

## ANOTHER NEW FREE SPEECH CASE

By John Patrick Quigley

**F**irst Amendment to the United States Constitution:  
 “Congress shall make no law ... abridging the freedom of speech ....”

The Bipartisan Campaign Reform Act of 2002 (116 Stat. 81, popularly referred to as McCain-Feingold) prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that expressly advocates the election or defeat of a candidate within 30 days of a primary election. 2 U.S.C. § 441b. BCRA sections 201 & 311 also required disclosures to the Federal Election Commission and public disclaimers about sponsors, for publications pertaining to elections. Citizens United v. Federal Election Commission 130 S.Ct. 876, 175 L.Ed.2d 753 (2010)

Citizens United, a non-profit corporation, released a documentary, dubbed Hillary – the Movie, which was critical of Senator Hillary Clinton, a candidate in the upcoming Democratic primary election. Since Citizens United planned to make the movie available through video-on-demand within 30 days of the primary elections, it produced TV ads to run on broadcast and cable TV and sought declaratory and injunctive relief, arguing that §441b and BCRA §201 & 311 were unconstitutional. The Federal District Court denied that relief and granted summary judgment to the FEC, which was appealed to the U.S. Supreme Court. By a 5-4 majority opinion, the Supreme Court reversed in part and affirmed in part.

### Prohibition of the Speech of Corporations and Unions is Unconstitutional

Swing-voting Justice Kennedy wrote the majority opinion, joined by the four conservative Justices (Roberts, C.J., Scalia, Alito and Thomas). “The right

of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it...The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”

Justice Kennedy emphasized that the First Amendment pertains to speech, not speakers. He noted that the statutory provision in question could be used against the Sierra Club, the National Rifle Association, and the ACLU, but not against media corporations, which are specifically exempted. He could not envision attempts to control speech by media corporations, but could see no constitutional justification for distinguishing between corporations.

(Kennedy’s opinion admittedly rests on a literal, simple enforcement of the First Amendment, and seems impatient with past opinions of the Court, which crafted various complex exceptions to such enforcement. Most of his opinion consists of rebutting arguments of the dissenting Justices, as summarized below.)

### The Dissenting View

Justice Stevens, joined by the other three liberal Justices (Ginsburg, Breyer and Sotomayor) wrote the dissent. It includes a lengthy history lesson, which is critiqued by conservative Justice Scalia in a separate opinion. Justice Stevens’s opinion consists of four main arguments.

(1) *Statutory exceptions to First Amendment protection are justified by three compelling governmental interests: anti-distortion, anti-*

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corruption, and protection of shareholders. The anti-distortion interest claims that the immense funds accumulated by corporations and unions can distort the political debate. The anti-corruption interest claims that corporation and union funds spent on promoting politicians may lead to corruption or the appearance of corruption. And the shareholder protection interest claims that shareholder funds may be used to support candidates that the shareholder opposes. (The majority opinion avoids objecting to the idea of compelling government interests trumping the First Amendment, but seems to say that the interests in this case aren't compelling enough to justify Congress abridging freedom of speech.)

(2) The majority opinion ignores the principle of *stare decisis* to overrule Austin v. Michigan Chamber of commerce, 494 U.S. 652, and that part of McConnell v. Federal Election Commission, 540 U.S. 93, that relied on the Austin case. "I am not an absolutist when it comes to *stare decisis*. No one is. But if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine." (This issue was extensively argued by Justice Stevens, and just as extensively answered by Chief Justice Roberts in his separate opinion, joined by Justice Alito.)


(3) Instead of a "facial" approach, that the legislation is unconstitutional on its face, the majority should have taken a more limited "as-applied" approach, that it was only unconstitutional as applied, especially since Citizens had abandoned its claim that the statute was unconstitutional on its face. "If it is not necessary to decide more, it is necessary not to decide more."

(4) The limitation on political speech funded by corporation and union general treasury funds is not an absolute ban on all such speech, because they can choose to do so through statutory Political Action Committees and other means. (The Court majority felt that the requirements for using other means were unconstitutionally burdensome.)

