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Understanding the Citizens United Ruling

By Ira Glasser

The recent decision by the U.S. Supreme Court in the case of *Citizens United v. Federal Election Commission* has been greeted with screaming dismay by most liberals. Many of them mistake the decision for doing things it did not do: for example, one hyperbolic letter to The New York Times asserted that the decision overturned "the century-old ban on corporate contributions to political campaigns." It did no such thing. Corporations are still banned from contributing to a candidate or to a candidate's campaign. The assertion was wrong, and the Times was remiss in publishing such a factually false claim.

More seriously, in his State of the Union, President Obama said that the Court's decision "reversed a century of law." It did no such thing. Congress did enact a law about a hundred years ago that barred direct corporate contributions to election campaigns. But that law was not involved in the Citizens United case, and remains unaffected by it.

Now such stalwart liberals as Sen. John Kerry in the Senate and Rep. John Conyers in the House, normally reliable supporters of freedom of speech, have proposed a constitutional amendment to "fix" the First Amendment in order to bar corporations from exercising freedom of speech. What corporations exactly? They don't say. Who shall decide which corporations may speak, and which may not? They don't say that either.

These liberals, and others like them, who denounced the decision have failed to appreciate what a great ruling it was for the First Amendment, and what a huge victory it was for freedom of speech and against government censorship. Yes, censorship.

So what was this case actually about, and what did the decision actually do? Herewith some observations:

1. The issue at stake in the case was whether, consistent with the First Amendment, the government could criminalize speech that criticized a public official who was also a candidate for elective office, 60 days before a general election and 30 days before a primary. One would think that it was precisely during an election campaign that the right to criticize or defend an elected official was most important. But not according to the campaign finance "reformers." They have actually been trying to stop such speech for four decades, and not just speech by the sort of big, bad corporations you may have in mind.

In a similar case involving a similar issue back in 1972, the ACLU, which by the way is also a corporation, was prevented from taking out an ad in The New York Times criticizing then-President Nixon for his opposition to school busing for integration, and had to go to court to vindicate its right to free speech. The campaign finance "reformers" wanted to prohibit such speech because Nixon was also a candidate for re-election, and the ACLU's speech criticizing him might affect the election in ways the reformers thought was unfair! (I am not making this up.) The law was struck down when the ACLU sued, but it came back again in other forms. In 1984, the ACLU was cited and investigated by the Federal Election Commission for public statements it made criticizing President Reagan for what it considered his violations of civil liberties. That of course was what the ACLU existed to do. But because this criticism occurred during the 1984 re-election campaign, the FEC moved to bar it because, it claimed, such criticism was the functional equivalent of supporting a candidate!! And that was prohibited by campaign finance law.

In these and many other cases over decades, not-for-profit cause groups of all kinds were repeatedly subjected to curbs on precisely the kind of speech the First Amendment was designed to protect. In the current case that has caused all the commotion, the victim was a not-for-profit group called Citizens United that wanted to distribute a film it had made criticizing Hillary Clinton and questioning her fitness for office. No good, said the law, you can't criticize her while she's running for office. Why? Because Citizens United was incorporated. So is the ACLU and so is pretty much every other cause organization. Should Planned Parenthood, for example, or NARAL Pro-Choice America be banned from criticizing Sarah Palin during a future campaign for office? That was precisely the question raised by the Citizens United case. Should the fact that such activist citizens' organizations are incorporated allow the government to bar their speech, especially when it matters most? That is the question the Court was asked to answer, and it answered correctly: such organizations' freedom of speech is protected by the First Amendment. Why liberals should be unhappy about that, or willing to tolerate the censorship of their own speech that would have resulted from a contrary decision is a mystery.

