The Intellectual Forebears of Citizens United

Ronald D. Rotunda
The Intellectual Forebears of *Citizens United*

16 Nexus 113 (2010-2011)

Ronald D. Rotunda
Chapman University School of Law

This paper can be downloaded without charge at:
The Social Science Research Network Electronic Paper Collection:
The Intellectual Forebears of
Citizens United
Ronald D. Rotunda*

Introduction

Senator Hillary Rodham Clinton’s 2008 Presidential bid led to the creation of a 90-minute highly unflattering video documentary of her, featuring numerous critical comments from her Democratic and Republican political opponents. Her supporters would probably view Hillary: the Movie, as a hatchet job, just as George Bush’s supporters might view Fahrenheit 911.

One would reasonably consider the video of Hillary Clinton was crafted to persuade voters not embrace her Presidential candidacy. Consequently, federal law banned it as “political speech” aired too close to the election. And that, in turn, led to the controversial Supreme Court decision, Citizens United v. Federal Election Commission1 which held that the Federal Election Commission cannot constitutionally ban political speech just because it is close to an election and the speaker is incorporated.

That decision caused several commentators, such as Chapman Law Professor Timothy Canova, to urge a constitutional amendment2 — an amendment that, for the first time, would not extend constitutional rights but would contract them.

Professor Canova’s proposal — to amend the Constitution to limit First Amendment rights to human beings3 — is, frankly, both short-sighted and naïve.

* The Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman U. School of Law.


2. “Mr. Canova pointed out that corporations are not people and should not be extended the same constitutional rights as individuals. They are a ‘person’ in the legal fiction sense but are not an individual with individual liberties. His proposition was to amend the constitution to state that corporations are not people.” (emphasis added). Tara Simon, Citizens Divided On Citizens United: Campaign Finance Reform And The First Amendment, Nexus, http://www.lawschoolblog.org/blog/2010/oct/25/nexus-journals-symposium-highlights-keynote-speakers-and-distinct-panelists/ (Oct. 22, 2010, TIME STAMP).

NEXUS

It would leave newspapers, almost all incorporated, to the mercy of the legislature. Moreover, it rejects the considered judgment of some of the great titans of the Supreme Court, such as Justices William O. Douglas, Hugo Black, and Chief Justice Earl Warren. Although Professor Canova’s proposed amendment has no chance of passage, the principle behind this facile proposal merits discussion.

Let us first briefly look at Citizens United, and the road that led to its holding. We shall see that it is not a “conservative” decision, as Professor Canova has asserted, but a liberal one. That is why ACLU filed an amicus brief supporting Citizens United.

The Government’s Repeated Claim of Power to Ban Political Pamphlets

Last September of 2009, the Supreme Court heard oral argument in Citizens United v. Federal Election Commission. This oral argument was the second one for this case, because the Court had held it over from the prior term. That itself was unusual.

The issue was whether the Federal Government can ban Citizens United a (nonprofit corporation) from distributing its 90-minute documentary — called Hillary: the Movie — on a video-on-demand basis because an election involving Hillary Clinton was close at hand. In January, 2010, the Supreme Court said no: free speech prohibits the government from banning political speech that criticizes politicians, even if a corporation produced the video.

This decision gained unusual prominence when President Obama, in his State of the Union Address, specifically criticized the Supreme Court for its decision in Citizens United. Several of the justices who joined the majority were sitting in the audience as his invited guests. If the President knew what the Government’s lawyers were actually arguing, he might have had a different view.

The Bipartisan Campaign Reform Act of 2002 prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that is an “electioneering communication” or for speech that expressly advocates the election or defeat of a candidate. An electioneering communication is “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary election, and that is “publicly distributed,” which in the case of a candidate seeking Presidential nomination means that the communication “[c]an be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days.”

Citizens United sued the Federal Election Commission, to prevent it imposing civil and criminal penalties if Citizens United distributed Hillary: the Movie, through video-on-demand, within 30 days of primary elections. The issue before the Supreme Court was whether it was constitutional for the federal law to

ban a corporation from distributing this disparaging movie because it was “electioneering communication.”

The first oral argument was in the spring of 2010. The Supreme Court asked the Government how much power it is really claiming. In particular, does the statute authorize government bureaucrats to ban books? The Government, speaking through the Deputy Solicitor General, said yes: “we could prohibit the publication of the book using the corporate treasury funds.”

Wow! Most book publishers are incorporated. Most book stores are incorporated. The breadth of the Government’s claim was, well, breadth-taking. If a corporation tried to distribute a book critical of a candidate running for office within 30 days of the election, the Government could ban it.

