativity used by business to fight new regulations.

The first significant use of the Constitution to fight regulation occurred in *Lochner v. New York*, where a bakery owner successfully challenged a New York law that limited the number of hours for his workers, on the grounds that the law interfered with his freedom to contract and therefore was invalid under the fourteenth amendment. (fn) The fourteenth amendment was ratified in 1868 in response to the *Dred Scott* decision (fn), and provides that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” (fn) Building on the controversial Supreme Court decision in *Santa Clara* (fn), which may or may not have actually decided that a corporation could be a “person” for purposes of the Constitution, the decision enabled businesses for the next fifty years to challenge new regulations successfully, using the “substantive due process” premise. (fn)

*Lochner* was finally abandoned by the Supreme Court following enactment of New Deal legislation, in cases such as *West Coast Hotel v. Parrish*, where the Court upheld the constitutionality of state legislation that established a minimum wage for women. (fn) Today, *Lochner* merits not even a footnote in most business law texts. Indeed, in *Citizens United*, its only mention is in Justice Stevens’s dissent where he uses the decision as an example of thoroughly discredited legal thinking: “The majority’s rejection of (the need to regulate corporate campaign spending) “elevate(s) corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests.” (fn)

Even before *Lochner*’s demise, business had turned to the Bill of Rights as a shield against government regulation. For example, in *Hale v. Henkel*, the Court held that a corporation had Fourth Amendment rights and that an overbroad subpoena for corporate documents was an unreasonable search and seizure that violated those rights. (fn using Mayer) The same case also rejected the corporation’s argument that it
was entitled to the fifth amendment’s protection against self-incrimination, a position that remains unchanged today. (fn)

It was not until the 1960s that business had the need to explore more fully the text of the Bill of Rights to protect itself against government regulation. (fn) Some commentators have argued that it was not until this period that government regulation became more intrusive and sought to attain more than economic goals, such as environmental protection, consumerism, minority employment, women’s rights and health and safety. (fn to Mayer at 14) Moreover, it was not until the 1960s that regulation of business began to be conducted primarily at the federal, as opposed to state, level. (fn to Mayer at 15)

In the last thirty years, business has successfully used several parts of the Bill of Rights to invalidate government attempts at regulation, even while the Government has successfully used the Commerce Clause to uphold other regulations. (fn) For example, the Court found the Fourth Amendment and the Fifth Amendment to protect businesses in the same term in 1977. In Marshall v. Barlow, an electrical and plumbing company in Seattle successfully fought off federal inspections conducted under the Occupational Safety and Health Act. In Martin Linen Supply, a linen supply company successfully used the double jeopardy clause of the Fifth Amendment to avoid retrial in a criminal antitrust action.

Active learning exercise. Ask students to explore what types of businesses should properly be subjected to greater levels of government inspection, such as gun stores, notwithstanding protection that might exist under the Constitution. Ask students to predict whether we are entering into an era of greater government regulation as a result of the 2007-2010 financial crisis and whether business will be successful fighting such regulation in light of Citizens United.

Constitutional Amendment

Even before the Supreme Court’s decision in Citizens United, critics of the courts’ granting of constitutional rights to corporations have responded by suggesting that the only proper response is a constitutional amendment. For example, one commentator suggested twenty years ago that the Constitution be amended to declare that corporations are not persons and that they are only entitled to protection expressly granted by statute or by referendums. (fn to Mayer at 47) Citizens United has triggered calls for constitutional amendment as well, perhaps more closely tailored to the First Amendment issue at stake. For example, one Website has suggested the following four-part amendment:

“An Amendment to Preclude Corporations from Claiming Bill of Rights Protections”
SECTION 1: The U.S. Constitution protects only the rights of living human beings.

SECTION 2: Corporations and other institutions granted the privilege to exist shall be subordinate to any and all laws enacted by citizens and their elected governments.

SECTION 3: Corporations and other for-profit institutions are prohibited from attempting to influence the outcome of elections, legislation or government policy through the use of aggregate resources or by rewarding or repaying employees or directors to exert such influence.

