Topic Committee Report: First Amendment Controversy Area

By: Kathryn Rubino and Joe Patrice

Summary

It is my recommendation that the topic committee should include a topic on the ballot that has the Supreme Court limit First Amendment freedoms, specifically in the area of speech.

Unique educational opportunities

Mechanism

Using the Supreme Court as an actor presents debaters with unique educational opportunities in that it teaches a different set of procedural issues then a topic focused upon legislation and students explore the meaning of 'normal means' means when applied to different branches of government. Additionally, this mechanism provides a bit of variety in standard generic positions such as politics because the traditional horse-trading and backlash that typically form the basis of that disad do not apply in the same way to the Court

Additionally, in the last 15 years our community has gotten lax in regularly providing legal resolutions for our students to debate. As of the 2010-2011 season it will have been 5 years since we last debated a legal topic, meaning that only those students taking a 5th undergraduate year will have ever debated a legal topic. Even student who debated on the last courts topic has not debated the First Amendment, specifically limitations on free speech. Though the CEDA topic archive was down at the time of the writing of this paper the last time the First Amendment was debated by the NDT was 24 years ago when the topic was

RESOLVED: "That one or more presently existing restrictions on First Amendment freedoms of press and/or speech established in one or more federal court decisions should be curtailed or prohibited."[1]

1 http://groups.wfu.edu/NDT/HistoricalLists/topics.html

Potential Wordings

The United States Supreme Court should limit freedom of speech protections of the First Amendment.

The United States Supreme Court should overrule one or more of its holdings in one of the following cases (see relevant cases list).

The United States Supreme Court should curtail the protection provided for free speech by the First Amendment of the United States' Constitution by overruling one or more of its current holdings on pornography, hate speech, and or campaign finance.

Key terms

Pornography vs obscenity

According to the First Amendment Center

> Pornography refers to material dealing with sex designed to arouse its readers or viewers. Webster's Dictionary defines "pornography" as "writings, pictures, etc. intended primarily to arouse sexual desire."
> There are two types of pornography that receive no First Amendment protection — obscenity and child pornography. The First Amendment generally protects pornography that does not fall into one of these two categories — at least for adult viewers. Sometimes, material is classified as "harmful to minors" even though adults can have access to the same material.
> Even a 1986 Attorney General Commission Report on Pornography said that "not all pornography is legally obscene." The question becomes what types of pornography cross the line into the unprotected categories of obscenity and child pornography. Or to put it another way, courts often struggle with whether pornography is too "hard core."[2]

Material harmful to minors

Defined by Children Online Protection Act as:

> The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

2 http://www.firstamendmentcenter.org/speech/adultent/topic.aspx?topic=pornography

Hate speech

> Hate speech is a communication that carries no meaning other than the expression of hatred for some group, especially in circumstances in which the communication is likely to provoke violence. It is an incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, national origin, gender, religion, sexual orientation, and the like. Hate speech can be any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities or to women.[3]

Campaign finance reform

According to the The American Heritage® New Dictionary of Cultural Literacy, Third Edition:

> A movement, fueled in recent decades by political candidates' increasing dependence on expensive television advertisements, to restrict the amount of money that individuals and interest groups can contribute to political campaigns.[4]

Freedom of Speech

According to dictionary.com

> –noun
> the right of people to express their opinions publicly without governmental interference, subject to the laws against libel, incitement to violence or rebellion, etc.
> Also called free speech.

3 http://definitions.uslegal.com/h/hate-speech/

4 http://dictionary.reference.com/browse/campaign+finance+reform

Free Speech Areas

1. Hate Speech

RA.V. v. City of St. Paul, 505 U.S. 377 (1992)

Teenagers allegedly burned a homemade cross inside the fenced yard of a black family that lived across the street from the defendant; the incident took place in the middle of the night. D was prosecuted under the St. Paul "Bias-Motivated Crime Ordinance," which provided that "whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

The Supreme Court (5-4) concluded that the law was impermissibly content-based, because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."