Perhaps the Justices could not believe their ears, or perhaps they thought the Deputy Solicitor General had answered too quickly. In any event, Chief Justice Roberts raised the question again. He asked, if there is “a 500-page book, and at the end it says, and so vote for X, the government could ban that?”

Again, the Deputy Solicitor said, “Well, if it says vote for X, it would be express advocacy and it would be covered by the pre-existing Federal Election Campaign Act provision.” Even a few words in a lengthy book would allow the Government to ban the book.

The Court called for reargument for the fall of 2010, so the Government could reconsider its response. At reargument on September 9, 2009, the new Solicitor General, former Harvard Dean Elena Kagan (and now, Justice Kagan), announced that the “government’s answer has changed.”

We went back, we considered the matter carefully, and the government’s view is that although § 441b does cover full-length books, that there would be quite good as-applied challenge to any attempt to apply § 441b in that context.

She conceded that the statute does empower the FEC to ban books, but the statute, as applied to books is unconstitutional. So, the publisher should trust that the FEC would not enforce this power, but if it did, the publisher could sue and hope to win.

Again, the Justices may have been surprised at this new answer, even though the Government had months to rethink its position. So, Justice Scalia then said, “So you’re — you are a lawyer advising somebody who is about to come out with a book and you say don’t worry, the FEC has never tried to send somebody to prison for this. This statute covers it, but don’t worry, the FEC has never done it. Is that going to comfort your cli-

6. Transcript of Oral Argument at 29, Citizens United, 130 S. Ct. 876 (No. 08-305), 2009 WL 760811
ent?" And, again, Kagan’s responded: Section 441b “does cover books, except that I have just said that there would be a good as-applied challenge and that there has been no administrative practice of ever applying it to the books.”

General Kagan was not conceding much when she said that the statute was unconstitutional as applied to “books” because she promptly emphasized that the FEC can ban pamphlets because of their political content. Let me quote the exact language so know that I am not making this up.

CHIEF JUSTICE ROBERTS: “But we don't put our — we don't put our First Amendment rights in the hands of FEC bureaucrats; and if you say that you are not going to apply it to a book, what about a pamphlet?”

GENERAL KAGAN: “I think a—a pamphlet would be different. A pamphlet is pretty classic electioneering, so there is no attempt to say that § 441b only applies to video and not to print.”

Thomas Paine would not be pleased. In 1776, he published his pamphlet, Common Sense, which helped launch the American Revolution. Paine published it anonymously, because of fear of British censors. Now, we learn that the Government that Paine helped create, claims the power to ban electioneering pamphlets.

It is no wonder that the ACLU — hardly a conservative organization — supported Citizens United, and opposed the Government’s position. The ACLU’s brief explained that the powers that the Government claims “threatened speech that lies at the heart of the First Amendment, including genuine issue ads by nonpartisan organizations like the ACLU.”

The View of the Judicial Titans

Citizens United did not spring forth without any legal lineage. The issue arose in 1947, when Congress prohibited corporations and labor unions from independent expenditures in political campaigns. Truman announced, when he vetoed the Labor Management Act of 1947, that § 313 “would prevent the ordinary union newspaper from commenting favorably or unfavorably upon candidates or issues in national elections.” Congress overrode President Truman’s veto, even though Truman warned that this ban was a “dangerous intrusion on free speech.”

Later, the issue arose in United States v. CIO, when a union’s weekly
periodical endorsed a congressional candidate. The majority, to avoid the constitutional issue, interpreted the Labor Management Act to forbid the Government from banning that newspaper. Justices Black, Douglas, and Murphy joined Justice Rutledge, concurred in the result; they, reached the constitutional issue and invalidated the ban on independent expenditures. “[R]estricting expenditures for the publicizing of political views” serves to deprive “the electorate, the persons entitled to hear, as well as the author of the utterance, whether an individual or a group, of the advantage of free and full discussion and of the right of free assembly for that purpose.”

Nearly a decade later, in United States v. Automobile Workers, Justice Douglas, joined by Chief Justice Warren and Justice Black, specifically objected to the argument that the Government can restrict the independent expenditures or speech of any group, “labor or corporate,” because the group is too powerful:

Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group — labor or corporate. First Amendment rights are part of the heritage of all persons and groups in this country. They are not to be dispensed or withheld merely because we or the Congress thinks the person or group is worthy or unworthy.

The one exception to this line of cases was Austin v. Michigan Chamber of Commerce. The Court (with Scalia, Kennedy, and O’Connor dissenting) upheld provisions of a state law (the Michigan Campaign Finance Act) that prohibited corporations — except for media corporations — from using corporate treasury funds for independent expenditures that supported or opposed any candidate in elections for state office.