SECTION 4: Congress shall have power to implement this article by appropriate legislation.

(fn to reclaimdemocracy.org)

Shortly after the Citizens United, Senator John Kerry said, “I think we need a constitutional amendment to make it clear once and for all that corporations do not have the same free speech rights as individuals.” (fn to Huffpost).

Even the possibility of a constitutional amendment allows discussion of the arduous process for doing so, found in Article 5 of the Constitution. That article provides that one means of amendment is for both the House of Representatives and the Senate to adopt the amendment and then send it to the states. At least three-quarters of the states must ratify the amendment for it to become law. (fn to alternative constitutional convention method that has never been used). Discussion of this process serves to reinforce the rule of law and the supremacy of the constitution among our laws.

Active learning exercise. Ask students to compare the total number of amendments and over what number of years that have been made to the constitutions of the United States, the State of Alabama and the country of India. One way to do this might be to ask three students to come to the front of the class. One represents the United States, one the state of Alabama and one the country of India. Another student is then asked to volunteer to hand the card containing the actual number of amendments over the actual time period to the correct country representative.

Active learning exercise. Ask students to summarize the history of the Equal Rights Amendment, which failed to reach its three-quarters ratification by the states within the _-year limit imposed by Congress. (fn)

Active learning exercise. As an extra credit question immediately following class, ask students to describe the process for amending the constitution to reverse Citizens United.
Law of Business Organizations

*Citizens United* invites discussion of several topics covered in a legal environment course concerning business organizations. First, the case illuminates the history of corporations and other organizations under American and English jurisprudence. Second, the case allows an examination of some current issues in the governance of business organizations, particularly the relative rights of owners and managers.

**History of Corporations**

Most students and indeed most Americans take for granted that businesses can be operated through artificial entities known as corporations. It is questionable whether most Americans understand that the word “incorporated” is meant to connote the limitation from liability that the corporate form provides to the incorporators and shareholders in most circumstances. Nonetheless, “incorporated” and similar words such as “Inc.,” “Limited Liability Company” and “Limited Liability Partnership” are in common usage and hundreds of new corporations and new business entities are formed each and every day.

Because of *Citizens United*’s focus, described above, on the corporate personhood of the Citizens United organization, the case affords us as teachers the opportunity to illustrate how far we have come in recognizing business organizations as separate entities, regardless of their personhood status under the Constitution. Justice Stevens provides a short history of business corporations in his dissent, designed (as noted above) to show us that the authors of the First Amendment were distrustful of the few corporations that existed in the late eighteenth century and therefore could not possibly have intended to include them as “persons” entitled to the amendment’s protections. (fn to history showing that Thomas Jefferson was deeply opposed to the powerful British East India Company – see Lenny Flan k piece.). He notes that “Those few corporations that existed at the founding were authorized by grant of a special legislative charter.” (fn at p. 35 of dissent) citing articles with titles such as “Origin of the American Business Corporation.” (fn at 36). He describes how corporations did not gain favor as useful tools for our economy that could be created by anyone, until the 1800s. (fn)

Justice Stevens’s discussion of *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636 (1819) also allows us to describe how this seminal case illustrates both the importance of a contract (fn to fn 72 in dissent) as well as the legitimacy of the corporate form, albeit subject to the powers in its charter. (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it”) (fn)

**Corporate Governance**
Most legal environment textbooks cover corporate governance at least briefly, usually as part of investor protection and the Sarbanes Oxley Act. One definition of “corporate governance” is the system by which business corporations are directed and controlled.” (fn to OECD definition at page 597 of textbook.) This definition would include all of the various internal and external constituencies of a business organization that might direct its governance, including its board of directors, its management, its audit committee, its internal risk managers, its independent auditors, its lawyers, other “gatekeepers” such as ratings agencies and investment bankers and the Securities and exchange Commission. (fn to Kim and Nofsinger)

_Citizens United_ involves a narrower definition of corporate governance, the relationship between a corporation and its shareholders. (fn to page 597 of textbook). Specifically, the case raises the issue of whether shareholders should have a say in how their corporations spend corporate funds in the political process and the issue of whether laws restricting corporate political speech are justified by protecting shareholders who might disagree with such spending.