2. The law that barred corporations from spending money to speak critically or supportively of public officials during an election campaign also barred labor unions, even though labor unions aren't incorporated. Why? Because in 1947, the Taft-Hartley Act, a law hostile to organized labor and a law most liberals opposed, decided to include labor unions within the prohibition to "balance" the prohibition against corporate speech.. The precedent of barring corporate speech thus became an excuse for barring the speech of labor unions. Liberals who think that such limits, if allowed, will not apply to them but only to the corporations they hate are deluding themselves. As all our history shows, the first target of government censorship is never the last. It is for that reason that the First Amendment says "Congress shall make no law... abridging the freedom of speech" but Congress did, and in a series of campaign finance laws over the past 40 years, Congress has done so over and over again.

3. The case also had nothing to do with limits on campaign contributions to a candidate, or with the prohibition of corporate contributions to a candidate; those remain intact and were not at play in this case. Rather the case had to do with what is called independent expenditures on speech. This means speech

candidate by name in an electronic broadcast communication 60/30 days before an election, effectively granting the government the authority to silence such speech during that time, including speech by labor unions, the ACLU, Citizens United and any other similar organization.

4. The campaign finance “reformers” argue that the government ought to be given the power to ration speech because democracy requires an equitable balance of speech in order to be fair. And it is certainly true that inequities of speech flow from inequities of wealth. That has always been the case, and it is true for all speech, not just campaign speech. When I grew up, the names of the governors of New York were Lehman, Roosevelt, Dewey, Harriman and Rockefeller. All but Dewey were fabulously wealthy, a determinative fact in their political prominence and election. For that matter, Thomas Jefferson wasn’t exactly a man of the working class. Money isn’t speech, but how much money one has always determines how much speech one has. It’s like travel: money isn’t travel, but $100 won’t get you very far, and those who have $25,000 can travel more, and more freely. If I told you you had a right to travel, but could spend no more than $100, wouldn’t you think your right to travel was being limited? It’s the same with speech. Most if not all of you reading this have never had as much speech as, say, The New York Times or George Soros or Nelson Rockefeller or George Bush or, as we recently discovered in my city, Mayor Bloomberg. The inequities of speech that flow from the inequities of wealth are certainly a big and distorting problem for a democracy, and have always been so, and not just during elections. No one knows how to remedy that, short of fundamental re-distributions of wealth. But I’ll tell you what isn’t a remedy: granting the government the power to decide who should speak, and how much speech is enough. Nothing but disaster flows from that approach, and that was what was at stake in this case.

5. The campaign finance “reformers” claim that corporate wealth is uniquely different, and that the protections of free speech afforded to the rest of us ought not, in the name of equity, be afforded to corporations. But any effort to single out “corporations” as properly subject to such a licensing system as this case represented is both over- and under-inclusive: if regulating the unevenness of speech by regulating the unevenness of wealth is the goal, then why include small business corporations (repair shops, small grocery stores, gasoline stations, etc.) but not Warren Buffet or George Soros, and many other individuals whose personal wealth, unincorporated, dwarfs that of most corporations? And what about the ACLU and the NAACP and Planned Parenthood and The Sierra Club, etc., etc., all of which are corporations that engage in the sort of speech prohibited by the statute struck down in Citizens United?

And what about The New York Times, and CBS and other media corporations, which also are corporate (NBC is owned by General Electric) and which by their coverage and their editorials endorsing and opposing candidates spend money all the time for purposes that were generally prohibited by the statute? Consider: The Times endorses Candidate A in an editorial, or Fox News devotes its entire coverage to promoting or tearing down a candidate, and that is constitutionally protected, but if Citizens United or the Sierra Club or the NAACP or Planned Parenthood wants to buy time for an ad to reply, supporting a different candidate or even just mentioning a candidate by name in an ad that doesn’t expressly support or oppose the candidate, they commit a crime? Where in the First Amendment does it say that such

ABC (which they both did), they become a “media corporation” that escapes the ban? Why should we be allowing the government to decide who may speak by making such distinctions? Yet the Times, a corporate entity that spends money all the time to criticize or praise candidates, and to support or oppose them, blathers on hypocritically about how if other corporations have exactly the same right as they do, it means the end of democracy. Do we want the government—the government??!!— to be deciding which corporations can speak and which not? The Times? Yes. The ACLU or Citizens United? Sorry, no. Wasn’t this precisely the power denied to Congress under the First Amendment? One of the great features of the Court’s decision is that it cleared away all of these unsupportable distinctions, and took away the government’s power to decide whose speech it would permit and whose it would not.

