

Reprint Island Tides

Visit www.islandtides.com to read the current edition and more find more interesting articles on other BC, national & international topics in our extensive archive of newspapers and articles.

Reprint from Volume 22 Number 3

Feb 18, 2010

US Supreme Court allows election advertising by corporations

Patrick Brown

That uproar you hear from south of the border results from a decision of the US Supreme Court to allow unlimited 'independent' corporate (and union) advertising in direct and express support of (or opposition to) specific candidates within an election period. This follows more than a century during which such corporate involvement has been a criminal offence.

The Court, in effect, may well have removed the last barrier to corporate influence in US politics. In the US, corporations have vigorously exercised their rights to contribute to political campaigns, organize Political Action Committees (PACs) to support candidates, run 'issue' advertisements, advertise outside election periods, and lobby office-holders in order to gain favourable treatment from government. But their direct voice during election campaigns has been restricted.

The Supreme Court's 5-4 split Decision reflects a Supreme Court divided on philosophy, on principle, on procedure, and on its constitutional role. This pattern of partisan split is echoed in the other three branches of the US government—the House of Representatives, the Senate, and the Presidency.

The Case Before The Court

A specific question was put to the Supreme Court by political organization Citizens United (CU), which is partially funded by corporate donations. During the 2008 election period, the organization had produced an hour-and-a-half long anti-Hillary Clinton video and wished to air it. But, fearing criminal action, Citizens United had requested court assurance that this TV distribution would be legal. However, the District Court refused to give assurance which then lead to this Appeal to the Supreme Court.

A Sweeping Ruling

The US Supreme Court's January decision went significantly beyond what Citizens United had requested. The Court went so far as to strike down all limitations on corporate (and union) advertising during an election period, retaining only loose requirements for disclaimers and disclosure.

The Citizens United case ostensibly concerned the *First Amendment* to the US Constitution, part of the 1791 *Bill of Rights*, which in part reads 'Congress shall make no law ... abridging the freedom of speech, or of the press....'

Over the past hundred years there have been numerous cases which limit the political actions of corporations, mainly in the interest of reducing corruption. One such case, 'Austin versus Michigan Chamber of Commerce (1990)', recorded the Court's opposition to 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'

Within the Majority Opinion of the current case, Justice Kennedy characterizes the 'Austin' ruling as establishing a general principle that 'political

speech may be banned based on the speaker's corporate identity.' However, Kennedy then goes on to claim, 'The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.'

Working Back To Front

Not until this point does he state, 'We turn to the case now before us.' It is remarkable that this Majority Opinion begins

US Supreme Court Polarization

The split between the Supreme Court Justices reflects the polarization of US politics, and the make-up of the court since John Roberts was appointed Chief Justice by President George W Bush in 2005.

The 183 page Decision included 80 pages of the Majority Opinion and Concurring Opinions, and a 90 page Dissent. The following table names the justices, together with when they were appointed and by which president:

The Majority:

Chief Justice Roberts	2005 G.W. Bush	(Republican)
Justice Kennedy	1988 Reagan	(Republican)
Justice Scalia	1986 Reagan	(Republican)
Justice Alito	2006 G.W. Bush	(Republican)
Justice Thomas	1991 G.H.W. Bush	(Republican)

Dissent:

Justice Stevens*	1975 Ford	(Republican)
Justice Ginsberg	1993 Clinton	(Democrat)
Justice Breyer	1994 Clinton	(Democrat)
Justice Sotomayor	2009 Obama	(Democrat)

* Justice Stevens was confirmed by a Senate in which the Democrats held a 60-vote majority.

© Island Tides Publishing Ltd. This article may be reproduced with this attribution, in its entirety, with notification to Island Tides Publishing Ltd.

This article was published (Feb 18, 2010) in 'Island Tides'. 'Island Tides' is an independent, regional newspaper distributing 17,500 print copies throughout the Gulf Islands and the Canadian Strait of Georgia from Victoria to Campbell River to Howe Sound.