The Supreme Court has previously held in Chaplinsky and after that the First Amendment does not protect "fighting words." (Court held that the statute in question only impacted “fighting words”--- this prevented overturning the ordinance on overbreadth grounds) Nevertheless, even though the government is regulating a supposedly "unprotected" category (such as fighting words), it may not do so in a content-based manner.

Justice Scalia gave two examples of what he considered to be impermissibly content based regulations of "unprotected" categories: The government may proscribe libel, but it may not make the further content discrimination of proscribing only libel critical of the government. Similarly, a city council may not enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government.

But there is a caveat to the above rule. Scalia acknowledged that there is an exception to the rule that even unprotected categories enjoy complete freedom from content-based regulation: when "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists," and the content discrimination is allowed. Thus the state could choose to prohibit only "the most lascivious displays" of sexual activity, rather than all constitutionally-obscene materials; or, the federal government can (as it does) criminalize only those threats of violence that are directed against the President becayse in each case, the proscribed speech represents the most extreme instance of the reason why the whole category is unprotected in the first place (i.e., it is the "most obscene," or it is the "most dangerously violent").

Analysis

This case raises the classic dilemma that free speech entails a freedom to hate and pits civil libertarians against the postmodern critical theorists. The case implicates not only racism, but hate crime legislation for sexism, heterosexism, and religious persecution. Additionally, objectivists take exception with that very concept of regulating some types of speech.

The debate on this decision is focused on the underlying value conflict because of its limited scope. While hate crime legislation is unconstitutional under R.A.V., hateful motivations may be used to enhance penalties for other crimes (e.g. racially-inspired murder can be punished more harshly than other murders). This is problematic for those seeking a non-critical debate because from the perspective of most links we can think of there is little difference between hate crime legislation and hate crime enhancements. Ultimately, we think this case is essential to a courts topic, whether focused on the First Amendment or as part of a “social issues potpourri” due to the wealth of legal scholarship on the case and the centrality of the social issues it raises.

Bibliography

Bell, Jeannie, "Oh Say, Can You See: Free Expression by the Light of Fiery Crosses," 39 Harvard Civil Rights-Civil Liberties Law Review 335 (2004)

Article argues cross burning should be treated as a hate crime, which may be prosecuted rather than as constitutionally protected hate speech. Argues 1A scholars do not put cross burning in the correct historical perspective and race theorists do not analyze the 1A issues correctly.

McMasters, Paul, “Must a civil society be a censored society?,” Human Rights, published by the American Bar Association, Fall 1999, Vol. 26, No. 4

Argues we should never take steps to censor speech and RAV is correctly decided. Also argues hate speech laws encourage appropriation of victims group’s identities.

Delgado and Stefancic, "The Boundaries of Free Speech: Understanding Words That Wound”, 2004

Revisits Delgado’s seminal work: Delgado, Richard, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," 17 Harv. C.R.-C.L. L. Rev. 133 (1982). Describes the paternalistic approach taken by many advocates of regulating hate speech and the ‘tough love’ approach of conservative libertarians. Also discusses hate speech regulation in an international context

Demaske, Chris, "Modern Power & the First Amendment: Reassessing Hate Speech," 9 Communications Law & Policy J. 273 (Summer, 2004, #3)

Modern power dynamics indicate that free speech doctrine needs to be reconsidered— this requires the Court to think about the role of group identity and how speech can be resistant and oppressive. The article also advocates a different way to analyze 1A questions and reject the content neutral analysis traditionally used to assess these kinds of questions

Holdowsky, Jonathan, "Out of the Ashes of the Cross: The Legacy of R.A.V. v. St. Paul," 30 New England L. Rev. 1115 (1996)

Lower courts have applied RAV in ways that are arbitrary, incoherent and self-serving. Court needs to clarify (perhaps overturn) its holding.

Butler, Judith, “Constitutions and ‘Survivor Stories’: Burning Acts: Injurious Speech”, 3 U Chi L Sch Roundtable 199, 1996

A reading of the RAV decision that explores the power dynamics of the decision and the violence that precipitates hate speech.

Tsesis, Alexander, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS (2002)

The dangers of hate speech are compounded when it is systematically developed over time. This becomes part of the culturally acceptable dialogue, which leads to the persecution of minorities.

