2010 INSIGHTS:

In the remaining weeks of this year, the Daily Journal will be featuring columns written by select contributors touching upon this year's legal developments, lessons learned and what's to come.

The Court Keeps Faith With the Constitution: A Retrospective on *Citizens United v. FEC*

By Joerg W. Knipprath

Associated Press

President Barack Obama arrives on Capitol Hill to deliver his State of the Union address as Supreme Court justices Samuel Alito, Anthony Kennedy, and Chief Justice John Roberts applaud.

The Supreme Court recently heard oral argument in *Schwarzenegger v. Entertainment Merchants Assoc. (EMA)*, which asks whether California can prohibit the sale of violent video games to children. Under the challenged law, parents are still free to buy such games that invite their offspring, according to the state's brief, to decapitate girls who are begging for mercy after having been attacked with a shovel or, for a different thrill, to pour gasoline on people who have been shot in the leg and are trying to crawl away and then to set them afire. Oh, and to urinate on them. The attorney for the purveyors of these purportedly socially redeeming games assured the justices that such displays of violence represent a traditional teaching tool for America's youth, and that, unless children have unrestricted opportunity to purchase these materials, free speech is devastated. Academic readers of Supreme Court tea leaves are quite confident that the Court will make short shrift of California's affront to the First Amendment.

Yet, only 10 months ago, the Supreme Court's decision in *Citizens United v. FEC*, which upheld the right of corporations and unions to air political ads without fear of criminal prosecution, produced a near-universal howling among academics and "correct" pundits that the decision was a severe blow to the republic. Four justices dissented from the (to them) apparently incomprehensible argument that the First Amendment protects political speech and association for all. The President even took the occasion to depart from professional protocol and common tact and, to the delight of his co-partisans, dressed down the justices seated in front of him during the State of the Union Speech for their lapse of constitutional propriety.

Presumably, in the minds of these critics, American adults are overwhelmed by the excitement of political ads and are not capable of rationally deciding for themselves how to evaluate the ads' messages. Based on the experts' reaction to the California video game law, American children, though, are fully capable of deciding for themselves whether such invited interactive acts of violence are appropriate for them and will rationally evaluate the games' messages. To sharpen the irony of the academic commentariat's reaction, the "political" movie produced by Citizens United, an attack on then-candidate Hillary Clinton, would be shown on cable television through video-on-demand. If only the movie had contained interactive deviant brutality, it would have been like the violent video games in *EMA*, and *Citizens United* might have been an easy call for my colleagues troubled by speech in the forum of a political campaign. Fortunately for political speech, five justices sided with the Constitution.

Citizens United struck down a portion of the McCain-Feingold campaign finance law of 2002. That section prohibited corporations and unions from making any direct expenditures for messages on behalf of candidates ("electioneering communications") within 30 days of a primary election or 60 days of a general election. Along the way, the Court endorsed the holdings of prior cases, cleared away a contrary outlier case, and affirmed the heretofore-unremarkable principle that at the core of the First Amendment is the protection of political advocacy. By one vote.

As President Barack Obama did, critics claimed that the Court overturned a century of precedent against such corporate expenditures. Justice Anthony M. Kennedy meticulously eviscerated that argument. Justice Antonin Scalia's concurrence put to rest the dissent's pseudo-originalist canard that the Framers did not intend corporations to exercise freedom of speech, by citing to numerous 18th-century educational, religious, and literary corporations and identical non-corporate associational entities that engaged in free speech activities. To underscore that point, the Court cited a long series of cases in which the free speech rights of corporations were protected.

Contrary to the critics' assertions, federal law initially only prohibited direct corporate *contributions* to candidates. In 1947, for the first time, Congress prohibited independent political *expenditures* from corporations and unions. Although the Court would not squarely reach the constitutionality of such restrictions for three decades, questions were raised about their constitutionality almost immediately, first by President Harry S. Truman, then by the Court and concurring justices in *U.S. v. CIO* (1948), and, finally, by three justices in *U.S. v. Automobile Workers* (1957).

Judicial resolution of the constitutional issue did not occur until *Buckley v. Valeo* (1976). The Court made a stark distinction between contributions to candidates and independent expenditures. The former (which had been restricted in the early-20th century laws) could be limited because of the concern over corruption and the appearance of corruption. Limitations on the latter were struck down as unconstitutional, with only Justice Byron White (who seems never to have met a federal law he did not like) dissenting. The specific statutory Section 608(e) in *Buckley* applied to individual, as well as corporate and union, expenditures. Some of the winning plaintiffs were corporations. However, another part of the statute (Section 610, the 1947 restriction on corporate and union expenditures that had been at issue in the earlier cases), was not specifically involved in *Buckley*. That section, subsequently recodified, was at issue in *Citizens United*.

