***Citizens United*: A Victory for Freedom of Speech**

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In his January 2010 State-of-the-Union address, President Obama claimed that *Citizens United* “reversed a century of law that … will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.” “It strikes at our democracy itself,” he claimed. “I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities,” he added. Similarly, Ronald Dworkin asserted that *Citizens United* “threatens an avalanche of negative political commercials financed by huge corporate wealth…Overall these commercials can be expected to benefit Republican candidates and to injure candidates whose records dissatisfy powerful industries.” Dworkin also contended that “allowing rich corporations to swamp elections with money will” not produce a better-informed public but rather “a worse-informed one.”

Liberal groups, including MoveOn.org, People for the American Way, and Alliance for Justice Action Campaign, launched newspaper ads accusing the Court of becoming “corporate America’s newest subsidiary.” MSNBC’s Keith Olberman and Democratic Congressman Alan Grayson compared the Court’s ruling to the 1857 *Dred Scott* decision that upheld slavery.

By contrast, long-time free-speech champion, Floyd Abrams, who argued the case for *Citizens United*, praised it. The American Civil Liberties Union, which has long urged the Court to treat corporate political speech just like individual political speech, welcomed it too. Supporters contended that it vindicated democratic freedom and will give voters more messages from more sources.

The ruling has drawn polarized responses, partly because our political and media elites are polarized, including the justices whose 5-4 ruling reflected the now common polarization between the Court’s usual conservative and liberal factions, with the sometimes liberal, sometimes conservative justice, Anthony Kennedy, siding with the conservatives this time. This polarization raises serious questions about the integrity of the Court as a neutral arbiter of the federal Constitution.

The decision was polarizing, too, because it was bold. The majority rejected an opportunity to issue a narrower decision.

**Constitutional and Legal Dimensions of the Ruling**

The president’s claim that the ruling reversed a century of law is less than self-evident. The ruling overturned only two judicial precedents: *Austin*, decided in 1990, and *McConnell*, decided in 2003, largely on the basis of *Austin*, although McConnell was only partially overruled. The dissenters contended that the ruling also disavowed five other Court rulings. Even if one accepts the dissenters’ contention, the oldest judicial precedent they cited was 1981, not 1910.

*Citizens United* did not reverse the Tillman Act of 1907, which prohibits corporations from making contributions from their own treasuries to candidates for federal offices. Had the Court invalidated Tillman, the president’s statement would have been correct.

Furthermore, the Court had held for more than 30 years that independent spending on campaigns is protected speech that cannot be restricted in the name of minimizing political corruption or limiting the clout of rich people.

However, it does appear that the ruling did overturn the 62-year-old Taft-Hartley Act’s restrictions on independent expenditures and may have invalidated the laws of about 24 states, some of which date back to the 1890s. This reach back to the 1890s, however, is not due to *Citizens United* per se but to the incorporation of the First Amendment’s free-speech clause in 1925, which, presumably, makes *Citizens United* applicable to the states. It might be noted, too, that Taft-Hartley was enacted over President Harry Truman’s veto. His veto message warned that the expenditure ban was “a dangerous intrusion on free speech.”

It should also be noted that even in terms of the 1990 *Austin* precedent, the president’s own solicitor general, Elena Kagan, now serving on the Supreme Court, ignored *Austin*’s central “political distortion” rationale and sought, instead, to defend *Austin* on two entirely new grounds, thus discounting *Austin*’s precedential value. Many election-law experts, moreover, viewed *Austin* as an anomaly.

Before turning to the president’s incorrect claim about foreign corporations, let’s remember that the First Amendment says that Congress shall make no law abridging the freedom of speech. That’s it. There are no qualifications or exceptions; yet, over the centuries, this simple phrase has been parsed into near oblivion to permit laws banning or restricting certain types of speech, certain types of speakers, and speech deemed harmful in one way or another.

Of the various types of speech subject to parsing, however, one type, political speech, is accepted by virtually everyone as the quintessential speech type protected by the First Amendment. Although I do not share this parsed view of the First Amendment, I will concede this point for the sake of this debate. Thus, of all types of speech, political speech should be the most unfettered of all. *Citizens United* is a very big case about political speech.