2. Pornography

American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986)

Background

Indianapolis enacted an anti-pornography ordinance drafted by feminist scholars Andrea Dworkin and Catherine MacKinnon. The ordinance contained four prohibitions. People may not "traffic" in pornography, "coerce" others into performing in pornographic works, or "force" pornography on anyone. Anyone injured by someone who had seen or read pornography had a right of action against the maker or seller.

"Pornography" under the ordinance is defined as "the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humiliation; or

(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented as being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display."

The Seventh Circuit (Judge Easterbrook) invalidated the ordinance on the First Amendment ground that the ordinance is impermissibly aimed at viewpoint and the Supreme Court summarily affirmed.

The Seventh Circuit summed up the dilemma of free speech eloquently, stating: Depictions of pornography tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, "pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex, which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]." Yet this simply demonstrates the power of pornography as speech.

Analysis

Another classic case within the scholarship. Not only does this case problematize the promise of freedom through free speech for those not within the majority, but unlike R.A.V. the holding is fully unique because there is no civil rights based anti-pornography act of any kind.

This case raises gender literature, heterosexism literature (gay porn was banned under this statute too), in addition to the legal literature.

Bibliography

Sunstein, “Pornography and the First Amendment,” 1986 Duke L.J. 589 (1986).

Sunstein counters “content neutrality” in the context of antiporn legislation by positing that such legislation is “directed at the harm rather than at viewpoint.” Invoking the footnote of Carolene Products, Sunstein contends that the economic advantages of the porn industry actually function to limit the marketplace of free speech and justify antiporn legislation.

MacKinnon, “Pornography, Civil Rights, and Speech,” 20 Harv.C.R.-C.L.L.Rev. 1

(1985). Dworkin, “Against the Male Flood: Censorship, Pornography, and Equality,” 8 Harv. Women’s L.J. 1 (1985).

MacKinnon and Dworkin outline the premise of their statute and argue that pornography’s societal harms extend beyond the individual viewing the work and therefore justify regulation. They also contend that pornography underlies violence against women.

Rosen, “SYMPOSIUM: DEMOCRACY IN ACTION: THE LAW & POLITICS OF LOCAL GOVERNANCE: Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances,” 21 J. L. & Politics 223 (2005).

Tailoring antiporn ordinances to permit sub-state polities (but not states or the federal government) to enact content-based regulations may advance rather than impede foundational free speech values.

Allen, Pornography and Power, Journal of Social Philosophy, Winter 2001, 512-31 (2001)

“Insofar as pornography is empowering, it is a possible site for resistance, but insofar as the genre is structured to a large extent by relations of masculine dominance and feminine subordination, it is also a possible site of the application and articulation of oppression. Finally, what might allow pornography to go from being a possible to being an actual site for resistance is precisely the resources that are generated by the collective power of feminism as a social movement.”

Strossen, Defending Pornography: Free Speech, Sex, and the Fight for Women’s

Rights (1995); Meyer, “Sex, Sin, and Women’s Liberation: Against Porn-Suppression,” 72 Tex.L.Rev. 1097 (1994).

Pornography can empower women as greater sexual citizens

3. Children and the Internet

Background

Since 1996, Congress has passed several laws that address sexually explicit materials and sexual predation found on the Internet, including:

The Communications Decency Act (CDA): Passed in 1996, the CDA represents Congress's first attempt to regulate children's access to sexually explicit material on the Internet. The CDA made it illegal to put "indecent" content on the Internet where kids could find it. However, the Supreme Court unanimously declared the CDA unconstitutional in 1997 in Reno v. ACLU for "broad suppression of speech addressed to adults"; the term "indecent" was found to be too vague.

The Child Online Protection Act (COPA): In 1998 a narrower version of the CDA required commercial Web sites to verify proof of age before giving users access to sexually explicit material considered obscene for minors. COPA was immediately challenged by the ACLU and other civil liberty organizations, and in 1999 a permanent injunction was ordered against its enforcement. On May 13, 2002, in ACLU v. Ashcroft,[5] the Supreme Court directed a lower court to reexamine its ruling that COPA was unconstitutional. On March 7, 2003, the court again found that COPA was unconstitutional. On June 29, 2004 the Supreme Court kept in place the 1999 lower-court ruling against the enforcement of COPA, ACLU v. Ashcroft II,[6] but ordered the lower court to consider whether recent advancements in filtering technologies could protect children more or less effectively than the criminal sanctions specified in COPA.