Soon after *Buckley*, the Court struck down a state law that prohibited independent corporate expenditures related to referenda in *First National Bank of Boston v. Bellotti* (1978). The Court emphasized that "the legislature is constitutionally disqualified from dictating...the speakers who may address a public issue." Not until *Austin v. Michigan Chamber of Commerce* (1990) did the Court break from this line of precedents and uphold a restriction on corporate independent expenditures.

Austin rested on an "anti-distortion" theory that sought to allow government to intervene in the marketplace of speech to curb the power of wealthier speakers who might exercise a disproportionate influence in getting out their message. That theory had been roundly rejected by the Court before *Austin*, and was so, again, in *Citizens United*. Moreover, the McCain-Feingold Act's exemption of huge media corporations from its coverage, and Buckley's exclusion of wealthy individuals from expenditure limits, made a mockery of the anti-distortion rationale. Indeed, then-Solicitor General Elena Kagan made little effort to defend *Austin* during oral argument in *Citizens United*. *Austin* was overruled.

After the mis-step in *Austin* and the tortured opinions in *McConnell v. FEC* (2003), the Court returned to its earlier jurisprudence and protected the rights of all, including individuals, associations, unions, and corporations, to participate in political discourse. In *FEC v. Wisconsin Right to Life* (2007), the Court foretold the result in *Citizens United* by holding the restriction on electioneering communications unconstitutional where the communication was not express advocacy for or against a particular candidate.

One year and one election cycle since *Citizens United*, the sky has not fallen. Contrary to the crisis-mongering of First Amendment Luddites, corporations have spent much the same as before. Indeed, individual corporations are not the largest spenders, and unions eventually may be bigger beneficiaries of the decision. According to the Fair Political Practices Commission, during the last decade, private interests not affiliated with political parties have spent more than $1 billion on influencing California elections. Almost 60 percent has come from two public employee unions, an industry association, and two Indian tribes, in that order. Nationally, the biggest spender during the 2010 elections was another public sector union. Individual corporations have been comparative pikers. Moreover, the efforts of business, labor, and issue-oriented interest groups have been dwarfed by more than $1 billion spent by the major parties on the 2010 election, and by the nearly $800 million raised by President Obama just for his 2008 campaign.

Repeated measures to control campaign expenditures through layers of regulation have just made matters more opaque, though the complexity of the laws and the threat of felony prosecutions have resulted in a windfall for election law attorneys. Complexity and opacity deter smaller associations from participating in the political process, as the Court noted in *Citizens United*, and magnify the power of wealthier actors able to maneuver through the regulatory labyrinth. One reason corporate spending has not changed much is that associated entities previously could spend unlimited "soft" money on electioneering activities (even within the time before an election) through political action committees.

Attempting to control political spending in a country of 300 million that supposes itself to be a participatory political system, and one that prizes informed electorates, is chimerical. As former California Assembly Speaker Jesse Unruh famously declared, "Money is the mother's milk of politics." *Citizens United* is faithful to the First Amendment's core values and brings the potential for more accountability to campaign financing through disclosure rules. It is to fine-tuning the constitutionality of disclosure rules that the Court will turn next.

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In Celebration of the Declaration of Independence and the U.S. Constitution

By Dean R. Broyles

Recently a large number of our citizens have displayed an invigorated curiosity and interest in the Declaration of Independence and the U.S. Constitution. While the causes of this renewed fascination may be debated, as a constitutional attorney, I am very pleased that many are rediscovering in this generation the foundations of what makes America special in the pantheon of nations.

If there is one overarching principle embodied in our founding documents it is the virtue of freedom. The promotion, protection and preservation of liberty were our founders' chief goals. The main problem they confronted when creating our government was the universal scourge of unchecked and unaccountable centralized government power. The history of Europe was instructive in this regard. There, the rise of the state was almost always accompanied by a concurrent loss of individual freedom.

Like a beacon of hope and light in the midst of global darkness, our founders boldly declared that it would be very different here in the new world. Rejecting the abuses inherent in the divine right of kings, the corruption of the nobles and the bondages of feudalism, Thomas Jefferson's powerful words in the Declaration of Independence sparked a righteous revolution in 1776 when he boldly declared that "all men are created equal." Jefferson's original draft condemned the African slave trade, but that portion was removed to assuage the complaints of South Carolina and Georgia. Later, President Abraham Lincoln, who said the United States is "the last best, hope of earth" would re-affirm and realize the principle of equality in his costly campaign to free the slaves.

