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## The Trouble That Citizens United Wrought

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Frank Askin

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Benjamin Bluman is an American lawyer working as an associate at a New York law firm. But he is a Canadian citizen, residing in the United States on a temporary work permit.

Under federal legislation, he, like other foreigners, is prohibited from contributing to American political campaigns and parties or from spending any money to try to influence U.S. elections.

Together with several co-plaintiffs, Bluman sued the Federal Election Commission, which is entrusted with enforcement of the law, claiming it violated his freedom of speech under the U.S. Constitution.

This was the first real legal test of the kerfuffle that arose between Supreme Court Justice Samuel Alito Jr. and President Barack Obama during his State of the Union address in 2010. It was Alito, sitting in the audience, who silently mouthed the words "not true" when the president suggested in his speech that the Supreme Court's *Citizens United* opinion might open up American elections to foreign influence.

Obama's concern was well-founded. In *Citizens United*, the Court held that the First Amendment provided categorical protection for speech that made the identity of the speaker irrelevant. It was the view of the five-member majority that speech was speech, the more the better in order to educate the electorate.

Now, of course, *Citizens United* did not immediately involve political spending by foreigners, but by domestic corporations. But, like Obama, many election law experts could not readily envision how foreigners could be excluded under that categorical formula. If speech is speech and the identity of the speaker is irrelevant, how do we distinguish between a corporate speaker and a foreign speaker?

But the U.S. Court of Appeals in the District of Columbia has decided it could do so. It rejected

lawyer Bluman's petition. The next stop will no doubt be the Supreme Court, and Alito can put his vote where his mouth is.

As a teacher of election law, I like the Court of Appeals' result. But then I thought *Citizens United* was wrongly decided.

I confess that I do not have a big problem with Bluman, a U.S.-educated lawyer from our friendly northern neighbor working for a U.S. law firm, trying to influence a U.S. election. The problem is I don't know how to distinguish between him and some Saudi or Chinese national who may be acting at the behest of their respective governments — or for that matter, those governments themselves. The problem is with the *Citizens United* notion that the First Amendment protects speech — not the speaker.

The Court of Appeals found a rationale in the notion that influencing elections was tied to the right to govern, which is reserved for U.S. citizens, and analogized it to the right to vote. I can relate to that. But does it really distinguish foreigners from business corporations like Exxon Mobil or AT&T? They can't vote either. And they are not citizens.

The Court of Appeals answered that by saying corporations are "members of the American political community."

First of all, under the categorical theory, what difference should that make? If speech is speech, why should it matter whether the speaker is a member of "the political community"? His or her speech still adds to the wealth of public information.

Second, in what sense is a corporation a member of the political community? Business corporations (unlike nonprofit membership associations whose members share an ideological point of view) are created for economic, not political, purposes. Their function is to amass wealth and hold and manage property — and in the process receive legal benefits not available to mere mortals. Like robots, corporations have no souls. What invests them with membership in the political community?

The First Amendment does proclaim that Congress shall make no laws abridging freedom of speech. If the *Citizens United* majority is correct that the identity of the speaker is irrelevant under that provision, then how do we exclude foreigners?

I suggest the Supreme Court got it wrong in *Citizens United*. What the Court forgot was that the Constitution was created by and for "We the people of the United States." It is they the First Amendment protects. And from that view, neither business corporations nor foreigners qualify — and can both be treated the same.

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