5 http://www.firstamendmentcenter.org/faclibrary/case.aspx?id=807

6 http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Ashcroft_v_ACLU_II

“The Government has failed, at this point, to rebut the plaintiffs' contention that there are plausible less restrictive alternatives to the statute,” Justice Anthony Kennedy wrote for the Court. “Substantial practical considerations, furthermore, argue in favor of upholding the injunction and allowing the case to proceed to trial.”

The case returned to district court for a full trial in fall 2006. In March 2007, the district judge released his opinion striking down COPA. “Perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection,” wrote Senior U.S. District Judge Lowell Reed Jr. in ACLU v. Gonzalez.[7]

In July 2008, a three-judge panel of the 3rd Circuit invalidated COPA in ACLU v. Mukasey,[8] finding that it did not pass strict scrutiny because filtering presented a less speech-restrictive alternative. The Supreme denied an appeal of this decision in January 2009.[9]

The Children’s Internet Protection Act (CIPA): In 2000, Congress enacted CIPA, which took effect in April 2001, requiring schools and libraries receiving federal technology funds to install pornography-blocking software on their computers. The American Library Association filed suit alleging that the library portion of CIPA was unconstitutional on its face. On May 31, 2002, the U.S. District Court for the Eastern District of Pennsylvania agreed. The U.S government appealed that decision, and on June 23, 2003, the Supreme Court overturned the district court’s ruling. (The school portion of CIPA has not yet been challenged, so its constitutionality remains untested.)

7 http://www.paed.uscourts.gov/documents/opinions/07D0346P.pdf

8 http://www.ca3.uscourts.gov/opinarch/072539p.pdf

9 http://www.firstamendmentcenter.org/news.aspx?id=21139

This backdrop provides an interesting area that affirmatives may want to limit free speech rights. Even though CIPA has been upheld COPA and CDA were much more sweeping pieces of legislation and an overrule of Reno v. ACLU or ACLU v. Ashcroft would be seen by most First Amendment scholars as a significant change in the landscape. There is a wealth of research that has been done examining the potential harm to minors that affirmatives may wish to tap into.[10]

Additionally, this area is particularly salient right now as the Sixth Circuit recently (April 15, 2010) upheld an Ohio law that criminalized the sending of harmful material to juveniles.[11] This decision may also prove to provide interesting ground for negatives to run a states counter plan.

10 http://www.copacommission.org/papers/

11 http://www.firstamendmentcenter.org/speech/news.aspx?id=22845

4. Campaign Finance reform

Citizen United v. Federal Election Committee, No. 08–205 (January 21, 2010).[12]

Background

Citizen United, a nonprofit organization, sought to run television commercials promoting its film Hillary: The Movie, a documentary critical of the then-Senator Hillary Clinton, and to show the movie on DirecTV. The Bipartisan Campaign Reform Act of 2002 (BCRA)(AKA McCain-Feingold), prohibited corporations and unions from using their general treasury funds to make an "electioneering communication" or for "independent expenditures," defined as speech that expressly advocates the election or defeat of a candidate and that is made independently of a candidate's campaign. In January 2008, the US district court for the District of Columbia ruled that the commercials violated provisions in the Bipartisan Campaign Reform Act of 2002 restricting "electioneering communications" 30 days before primaries. Though Citizens United argued that the film was fact-based and nonpartisan, the lower court found that the film had no purpose other than to discredit Clinton.

The Supreme Court found that the legislation's prohibition of all independent expenditures by corporations and unions were invalid and could not be applied to spending such as that in "Hillary: The Movie." Kennedy wrote: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." He also noted that since there was no way to distinguish between media and other corporations, these restrictions would allow Congress to suppress political speech in newspapers, books, television and blogs. The Court overruled Austin v. Michigan Chamber of Commerce, which had previously held that a Michigan campaign

12 http://www.scotuswiki.com/index.php?title=Citizens_United_v._Federal_Election_Commission

finance act that prohibited corporations from using treasury money to support or oppose candidates in elections did not violate the First and Fourteenth Amendments. The Court also overruled the part of McConnell v. Federal Election Commission that upheld BCRA §203's extension of §441b's restrictions on independent corporate expenditures.