While this statute applied to the Chamber, a nonprofit corporation, the law included a statutory exemption for media corporations or labor unions. Austin ruled that Michigan’s exemption for media corporations (e.g. newspapers) was constitutionally permissible but not constitutionally required. Because Citizens United overruled Austin and followed the earlier view of Chief Justice Warren, and Justices Black, Douglas, Murphy and Rutledge, incorporated newspapers, television, and publishers are not left to the largess and beneficence of the state.

Limiting the First Amendment to Human Beings

Professor Timothy Canova is not alone in arguing the First Amendment should only be applied to human beings, and not to groups of human beings who ban together into entities that the law recognizes. During oral argument in the Citizens United case, Justice Ginsburg

---

17. Id. at 106, 1349 (Rutledge, J., joined by Black, Douglas, and Murphy, JJ., concurring in result).
flirted with this idea. She suggested that the Court deny free speech rights to corporations. “A corporation, after all, is not endowed by its Creator with inalienable rights.”

In his dissent, Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, argued that the Framers had “little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.”

Even if one approved of Justice Stevens’ view, one would hope that he intended his revised First Amendment to protect aliens and not just “individual Americans.”

In any event, this argument misses the point: the First Amendment does not speak in terms of persons, corporations, unions, aliens, citizens, or human beings. It simply takes away from Congress any power to abridge the Freedom of Speech or of the Press. Consequently, Professor Canova may have really meant that his proposed amendment would authorize Congress to abridge the freedom of speech or of the press of legal entities that are not human beings.

Such an amendment to our Constitution would be like painting a moustache on the Mona Lisa in an effort to improve it. It is a dangerous proposal — virtually all newspapers are corporations, not “individual Americans.” Most book publish-


22. 130 S.Ct. 876, 950 (footnote omitted)(Stevens, J., concurring in part and dissenting in part)(emphasis added).

23. 343 U.S. 495 (1952).
Ronald D. Rotunda

Moreover, Professor Canova’s proposal is disconcerting because it would give to incumbents — the lawmakers — the power to set the parameters of the debate about something that is near and dear to their heart: their own reelection.

Corporate and Union Expenditures in the Wake of Citizens United

Citizens United only applies to U.S. corporations and entities. The Court made clear that it was not considering any expenditure by foreign corporations. Since that decision, we have had a midterm federal election. What we have seen should give us no cause for concern that U.S. corporations will overwhelm the political debate. The empirical evidence of undue corporate influence is underwhelming. Indeed, the main participants who have engaged in these independent expenditures have not been corporations — President Obama’s claim — but unions.

Before Citizens United, over half of the states already allowed corporations and unions to engage in unlimited independent election expenditures under state law, and two more allowed limited corporate expenditures. These states, representing over 60% of the nation’s population, “were not overwhelmed by corporate or union spending in state elections.”

The first federal election after Citizens United was in 2010. In that off-year election for Senators and Representatives, the campaign’s biggest spender was the American Federation of State, County, and Municipal Employees, AFCME, a union, not a business corporation. It spent $87.5 million to help Democrats. The Service Employees International Union (SEIU), yet another union, spent $44 million; the National Education Association, yet another union, spent $40 million. The U.S. Chamber of Commerce spent $75 million to help other candidates, mainly Republicans. And the Democratic and Republican Parties spent together, nearly $1 billion — dwarfing these corporate and union contributions.

It is inevitable that money will flow into political campaigns: indeed, economic studies wonder why the major players do not invest more in the campaigns, given that they believe that so much money rides on the outcome. Campaigns are expensive. As long as politicians and judges decide billion-dollar issues, there will be billion-dollar campaigns.

In the 2000 federal election, the total amount spent on the political campaigns was between $2.4 and $2.5 billion. That year, Americans spent $7.8 billion on movie tickets. For the 1995 through 1996 election cycle, the total campaign contributions for all federal elections was a little over $2 billion. That sounds like a lot, but it amounted to 0.02% of this country’s GDP during that same time period. And, during that period, it was only one-third of the amount that individuals and corporations gave just to the United Way. During that same time frame, individuals donated over $300 billion to all charitable causes, while corporations gave more than $15 billion.

The federal and state governments are a trillion dollar enterprise. Politicians routinely enact laws that take money from the pocket of Peter and put it into the pocket of Paul. As long as Government has such sway over our pocket-books, unions, business, tort lawyers, and other interest groups will spend money to get their friends elected. Economists have a term of this behavior: rent-seeking. Political campaigns engage in rent-seeking in spades. *Citizens United* will not change that.

---