One of the most pernicious provisions of the Bipartisan Campaign Reform Act (BCRA) of 2002 that was struck down by the Court was that it prohibited corporations and labor unions from spending their money directly on political advertising 30 days before a primary election and 60 days before a general election. This was atrocious because, as political scientists know, these periods are the heights of political campaigns. The vast majority of voters pay little attention to election campaigns until shortly before elections. This is why Labor Day marks the beginning of the full-scale campaign season before a November election. This year, Labor Day fell 62 days before the election scheduled for November 2. Hence, BCRA would have prohibited corporate and union advertising for all but the first two days of the campaign season. This was an egregious abridgement of political speech during a period when political speech is most vital to our election system. BCRA was a blatant attempt to drive certain speakers out of the most important political seasons of our democracy.

This 60-day ban provided incentives for candidates to withhold true disclosures of some of their positions as much as possible until the 60-day period when they would be shielded from any opposition advertising by corporations and unions. This 60-day ban also prohibited corporations and unions from responding to new developments that emerge in every campaign.

We often think of the First Amendment as protecting individual rights, but it also protects collective rights. The establishment clause prohibits the federal government from establishing a religious corporation that would, among other things, receive favored treatment and disadvantage all other religious corporations; the free-exercise clause protects one’s right to pray in a closet as well as to pray with other people in a congregations; the press-freedom clause originally protected wealthy individuals and businesses that could afford printing presses; freedom of assembly is obviously a collective right; and the right to petition includes both a solitary individual petition and collective petitions signed by thousands of people.

These collective rights are vital to the First Amendment because without these collective expressions of First Amendment rights, the individual rights would have little or no efficacy. It is precisely the collective expressions of these rights that give our individual rights political and social clout. Otherwise, each of us would be a voice crying in the wilderness, praying in a closet, or waving an orphan petition.

Labor unions are the quintessential example of the need for collective action, such as striking and bargaining, to protect otherwise powerless individual workers. Yet, BCRA prohibited labor unions from advertising. Likewise, organizing a corporation, whether for-profit or non-profit, is way to mobilize individual rights collectively. In fact, the government requires incorporation for the vast majority of collective actions taken by citizens.

Why should people lose First Amendment rights when they collaborate in corporations? If we accept such limits on corporations, then Congress has the potential to dictate or prohibit all corporate behavior, including news content, opinions expressed through corporate media vehicles, and sermons preached from pulpits (because churches, synagogues, mosques, and temples are non-profit religious corporations).

For most people, the word “corporation” conjures up images of Exxon, BP, Microsoft, and other Fortune 500 companies, but these are a small portion of thousands of for-profit corporations, all of which are much smaller, and range from medium-sized to tiny corporations having only a few employees. Furthermore, BCRA also prohibited non-profit corporations from advertising, thus shutting out hundreds of thousands of citizen-based organizations, large and tiny. The vast majority of for-profit and non-profit corporations lack the millions of dollars that can be spent by huge corporations such as Exxon and Google. Yet, the law smote the speech of both the mighty and the weak. The weak, moreover, are the most in need of banding together for the kind of collective action prohibited by BCRA.

The dissenters and other critics also have argued that if corporations can spend on political advertising, then why not let them vote too? This is meaningless rhetoric. The Court has long held that the First Amendment protects corporations as well as individuals. The dissenters agree. Other portions of the U.S. Bill of Rights also apply to corporations. Fourth and Fifth Amendment rights pertaining to search warrants, counsel, eminent domain, and trial by jury all apply to corporations such as Lafayette College. If one sues Lafayette College, the College will have a right to a jury trial; yet no one suggests that corporations like Lafayette College be allowed to serve on juries.

Another curious aspect of the opposition to *Citizens United* is that the law has long permitted corporations and unions to spend millions to influence political campaigns through trade associations, political action committees, non-profit entities, fundraising events, and other means. So, why did Congress and the dissenters single out for prohibition the one particular form of corporate and union spending at issue in *Citizens United*? The dissenters offered no credible basis for banning this form of corporate speech while permitting all these other forms of corporate speech. It makes no sense, unless the dissenters’ true intention is to lay the groundwork to ban these other forms of corporate speech too.

The president was wrong about foreign corporations. *Citizens United* did not overturn laws prohibiting foreign nationals, including corporations headquartered or incorporated outside the U.S., from participating in any U.S. election.

Even so, I will meet the president a part of the way on this point by noting that the Court’s ruling that speech cannot be banned on account of the identity of the speaker opens the possibility that the Court could vacate election laws governing foreign corporations. This seems unlikely, although there will be battles over defining a foreign corporation. This is already evident in the proposed Disclose Act sponsored by congressional Democrats and backed by Obama to counter *Citizens United*. The Disclose Act would prohibit corporations from spending on campaigns if at least 20 percent of the corporation is foreign-owned, if a majority of the board of directors consists of foreign nationals, or if the corporation’s political decision-making is controlled by a foreign entity. Under these rules, for example, Verizon Wireless, a Delaware Corporation headquartered in New Jersey with 83,000 U.S. employees and 91 million U.S. customers, would be shut out of the electoral arena because British Vodafone is a minority owner. Given rising globalization and the need for U.S. corporations to acquire foreign capital and conduct overseas operations, it will become ever more difficult to distinguish between domestic and foreign corporations. So, this is an important issue flowing from *Citizens United* that needs resolution.