Aff ground

President Obama has come out very strongly against the decision, stating it "gives the special interests and their lobbyists even more power in Washington – while undermining the influence of average Americans who make small contributions to support their preferred candidates."[13]

Obama later elaborated in his weekly radio address saying, "this ruling strikes at our democracy itself" and "I can't think of anything more devastating to the public interest,"[14] before criticizing the decision as part of his State of the Union address.

Senator John McCain, co-author of the BCRA said "there's going to be, over time, a backlash ... when you see the amounts of union and corporate money that's going to go into political campaigns".[15] McCain was "disappointed by the decision of the Supreme Court and the lifting of the limits on corporate and union contributions" but not surprised by the decision, saying that "It was clear that Justice Roberts, Alito and Scalia, by their very skeptical and even sarcastic comments, were very much opposed to BCRA." He pointed out "Justice Rehnquist and Justice O'Connor, who had taken a different position on this issue,

13 CNN, 1-20-10 http://politicalticker.blogs.cnn.com/2010/01/21/obama-criticizes-campaign-finance-ruling/?fbid=V83K7Zx86Ng "Obama Criticizes Campaign Finance Ruling".

14 Superville, Darlene, 1-23-10, http://www.huffingtonpost.com/2010/01/23/obama-weekly-address-vide_n_434082.html

15 Amick, John 1-24-10, http://voices.washingtonpost.com/44/2010/01/mccain-skeptical-supreme-court.html?wprss=44, "McCain skeptical Supreme Court decision can be countered"

both had significant political experience, while Justices Roberts, Alito and Scalia have none."[16]

Republican Senator Snowe opined "[t]oday's decision was a serious disservice to our country."[17]

Additionally, there has been a great deal of concern over the decision from various third parties. The Green Party stated "In a transparently political decision, a majority of the US Supreme Court overturned its own recent precedent and paid tribute to the giant corporate interests that already wield tremendous power over our political process and political speech… The Court has literally legalized corporate bribery of our elected officials."[18]

Ralph Nader condemned the ruling, saying "[w]ith this decision, corporations can now directly pour vast amounts of corporate money, through independent expenditures, into the electoral swamp already flooded with corporate campaign PAC contribution dollars."[19] And the Reform Party, along with some conservatives, are concerned about the decision's ability to introduce foreign campaign contributions into US elections. "The court has, in effect, legalized foreign governments and foreign corporations to participate in our electoral politics."[20]

Additionally, there has been some concern that the decision could impact the US's international commitments. Ambassador Janez Lenarcic speaking for the OSCE stated that the ruling may adversely affect the organization's two commitments of "giving voters a genuine choice and giving candidates a fair chance" in that "it threatens to further marginalize candidates without strong

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16 Id.

17 Snowe, 1-10, http://snowe.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=52d6486c-802a-23ad-4fb5-e34d8249a594, "Snowe troubled by U.S. Supreme Court ruling to remove limits on corporate and union spending in political campaigns"

18 http://www.gp.org/press/pr-national.php?ID=291

19 http://www.nader.org/index.php?/archives/2168-Time-to-Reign-in-Out-of-Control-Corporate-Influences-on-Our-Democracy.html

20 http://www.politico.com/news/stories/0110/31845.html

financial backing or extensive personal resources, thereby in effect narrowing the political arena."[21]

Laurence Tribe wrote that the decision "marks a major upheaval in First Amendment law and signals the end of whatever legitimate claim could otherwise have been made by the Roberts Court to an incremental and minimalist approach to constitutional adjudication, to a modest view of the judicial role vis-à-vis the political branches, or to a genuine concern with adherence to precedent" and pointed out that "Talking about a business corporation as merely another way that individuals might choose to organize their association with one another to pursue their common expressive aims is worse than unrealistic; it obscures the very real injustice and distortion entailed in the phenomenon of some people using other people's money to support candidates they have made no decision to support, or to oppose candidates they have made no decision to oppose."[22]

