

Montana Supreme Court throws down gauntlet in Citizens United decision

Published: Friday, March 09, 2012, 8:50 AM



By Frank Askin/NJ Voices

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The Montana Supreme Court has thrown down the gauntlet in the Citizens United decision.

Citizens United, you will recall, was the 5-4 decision two years ago that overturned a century of law by deciding that corporations (and labor unions) could spend unlimited amounts from their treasuries to elect candidates to office — so long as they did not coordinate the specific expenditures with a candidate or a candidate's campaign.

It was that ruling — with a little bit of help from some lower court follow-ups and a divided Federal Election Commission — that unleashed the orgy of “independent” spending in this year's presidential campaign, much of it from corporate sources.

The linchpin of the Citizens United majority opinion by Justice Anthony Kennedy was the notion that “independent” expenditures on behalf of, or in opposition to, a candidate did not give rise to corruption or its appearance. That proposition was not new. It was part of the decision in *Buckley vs. Valeo* some 40 years ago, dealing with the original Federal Election Campaign Act.

It was the *Buckley* notion that, under the First Amendment, the only justification for limiting the electoral speech of individuals was the threat of corruption. Thus, if individuals wanted to spend their own money to independently campaign for a candidate, the amount could not be limited. Few individuals took the court up on the offer for a variety of reasons — including the fact that they would have to publicly identify themselves as the source of the expenditures.

In addition to freeing corporations and unions to operate as flesh-and-blood people, Kennedy's opinion also narrowed the definition of “corruption” to include only “quid pro quo” expenditures — in other words, activities that would amount to actual bribery.

If the only result of the expenditure was to give the spenders influence and access to the candidates they helped elect, that could not be considered corruption.

Enter the Montana Supreme Court.



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A 2009 file photo of the U.S. Supreme Court building in Washington.

In 1912, the voters of Montana passed a referendum restricting corporations from spending money to elect candidates to office, except through closely regulated political action committees. The law was the result of well-publicized scandalous behavior by Montana corporations, especially mining companies, to take over state government.

In the aftermath of Citizens United, three corporations challenged the constitutionality of the 100-year old Montana statute.

Rather than acknowledging the precedent of Citizens United to strike down the law, the Montana justices (or at least six of the nine) either challenged or distinguished (depending on one's perspective) the decision.

Acknowledging that Kennedy's opinion had narrowly defined "corruption" as "dollars for political favors," the Montana court wrote: "Montana's experience and experience elsewhere make it exceedingly difficult to maintain that independent expenditures by corporations do not give rise to corruption or the appearance of corruption."

One issue the opinion raises is whether the Citizens United ruling on the corrupt impact of independent expenditures was a ruling of law or a finding of fact based on the record immediately before the court. While most legal observers assume it was the former, the Montana opinion at least gives Kennedy, who everyone recognizes is the swing vote of the ideologically divided court, an opportunity to refine his position in light of post-Citizens United experience, without seeming to contradict himself.

Justices Ruth Bader Ginsburg and Stephen Breyer, two of the four Citizens United dissenters, welcomed the Montana decision. When the Montana defendants petitioned the U.S. Supreme Court to review the case and stay the decision pending a hearing, Ginsburg and Breyer wrote a brief opinion stating: "A petition for certiorari will give the Court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates' allegiance, Citizens United should continue to hold sway."

Obviously, Breyer and Ginsburg are hoping that the vast amount of political money his opinion unleashed from a tiny segment of the population will cause Kennedy to reconsider his views.

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