Island Tides, Box 55, Pender Island, BC, Canada. Phone: 250-629-3660. Fax: 250-629-3838.
Email: islandtides@islandtides.com. Website: <http://www.islandtides.com>

with the conclusion that there should be no limitations on the political 'speech' of corporations, and *then* works backwards from this broad finding to the particular case at hand.

What follows in the ruling is a lengthy justification explaining how, after being asked a simple question about a specific application of the law, the justices rationalized this precedent-setting ruling—a ruling which overturns 'Austin', many similar previous precedents, and, indirectly, the election laws of some 24 states.

Excerpts From The Majority Opinion

Besides its basic principle that any restrictions on corporate 'speech' contravene the *First Amendment*, the Majority Opinion includes a barrage of arguments, of which a few stand out:

Corruption: unless a direct pay-off can be proven, evidence of undue influence is difficult to obtain: 'Ingratiation and access, in any event, are not corruption ... If elected officials succumb to improper influences from independent expenditures ... then surely there is cause for concern ...' but 'An outright ban on corporate political speech during the critical preelection period is not a permissible remedy.'

Restricting speech: 'Speech restrictions based on the identity of the speaker are all too often simply a means to control content.'

Impractical to litigate or enforce: should a question arise during an election period, there is not sufficient time for the courts to deal with it. 'Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws....'

The exemption of the press: has muddied the waters. Nowadays, the Decision says, corporate ownership of the press makes other corporations indistinguishable from it, particularly on the internet. Nor nowadays is the publication of books distinguishable from the press. Restriction of any media has become unenforceable, the justices say.

And any uncertainty in the application of the law has the effect of 'chilling', or discouraging voices that should be heard, as it did in the case of Citizens United. The Justices commented: 'This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the *First Amendment* must secure.'

An argument the that touches on the absurd: even the movie *Mr Smith Goes to Washington* could be banned as political speech produced by a corporation, if shown during the election period: '...fiction and caricature may be a powerful force.' (In actuality, this movie does not explicitly support or oppose a candidate—the question in the Citizens' United case. It's inclusion illustrates that the entire Majority Opinion is focused on corporate political speech in general, and not on the specific case at hand.)

Disclosure and Disclaimers

All the justices, both in the majority and in dissent, with the sole exception of Justice Thomas, supported the continuation of requirements for disclosure and disclaimers for corporate political speech (particularly referring to advertisements). In the Majority Opinion: 'This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.'

Thomas went so far as to argue that the possibility that such disclosure might expose such corporations to attack. He upheld a 'right to anonymous speech' and thus held that the disclosure and disclaimer rules were unconstitutional.

Blockbuster Dissent

What is remarkable about this judgement is that the Dissent, written by Justice Stevens, is longer than the combined arguments of the majority and the two Concurring Opinions that followed. The Dissent is also remarkable for its passion, eloquence, and occasional irony. It includes the following arguments.

Judicial restraint: Stevens starts by reminding the reader that: 'All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period ... not one of those questions raised an issue based on Citizens United's corporate status.'

He then cuts to the chase: 'Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.'

This, he describes as a denial of congressional authority. Finally, he says: 'The only relevant thing that has changed since Austin ... is the composition of this Court.'

Corporations: cannot vote, cannot run for office, and their interests may be contrary to the interests of the state or nation; may be foreign-controlled (even US domestic corporations may be 'foreign' to an individual state), but also enjoy favourable treatment of assets, limited liability, and perpetual life. Stevens also points out that shareholders could be forced into financial support of political positions with which they disagree.

'It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires ... they are not themselves members of 'We the People' by whom and for whom our *Constitution* was established.'

Balance: the majority decision upsets a balance between public and corporate speech which has been arrived at over years of decisions by the Court. Quoting 'Austin', Stevens writes that corporate advertising during elections weakens democracy, gives voters an impression of corporate domination, and chills the speech of candidates.

