The Free State Foundation

A Free Market Think Tank For Maryland...Because Ideas Matter

Perspectives from FSF Scholars
January 22, 2010
Vol. 5, No. 3

What *Citizens United* Means for Free Speech in the Digital Age

by

Seth L. Cooper*

By its 5-4 ruling in *Citizens United v. FEC*,[i] the U.S. Supreme Court struck down government bans on corporations and unions using general treasury funds to make independent expenditures for "electioneering communications" or for speech expressly advocating the election or defeat of candidates. Justice Anthony Kennedy's majority opinion concludes that under the First Amendment's free speech protections, "government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."[ii] *Citizens United* is a new landmark in the Supreme Court's jurisprudence for political speech and campaign finance restrictions. However, the Court's ruling offers some broader First Amendment insights concerning modern communications technologies that cast further doubt on certain existing and potentially new speech regulations of such technologies.

The case arose when a nonprofit corporation released a muckraking film opposing the 2008 presidential candidacy of now-Secretary of State Hillary Clinton and sought to make the film available as a free video-on-demand

offering with a cable provider. The nonprofit, which receives a small amount of donations from for-profit corporations, sought a declaratory judgment that certain federal campaign finance laws would unconstitutionally penalize the nonprofit's film and its planned TV ad spots.

Again, *Citizens United* is a political speech case, first and foremost. But language from the Court's opinion appears to call into greater question certain forms of media regulation. First, the Supreme Court reiterated that "First Amendment protection extends to corporations."[iii] In a concurring opinion, Justice Antonin Scalia put the proposition this way:

> The Amendment is written in terms of "speech," not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals.[iv]

This isn't a new proposition advanced by the Court,[v] but its punctuation is significant. Many forms of mass media and modern communications regulations, and many calls for additional regulations of such kind, are premised on lesser or no First Amendment protections being accorded to corporations. But the Court reemphasized that First Amendment limits on government speech restrictions don't go out the window just because those restrictions target an association, union, or corporation.

Second, the Supreme Court expressed its disapproval for disparate treatment of different forms of media and communications technologies. As Justice Kennedy wrote for the majority:

> While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular types of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux...[vi]

> Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on particular media or technology used to disseminate political speech from a particular speaker...The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable. First Amendment standards, however, 'must give the benefit of any doubt to protecting rather than stifling speech...[vii]
>
> Rapid changes in technology —and the creative dynamic inherent in the concept of free expression— counsel against upholding a law that restricts political speech in certain media or by certain speakers...Today, 30-second television ads may be the most effective way to convey a political message...Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues...The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech...[viii]

These passages from the Court's opinion in *Citizens United* are clearly at odds with *Red Lion Broadcasting v. FCC*'s assertion sixty years ago that "differences in the characteristics of news media justify different in the First Amendment standards applied to them."[ix] As Professor Eugene Volokh has already pointed out in a *Volokh Conspiracy* blog post, "the Court has long treated over-the-air broadcast TV and radio as less constitutionally protected than newspapers, magazines, books, and (in recent years) cable television and the Internet... The *Citizens United* majority...includes language that casts considerable doubt on this second-class status of broadcast TV and radio."[x] This "varying standards approach" for different technologies provided the basis for permitting the Federal Communications Commission's so-called "Fairness Doctrine" regulation of broadcasting.[xi] In last year's *Fox v. FCC,*[xii] the Supreme Court declined to address and revisit the shaky rationale for the FCC's ongoing indecency regulation of broadcasting. Neither does the Court specifically address such issues in *Citizens United*. Nonetheless, the language in the majority opinion suggests the Court is one appropriate case away from expressly renouncing the "varying standards approach" to modern communications platforms for

purposes of speech regulation and instead directly applying a technologically neutral standard. (FSF President Randolph May has addressed this very topic in "Charting a New Constitutional Jurisprudence for a Digital Age"[xiii] and also in an abbreviated version[xiv] of the article.)