Though former supreme court Justice Sandra Day criticized the decision only obliquely, she did focus on the rapid timeframe the problem of campaign finance presents "In invalidating some of the existing checks on campaign spending, the majority in Citizens United has signaled that the problem of campaign contributions in judicial elections might get considerably worse and quite soon."[23]

A variety of academics have also written criticizing the decision and and providing affirmatives leverage for activism or court credibility advantages. Heather K. Gerken, Professor of Law at Yale Law School wrote that "The court has done real damage to the cause of reform, but that damage mostly came earlier, with decisions that made less of a splash."[24] Richard L. Hasen, Professor of Law at Loyola Law School, found that the ruling "is activist, it increases the dangers of corruption in our political system and it ignores the strong tradition of American political equality".[25] Michael Waldman, director of the Brennan Center

21 http://www.osce.org/odihr/item_1_42468.html

22 http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/

23 http://thecaucus.blogs.nytimes.com/2010/01/26/oconnor-mildly-criticizes-courts-campaign-finance-decision/?hp

24 http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics/

25 Id.

for Justice at NYU School of Law, opined that the decision "matches or exceeds Bush v. Gore in ideological or partisan overreaching by the court."[26] Fred Wertheimer, founder and president of Democracy 21 considered it "a disaster for the American people".[27]

There is also ample ground for a democracy advantage. The New York Times stated in an editorial, "The Supreme Court has handed lobbyists a new weapon. A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election."[28] Jonathan Atler called it the "most serious threat to American democracy in a generation."[29] The Christian Science Monitor wrote that the Court had declared “outright that corporate expenditures cannot corrupt elected officials, that influence over lawmakers is not corruption, and that appearance of influence will not undermine public faith in our democracy.”[30]

Neg Ground

Citizens United, the group filing the lawsuit said, "Today's U.S. Supreme Court decision allowing Citizens United to air its documentary films and advertisements is a tremendous victory, not only for Citizens United but for every American who desires to participate in the political process."[31] During litigation, Citizens United had support from the US Chamber of Commerce and the NRA.[32]

There is also ample case evidence from the petitioner’s briefs and the amicus briefs. (Full copies of the briefs are available at the SCOTUS wiki.) The advocacy groups involved as amicus have also written support of the decision in the weeks

26 Id.

27 Id.

28 http://www.nytimes.com/2010/01/22/us/politics/22donate.html

29 http://www.newsweek.com/id/232147

30 http://www.csmonitor.com/Commentary/Opinion/2010/0122/Supreme-Court-s-campaign-ruling-a-bad-day-for-democracy

31 http://citizensunited.org/blog.aspx?entryid=8225648

32 http://www.bloomberg.com/apps/news?pid=20601110&sid=aU.fsorJbt3E

that have followed. "The Supreme Court has correctly eliminated a constitutionally flawed system that allowed media corporations (e.g., The Washington Post Co.) to freely disseminate their opinions about candidates using corporate treasury funds, while denying that constitutional privilege to Susie's Flower Shop Inc. ... The real victims of the corporate expenditure ban have been nonprofit advocacy organizations across the political spectrum."[33]

Heritage Foundation fellow Hans A. von Spakovsky, a former Republican member of the Federal Election Commission, said "The Supreme Court has restored a part of the First Amendment that had been unfortunately stolen by Congress and a previously wrongly-decided ruling of the court."[34]

Cato Institute researchers John Samples and Ilya Shapiro wrote that restrictions on advertising were based on the idea "that corporations had so much money that their spending would create vast inequalities in speech that would undermine democracy." However, "to make campaign spending equal or nearly so, the government would have to force some people or groups to spend less than they wished. And equality of speech is inherently contrary to protecting speech from government restraint, which is ultimately the heart of American conceptions of free speech."[35]

