

CITIZENS UNITED: CORRECT, MODEST, AND OVERDUE

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I. INTRODUCTION

The hyperbole directed at the Supreme Court's *Citizens United v. FEC*¹ opinion is exceeded only by the misinformation surrounding it. In this brief essay I hope to raise and rebut the key points typically made to attack the decision, and persuade the reader that, whatever the policy wisdom, the decision itself is a proper application of First Amendment doctrine.

Critics of the decision attack it from several fronts. First, they question its departure from what is argued to be “long settled precedent.”² Second, they question whether the activity at issue – independent expenditures of money in elections, is really “speech.” Lastly, they complain that the Court has illegitimately extended to corporations constitutional protections that should only apply to people. All of these arguments are weak, unconvincing, and potentially dangerous.

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1. 130 S. Ct. 876 (2010).

2. Nan Aron, *It is Time To Take Back the Courts*, HUFFINGTON POST, Jan. 29, 2010, http://www.huffingtonpost.com/nan-aron/it-is-time-to-take-back-t_b_442050.html; See also President Barack Obama, State of the Union Address, Jan. 27, 2010 (chastising the majority for “overturn[ing] more than a century of precedent.”).

II. PRECEDENT? WHAT PRECEDENT?

Justice Kennedy's *Citizens United* opinion is attacked as a departure from long-standing precedent.³ In his dissent, Justice Stevens criticized the majority for neglecting the Court's usual standards for overturning precedent.⁴ Stevens asserted that the majority simply did not like the 1990 holding in *Austin v. Michigan Chamber of Commerce*, which upheld a state statute barring a business association from spending general treasury funds in state elections.⁵ Stevens listed the Court's usual considerations as, first, the "antiquity of the precedent"; second, the workability of the legal rule; and third, the reliance interests at stake.⁶

Granting Stevens' list for the sake of argument, let us examine each of these, in turn, as they relate to the ban on independent expenditures. Is the *Austin* precedent "antique?" *Austin* dated to 1990, which for some of my students may seem like ancient history, but in the context of political regulation, is not. The law at issue dates to 1947,⁷ so one might be forgiven for presuming that the Court's precedents also included decisions from that era considering and upholding the ban.

One would be wrong. In *United States v. CIO*, the test case brought by organized labor immediately after the law's enactment, the Court refused to allow the expenditure ban to reach a CIO publication endorsing a federal candidate.⁸ The Court broadened this limited construction less than a decade later to prohibit a union-sponsored television series in *United States v. UAW-CIO*, but the Court again refused to reach the constitutional question.⁹ Until *Austin*, cases raising corporate expenditures in federal court only tested the scope of "expenditure," or whether something short of "express advocacy" could be constitutionally prohibited.¹⁰ In short, the Court first confronted the constitutionality of the 1947 expenditure ban in 1990.¹¹ Thus, the law was under a constitutional cloud for about forty-three years, and *Austin*

3. *See id.*

4. 130 S. Ct. at 940.

5. 494 U.S. 652 (1990).

6. *Citizens United*, 130 S. Ct at 940.

7. Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 80-101, §304, 61 Stat. 136, 159-60.

8. 335 U.S. 106 (1948).

9. *See* 352 U.S. 567 (1957).

10. *See, e.g., Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986).

11. *See Austin*, 494 U.S. 652 (1990).

presided for only about twenty. The “antique” precedent is, in truth, a very mixed bag.

How about the workability of the legal rule? Stevens noted that “no one has argued to us that *Austin's* rule has proved impracticable.”¹² Yet many of the more controversial campaign finance practices are simply less direct and accountable ways of engaging in the political speech banned by the law. The Federal Election Commission took an entire unhappy decade to produce rules governing the use of corporate and labor resources in the wake of *MCFL*,¹³ *Austin*, and high profile enforcement matters.¹⁴ Soft money and “issue ads”, the campaign finance bugaboos of the 1990s addressed in *McCain-Feingold*,¹⁵ provided a way for funding sources prevented from making express advocacy expenditures to address political issues, and thereby assist their favored candidates and parties.¹⁶ The rise of the so-called “527” tax-exempt vehicle for political activity, again provided a means for corporations and unions (and wealthy individuals) to engage in politics.¹⁷ The notion that the expenditure ban kept corporate and labor money out of politics is wrong – what it did was drive that activity below the radar screen and create a market for campaign finance lawyers. If a law's workability is tested by its clarity and efficacy, the expenditure ban flunks the test.

