



Montana's Supreme Court Relies on Erroneous History in Rejecting *Citizens United*

By Robert G. Natelson¹

I. INTRODUCTION

The Montana Supreme Court won national attention recently when it decided that the First Amendment does not fully protect the speech and association rights of people using the corporate form within Montana.² The basis for this decision was an alleged special history of corrupt corporate activity in Montana campaigns. Contrary to the Montana Supreme Court's decision, there is little reason to think Montana's historical experience justifies giving it greater discretion to regulate corporations than that enjoyed by other state governments.

The story begins in 2010, when the U.S. Supreme Court decided *Citizens United v. Federal Election Commission*.³ *Citizens United* protected the rights of people choosing the corporate form⁴ to make independent election expenditures. The Court decided that people organized as a corporation may urge the election or defeat of a candidate, so long as they operate independently and not in conjunction with the candidate's campaign. In so doing, the Court followed a long line of precedents that hold that people operating as a

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²See, e.g., *Montana Defies Supreme Court's Citizens United Case*, National Public Radio, Feb. 27, 2012, <http://www.npr.org/2012/02/27/147488187/montana-defies-citizens-united-case>.

³*Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

⁴A corporation is merely an association of people who organize under state corporation laws rather than in some other form (such as a partnership). The corporate form offers several technical advantages, such as limited liability and ability to sue and be sued in the corporate name. In exchange, people organized as corporations have to comply with special state and federal requirements, including bookkeeping and rules of governance, and often must pay additional taxes.

corporation enjoy First Amendment rights, just as they do when using other forms of association.⁵

Moreover, under other long-standing precedents, the Fourteenth Amendment of the Constitution applies the First Amendment to the states. In response to *Citizens United*, every state except Montana “either repealed their independent expenditure prohibition laws or issued interpretations that declared the laws unenforceable.”⁶

Since 1912, Section 13-35-227 of the Montana Code denied corporations the right to express their views in political campaigns. Federal courts previously struck down parts of this statute.⁷ In the wake of *Citizens United*, three small corporations sued to void the portion that banned corporate independent expenditures.

In *Western Tradition Partnership v. Attorney General*, a challenge to Section 13-35-227, the trial court agreed with the plaintiffs, finding that the law was inconsistent with *Citizens United*. But over the dissent of two justices, the state supreme court reversed the trial court’s ruling.⁸

The Montana justices conceded that *Citizens United* was legitimate authority for other states. But they claimed that special historical circumstances justified restriction of free speech and association rights in Montana. Relying on historical sources and affidavits presented by the Attorney General, the court cited two factors purporting to show those special circumstances. The first was the corruption of Montana politics in the “Copper Wars,” an economic and political struggle between Montana copper mining firms around the year 1900. The second was the alleged domination of state politics for several decades thereafter by the victor in the Copper Wars, the Anaconda Company. The court concluded: “Clearly, Montana has unique and compelling interests to protect through preservation of this statute.”⁹

Whether or not this history was accurate or relevant, there are obvious problems in depriving innocent people today of constitutional rights because of events occurring long ago. But as it turns out, the historical material the court relied on does not support the court’s constitutional conclusions.

⁵E.g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *NAACP ex rel. Patterson v. Alabama*, 357 U.S. 449 (1958).

⁶Robert M. Stern, *Sunlight State By State After Citizens United*, Corporate Reform Coalition, June 2012, (available at: <http://www.citizen.org/documents/sunlight-state-by-state-report.pdf>).

⁷*Montana Chamber of Commerce v. Argenbright*, 28 F.Supp.2d 593, 595 (D. Mont. 1998), *affirmed*, 226 F.3d 1049 (9th Cir. 2000); *C & C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978).

⁸*Western Tradition Partnership v. Attorney General*, 363 Mont. 220, 271 P.3d 1 (Mont. 2011).

⁹*Western Tradition Partnership*, 363 Mont. at 236, 271 P.3d at 11.