#### **Statutory Disclaimer & Disclosure Requirements for Speech are Constitutional**

*"...there has been no showing that, as applied to this case, these requirements would impose a chill on speech or expression."*

All Justices agreed on this, except for Justice

Thomas, arguably the most conservative of the conservative block and seemingly the most willing to overrule prior decisions which he considers to be in error. He refers to amici curiae briefs that mention similar California disclosure requirements. Donors of over \$100 to any committee supporting or opposing Proposition 8 (Gay Marriage ban) were required to furnish their names, addresses, employers, and the amount of their contribution, which the Secretary of State was required to post on the Internet. Opponents of Proposition 8 created Web sites with maps showing the homes or businesses of Proposition 8 supporters. Many claimed to have suffered property damage, or threats of physical violence or death. 

## LOOKING AT THE WEB

By Mora Prestinary

Citizens United v. Federal Election Commission  
130 S.Ct. 876, 175 L.Ed.2d 753 (2010)  
<http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>

California Business Portal-  
Establishing Your Business in California  
<http://www.calbusiness.ca.gov/cedpeybsb.asp>

Small Business Administration-Start Your Business  
<http://www.sba.gov/smallbusinessplanner/start/index.html>



## **Ask a Librarian**

By Mora Prestinary

**QUESTION:** Where can I find Pleading Paper online ?

**ANSWER:** The Orange County Superior Court website has a link to fillable Pleading paper:

<http://www.occourts.org/forms/local/1930.pdf>





## Database Focus

# HeinOnline

By Molly Solazzo

HeinOnline is a subscription database that provides online access to historical legal material in the original page-image (PDF) format. Documents can be downloaded to flash, or printed out.

Coverage is extensive: ABA law journals, US Reports from 1754, all US Treaties, Federal Register from inception in 1936, CFR from inception in 1938, Statutes at Large, US Code, Federal Legislative History Library, US Attorney General Opinions, US Presidential Library (including Executive Orders, Economic Report of the President, Daily Compilation of Presidential Documents, etc), the fulltext of English Reports from 1220-1867, and much more.

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# WHAT'S GOING ON

## @ the Library, @ the Civic Center

### Document Preparation & Educational Workshops at the Law Library

Every second & fourth Tuesday of each month:

#### How to Clean Up your Criminal Record

**2 pm**, 5th Floor Conference Room

**Upcoming dates: 5/11, 5/25, 6/8, 6/22**

Please bring:

- Your California criminal record(s) from the court(s) in which you were convicted, or, your CA Dept of Justice Rap Sheet
- Your own interpreter, if necessary

Every Thursday:

#### How to Answer an Unlawful Detainer (Eviction)

**9 am**, 5th Floor Conference Room

- Please bring: Copy of the Summons & Complaint, Envelopes & Postage, Your own interpreter, if necessary

-Presenters do not give Legal Advice -

Presenters are from the Self-Help Center - Central Justice Center



### Superior Court Furlough Days

The Superior Court will be closed the 3rd Wednesday of each month:

May 19, 2010

June 16, 2010

[www.occourts.org/general-public/holiday-schedule.html](http://www.occourts.org/general-public/holiday-schedule.html)

The Court closes at 3 pm every Friday.

[www.occourts.org/media-relations/current-news-releases/court\\_closure\\_info.pdf](http://www.occourts.org/media-relations/current-news-releases/court_closure_info.pdf)



### California State Building Furlough Days

The California State Building (Building 28) will be closed 3 Fridays per month:

May 7, 14, 21, 2010

June 4, 11, 18, 2010

[www.dpa.ca.gov/personnel-policies/furloughs/list-of-furlough-fridays.htm](http://www.dpa.ca.gov/personnel-policies/furloughs/list-of-furlough-fridays.htm)

Certain agencies will remain open: see the

State's website at <http://www.dpa.ca.gov/personnel-policies/furloughs/list-of-offices-open-to-the-public-on-furlough-fridays.htm>

THE LIBRARY WILL BE  
CLOSED:  
MAY 31<sup>st</sup> & JULY 5<sup>th</sup>

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[www.ocpll.org](http://www.ocpll.org)

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<b>Friday</b>	<b>8 am - 5 pm</b>
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