Here, though, the dissenters provided the majority grounds for not extending *Citizens United* to foreign corporations. That is, *Citizens United* held that the First Amendment protects not only speech but also speakers. The identity of the speaker cannot be grounds for speech suppression. *Citizens United* held that government cannot, therefore, suppress the speech of disfavored speakers such as corporations. The dissenters argued, however, that the majority erred in saying that a speaker’s identity should not determine First Amendment protections. “The Government routinely,” said the dissenters, restricts “the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees.”

This is a bizarre contention, however, because these are not identities, like WASP or Latino Catholic, but rather roles confined to government institutions. Once one leaves those roles, one is entitled to full First Amendment protections. Once one steps outside the boundaries of a public school or prison, once one leaves active military service, once one becomes a naturalized citizen, and once one ceases to be a federal government employee, one has full First Amendment protections. Thus, these alleged identities brandished by the dissenters are no basis at all for suppressing the speech of domestic corporations. The only possible exception is the dissenters’ point about foreigners, but this point could easily be used by the Court’s *Citizens United* majority in the future to deny speech protections to foreign corporations without contradicting its *Citizens United* ruling.

Another problem confronted in *Citizens United* is that BCRA exempted media corporations such as the *New York Times*, CBS, and Fox News. On its face, these exemptions, which disturbed the Court’s majority, violate the First Amendment by favoring the speech of certain corporations, namely, media corporations, over non-media corporations. But why should Rupert Murdoch’s media conglomerate or the *Washington Post’s* conglomerate be allowed to pronounce at will for and against political candidates while a small group of citizens, such as Lafayette’s faculty, let’s say, could not use a nonprofit corporation to buy a political ad in the *Wall Street Journal* or *Washington Post*? This was an egregious violation of First Amendment principles, to say nothing of the equal protection of the laws clause of the 14th Amendment.

Furthermore, how does one define the “media” these days so as to know what entities are exempt or not? This is a growing problem in the age of the Internet and Tweeting. In April, a New Jersey court ruled that a mother who blogs is not a journalist for purposes of protecting her sources. She is being sued for derogatory comments she posted on a message board about a company that supplies software for the porn industry. Also in April, a California sheriff raided the home of an individual who purchased an iPhone prototype that an Apple engineer had left at a bar. The individual wrote about the iPhone on his website. Is he a journalist entitled to First Amendment protection or not?

Absent *Citizens United*, moreover, how would the FEC handle a video clip that goes viral on YouTube like the Antione Dodson video last summer? The Gregory Brothers set to music a news video of the rant of the brother of a woman who had struggled with an intruder in her bed. It was viewed more than 16 million times, sold almost 100,00 copies on iTunes, reached No. 39 on the iTunes singles chart, and No. 89 on Billboard’s Hot 100 chart. What if Citizens United set a news clip of Hillary Clinton to music in a derogatory way and it went viral within 60 days before a general election? Would this be a violation of the campaign-finance law? To make matters worse, BCRA’s rule applied to communications viewed by 50,000 people or more. But how can anyone know in advance whether a YouTube video will be viewed by 100 or 10 million people? And how would YouTube know? The mere possibility that viewership could exceed 50,000 would shut down the thousands of people who like to parody politicians on YouTube and other websites. YouTube would have to ban it and perhaps search engines like Google would have to ban it for fear of federal prosecution. Consequently, the Court majority opined, “the First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.”

Also extremely disturbing was the federal government’s admission that it could ban books under BCRA. During one oral argument, Chief Justice Roberts asked: “If it’s a 500-page book, and at the end it says, and so vote for X, the government could ban that.” The government’s response was Yes.

Indeed, the Sierra Club, a non-profit environmental group, was fined $28,000 in 2004 for “distributing pamphlets in Florida contrasting the environmental records of the two presidential and U.S. Senate candidates.” This example also goes to the question of what is a “media” corporation. The Sierra Club publishes all kinds of materials. Why can it not be regarded as a media corporation and be allowed to support and oppose candidates like the *New York Times*?