II. THE HISTORICAL MATERIAL CITED DOES NOT SUPPORT THE MONTANA SUPREME COURT'S CONSTITUTIONAL CONCLUSIONS

As noted, the state court cited two factors to demonstrate Montana's unique circumstances: Copper Wars corruption and the ensuing domination of state politics by the Anaconda Company. Before assessing these two claims, it is worthwhile to summarize modern campaign finance jurisprudence as declared by the U.S. Supreme Court.

Under that jurisprudence, any legal restrictions on independent political speech must be justified as serving a sufficiently compelling governmental purpose. The only compelling governmental purposes the U.S. Supreme Court has identified as justifying limits on independent spending are (1) avoiding corruption and (2) avoiding the appearance of corruption.¹⁰ The Court has ruled specifically that lawmakers may not restrict First Amendment rights merely to avoid political results they find distasteful—including, presumably, avoiding corporate “domination.”¹¹ As for the Montana court's corruption rationale, while this would be sufficient to justify some forms of campaign finance control, the U.S. Supreme Court has ruled that it does not justify the specific legal technique of banning independent expenditures.¹²

Even if the corruption rationale had been constitutionally sufficient in the abstract, the Montana justices' recitation was woefully inadequate to show that a ban on independent corporate expenditures was narrowly tailored to serve compelling governmental purposes. Although the justices claimed that examples of corruption “abound” from the Copper Wars era, they cite only two occurrences: purchase of a U.S. Senate seat in 1899 and a single copper magnate's unproved (although probable) bribery of two district court judges before 1904.

Upon examination, however, both cases turn out to be irrelevant to a uniquely Montana state interest in banning independent corporate campaign expenditures. First, the purchase of a U.S. Senate seat from state lawmakers was hardly “unique” to Montana. Corruption of Senate elections *in many states* was a principal reason the Seventeenth Amendment was adopted to transfer Senate elections from the state legislatures to the people.¹³ Second, the bribe of two sitting judges had nothing to do with *campaign* finance at all. Third, none of these expenditures was *independent* of a political candidate; on the contrary, all were *direct payments* to officeholders or prospective officeholders— a

¹⁰See *Buckley v. Valeo*, 424 U.S. 1 (1976); *Davis v. Federal Election Commission*, 554 U.S. 724 (2008).

¹¹*California Democratic Party v. Jones*, 530 U.S. 567 (2000).

¹²*Citizens United*, 130 S.Ct. at 913.

¹³See George H. Haynes, *The Changing Senate*, 200 NO. AM. REV. 202, 231 (1914); GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 91 (1938) (discussing widespread corruption).

distinction the U.S. Supreme Court views as crucial.¹⁴ Finally, the state court cited no evidence that in either case the bribes were *corporate*. On the contrary, the U.S. Senate report on the electoral incident cites only payments by individuals, and no payments by corporations.¹⁵

In other words, even if taken at face value, the events cited by the Montana Supreme Court do not support its conclusion. The U.S. Supreme Court already has held that the “domination” rationale is constitutionally irrelevant, and the two corruption incidents simply had nothing to do with independent corporate expenditures in political campaigns.

III. THE MONTANA SUPREME COURT’S DEFECTIVE SOURCES

The foregoing comments were based on the premise that the historical sources cited by the Montana Supreme Court are fully reliable and accurate. Those sources include the following:

- * An affidavit by Harry Fritz;
- * C.B. Glasscock’s book, *The War of the Copper Kings*;
- * Helen Fitzgerald Sanders’ book, *History of Montana*;
- * Michael Malone and Richard Roeder’s book, *Montana, A History of Two Centuries*;
- * K. Ross Toole’s history, *Montana, An Uncommon Land*.

The affidavit by Fritz was based substantially on the other four sources. Of those four, both Fritz and the state court placed the most reliance on K. Ross Toole’s *Montana, An Uncommon Land*.

However, the state court should not have assumed that these works treat the subject completely. This is because the sources are *incomplete* on the subject of Section 13-35-227, and both the sources themselves, as well as easily obtainable outside material, show that the assertions about Anaconda influence are partly *inaccurate*.

¹⁴*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

¹⁵*See Report of the Committee on Privileges and Elections of the United States Senate Relative to the Right and Title of William A. Clark to a Seat as Senator from the State of Montana*, S. REP. NO. 56-1052 (1900) (available at: www.senate.gov/artandhistory/history/common/contested_elections/pdf/89_Apr_23_1900_Clark.pdf).