And so it is no small matter that in his famous plea to separate from Great Britain that Jefferson appealed to the "laws of nature and nature's God" as the only secure foundation of this new freedom. Our founders understood the fallible nature of humanity and were humble enough to posit the "Supreme Judge of the world," not fallen man, as the only accurate arbiter of the propriety of our separation. And in so doing, our founders were appealing to an external, fixed, universal and objective standard; an authority far above kings, nobles and parliament.

In the new world, the purpose of government was no longer to serve the selfish whims, tyrannies and tantrums of kings and nobles who often ruled by coercion, but rather to secure the God-given "unalienable Rights" of the individual, namely "Life, Liberty and the pursuit of Happiness." Here, authority would not be created by heredity or obtained by titles of nobility, but would rather be a more "just" authority deriving its power "from the consent of the governed."

And so in the years following 1776, in order to "secure the Blessings of Liberty," the U.S. Constitution, which replaced the Articles of Confederation, was ratified in 1789. And as if to hammer home the principle of individual liberty over and against the power of the state, the preamble begins with the words "We the people" written in bold strokes in large calligraphy script. Thus, the U.S. Constitution places ultimate governmental authority squarely in the hands of the individual citizen — not the king, nor noble, nor government bureaucrat, nor career politician. Thus, we would be the world's first truly democratic republic.

In America, the founders' concern over the corrupting influence of government power was directly addressed in the very form and structure of the federal government. Rather than placing absolute power in one person or in one government body, such as a king, the authority of the federal government, was separated and thereby diffused into three branches — the executive, legislative and judicial branches, with a brilliantly constructed set of sophisticated checks and balances. The founders borrowed this idea from Isaiah 33:22, which addresses these three areas of the state's authority: "king" (executive), "judge" (judicial) and "lawgiver" (legislative).

To further check the power of the state, the founders wisely consigned to the federal government *only* that amount of power absolutely necessary to carry out a very limited number of essential "national" functions. This principle of "limited enumerated powers" means that if the U.S. Constitution does not provide explicit written federal authority in a particular area, then the federal government does not have jurisdiction to act. Plenary power was reserved to the states and to the people. Thus, the 10th Amendment declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

But the U.S. Constitution did not only restrict and restrain the power of the federal government, but also concurrently elevated the liberties of individual citizens to an unparalleled plateau. Here in America, the individual would be as free as possible. These historic individual rights are spelled out in the Bill of Right's First Amendment, ratified two years after the Constitution in 1789. Specifically, the First Amendment protects fundamental individual liberties such as the freedom of *speech*, the free exercise of *religion*, prohibition of government religious coercion (the Establishment Clause), the right to *assembly* and right to *petition* the government to redress grievances. In the new world, the individual was free to dissent and express that dissent without fear of retaliation by the state.

But what of the federal government today? Based upon my study of history and law, I submit that the current federal government would be virtually unrecognizable to our founders. They would lament, not only the sheer size of the federal government, but would be shocked at the raw power the federal government has aggrandized. This excessive power grab is inimical to both the spirit and text of the Constitution, undermines state's rights, and harms individual freedoms. And, among other things, I suspect that the founders would be deeply disappointed with the current and emerging threats to the freedom of speech and religious liberty.

One pernicious threat to freedom was recognized early by Jefferson himself — the power of unelected federal judges to incrementally distort the meaning of the U.S. Constitution by their legal opinions. "At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions, nevertheless, become law by precedent, sapping, by little and little, the foundations of the constitution, and working its change by construction, before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance. In truth, man is not made to be trusted for life, if secured against all liability to account. (Thomas Jefferson, letter to Monsieur A. Coray, Oct. 31, 1823).

Our founders and framers universally believed that the foundation of a good government was morality and that the foundation of morality was religion. And by religion, they specifically meant the Judeo-Christian biblical worldview. You may be surprised that Jefferson, who some consider our least religious founder, stated: "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever." (Thomas Jefferson, Notes on the State of Virginia, Query 18, 1781).
I submit that it is impossible for a citizen to truly understand and appreciate the exceptionalism of the United States of America, if one does not profoundly understand the biblical worldview, which motivated our founders.

For far too long, we have forsaken and forgotten what makes America great — the true source of our liberties. Far too often, because we do not understand our history, we have confused change with progress. Yet truth remains. It is encouraging that today many are rediscovering the truth embodied in our history and in the brilliance our founding documents. In these dark and uncertain times, that beacon of truth, passed down to us by our wise founders, though dimmed, still shines. Can you see it? And the voice of truth still echoes down the halls of history speaking again to us today. Can you hear it?

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