Third, the Supreme Court rejected speech restrictions based upon an "'antidistortion rationale' as a means to prevent corporations from obtaining 'an unfair advantage in the political marketplace' by using 'resources amassed in the economic marketplace.'"[xv] As Justice Kennedy elaborated in explaining the unconstitutionality of government suppression of political speech by media corporations:

> [T]elevision networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times. The First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media. It was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the colonies…The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that that provided the means of communicating political idea when the Bill of Rights was adopted.[xvi]

Combined with the Court's reiteration of the free speech rights of corporations and its general disapproval of differential treatment of different speech medium technologies, this explicit rejection of the "antidistortion rationale" might foreshadow a more rigorous examination of media ownership and subscribership limit rules in future cases. Just this past August, I blogged in "D.C. Circuit: Vindicating Video Competition"[xvii] about how the D.C. Circuit struck down the FCC's subscriber caps for cable operators in *Comcast v. FCC*.[xviii] The D.C. Circuit made its ruling primarily on the basis that the FCC's rules were "arbitrary and capricious" and failed to account for new competition offered by DBS in the rapidly-evolving video marketplace. The court also mentioned that the First Amendment rights of cable operators are implicated by such regulations,[xix] but saw no need to vigorously pursue the issue. In light of the ruling in *Citizens United*, however, the First Amendment may likely play an increased role in

any FCC media ownership or cable subscriber cap regulations under judicial review by the Supreme Court or by lower courts.

Interestingly, although the Supreme Court's use of the "antidistortion rationale" was limited to one or arguably only a few political speech and campaign finance restrictions cases,[xx] its rejection appears to coincide with and bolster the Court's previous rejection of a "concentration of control" rationale in *Miami Herald Publishing Company v. Tornillo* (1974).[xxi] Both the "antidistortion rationale" and the "concentration of control" rationale premised government-imposed speech restrictions on a certain set of private speakers in order to give a platform to other speakers, the argument being that certain speakers had become too powerful in the marketplace of ideas and that they should be compelled to provide a venue for contrary viewpoints. The "concentration of control" rationale was offered in *Tornillo* as the basis for imposing government-compelled speech access mandates on a newspaper. In that case, the Court refused to accept restrictions on the publisher's free speech on the proffered basis that speech restrictions are offset by the granting of speech opportunities to other speakers.

As Free State Foundation President Randolph May has contended in a number of articles,[xxii] and as FSF reiterated this month in comments to the FCC,[xxiii] the recently proposed net neutrality regulation is an analogous form of compelled speech access mandate that raise serious problems under the First Amendment. *Tornillo*'s rejection of "concentration of control" type of rationale for imposing a right-of-reply requirement on a newspaper publisher likewise means that courts should reject net neutrality mandates that compel speech by a private broadband ISP's. *Citizens United*'s rejection of the "antidistortion rationale" for imposing speech restrictions now adds some additional heft to *Tornillo*'s firm rejection of a rationale for imposing speech restrictions on a set of private speakers based on their claimed dominance in the marketplace of ideas. This adds even more force to the First Amendment argument against net neutrality mandates. On this score, the paper recently filed in the FCC's net neutrality proceeding by noted constitutional law scholars Laurence Tribe and Thomas Goldstein is well worth reading.[xxiv] It argues that net neutrality regulations could violate the First Amendment.

Finally, the Supreme Court also maintained that elaborate systems of regulation that call for specialized application in individual case are no panacea, but may in fact present prior restraint problems. "We decline to adopt an interpretation that requires intricate case-by-case determinations

to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on the subject,"[xxv] Justice Kennedy wrote for the Court. In referring to an extensive set of Federal Election Commission (FEC) regulations, Justice Kennedy went on to opine:

> As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid the threat of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak…These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in the 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.[xxvi]

In other words, the fact that a federal agency offers a regulatory labyrinth by which a citizen—corporate or otherwise—could escape speech restriction enforcement and associated penalties confers no legitimacy on the exercise of such power where the underlying restrictions chill speech. For this reason, adoption of an ambiguous set of net neutrality regulations that would require several rounds of FCC rulings to flesh out their meaning is problematic because, in the meantime, speech is chilled by the ominous presence of such regulations and potential sanctions.

Citizens United v. FEC may not be the pivot point, at least in the near-term, for any forthcoming court ruling on the constitutionality of modern communications regulation such as media ownership, cable subscriber caps, or network neutrality. But the Court's ruling should provide some persuasive reinforcement for already existing arguments about the potential unconstitutionality of many types of regulatory mandates applicable to communications companies.

---

* Seth L. Cooper is an Adjunct Fellow of the Free State Foundation, a free market-oriented think tank located in Rockville, Maryland.

[i] 588 U.S. ____ (2010). See generally Slip Opinion (January 21, 2010), available at:
[ii] *Citizens United.,* Slip. Op. at 1-2.
[iii] *Id.*, at 25.
[iv] *Id.*, at 8-9 (Scalia, J., concurring).
[v] *See, e.g., id.* at 25-26 (citing several cases recognizing First Amendment protections for corporations).

