Spring 2010

What is the Sound of a Corporation Speaking? "Just Another Voice," According to the Supreme Court

Linda L. Berger
University of Nevada, Las Vegas -- William S. Boyd School of Law

What is the Sound of a Corporation Speaking? "Just Another Voice," According to the Supreme Court

*By Linda L. Berger**

When the Supreme Court overrules itself, and reaches a result different from the conclusions of Congress, the Executive Branch, and more than 20 state legislatures, the Court has the burden of persuasion. Did the five justices in the majority in *Citizens United v. Federal Election Commission*, 558 U.S. ___ (2010), meet that burden? I think the answer is no, setting aside the question of whether the majority reached the "right" conclusion about the constitutionality of limiting corporate spending in election campaigns. In this essay, I will explain my answer and address a related question: did the *Citizens United* majority observe the rules of the legal conversation within which the Court is but one of the speakers?

To be persuaded by the majority that the First Amendment protects corporate expenditures for "electioneering communications" and candidate advertisements during election campaigns, you must first agree with the majority that corporations are engaged in "speech" when they spend money for these purposes. Otherwise, the "unqualified text" of the First Amendment—"Congress shall make no law . . . abridging the freedom of speech, or of the press"—does not cover what could easily be described as just another product manufactured by the corporation. The majority claims a simple syllogism renders the conclusion certain: the First Amendment protects speech; corporations produce speech; thus, corporations are protected by the First Amendment. But the syllogism's premises require the decision maker to accept without question much that is implicit in the two metaphors on which its logic depends. The logic depends on the assumption that for the purposes of the First Amendment, corporations should be seen as "persons" and their spending of money to achieve some results should be viewed as "speech." Articulating these metaphors uncovers some of what is hidden by the majority's opinions, revealing our ordinary understanding that "free speech" is the expression in speaking or writing of the views of an individual human being. Because our ordinary understanding of free speech is so different, we recognize that it is a stretch to fit the source of the metaphor, a person speaking, onto the metaphor's target, a corporation spending.

That the majority shares our ordinary understanding of free speech is reflected in Justice Kennedy's comparison of the campaign financing statute to other restrictions on free speech. The exemplary speakers described in Justice Kennedy's opinion for the Court match this ordinary understanding; they are individuals (distributing pamphlets and speaking about politics); media corporations (publishing books and newspapers); and nonprofit advocacy groups (the Sierra Club, the National Rifle Association, and the American Civil Liberties Union) expressing their views on public issues. After describing these speakers, Justice Kennedy argues that no one would claim the statute was constitutional if it was being applied to individuals. But he fails to acknowledge the reason why no one would make this claim: when individuals exercise their First Amendment rights, they are "persons speaking," exactly what we expect when we think of free speech, with little metaphoric transfer required to make them fit.

Avoiding the metaphoric reasoning on which its syllogism depends, the majority conceals the question of whether the metaphors are helpful in these circumstances and fails to examine whether corporate spending *should* be viewed as speech. Instead, the majority assumes that what the statute regulates not only constitutes speech but in fact constitutes political speech, the most favored kind. Early in the opinion, Justice Kennedy lets his readers know that they should take for granted that "political speech" is involved. Writing about one of the cases the majority is about to overrule, he identifies its holding as prohibiting core value speech: "*Austin* had held that political speech may be banned based on the speaker's corporate identity." So too, in his concurrence, Chief Justice Roberts characterizes the government's argument as urging "us in this case to uphold a direct prohibition on political speech."

Compounding the generalization that corporate spending automatically qualifies as speech, the majority makes a good deal of the principle that the First Amendment protects "speech," not speakers. Dismissing the dissent's argument that protected speech might be confined to the expression of individual human beings, Justice Scalia scoffs, "This is sophistry," and explains that the corporation's authorized spokesperson is a human being. But the opposing argument is not that there is no "person" working at the corporation who signs the contract or operates the machinery or convenes the board meeting. Instead, the opposing argument is that it might make a difference for First Amendment purposes that a challenged communication was the product of a corporate process, rather than the expression of an individual person. When a corporation "speaks" in this way, no one knows which corporate employees participated in the process through which the communication was produced or whose