*Citizens United* held that the fact that some speakers have more wealth than others does not reduce or eliminate their First Amendment rights. Money is not literally speech, but the exercise of freedom of speech often entails the expenditure of money. Thus, money, in addition to collective action, is another way to effectuate one’s individual rights, and acting collectively to pool money is a way to further enhance the expression of individual rights. If Congress were to say that people are free to speak out for and against candidates but are not allowed to spend any money to do so, most of us would see this as a grievous violation of speech freedom.

**Empirical Impacts of the Ruling**

But money, or more exactly, big money, is precisely what worries people. In a recent poll, some 80% of Americans said that members of Congress are controlled by groups that help fund their political campaigns. This is the conventional wisdom, and it was expressed in spades by the dissenters in *Citizens United*, by President Obama, and by most critics of the decision.

Is this conventional wisdom accurate? No. Considerable social science research suggests otherwise; yet the dissenters in *Citizens United* cited none of this research, nor did they cite research to support their contentions that the *Citizens United* decision will open the floodgates of corporate money so as to distort the political marketplace, increase public cynicism, decrease public participation, and decrease public knowledge.

For example, recent research (La Raja) compared business-related money in elections, election outcomes, and policy consequences in the 28 states that allow corporate spending in elections and the 22 states that prohibit corporate spending.

The author concluded “that Justice Alito was more correct when he uttered…’that’s not true’ in response to Obama’s proposition.”

He found state allowances of corporate spending do not open the floodgates “to corporate financing of politics.” Business interests do increase their share of spending and are able to support more Republican candidates, but business spending does not dominate the process in states that allow corporate spending.

He found no evidence for the hydraulic theory. That is, “business interests do not necessarily shift to a strategy of using IEs when” permitted to do so. Instead, they continue to invest in elections overwhelmingly through political contributions. He did find some evidence supporting an arms race theory; that is, in states allowing corporate spending, the amount of spending increases across all groups.

He found no evidence that states that allow corporate spending elect more Republicans and tilt policies toward business interests compared to the states that prohibit such spending.

Other research on the states suggests that when political competition is high and voter education and information are high, politicians promote policies for the median voter rather than special interests and that interest groups actually decrease their activities under these conditions.

A meta analysis of some 80 studies from 1970 to 2005 by a Harvard political scientist (Stephen Ansolabehere) concluded that the probability of success of a bill was unaffected by total contributions. Much more important are constituent needs and political party.

A recent study in California found that campaign contributions had no effect on legislative support for the tobacco industry, even during a period of heavy tobacco regulation. This finding, noted the author, is consistent with the extant empirical literature, which has, for the most part, found that campaign contributions do not influence legislative behavior.

In *Lobbying and Policy Change*, Baumgartner et al, which examined 98 randomly selected policy issues during 1999-2002, they found gridlock and stalemate such that 60% of time, nothing happened. Even though corporations and associations spent 19 times as much as all of the unions and 12 times as much as all of the citizens groups, the side with more lobbyists, more PAC donations, and more members won only half the time. Wealth and resources can make a difference, they concluded, but only if the balance of resources is heavily skewed toward one side, and that occurred only 19 percent of the time. Even then, the wealthier side didn’t always win.

Better predictors of success than money are the support of government agency heads, congressman-turned-lobbyists, high-level congressional and government officials and, best of all, party leaders and the president.

It is not necessarily the case that wealthy interests support Republicans. For example, in 2008, Obama raised more money than McCain in eight of the ten wealthiest zip codes, and he captured voters making over $200,000 by six percentage points. *The New Republic* (7-8-10) reported that more corporate jets flew into Dulles for Obama’s inauguration than for George Bush’s second inauguration. Many billionaires of the new information economy support Democrats mostly or exclusively: for example, Google’s co-founders and Google’s CEO, Apple founder Steve Jobs, Netflix CEO Reed Hastings, Cisco’s CEO John Chambers, Quark’s founder Tim Gill, RealNetworks founder Rob Glaser, and eBay’s Jeffrey Skoll. In addition, labor unions spent a half billion in 2008 supporting Democrats, much more than any group representing business.

Wealth also funds important insurgent candidates. Had Eugene McCarthy, for instance, not been funded by three wealthy individuals, he would not have been able to challenge Lyndon Johnson in the 1968 New Hampshire primary and, as a result, drive Johnson out of the White House over the Viet Nam War.

Contrary to what the dissenters said in *Citizens United*, other research indicates that more money in politics produces more information during elections and greater mobilization of voters. “This is especially important in down ballot races that receive less attention from the news media.”