[vi] *Id.*, at 9 (cite omitted).
[vii] *Id.* (cites omitted).
[viii] *Id.*, at 49 (cites omitted).
[ix] 395 U.S. 367, 386 (1949).
[x] Eugene Volokh, "*Citizens United* on the Second-Class First Amendment Status of Broacast TV and Radio?" *The Volokh Conspiracy* (January 21, 2010), available at: http://volokh.com/2010/01/21/citizens-united-on-the-second-class-first-amendment-status-of-broadcast-tv-and-radio/.
[xi] *See Red Lion Broadcasting*, 395 U.S. 367. The term "varying standards approach" comes from Jonathan W. Emord, Freedom, Technology and the First Amendment 278 (1991). For Emord's critique of the scarcity rationale for broadcast content, *see id*. at 189-191 and 285-289. For additional criticisms of the Fairness Doctrine and its underlying rationales, *see also, e.g.*, Ronald Coase. R. H. Coase, "The Federal Communications Commission," 2 *J. L. & Econ*. 1 (1959); Christopher S. Yoo, "The Rise and Demise of the Technologically-Specific Approach to the First Amendment," 91 *Geo. L. J*. 245, 266-292 (2003).
[xii] 556 U.S. ___ (2009), available at: http://www.law.cornell.edu/supct/pdf/07-582P.ZO.
[xiii] 3 *Charleston L. Rev*. 373 (2009), available at: http://www.freestatefoundation.org/images/Charting_a_New_Constitutional_Jurisprudence_for_the_Digital_Age-Charleston_Law_Rev.pdf.
[xiv] Randolph J. May, "Charting a New Constitutional Jurisprudence for the Digital Age," *Engage*, Vol. 9, Issue 3, pg. 110 (October, 2008), available at: http://www.freestatefoundation.org/images/Charting_a_New_Constitutional_Jurisprudence_for_the_Digital_Age-Engage.pdf.
[xv] *See Citizens United*, Slip. Op. at 32-36 (cites omitted).
[xvi] *Id.*, at 37-38 (cites omitted).
[xvii] Seth L. Cooper, "D.C. Circuit: Vindicating Video Competition," *FSF Blog* (August 31, 2009), available at: http://freestatefoundation.blogspot.com/2009/08/dc-circuit-vindicating-video.html.
[xviii] 579 F.3d 1 (2009), available at: http://pacer.cadc.uscourts.gov/common/opinions/200908/08-1114-1203454.pdf.
[xix] *See id.* at 9-10.
[xx] In his concurring opinion, Chief Justice John Roberts writes:

> The dissent erroneously declares that the Court "reaffirmed" Austin's holding in subsequent cases…Not so. Not a single party in any of those cases asked us to overrule Austin, and as the dissent points out…the Court generally does not consider constitutional arguments that have not properly been raised. Austin's validity was therefore not directly at issue in the cases the dissent cites.

Citizens United, Slip. Op. at 5 (Roberts, C.J., concurring) (cites omitted). For a contrary view, see *Id*. at 4-6, 48-50 (Stevens, J., dissenting).
[xxi] 418 U.S. 241.
[xxii] *See, e.g.*, Randolph J. May, "First Amendment-Net Neutrality Issues," *National Law Journal* (August 14, 2006), available at: http://www.freestatefoundation.org/images/First_Amendment-Net_Neutrality_Issues-NLJ-081408.pdf; Randolph J. May, "Net Neutrality Mandates: Neutering the First Amendment in the Digital Age," *I/S: A Journal of Law and Policy for the Digital Age* (2007), available at: http://www.freestatefoundation.org/images/First_Amendment-Net_Neutrality_Issues-NLJ-081408.pdf.
[xxiii] Randolph J. May and Seth L. Cooper, "Comments of the Free State Foundation," *In the Matter of Preserving the Open Internet*, (FCC) GN Docket No. 09-191, at 16-21 (January 14, 2010), available at: http://www.freestatefoundation.org/images/Comments_-_Preserving_the_Open_Internet_-_GN_Docket_No._09-191.pdf.
[xxiv] See Laurence Tribe and Thomas Goldstein, *Proposed 'Net Neutrality' Mandates Could Be Counterproductive and Violate the First Amendment*, attached to Comments of Time Warner Cable', GN Docket No. 09-191, filed January 14, 2010, available at: http://freestatefoundation.org/images/TWC_Net_Neutrality_Violates_the_First_Amendment_-Tribe_Goldstein.pdf
[xxv] *Citizens United*, Slip. Op. at 12.
[xxvi] *Id*. at 18 (cites omitted).