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Justice John Paul Stevens Dissents
James Allison
June 21, 2013

(Gavel.) My name is John Paul Stevens. Chances are you don't know me. But if you do, you might recall a rich kid from Chicago, always dropping names. Charles Lindbergh. Amelia Earhart. I really did meet them. Babe Ruth. I actually saw him play in the '32 World Series. Wrigley Field. Pointed his bat at that center field fence, and smacked the next pitch out of the park. It really happened.

In World War II I worked in naval intelligence. We all wanted to nail Admiral Yamamoto. He planned the attack on Pearl Harbor. We decoded secret Japanese messages that told us when and where he would be, and sent out a flight of P-38s. In a beautiful job of long range navigation they intercepted Yamamoto's plane, right on the button, and shot it down. We nailed him, all right.

You're thinking **ancient history**. Dead as the Roman Empire. Why all this nonsense? Well, I'm giving you this nonsense because I need to tell you something big. But you won't know what it means unless you know something about me. The more the better, up to a point. So here's a little more prefatory nonsense.

I got a degree in English at the University of Chicago. After the war, at Northwestern, a law degree on the G.I. Bill. Highest grades ever recorded there. Not that it matters. Just wanted to mention it so you'll know how smart I am. Or was.

Like many bright young lawyers, I spent a year in Washington as clerk for a Supreme Court judge. Joined a good firm back in Chicago, practiced antitrust. Returned to Washington, counseled a House committee on monopoly power. Back to Chicago, where a bunch of us started our own firm and I made my name as an antitrust litigator. President Nixon made me a circuit court judge. When the great William O. Douglas retired, President Ford put me up as his replacement on the U.S. Supreme Court. The Senate confirmed me, 98-0. That was 1975.

After 34 years on the bench, just before my own retirement, I wrote a dissenting opinion that could be my claim to fame. At least that's what they tell me. You know, it's funny. So many minority opinions wind up in the history books, it's like it's **good** to be in the minority. Anyway, that's what I want to talk about.

What's that? Am I **still** a Republican? (Long pause.) No comment.

Now, my dissent's formal title:

Opinion of Stevens, J.
Supreme Court of the United States
Citizens United, Appellant v. Federal Election Commission
on appeal from the united states district court for the district of columbia
January 21, 2010

The three on my side were Ginsburg, Breyer, and Sotomayor. So the other side won a close fight, 5-4.

A fight? About what? About an outfit, called "Citizens United," that had a beef with the Federal Election Commission. Yes, in a way. But the Supreme Court can be pretty devious, and this was one of those times. **[End of Page 1.]**

Peel off one layer, and what do we see? We see another fight, 20 years old, that the other side **lost**. And they never got over it. They've been sore ever since, waiting for a chance to get even. That old fight was called *Austin v. Michigan Chamber of Commerce* (1990).

You see, the state of Michigan had this campaign finance law. Said that corporations could **not** use treasury money to support or oppose political candidates. Well, the Michigan Chamber of Commerce **challenged** that law. And the case went up to the U.S. Supreme Court.

We said "The Michigan law is fine. It does not violate the First or Fourteenth Amendment." Free speech, due process, equal protection. We affirmed that the state had a compelling interest in combating a special kind of political corruption. Look, we said. Our country has enabled corporations to aggregate huge piles of money. And the country got a lot in return. But we can't interpret those huge piles of money as public support for the corporation's **political** ideas. The corrosive distortion by corporate money is the special kind of political corruption we're talking about here. And the state **does** have a compelling interest in combating it. That's what we said in *Austin*. And *Austin* built up 20 years of good, useful precedent. But a stalker was out there. A big game hunter, lying low, waiting for a chance to knock off *Austin*.

Time passes. The 2008 election comes along. Hillary Clinton and Barack Obama are fighting it out in the primary season. Citizens United shows up. It's a corporation. A wealthy nonprofit that runs a PAC--a political action committee--with millions of dollars to spend.

Now: Can it spend that money just any way it pleases? Is this the Wild West? Of course not. Congress has passed laws that regulate the financing of political campaigns, such as the Federal Election Campaign Act of 1971, amended by McCain-Feingold in 2002.

Now, then: Citizens United has this anti-Hillary Clinton film. And they want to **use the corporate treasury to finance their broadcasts the month before the final primary.** The Federal Election Commission says "No. It's against the law to do that so close to the primary season. It wouldn't allow enough time to answer an attack. And the Court recently affirmed the law in question in *McConnell v. Federal Election Commission* (2003)."