* Professor, Mercer University School of Law.

views the communication represents; no one is responsible or accountable for the content of the statements or the manner in which they were communicated.[1]

Only when you accept the inferences and reasoning processes transferred by metaphoric reasoning are you able to conclude that corporations are engaged in speech when they spend money in an election campaign. Going further, the majority's conclusion that the First Amendment should protect corporate speech relies on another set of unexamined assumptions: that the marketplace of ideas metaphor is the most appropriate way to think about how the First Amendment works. The majority assumes its audience agrees with this framework, which automatically suggests that the corporation needs protection from government regulation. Thus, Justice Kennedy writes that speech is so important to the election process that further regulation of the market could only be detrimental: "As additional rules are created for regulating political speech, any speech arguably within their reach is chilled." Transferring its assumptions about the economic marketplace to the First Amendment arena, the majority naturally concludes that more speech is better than less speech, that (because money is "speech" in this instance) more spending is better than less spending, and that the better product will prevail.

Nowhere does the majority acknowledge that the dissent's question deserves serious consideration: given the language, purpose, and history of the First Amendment, should it be interpreted to protect artificial entities such as for-profit corporations against government regulation? In his dissent, Justice Stevens presents the text-based argument that the Constitution itself makes a distinction between types of speakers. Thus, it might be concluded that individual speakers are protected by the free speech clause, but that the only protected entities are those that fall within the free press clause. Rather than counter the argument that the text itself distinguishes between speakers, the majority responds that it would be hard to apply the distinction.

As for the purposes of the First Amendment, most commentators acknowledge that protecting personal expression, supporting individual self-fulfillment and self-determination, is among them. This purpose might be furthered by extending protection beyond the personal to a group of people who have joined together for the specific purpose of expressing their views. But it is difficult to justify extending protection on these grounds to a corporate entity whose purposes grow out of and are limited by its responsibility to its stockholders.

Rather than meeting their burden of persuasion, the majority justices repeatedly shift the burden to the dissent. First, the majority asks the reader to assume that if a corporation is treated for some purposes as a person, it follows (as night follows the day) that a corporation should be treated as a person for all purposes. "The lack of a textual exception for speech by corporations" indicates to Justice Scalia that the natural reading of the First Amendment's free speech clause would include them. Given corporate attributes that make the entity very different from an individual speaker, the majority instead should explain the lack of any text indicating that corporations were intended to be included. Writing that "the individual person's right to speak includes the right to speak in association with other individual persons," Justice Scalia concludes that "[t]he association of individuals in a business corporation is no different." But surely it is the majority's burden to explain why there is no difference.

As for engaging effectively in the national civic and legal conversation, the majority appears oblivious to current discussions of corporate roles and responsibilities, the functioning of a poorly regulated economic marketplace, and the excesses of campaign financing. Chief Justice Roberts assumes his audience agrees that it would be a bad thing if "First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy." Justice Scalia concludes that "to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate." Given the current public debate, these statements seem jarring; as the dissenting Justice Stevens notes, "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 majority's tone-deafness extends to its expressions of reluctance to reach a sweeping conclusion, claiming to have been forced by circumstances to decide a difficult question. Instead, the majority appears to have reached out to find and determine an issue not pursued by the parties. Though Chief Justice Roberts claims that "[t]his is the first case in which we have been asked to overrule *Austin*," Justice Stevens responds that it would be more accurate "to state that 'we have asked ourselves' to reconsider [*Austin* and *McConnell*]."

Reopening the argument, then reversing recent precedent partly on the basis that it was unstable, violates the conventions of the legal conversation in several ways. As anyone who has been engaged in a long-running dispute can attest, it is just not fair to claim that a decided principle is undecided simply because the people who disagreed in the first place continue to complain. Yet Justice Kennedy relies on this evidence to show that *Austin* is ripe for overruling: "[I]t has been noted [by two of us] that '*Austin* was a significant departure from ancient First Amendment principles.'" Concurring, Justice Roberts points out that "the validity of *Austin*'s rationale—itself adopted over two 'spirited dissents,'—has proved to be the consistent subject of dispute among Members of this Court ever since." Dissenters may continue to disagree; what the rules frown on is the claim that continuing to disagree is destabilizing rather than merely obstinate. The

continued on page 15

[1] The *Citizens United* decision may allow corporations and unions to donate anonymously to nonprofit groups; those groups can use the money to finance political advertisements, and corporations and unions may thus avoid the disclosure requirements upheld in *Citizens United*.

accepts, subject only to IRS restrictions on nonprofit spending and *Buckley's* major purpose test mentioned above. The concept of an electioneering communication is also somewhat obsolete, for what organization would bother with an electioneering communication when it could expressly advocate?

