Court's Campaign Money Ruling Is a Red Herring

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Before running off trying to counter the recent Supreme Court decision in Citizens United v. Federal Election Commission (FEC), we ought to sort out what this decision does and does not do.

The Citizens United decision does make our democracy theme park a little worse, the way having an atomic bomb dropped on your own house would be slightly worse than having it dropped on your neighbor's. But despite dire claims that the decision is the nail in the coffin of our democracy, that it will shake the current election system to its core, and so on, the case changes very little of our current situation.

Just how teensy a change it will bring can be illustrated by looking at one of the cases overruled by Citizens United: the 1990 Austin v. Michigan Chamber of Commerce[1] case, hailed by many as a ray of hope in the morass of campaign finance reform efforts. Austin affirmed an extremely mild Michigan law that essentially prevented the Michigan Chamber of Commerce (one type of nonprofit corporation) from spending general funds to support or oppose a political candidate.[2] That law specifically defined person to include corporations.[3]

The Austin case accepts that money equals speech (following the Supreme Court's 1976 Buckley v. Valeo decision[4]), that corporations can spend treasury funds on initiatives and referendums, and that political action committees (PACs) using segregated funds are legal and constitutional. Austin also affirms that corporations are "persons" with constitutional rights, and that they have both First Amendment speech rights, and Fourteenth Amendment equal protection rights. That such a case is regarded as the Magna Carta of campaign reform efforts must leave corporate counsel hiding their smirks.

The recent Supreme Court decision in Citizens United is a gift to the right wing, all right, but not the way many pundits claim. It is a gift to the right wing because of the way that many in the mainstream media have reacted to it, in full frontal denial that it is a red herring.

Let's review where we were before the Citizens United case was decided. After the 2002 McCain-Feingold Act[5] went into effect, the public no longer had reason to suspect that corporate lobbying, campaign contributions, or corporate cash affected elected officials' votes on legislation or positions on issues. The M-F Act transformed elections into paragons of open discussion, free sharing of ideas, thoughtful parrying, and heartfelt non-partisan pro-civic engagement orgies. Right?

Look at any index: the role of money in elections, voting records that mirror campaign contribution patterns, the quality of debate, or the proportion of legislation clearly designed to benefit some corporate interest group. McCain-Feingold recalibrated, rearranged, and redecorated the loopholes used to determine how election money flows and is tallied. It did not eliminate that money, or the influence it reflects. For a current example unrelated to the Citizens United case, look over the Valentine's Day New York Times front-page article on corporate influence on the Congressional Black Caucus.[6]

The previous major national paroxysm of campaign reform was hardly more effective. The main claim to fame of the Federal Election Campaign Act (passed 1971; amended 1974; shredded in the 1976 Valeo decision; liquefied in the 1978 Bellotti ruling [7]) was legalizing the PAC (Political Action Committee). Doubtless, those of us old enough to have lived through the Nixon years will recall a sudden elevation of the quality of elections and political discussion, and correlative diminution of political corruption in the years after its passage. Nope.

Legislation (the FEC Act in the 1970s, McCain-Feingold in 2002) that makes minor adjustments to a thoroughly corporate-dominated corrupt system should not be expected to resolve major problems. If insanity is defined as expecting different results while doing the same thing over and over, surely we are getting dangerously close with campaign reform efforts.

As the Citizens United case was being heard in the fall of 2009, I noted the Supreme Court's false framing: "Must we

limit speech in order to have free and fair elections? Or, must we accept corporation-dominated political debate in order to preserve free speech? This false dilemma disappears if we reject corporate personhood—the idea that corporations have constitutional rights. Only if we pretend that corporations are 'persons' under the Constitution, is limiting corporate 'speech' a constitutional infringement."[8]

After the Citizens United ruling, this is still true. Corporations function like retroviruses, taking over the rights and protections that we wrote for humans, and then using them against us, their human hosts. The opinion of the Court is chock full of paeans to the nobility and preciousness of unfettered free speech—of corporations. Rights we the people fought for—at the cost of much life, liberty, and happiness—are now used with great (and seemingly invisible) regularity to shield corporations from government "interference."

Maryland Congresswoman Donna Edwards's proposed Constitutional Amendment,[9] inspired by the Citizens United decision, would guarantee that "Congress and the states may regulate the expenditure of funds for political speech by any corporation, limited liability company, or other corporate entity." Would this amendment end corporate domination of our political process? Clearly not. The "corporation" or "corporate entity" referred to ALREADY HAS constitutional rights and other constitutional protections, a circumstance Edwards's proffered amendment does nothing to alter.

Since the 1870s and 1880s, federal judges have worked hand-in-hand with corporate counsel to haul into place the edifice of constitutional protections that exempt corporations from the authority of the very states that created them. These protections are the linchpin of corporate power, and the cornerstones of our democracy theme park. Rather than overstating the significance of the Citizens United decision, offering measures that tiptoe around the fundamental problem, and wallowing in the usual moaning and groaning about corporate influence, let's address the problem directly, something we should have done generations ago.

Peek outside the democracy theme park, and repeat after me: Only if we pretend that corporations are "persons" under the Constitution, is limiting corporate "speech" a constitutional infringement.

And kick that red herring out of the way.

Notes

1. Austin v. Michigan Chamber of Commerce, 494 US 652 (1990).

2. §54(1) of the Michigan Campaign Finance Act, 1976 Mich. Pub. Acts 388.

3. Michigan Campaign Finance Act, 1976 Mich. Pub. Acts 388, 591(g) of statute.

4. Buckley v. Valeo, 424 U.S. 1 (1976).

5. Bipartisan Campaign Reform Act of 2002 (BCRA).

6. Eric Lipton and Eric Lichtblau, "In Black Caucus, a Fund-Raising Powerhouse: Corporate Donors Buy Access, and Push Agendas, at Lavish Events," New York Times, Feb. 14, 2010. [front-page]

7. First Nat. Bank of Boston v. Bellotti, 435 US 765 (1978).

8. Jane Anne Morris, paraphrase, "Corporate 'personhood' must be challenged," The Progressive Populist, Nov. 1, 2009 (vol. 15, number 19).

9. John Nichols, "Amend Constitution to save democracy," (Opinion and Commentary, The Cap Times, Feb.10-16, 2010).