Ah, but the Court's not what it used to be. Clarence Thomas joined in 1991--one year after *Austin*. Roberts and Alito, 2005 and 2006--two and three years after *McConnell*. Can *Austin* be in trouble? Does that patient stalker have it in the cross hairs? Is *Austin* the oblivious stag, grazing in the meadow?

It should **not** be. The parties to this dispute should have resolved their difference without toppling any statutes or precedents. They could have carved out an exception very easily, it's done all the time. The thing in dispute is only a film, just a pay-to-view TV show. But the majority of this Court had buck fever. They were so hot to bring *Austin* down, they went ahead and broke a cardinal principle of the judicial process. Namely: If it is **not necessary** to decide more, it is **necessary not** to decide more. Yes. **[End of Page 2.]**

They were even ready to violate the most transparent principle of judicial process, **stare decisis** [pronounced "starry de-sye-suss"]. **Respect for precedent**.

Now, I am not an absolutist on stare decisis. In campaign finance, or anything else. No one is. But if it's going to mean **anything** in the rule of law, respect for precedent demands at the very least a **significant justification** for overturning settled doctrine. Something more than the preferences of five Justices. To quote an earlier Court, "[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." [*Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 864 (1992)]. There is no such justification in this case. This Court's central argument is that it **does not like *Austin*.**

This *Citizens United* ruling will do a lot of bad. One big example: From now on, **corporations and unions** can empty their treasuries on ads that support or attack specific candidates--with no disclosure of source. "Soft money." But **national parties** cannot spend one thin dime of soft money on ads of any kind. What a spectacular distortion! This ruling inflates the role of corporations and unions--and the narrow interests **they** represent--relative to the role of political parties and the broad coalitions **they** represent--in determining who will hold public office. That's just one thing these five judges have done in their revisit of *Austin*.

Did *Austin* need reform? We've had it for 20 years. We've had over 50 years with similar statutes that this Court suddenly calls into question. Have they been bad law? The Court offers no evidence of that. No one says it's impracticable. No corporation has asked us to overrule *Austin*. No union. No state. On the contrary, leading groups from business, organized labor, the nonprofits, and over half the states have urged that we preserve *Austin*. What then has changed since we adopted *Austin* ? The one relevant change is **the composition of this Court**.

So, today's ruling strikes at the vitals of stare decisis. So what, you say? Why the big deal? Well, many Courts have told us why. One has said that stare decisis--respect for precedent--is "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion [that] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." [*Vasquez v. Hillery*, 474 U. S. 254, 265 (1986).]

All right. What about the **merits** of its ruling? Did *Austin* kill corporate speech? Does the First Amendment forbid regulatory distinctions based on who's doing the speaking? In other words, does the First Amendment forbid different rules for different speakers? Does *Austin* betray our First Amendment tradition? Our tradition of campaign finance law?

When Citizens United brought suit, the lawful restrictions on speech were so pitifully few as to render nonsensical the claim that corporations had been--and I quote: "**excluded** from the general public dialogue." Corporations, excluded? Come on! In the 20 years since *Austin*, corporations have played a major role in the national dialogue. The corporate voice has not been stifled. Indeed, it threatens to drown out everybody else. **[End of Page 3.]**

What about the First Amendment? For over 200 years our Courts have rejected an absolutist interpretation of the First Amendment. It does say that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Yet, in various contexts, we have held that speech **can** be regulated differentially for different categories of speakers. The government routinely places special restrictions on the speech rights of students, prisoners, members of the armed forces, foreigners, and its own employees. **When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems.**

If taken seriously, our colleagues' assumption--that the government's ability to regulate political speech does not depend on the identity of the speaker--leads to some pretty remarkable conclusions. In World War II Tokyo Rose's propaganda broadcasts to our troops would have had the same protection as speech by Allied commanders. Yes. And multinational corporations controlled by foreigners would have the same speech protections as individual Americans. Yes. And if voting is a form of speech, our majority colleagues should declare a First Amendment right of corporations to vote. To cast a ballot. **To cast a ballot!**

In short, the Court dramatically overstates its critique of distinctions based on identity. And it never explains why corporate identity demands the same treatment as individual identity. Only a wooden hand could use the First Amendment to draw a line so straight, so innocent of precedent.