Key to negative ground if this controversy is selected will, of course, be an increase in free speech and supporters of the Citizens United decision make a strong case that the increase in speech is particularly important in the area of elections. Capital University Law School professor Bradley A. Smith former chairman of the Federal Election Commission, wrote that the major opponents of political free speech are "incumbent politicians, shocked by the apparent tectonic shift in politics of late" who "are keen to maintain a chokehold on such speech." Empowering "small and midsize corporations—and every incorporated mom-

33 http://www.washingtonpost.com/wp-dyn/content/article/2010/01/22/AR2010012203874.html?hpid=opinionsbox1

34 http://www.washingtontimes.com/news/2010/jan/21/divided-court-strikes-down-campaign-money-restrict/?page=2

35 http://www.cato.org/pub_display.php?pub_id=11159

and-pop falafel joint, local firefighters' union, and environmental group—to make its voice heard" frightens them.[36]

Campaign finance expert Jan Baran, a member of the Commission on Federal Ethic Law Reform agreed, writing that "The history of campaign finance reform is the history of incumbent politicians seeking to muzzle speakers, any speakers, particularly those who might publicly criticize them and their legislation. It is a lot easier to legislate against unions, gun owners, 'fat cat' bankers, health insurance companies and any other industry or 'special interest' group when they can't talk back."[37] Attorney Kenneth Gross, former associate general counsel of the Federal Election Commission, wrote that corporations relied more on the development of long-term relationships, political action committees and personal contributions, which were not affected by the decision. He held that while trade associations might seek to raise funds and support candidates, corporations which have "signed on to transparency agreements regarding political spending" may not be eager to give.[38]

This area is also rich in case literature, and the potential impact foreign entities may have over the election process post Citizens United is an issued hotly debated. In response to statements by President Obama and others that the ruling would allow foreign entities to gain political influence through U.S. subsidiaries, Bradley Smith pointed out that the decision did not overturn the ban on political donations by foreign corporations and the prohibition on any involvement by foreign nationals in decisions regarding political spending by U.S. subsidiaries, which are covered by other parts of the law.[39]

The New York Times asked seven academics to opine on how corporate money will reshape politics as a result of the court's decision.[40] Three of these wrote that the effects would be minimal or positive: Christopher Cotton, a University of

36 http://www.city-journal.org/2010/eon0125bs.html

37 http://www.nytimes.com/2010/01/26/opinion/26baran.html

38 http://www.washingtonpost.com/wp-dyn/content/article/2010/01/22/AR2010012203874.html?hpid=opinionsbox1

39 http://corner.nationalreview.com/post/?q=ZTVkODZiM2M0ODEzOGQ3MTMwYzgzYjNmODBiMzQzZjk=

40 http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics/

Miami School of Business assistant professor of economics, wrote that “There may be very little difference between seeing eight ads or seeing nine ads (compared to seeing one ad or two). And, voters recognize that richer candidates are not necessarily the better candidates, and in some cases, the benefit of running more ads is offset by the negative signal that spending a lot of money creates. University of California professor of law Eugene Volokh held that the “most influential actors in most political campaigns” are media corporations which “overtly editorialize for and against candidates, and also influence elections by choosing what to cover and how to cover it.” Holding that corporations like Exxon would fear alienating voters by supporting candidates, the decision really meant that voters would hear “more messages from more sources.” Joel Gora, a professor at Brooklyn Law School said that the decision represented "a great day for the First Amendment" writing that the Court had "dismantled the First Amendment 'caste system’ in election speech."

Additionally, The Editorial Board of the San Antonio Express-News criticized McCain-Feingold's exception for media corporations to its ban on corporate electioneering, writing that it “makes no sense” that the paper could make endorsements up until the day of the election but advocacy groups could not. "While the influence of money on the political process is troubling and sometimes corrupting, abridging political speech is the wrong way to counterbalance that influence.”[41]

The National Review wrote “is there something uniquely harmful and/or unworthy of protection about political messages that come from corporations and unions, as opposed to, say, rich individuals, persuasive writers, or charismatic demagogues?" He noted that “a recent Gallup poll shows that a majority of the public actually agrees with the Court that corporations and unions should be treated just like individuals in terms of their political-expenditure rights."[42] According to a Gallup poll taken in October 2009 and released soon after the