6. Congress and state legislatures may still, under the terms of this decision, require corporations to disclose their funding of other groups’ speech, especially for very large gifts, thereby turning such gifts into a political issue. More fundamentally, if Congress were interested in creating fairness and equity in campaign speech, it could move in the direction of public financing. The problem is, however, that such public financing is unlikely to be either adequate or equitable. For one thing, Congress, consisting nearly entirely of Democrats and Republicans, is unlikely to want to fund third-party candidates, yet why shouldn’t their speech be as entitled to be heard as the speech of the two major party candidates?

For another, Congress is highly unlikely to provide adequate funds to finance effective challenges to themselves. Campaign finance reforms have from the beginning been designed to protect incumbents. For example, research shows that what matters in campaign speech is more the floor of spending than the ceiling. That is, if $2 million is an adequate amount to get your message out, and if an insurgent candidate for Congress has $2 million to spend and the incumbent spends $4 million, then that doesn’t normally affect the outcome, assuming $2 million is enough. But if the insurgent only has $400,000, the incumbent virtually always wins. The incumbent has name recognition, which the insurgent usually doesn’t; the incumbent has the franking privilege with which to reach voters, while the insurgent has to raise money in amounts limited by law to do equal mailings; the incumbent can call a press conference or hold a hearing and generate publicity that is regarded as news, while the insurgent has to spend money raised in small amounts to generate equal coverage.

The requirement to raise campaign dollars in small amounts discriminates against insurgent candidates and favors incumbents. Raising lots of contributions in small amounts requires name recognition and the support of many people, which insurgents usually don’t have. In 1968, Gene McCarthy began his anti-war campaign against incumbent President Lyndon Johnson with only about 2% name recognition in New Hampshire. He had three major donors who gave him seven figures each—huge gifts in 1968— when he challenged LBJ in the New Hampshire primary; those gifts would have constituted a crime today, and pretty much since the early seventies. Without that handful of large gifts, McCarthy would have had little chance to get his message out effectively against an incumbent. With those gifts, he came so close to beating Johnson that Johnson quit the race for re-election. Legislators know all this research; that is why they pass the “reforms” they do, which limit large contributions, require challengers to raise money in

raising any additional money. Campaign finance laws passed by incumbents assure the insufficiency of insurgent candidacies. Incumbency has greatly increased for several reasons, but its rise since these campaign finance “reforms” became popular about 40 years ago is a substantial one.

When I testified in Congress over the years against such campaign finance restrictions on First Amendment grounds, I proposed many public finance alternatives: free air time for candidates who get on the ballot; the franking privilege for challenger candidates as well as incumbents, and direct funding for all Congressional candidates in adequate amounts. No one, not any Democrat, not any Republican, not any advocate of campaign equity, supported such suggestions. Why? Because they were not about to fund effective challenges to themselves.

So aside from the profound First Amendment problems created by all these laws, they have generally suppressed insurgent candidates, advantaged incumbents and increased inequity in election campaigns.

Liberals and Democrats have been the chief offenders in this scenario, favoring equity in the abstract but never seeing how the particular reforms they advocated made the problems they wished to remedy worse, and never seeing that giving the government the authority to regulate speech was not a good thing. Maybe now this result, which has steamed up liberals and Democrats, may at last shift their attention to the kind of public financing that equitably provides money for more speech instead of pretending to create equity by granting the government the authority to restrict speech. We shall see. If they do move in this direction, citizens should remember that the floor is more important than the ceiling: the amounts provided have to be adequate; if they aren’t, fair campaigns will not follow; and if they are, then restrictions on what can be raised in addition, with disclosure of the source (for large amounts), will be unnecessary. This is not a new proposal; but maybe now it can gain some traction.

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