A. *Neither the sources nor the court really explain the background or purpose of Section 13-35-227.*

The Montana Supreme Court attributed Anaconda influence partly to the fact that it controlled most of the state's newspapers. But this fact says nothing about the justification for Section 13-35-227. This statute excluded newspapers from its coverage. Thus, Section 13-35-227 actually would have *magnified* Anaconda influence because it left Anaconda free to influence political campaigns through press outlets, while other corporate speakers were prevented from making arguments.

This illustrates the problems with the court's conjecture about the reasons behind, and effects of, Section 13-35-227. Those guesses are not based on the sources the court cites, or any other sources for that matter. Only Malone and Roeder mention the law in passing,¹⁶ and they do not discuss the reasons behind it or its effects. More importantly, they argue that Montana's progressive reforms were not a response to uniquely troubling Montana corruption, but were akin to progressive reforms across the nation, which include corrupt practices laws, direct election, women's suffrage, and the initiative and referendum processes.¹⁷

In order to show that Section 13-35-227 was narrowly tailored to serve a compelling governmental purpose, both the attorney general and the court needed to explain what the original version of the law did, and why.

B. *The cited sources contradict their own assertions as to the extent of Anaconda influence in state affairs.*

It may be admitted that from the end of the Copper Wars until about 1970, Anaconda was the most powerful single interest group in Montana. But the cited writers, and therefore the *Western Tradition* court, go much farther than that. Their claim was that the Company's word was law—that Montana was a “one company state, a commonwealth where one corporation ruled.”¹⁸

Yet facts cited by the authors themselves, as well as other readily accessible data, clearly contradict this. Much happened in Montana that Anaconda opposed and could not stop. For example, Malone and Roeder state that the Progressives “aimed to curb the power of large corporations, especially the Amalgamated Copper Company” [Anaconda], and that Progressives “pushed an impressive number of reforms through the legislature. . . .”¹⁹ But

¹⁶MALONE & ROEDER, *MONTANA: A HISTORY OF TWO CENTURIES* 259 (2003).

¹⁷MALONE & ROEDER at 255-56.

¹⁸*Id.* at 231. The *Western Tradition Partnership* court, following MALONE & ROEDER, wrote that “local folks now founding themselves in the grip of a corporation controlled from Wall Street” and that state government had been converted “into a political instrument for the furthering and accomplishment of legislation and the execution of laws favorable to the absentee stockholders of the large corporations” etc.

¹⁹*Id.* at 255; see generally *id.* at 255-58.

if Montana was, as they claim, a “commonwealth where one corporation ruled,” how could progressives “push[] an impressive number of reforms through the legislature?”

Furthermore, Anaconda could not prevent many other developments documented by these authors: adoption of the citizen initiative in 1906, the campaign finance law in 1912, and a 1928 initiative imposing a graduated severance tax on mines. Nor could Anaconda prevent the statewide election of a long succession of progressive politicians, including Attorney General Sam Ford, U.S. Representative Jeanette Rankin, U.S. Senator Thomas J. Walsh, Governor and Senator Joseph M. Dixon, Senator Burton K. Wheeler, Governor Leif Erickson, U.S. Representative and Senator Mike Mansfield, and U.S. Representative and Senator Lee Metcalf. In some elections, the only choice was between two liberals (e.g., Dixon and Wheeler in the 1920 race for governor).

The extent of Anaconda “domination” may be assessed by this fact: Burton K. Wheeler was first *elected* U.S. Senator in 1922 against fervent Company *opposition*—and he was finally *defeated* for re-election in 1946 when he had Company *support*.

None of the cited writers deal satisfactorily with how their own discussion contradicts their central thesis. In a few cases they try to fudge this record to obscure the contradiction.²⁰ But mostly they ignore it, as the state court did in its *Western Tradition* opinion.