A study of presidential campaigns from 1952 to 2000 found that paid ads during the campaigns have served to maintain a steady level of information and to increase the focus on policy in presidential politics because the paid ads “have compensated for the shift of news media coverage toward candidate character, scandal, and the horse race.”

The dissenters argued that allowing corporations to spend directly on ads will increase public cynicism and decrease public trust in government. There is no evidence for this; on the contrary, public trust declined permanently in the early 1970s when the first major campaign finance reforms were enacted, and trust has declined further since BCRA was passed in 2002.

The dissenters argued also that allowing corporations to spend directly on ads will alienate people and reduce voter turnout. Again, there is no evidence for this. Turnout was at its highest in the late nineteenth century when politics was allegedly even more corrupt. Voter participation dropped precipitously at about the same time the Tillman Act was enacted. Voter participation has not recovered its historic heights, despite all the campaign finance reforms enacted since 1907.

Some critics, such as Dworkin, argue that public financing of elections might better, but that is questionable for many reasons. Furthermore, pursuant to a mandate of the Bipartisan Campaign Reform Act of 2002, the U.S. Government Accountability Office studied legislative elections from 2000 through 2008 in Arizona and Maine, two states that have public financing of legislative elections. The GAO found no changes in campaign spending, the number and variety of candidates, perceived interest-group influence, or public confidence. GAO did find a decrease in margins of victory, but could not attribute the finding to the public financing, and it could not assess changes in voter participation due to data limitations.

President Obama’s advisor, David Axelrod, said that because of *Citizens United*, “any lobbyist could go into any legislator and say, ‘If you don’t vote our way on this bill, we’re going to run a million-dollar campaign against you.’” This rhetorical comment obscures three facts. First, lobbyists can already do this. Second, the legislator can say, so what? I will get my other lobbyists friends to spend millions to support me. Third, corporations are likely to prefer to continue putting money into tax-exempt 501(c)(4) and 501(c)(6) trade groups that can spend on ads and do not have to disclose their donors.

In addition, corporations contribute quietly to non-profit organizations created by members of Congress who use those charities to shower benefits on their constituents and promote themselves with the people in their districts.

Furthermore, as one lobbyist put it, “Cheerios wants to sell to Democrats and Republicans, so General Mills won’t give overwhelmingly to Republicans.”

This suggests, as well, that labor unions may benefit the most from *Citizens United* because unlike General Mills, they do not sell products to the general public. Instead, unions focus on benefiting their members. Furthermore, shareholders probably have a greater ability to punish corporations for political messages they do not like, whereas union members have less ability to punish union leaders. Also, unlike shareholders who can exit a company by selling their shares, union members are rarely in a position to exit their union.

**Future Issues**

*Citizens United* potentially threatens other campaign-finance rules, such as disclosure rules, curbs on party spending, bans on foreign money, and contribution limits.

There already is ferment in campaign-finance law.

In February, Colorado’s Supreme Court struck down a voter-approved “pay-to-play” amendment to the state constitution. Citing a "presumption of impropriety between contributions to any campaign and sole source government contracts," amendment 54 prohibited holders of sole-source state and local contracts from contributing to any political party or any candidate for elected office.

In April, the DC Circuit Court of Appeals held that the government cannot impose contribution limits on donations given to independent political advocacy groups.

On September 8, a federal judge struck down a Washington state law that prohibited a nonprofit group from receiving contributions over $5000 during the 21 days before an election on a ballot proposition, though he let stand the law’s requirement to disclose donations exceeding $25.

Second, *Citizens United* defined corruption rather narrowly as quid-pro-quo corruption, thus suggesting that limits on campaign contributions might stand because of the possibility of quid-pro-quo corruption, but that limits not associated with quid-pro-quo corruption might fall under the knife of the First Amendment.

Another important issue is the need to bring small donors into politics. This could be the best way to try to equalize speech in the political marketplace rather than trying to suppress certain forms of speech.

Fourth, “Whether a given category of speech enjoys First Amendment protection,” Solicitor General Elena Kagan argued in *U.S.* v. *Stevens* (the crush-video case) “depends upon a categorical balancing of the value of the speech against its societal costs.” The Court rejected this 8-1 in *Stevens*, but only by 5-4 in *Citizens United*. Governments perennially try to proscribe disagreeable speech by claiming that it imposes unacceptable costs on national security, domestic order, public morality, political integrity, and so on.

Finally, again, there remains the issue of defining a foreign corporation in today’s globalized economy.

NOTE: Many of the above remarks were presented at a panel on the *Citizens United* case held at Lafayette College on September 21, 2010.