State political parties

Although the decision has no direct effect on them, the potential losers in the wake of *CU* are political parties. Many state parties have low-dollar contribution limits and limited ability to coordinate with their candidates under state and local laws. These organizations, however, are permitted to expressly advocate on behalf of their candidate within the limits of federal and state laws. The potential problem is that parties may find themselves further marginalized as nonprofits, corporations, and unions flood the political landscape with new spending in response to the *CU* decision. Whether this concern comes to fruition remains to be seen. Parties should remain a big player in the short term.

Conclusion

The *CU* decision has created somewhat of an uproar among those concerned about increased corporate influence in the democratic process. Leaving the discussion about the sanctity of democracy aside, the 2010 election cycle will be extremely interesting to watch as those corporate (and union) funds find the path of least resistance, new players emerge on the electoral stage, and these new rights are exercised.

What is the Sound of a Corporation Speaking? "Just Another Voice," According to the Supreme Court

continued from page 9

true ground of this objection to *Austin* is expressed by Justice Roberts; the court must balance "the importance of having constitutional questions *decided* against the importance of having them *decided right*."

Finally, the majority harms the legal conversation by not taking its burden of persuasion seriously. Rather than rebutting the dissent's argument that the free speech and free press clauses might be interpreted to protect different types of speakers, Justice Scalia flatly declares that "*[n]o one* thought that is what it meant." Near the end of his concurrence, Justice Scalia makes the same irrefutable contention: "we are therefore simply left with the question whether the speech at issue in this case is 'speech' covered by the First Amendment. *No one* says otherwise."

The majority addresses another question, whether narrower grounds might have been found adequate to decide the issue, in more depth. But its argumentation strategy is similar—declare that the conclusion is undisputed. Thus, the majority explains why the narrower arguments were rejected before it declares the statute unconstitutional on its face, presumably because there are cases not before the court in which the statute would be found unconstitutional. What are those cases? We don't know because the majority does not tell us. Instead, Justice Kennedy concludes that the statute "beyond doubt discloses serious First Amendment flaws," that it chills speech that is "beyond all doubt protected," and that "[a]ny other course of decision would prolong [its] substantial, nation-wide chilling effect."

In sum, the *Citizens United* majority substituted certainty for persuasion. On questions like these, the justices would better serve the ongoing legal conversation if they heeded Learned Hand's caution that when judges themselves so sharply disagree, they should not be too sure of their conclusions.

RESOLUTION IN MEMORY OF DAVD E. CARDWELL

WHEREAS our friend and colleague David E. Cardwell, passed away on November 18, 2009;

WHEREAS David served in such crucial roles as a member of the Section Council, liaison to the Section of State and Local Government, and liaison to the Standing Committee on Election Law;

WHEREAS David served as a long-time leader in the American Bar Association, a delegate to the House of Delegates, and member of the Board of Governors;

WHEREAS through his energy, good humor, and insight, he effectively represented the Section's interests to other entities within the American Bar Association;

WHEREAS, in his distinguished career, David was a partner at Holland & Knight; General Counsel to the Florida Redevelopment Association; and founder, Executive Director, and General Counsel of the Florida Grapefruit League Association;

WHEREAS David was a nationally recognized expert in election law and the political process;

WHEREAS David, with political acumen and persuasive insights, contributed so much to this Section as a mentor to many other leaders of this Section;

NOW BE IT RESOLVED that the Section expresses our deep sadness at David's passing, our condolences to his wife, Dagmar, his daughter Reece, and his son Patrick, and honors his memory for his numerous contributions to the American Bar Association, this Section, and the legal profession. We are honored to call him our friend and colleague.

January 23, 2010