In the majority opinion of _Citizens United_, Justice Kennedy rejects the shareholder protection interest as a reason for restricting corporate speech. First, he notes that if such an interest were relied upon, then the Government would be able to ban the political speech of even media corporations in order to protect their dissenting shareholders (fn to page 46), which ban he says the First Amendment would never allow. (id).

Justice Kennedy’s second reason for rejecting the shareholder protection interest argument provides a good illustration of some key current issues in the role of shareholders in corporate governance. His general premise is that the “procedures of corporate democracy” should be sufficient to protect shareholders (fn to _Bellotti_). While not enumerated by Justice Kennedy in the _Citizens United_ majority opinion, these procedures for a shareholder would include bringing a derivative action, selling the shareholder’s shares, voting in directors who agree with the shareholder’s views (and vice versa) and, for publicly-held corporations, using the shareholder proposal process found in Securities and Exchange Commission Rule 14a-8. (fn to Strauss and Pollman articles for description)

The majority opinion argues that corporate democracy mechanisms should be even more effective today than they would have been at the time that McCain-Feingold was passed because modern technology such as the Internet makes disclosures about corporate political spending “rapid and informative” (fn to page 55).

Not surprisingly, Justice Stevens’s dissent expresses a considerably more jaundiced view about the effectiveness of corporate democracy. Justice Stevens writes,
It is an interesting question ‘who’ is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management.” (fn to dissent at 77)

Justice Stevens’s view that shareholders lack meaningful input into the management of a corporation is supported by commentators who describe the difficulties with the shareholder derivative suit and shareholder proposal processes. For example, the “business judgment rule” protects most decisions by corporate officers and directors, including presumably decisions on how to spend corporate funds in the political process. (fn to DE law and Strauss). Similarly, the law is not clear as to whether shareholder proposals requiring corporations even to disclose (let alone limit) their political contributions must even be required to be included in corporate proxy statements. If such contributions are day-to-day business matters, then they are not the proper subject of a shareholder proposal under SEC rules. However, if they represent a “significant policy issue,” then they may not be excluded. (fn to Rule 14a-8(i)(7). (fn to Strauss article which describes Halliburton no action refusal and predicts that as a result of CU SEC will likely reach opposite result than it did in Halliburton).

Finally, the result in Citizens United allows for a discussion of how corporations might actually use the case to influence elected officials to dilute shareholder rights even further. For example, in a blog post entitled “Corporate Political Speech is Bad for Shareholders,” well-known shareholder rights proponent Lucien Bebchuk of Harvard Law School argues that the ownership of U.S. corporations is so dispersed that most companies “are de facto controlled by professional managers.” Bebchuk writes, “Such managers can be expected to use their influence to obtain and maintain rules that weaken the rights of dispersed shareholders and make it difficult for shareholders to replace them.” (fn to Harvard Law blog).

In short, Citizens United provides legal environment teachers with yet another vehicle for illustrating a current issue in business law, the power of shareholders to influence corporate decision-making. The case might also crystallize for students the otherwise vague concept of “corporate governance.”

Other Legal Issues

A good issue-spotter will find other legal principles illustrated by Citizens United, including many not spotted here. Certainly, the case is an excellent summary of election law. The case also provides valuable insights into federal administrative law including the check and balance mechanism that arises from the judiciary’s review of administrative rules. It is likely that the Federal Election Commission’s rules will have to
be altered considerably as a result of the case. Even the tort law of defamation might
be illustrated by a discussion of why Hillary Clinton most likely would not have been able
to sue Citizens United successfully for defamation as a result of *Hillary*, because of the
“public figure” exception to defamation law that requires that there be “actual malice”
on the part of the speaker in a publication that is critical of a “public figure.” (fn to *NYT
v. Sullivan*).