Stevens concludes: 'At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from

© Island Tides Publishing Ltd. This article may be reproduced with this attribution, in its entirety, with notification to Island Tides Publishing Ltd.

This article was published (Feb 18, 2010) in 'Island Tides'. 'Island Tides' is an independent, regional newspaper distributing 17,500 print copies throughout the Gulf Islands and the Canadian Strait of Georgia from Victoria to Campbell River to Howe Sound.

Island Tides, Box 55, Pender Island, BC, Canada.
Email: islandtides@islandtides.com.

Phone: 250-629-3660. Fax: 250-629-3838.
Website: <http://www.islandtides.com>

undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the Majority of this Court would have thought its flaws included a dearth of corporate money in politics.'

The Way It Is In Canada

Canadian law and practice differs from the US in both the appointment of senior judges and the rules of election finance.

This US judgement illustrates the danger of politicizing the appointment of senior and Supreme Court judges. Such judicial activism is destructive not only to the law, but also to the integrity of the courts.

Canada has never been immune from partisan political influence in the federal judicial appointment of judges—which covers the Superior Courts in each province, the Federal Court, and the Federal Court of Appeal.

However, after coming to power in 2006, the Conservative government increased the number of government nominees to each of the 17 regional judicial advisory committees, made the sole judicial representative on each committee a non-voting chair, and added a representative of Canada's police forces to each eight-member committee. These changes were criticized by Chief Justice Beverley McLachlin and the Canadian Judicial Council.

Currently, ten of the regional committees are inoperative because the government has failed to appoint members to fill out their ranks.

Since 2006, some 311 federal judges have been appointed or elevated; over a third of the total. Through a separate process, two new judges have been appointed to the Supreme Court of Canada.

All these appointments are made by the Prime Minister. He has been accused of 'stacking' the advisory committees, and of appointing party faithful and social conservatives to the federal bench.

Canada's national system of election financing differs significantly, both in philosophy and practice, from the US system. The Canadian approach avoids the sort of campaign finance issue which the US Supreme Court attempts to settle in the Citizen's United ruling. In Canada, in return for strict limits on political contributions, it includes the major component of public financing.

Since amendments in 2003, to the *Canada Elections Act*, corporations or unions may not contribute to registered parties, candidates, constituency associations, or leadership or nomination contestants. In return, registered political parties are paid \$1.75 annually for each vote they received in the previous general election. Candidates also receive a partial reimbursement of their election expenses, provided they receive 10% of the vote.

Contributions by individuals are limited to a \$5,000 annual total, and attract a tax credit of up to \$650. Corporations, unions, and associations may contribute up to \$1,000 to individual candidates.

The question of third party or 'independent' advertising, equivalent to that raised in the US Supreme Court decision, is covered by a separate set of *Elections Act* regulations. These require that any third party (which may include corporations, associations, unions, or individuals) which spends over \$500 in an election period, must register.

Advertising is then subject to a \$3,000 limit in support of candidates in any electoral district, and a \$150,000 limit in support of any registered party. (The definition of advertising includes 'issue ads' where the issue may be identified with any particular candidate. All advertising must also include disclosure of who paid for the ad.) There are provisions barring pooling of third parties funds.

Local Coda

It is interesting to note that, in the 2008 federal election, there were only 65 registered third parties in all of Canada, and they do not appear to include any corporations. (Interestingly, three of these, sharing a common address, were in Saanich—Gulf Islands. This attracted a good deal of controversy.) ☞

© Island Tides Publishing Ltd. This article may be reproduced with this attribution, in its entirety, with notification to Island Tides Publishing Ltd.

This article was published (Feb 18, 2010) in 'Island Tides'. 'Island Tides' is an independent, regional newspaper distributing 17,500 print copies throughout the Gulf Islands and the Canadian Strait of Georgia from Victoria to Campbell River to Howe Sound.

Island Tides, Box 55, Pender Island, BC, Canada. Phone: 250-629-3660. Fax: 250-629-3838.
Email: islandtides@islandtides.com. Website: <http://www.islandtides.com>