In sum: Even if prior corporate “domination” of Montana were constitutionally sufficient to justify state restriction of the First Amendment, the Montana Supreme Court’s thesis would suffer from a factual defect. Although Anaconda undoubtedly enjoyed great influence in Montana for several decades, the court’s own sources contradict the thesis that it enjoyed anything approaching absolute corporate control.

C. *The writers cited by the court are of doubtful reliability.*

Good academic practice requires that a historian support, through footnotes or endnotes, important and potentially-controverted statements made in the text. All of these works are striking in their failure to follow this practice: In the relevant pages, Toole offers few footnotes; Sanders, Glasscock, Malone and Roeder provide none. This makes their work difficult to verify, and forbids automatic assumptions of accuracy.

Because the court relied most heavily on Toole’s *Montana: An Uncommon Land*, that book’s use of sources is perhaps worthy of special attention. The relevant pages are almost free of citations. However, textual similarities show that the discussion of the Copper Wars in *Uncommon Land* was largely copied from Toole’s 1954 Ph.D. thesis, entitled *A History of the Anaconda Mining Company: A Study in the Relationships Between a State and Its People and a Corporation, 1880-1950*. As a Ph.D. candidate,

²⁰See, e.g., TOOLE, MONTANA: AN UNCOMMON LAND at 211-42.

Toole must have been required to provide citations to pass review, and he does so. Those citations offer an opportunity to assess his reliability as a historian.

Accordingly, I examined the footnotes in the portion of Toole's thesis that served as the basis for the relevant pages of *Uncommon Land*. Toole's references were often very hard to track down. One problem was that, although he made much use of newspaper sources, he did not follow the practice of citing page and column number; he included only the name of the paper and date. But page and column numbers are particularly important in citing older newspapers that contain large pages and many columns. Toole's omissions made cite-checking a very exacting task.

The relevant pages of Toole's thesis contain 19 footnotes containing 21 references to items in two Montana newspapers, the Butte *Miner* and the *Anaconda Standard*. Of the 21 references, 13—nearly two-thirds—contained inaccuracies. Sometimes the date was wrong. In one case, two separate headlines were conflated to make them appear as one. In another case the footnote did not sufficiently identify the issues the paper relied on. In still other cases, Toole got a quotation wrong. But most often the promised information was just not where Toole said it was. All of these errors do not necessarily mean that Toole's facts or conclusions were erroneous, but they do undermine any claim to presumptive credibility.

IV. CONCLUSION: WHAT'S REALLY GOING ON

Montana activists have a long history of adopting campaign finance “reforms”—even obviously unconstitutional ones—to promote their political agendas. Section 13-35-227 was just one example. Another arose in 1975, when “progressives” successfully banned corporate spending on ballot issues. A federal appeals court struck down the ban as unconstitutional.²¹ In 1996, they convinced the voters to pass I-125—yet another ban on corporate spending in ballot issue campaigns. The purpose was to prevent mining companies from defending themselves against an anti-mining initiative (I-137) to be offered at the following general election. Two federal courts invalidated I-125.²²

During oral argument on the *Western Tradition* case,²³ the Montana justices communicated that they were deeply concerned about how corporate contributions might change electoral results—particularly in their own elections, where corporate money has heretofore been locked out and financing dominated by trial lawyers.²⁴

²¹*C&C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978).

²²*Montana Chamber of Commerce v. Argenbright*, 28 F.Supp.2d 593, 595 (D. Mont. 1998), *aff'd*, 226 F.3d 1049 (9th Cir. 2000).

²³Streaming audio of the *Western Tradition Partnership* oral argument is available on the Montana Supreme Court's website at <http://courts.mt.gov/arguments/2011.mcp.x>.

²⁴During that argument, the attorney general twice conflated the plaintiffs' desire to influence elections with corruption, without any contradiction from the court. *See id.* at 39:30, 54:37 min. Questions from some

Thus, the history of Montana campaign finance restrictions shows that they are less instruments of “good government” than weapons wielded to silence political opponents. The Montana Supreme Court opinion in *Western Tradition* is the latest example. The U.S. Supreme Court should reverse it swiftly.

justices directed to plaintiffs’ counsel revealed a concern that corporate expenditures could cause jarring results in judicial elections. *Id.* at 1:17:27; 1:34.