The Court invokes what it calls "ancient First Amendment principles" to defend today's ruling. But it makes little reference to the thoughts of those who drafted and ratified the First Amendment. Why? Maybe because no Framer thought the First Amendment would preclude regulatory distinctions based on the corporate form. Indeed, to the extent that we can discern the Framer's views, they actually undercut the majority's position. For one thing, they conceived of speech more narrowly than we. And they thought differently about the social role of corporations.

Those few corporations present at the founding of our country were authorized by individual grant of a special legislative charter. If amenable, the legislature would issue a charter that specified the corporation's powers and purposes. The charter fixed the scope and content of corporate organization and structure. Corporations were created, supervised, and conceptualized as quasi-public entities--entities to serve a social function for the state. But their legally granted privileges came at a price: close legislative scrutiny, to keep their purposes in harmony with public welfare.

This view of incorporation truly reflected the cloud of disfavor that beshadowed corporations in the early years of this nation. They were called evil. Soulless. They were said to concentrate the worst urges of whole groups of men. Jefferson thought they would subvert the Republic. Not until the later 1800s did we have general incorporation statutes, and widespread acceptance of business corporations as socially useful actors. **[End of Page 4.]**

The Framers thus took it as a given that we could regulate corporations in the service of the public welfare. Unlike our majority colleagues, they easily distinguished corporations from human beings. When in the First Amendment the Framers constitutionalized the right to free speech, it was the free speech of **individual Americans** they had in mind. Individuals might exercise that right in concert, but business corporations had nothing to do with that.

Can a corporation invoke the First Amendment? The Framers would have laughed out loud! They all knew that if you wanted to legitimize any corporate activity, you had to have a concession from the sovereign. In the words of John Marshall, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."

[Long pause. Pour yourself a glass of water, and take your time sipping it. If the audience members grow restive--or even if they don't--gavel them back to order when you are ready to proceed.]

Given these background practices and understandings, we cannot believe that the Framers would have extended freedom of speech to corporate speakers. We cannot believe that the Founders' freedom of speech would forbid laws against the corporate capture of elections.

A century of more recent history shows that today's ruling violates our First Amendment tradition. In 1905 President Roosevelt told Congress "All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts." In 1907 Congress passed the Tillman Act, which banned all corporate contributions to candidates. The Senate report on the legislation said, and I quote: "The evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials."

Austin falls right in line with these legislative and judicial interpretations. They assert a clear governmental interest in the differential treatment of corporations and individuals. The purpose of *Austin* is to prevent both corruption and the appearance of corruption in our elected representatives.

The majority refers to our ruling in *Buckley v. Valeo* (1976). They lean heavily on this statement: ". . . the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." But this elegant phrase cannot support the weight our colleagues would have it bear. **[End of Page 5.]**

For one thing, the Constitution **does** permit many restrictions on the speech of some in order to prevent a few from drowning out the many. For example, we permit restrictions on ballot access. We permit restrictions on legislators' floor time. Indeed, in *Austin* we expressly ruled that the compelling interest supporting Michigan's statute was the state's need to confront the corrupting potential of electoral advocacy financed by corporate treasuries.

The majority lean still more on *Bellotti* (1978). At issue there was a Massachusetts law to keep corporate money out of a **referendum** election. The Court overturned that law. According to today's majority, that ruling means one thing: *Bellotti* forbade distinctions between corporate and individual expenditures.

But I can tell you that *Austin* sits perfectly well with *Bellotti*. In *Bellotti* the Massachusetts legislature tried to prevent corporations from influencing a **referendum**. The Court ruled against the state, but **not** as a First Amendment protection for corporations. It ruled as it did largely because it saw no compelling state interest in keeping corporate expenditures out of **referenda**--because referenda deal only with general public concerns. But **candidate** elections are different. States **do** have a compelling interest in **candidate** elections. Why? Because in a democracy the public must have faith that its representatives owe their positions to the people--and not to the corporations with the deepest pockets. I see no essential disharmony between *Austin* and *Bellotti*.

The majority view of political corruption is short-sighted. Their construction rises on the claim that the government interest in preventing corruption, real or apparent, is limited to **one kind**: **quid pro quo** corruption, the exchange of money for governmental favor. This view disregards both our constitutional history and the demands of any democratic society.