Stevens' third criticism invokes reliance interests. Reliance on what? The constitutionality of the law? Access to other means of participation? It boggles the mind to think that anyone who has lived through the last two decades of campaign finance and elections would believe this to be an area of stable and broadly accepted doctrine. Outside of the national security context, I cannot think of an area that is more capricious.

12. *Citizens United v. FEC*, 130 S. Ct. 876, 940 (2010).

13. *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) (holding that the Federal Election Campaign Act's prohibition on direct corporate expenditures for an election was unconstitutional as applied to a non-profit.)

14. Final Regulations, 60 Fed. Reg. 35,292 (July 6, 1995), *revised* December 14, 1995, 60 Fed. Reg. 64,260 (Dec. 15, 1995), *effective* March 13, 1996, 61 Fed. Reg. 10,269 (Mar. 13, 1996).

15. Bipartisan Campaign Reform Act of 2002 (*McCain-Feingold Act*), Pub. L. 107-155, 116 Stat. 81 (2002).

16. *See McConnell v. FEC*, 540 U.S. 93 (2003) (noting distinction between prohibited express advocacy and permissible issue advocacy).

17. *See Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir 2009).

Accordingly, even if we adopt Stevens' standards for when the Court should overturn precedent, it is clear that *Austin* needs to be reexamined.¹⁸

III. SPEECH! SPEECH!

Critics of the majority opinion in *Citizens United* also argue that the decision erroneously equates money and speech.¹⁹ But saying “money is not speech – it is property” provides no insight into any constitutional principle. Similarly, my computer is not speech but property (as the Commonwealth of Virginia reminds me whenever the personal property taxes are due). If agents from the Commonwealth taxed me for using my computer to blog about politics, would anyone question that my freedom of speech had been violated? Money is not religion, either; but if the government barred me from tithing would anyone question that this imposed an unconstitutional burden on my free exercise of religion? Constitutional rights do not float around in some abstract cloud. Constitutional rights are exercised by individuals and groups, using their property, including their money.

The government can, nonetheless, restrict the use of money for expression if it has a sufficiently weighty interest. Laws against libel and slander, which require “publication” that often involves spending money, are one example. The Constitution does not protect the use of money to perpetuate a fraud, pay for espionage or prostitution, or produce obscenity, despite the fact that each of these activities is also expressive. In these contexts, the speech itself justifies the law. There is no such interest supporting the corporate expenditure ban in expenditures. Instead, the ban pivots on the identity of the speaker as a corporation.

Still other speech-restrictive laws rely, not on the unprotected content of speech, but on its context. The First Amendment provides more governmental latitude to restrict speech in prisons,²⁰ in the military,²¹ in government offices,²² and in schools.²³ While these

18. During argument in *Citizens United*, even the government abandoned the *Austin* precedent. Rather than relying on the anti-distortion principle upon which the statute in *Austin* was upheld, the government argued that anti-corruption and shareholder-protection interests justified restrictions on corporate expenditures. 130 S. Ct. at 903.

19. Press Release, Sen. Christopher S. Dodd, *Dodd to Introduce Constitutional Amendment to Reverse Campaign Finance Ruling* (Feb. 4, 2010), <http://dodd.senate.gov/?q=node/5459>.

20. See e.g., *Beard v. Banks*, 548 U.S. 521, 528 (2006) (upholding the principle that restrictions on prisoners need only be “reasonably related” to legitimate penological interests”).

21. See e.g., *Parker v. Levy*, 417 U.S. 733 (1974).

examples stand for the proposition that government can restrict the speech of individuals under its control or in its custody, they provide no guidance in the *Citizens United* context, where a private corporation wants to reach society at large about candidates.