41 http://www.mysanantonio.com/opinion/82636522.html

42 http://bench.nationalreview.com/post/?q=NTk4OTA4YzlkMDg5ZmQyMWQ3OTFiZjM4OWIxMmYxNGI=

decision showed 57 percent of those surveyed agreed that contributions to political candidates is a form of free speech and 55 percent agreed that the same rules should apply to individuals, corporations and unions. Sixty-four percent of Democrats and Republicans believed campaign donations are a form of free speech.[43]

The Chicago Tribune editorial board member Steve Chapman wrote "If corporate advocacy may be forbidden as it was under the law in question, it's not just Exxon Mobil and Citigroup that are rendered mute. Nonprofit corporations set up merely to advance goals shared by citizens, such as the American Civil Liberties Union and the National Rifle Association, also have to put a sock in it. So much for the First Amendment goal of fostering debate about public policy."[44]

Congress or Amendment CP

Given the political reaction to the decision some may be concerned that there may be a legislative reaction to the Citizens United case that could, potentially invalidate this affirmative mid-year. However, only a constitutional amendment would be able to fully reverse the decision, as Lawrence Tribe describes:

Such an action in this setting – unlike the setting of the Violence Against Women Act, where the absence of a link to commerce proved constitutionally fatal a decade ago in United States v. Morrison – would be easy to defend as falling within Congress's power over commerce. It could overcome some of the weaknesses that have hindered state corporate law in the past. For example, it could provide a greater incentive for suit, by offering statutory damages or treble damages (i.e., reimbursement of three times the challenged expenditure, part of which reimbursement would go directly to the plaintiffs rather than into the corporation's coffers), as well as attorneys' fees, and it could provide better deterrence by imposing individual liability for the corporate officers authorizing the improper political expenditure. And the "business judgment" rule making

43 http://thehill.com/blogs/blog-briefing-room/news/77629-poll-public-agrees-with-principles-of-campaign-finance-decision

44 http://www.chicagotribune.com/news/opinion/ct-oped-0124-chapman-20100122,0,1729158.column

such cases notoriously difficult to bring under state law could be replaced with a rule less deferential to management and more focused on the existence of a convincing justification for using general treasury funds as such rather than relying entirely on PAC funds contributed by people with politics in mind.

Such a federal structure would not operate as a complete substitute for the provisions of McCain-Feingold that the Court struck down in Citizens United, but that is hardly an objection to this kind of legislation. On the contrary, the more completely a federal "fix" replicates what the Court held invalid under the First Amendment, the greater the danger that the Court would strike down the substitute as a thinly disguised end-run around its handiwork. So this is not a complete substitute, but it is an approach Congress should pursue, in a manner as bipartisan as McCain-Feingold itself, without delay.[45]

Though some politicians have discussed the possibility of introducing an amendment to reverse the decision (Democratic congresswoman Donna Edwards has advocated petitions to reverse the decision by means of constitutional amendment. Rep. Boswell has formally introduced legislation to amend the constitution, and is currently seeking co-sponsors. Senator John Kerry also called for an Amendment to Address this issue.[46]) the literature seems more likely to provide diverse counter plan ground rather then a threat to moot out a large part of the resolution. Even proponents of an amendment consider the possibility a long-term goal rather then something likely to occur within the next academic year.[47]

And though it is possible that legislation may attempt to create a patchwork of legislation to blunt some of the impacts of the Citizens United decision,[48] even if

45 See note 10.

46 http://pubrecord.org/multimedia/6674/congresswoman-professor-movement/

http://iowaindependent.com/26145/boswell-pushes-constitutional-amendment-to-overturn-scotus-ruling

http://thehill.com/homenews/senate/79289-kerry-backs-changing-constitution-to-deal-with-scotus-decision

47 http://thehill.com/homenews/senate/79289-kerry-backs-changing-constitution-to-deal-with-scotus-decision

48 http://www.nytimes.com/2010/02/12/us/politics/12citizens.html

http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/

the Congress were able to work with a remarkable speed, still wouldn't render the affirmative in this area because the Court's ruling of McCain Feingold as unconstitutional means there cannot be a complete substitute for the act without Court action.