Federal Judge Kollar-Kotelly has made several official findings about political corruption. She found that corporations and labor unions routinely notify members of Congress when they broadcast electioneering communications about the members' elections. In turn, members of Congress express appreciation for such broadcasts. They are especially grateful for negative issue ads--ads that free **them** to go positive, and thereby seem to rise in virtue above the fray. She also found that campaign managers know very well who is running ads that benefit the candidate. They know when and where the ads are being run.

And the lobbyists? A prominent lobbyist testified that lobby organizations use issue advocacy to influence members of Congress. Members ask corporations and unions to run issue ads on their behalf. A member may suggest that corporations or individuals make donations to interest groups--donations that will help the member's campaign. After the election, these interest groups often seek credit for their support.

Does any of this color public opinion? Yes. A large majority of Americans--80%--think organizations that electioneer for specific officials later get special consideration on official matters that affect the electioneers. **[End of Page 6.]**

Many of these relations seemed quid pro quo, but others were more subtle. The majority's myopic focus on quid pro quo scenarios would overlook the deep historical roots of our nation's understanding of corruption. The Framers were obsessed with the subject. During the Constitutional Convention the threat of corruption came in for more discussion than the threat of factions, the threat of violence, or the threat of instability. When they created our Constitution, the Framers had their sights set on a corrosive threat to republican self-government of which this Court seems blissfully unaware.

In summarizing her findings, Judge Kollar-Kotelly wrote: "The record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting."

That corporations **differ** from human beings should need no elaboration, but today's majority opinion practically ignores the difference. Unlike natural persons, corporations have limited liability for their owners and managers. Perpetual life. Separation of ownership and control. Favorable treatment of the accumulation and distribution of assets. All of which enhances their ability to attract and use capital to maximize return on shareholder investments. Unlike voters in United States elections, corporations may be under foreign control. Unlike other interest groups, business corporations have a delegated responsibility for society's economic welfare. They structure the life of every citizen. Yet, the size of its treasury is not a valid measure of popular support for a business corporation's political ideas. It reflects instead the economic decisions of investors and customers. Yet, a big treasury can magnify a corporation's political presence, far beyond the power of its ideas.

Corporations lack conscience, belief, feeling, thought, and desire. They help structure and facilitate human activities, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of We the People, by and for whom our Constitution was established.

All of this shows that corporate electioneering is likely to impair compelling governmental interests. It shows too that government can restrict corporate electioneering without encroaching upon First Amendment freedoms.

Here's another way such restrictions can serve First Amendment values. Interwoven with *Austin's* concern for electoral integrity is a concern to protect shareholders from a kind of coerced speech. I mean electioneering expenditures that do **not** reflect shareholder support. When a corporation uses general treasury funds to praise or attack a particular candidate for office, who foots the bill? It is the shareholder who foots that bill, as a residual claimant on corporate assets. As a result, shareholders who disagree with the corporation's political message may find their own investments at work against their own political convictions. **[End of Page 7.]**

In conclusion: In a democratic society, the long-standing consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. At bottom, this Court's opinion is a rejection of the common sense of the American people. Since the founding, Americans have recognized a need to prevent corporations from undermining self-government. Since the days of Theodore Roosevelt they have fought against the distinctive corrupting potential of corporate electioneering.

It is 2010. It is a strange time to repudiate that common sense. 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 say--and so do I--that an ad for candidate Jane Doe must plainly say "I am Jane Doe, and I approve of this message." This is a "stand by your ad" disclosure requirement, pure and simple. The majority say--and so do I--that corporations and unions shall not contribute directly to candidates. To avoid corruption, real or apparent, of the quid pro quo variety. But the majority also say--as I **cannot** say--that government has no compelling interest in keeping corporate money out of candidate elections. That is the fatal taint on this majority opinion.

When the U.S. District Court upheld the Federal Election Commission; when it said the FEC had every right to apply its exclusionary rule to that anti-Hillary film; that U.S. District Court was correct, and the present majority is wrong.

I would **affirm** the judgment of the U.S. Court for the District of Columbia.
(Gavel.)

Author's Notes

Case titles enclosed in square brackets should not be recited aloud, as their recitation would impede the narrative flow. They are provided in the text for the information of anyone who might ask about specific case citations.

Stevens' dissent can be seen in its entirety at
http://www.law.cornell.edu/supct/html/08-205.ZX.html