IV. SOME OF MY BEST FRIENDS ARE CORPORATIONS

Finally, it is said that *Citizens United* extended civil liberties to corporations that belong only to people, and that this is a very bad development.²⁴ In protest, some clever folks have even filed a corporation as a candidate for office²⁵. These critics observe that the constitution protects “We the People” from governmental overreach, and that “people” literally means living, breathing individuals, not entities.²⁶ Some argue that the roots of the Revolution were anti-corporate, as shown by the Boston Tea Party.²⁷

Ironically, the latter-day Tea Party groups function via the corporate form – Tea Party Patriots, for instance, is a tax exempt social welfare organization under IRC 501(c)(4)²⁸. It is difficult for any group of “the people” to do much at all in modern society without the superstructure of a “corporation.” Once incorporated, the group can enter into leases, open bank accounts, take out parade permits, register domain names as a group – without placing any individual member at risk of liability, or the group at the risk of that individual's reliability. When Justice Stevens asserts that corporations are not members of society,²⁹ one wonders in what society he lives.

22. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

23. *See e.g.*, *Morse v. Frederick*, 551 U.S. 393 (2007). For an overview of free speech law within those contexts, *see* Scott A. Moss, *Students and Workers and Prisoners - Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 U.C.L.A. L. REV. 1635 (2007).

24. *See* Lyle Denniston, *Analysis: The Personhood of Corporations*, SCOTUSBLOG, (Jan. 21, 2010, 18:45 EST), <http://www.scotusblog.com/2010/01/analysis-the-personhood-of-corporations/>.

25. The company is Murray Hill. *See* MURRAY HILL, <http://murrayhillweb.com/pr-012510.html> (last visited Sept. 9, 2010).

26. *See* Charles A. Reich, *A Passion for Justice*, 26 TOURO L. REV. 393, 430 (2010) (asking if corporations are a legitimate part of “We the People”).

27. For a recounting of anti-corporate sentiment in colonial America, *see* Dale Rubin, *Corporate Personhood, How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 525-34 (2010).

28. About Tea Party Patriots, <http://www.teapartypatriots.org/AboutUs.aspx> (last visited July 6, 2010).

29. *Citizens United v. FEC*, 130 S. Ct. 876, 930 (2010).

Significantly, the Court in *Citizens United* recognized that one way to resolve the case would be to craft a version of the expenditure ban that would keep political groups like Citizens United free to speak³⁰ This is much the approach taken by the Court in its 1986 *Massachusetts Citizens for Life* decision.³¹ There, Justice Brennan, writing for the Court, concluded that a pro-life group with no shareholders, organized for political and policy purposes, was not the kind of corporation that posed a risk of corruption justifying the expenditure ban.³² Obviously, not all corporations are alike, but the expenditure ban treats them alike. We should object to such an overbroad statute as the *Citizens United* Majority did,³³ and expect that the better party to craft a constitutional law would be Congress, not the Supreme Court.

Finally, any argument that attempts to cut off corporations from constitutional protection is dangerous. The Constitution protects the “freedom of speech” without designating which speakers are protected.³⁴ It is speech itself that is protected, and governmental censorship of disfavored sources is exactly what the Constitution does not allow. Imagine a world where corporate speech rights were not protected by the First Amendment. Congress could censor the speech of corporations to prevent them from criticizing legislation. Federal agencies could debar federal contractors because of their stated positions on public issues. The FCC could require licensees to carry propaganda. Given that newspapers and broadcasting facilities are operated by corporations, it is easy to see that this doctrine flips the freedom of speech on its head.³⁵

V. CONCLUSION

Only time will tell whether *Citizens United* marks a dramatic change in political regulation. I believe the chances of a dramatic change are slim because the decision is simply a straightforward application of First Amendment principles. The Court seized the opportunity to clarify an incoherent area of the law, and confirmed the constitutional protection of speech per se. What may prove regrettable is the hasty reaction of legislators to the decision, and the potential adoption of unwise restrictions with unintended consequences.

30. *Id.* at 892.

31. 479 U.S. at 263-64.

32. *Id.*

33. *Citizens United*, 130 S. Ct. at 930.

34. “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend I, § 1.

35. See *Citizens United*, 130 S. Ct. at 899-900.