Written by **Thomas R. Eddlem** on January 24, 2010

The Coming Small Business Revolution on Politics after Citizens United v. FEC

The Supreme Court decision in Citizens United v. Federal Election Commission promises to unleash the electoral fury of America's small businesses and citizens groups. The 5-4 decision will let for-profit corporations — and the citizen groups funded by them — make independent expenditures toward election advertisements.

This unqualified positive development is one of the best reasons for constitutionalists to cheer a court decision in decades. So it's no surprise that the official Left is squealing like a stuck pig over the decision. The *Huffington Post* screeched that it is "a danger to our long-cherished basic democratic principals." President Obama said the decision "strikes at our democracy itself" in his January 23 weekly radio address. "The Supreme Court has thrust politics back to the robber-baron era of the 19th century," whined the *New York Times* the same day of the January 21 court decision, labeling it a "blow to democracy."

The case revolved around a challenge by a private citizens group called *Citizens United* who had produced an unflattering video of Hillary Clinton called *Hillary: The Movie* and wanted to pay for its distribution within 30 days of the 2008 presidential primaries. Because *Citizens United* was partly funded by donations from for-profit corporations, the media buy would have violated the limits of the McCain-Feingold "Bipartisan Campaign Reform Act" of 2002. Facing possible criminal prosecution for violating McCain-Feingold if they had actually bought the advertisements, *Citizens United* successfully sued to get the law declared unconstitutional.

The *New York Times* has good reason to whine about the decision; it's in their corporate self-interest. As the court noted, "media corporations are now exempt from [McCain-Feingold's] ban on corporate expenditures." Overturning the ban knocked the *Times* from its privileged perch. Any company or interest group can now publicize an editorial on behalf of candidates after the *Citizens United* case, just as the *New York Times*' corporate affiliate — the *Boston Globe* — did on behalf of Massachusetts Senate Democratic candidate Martha Coakley just days before recent Massachusetts' special U.S. Senate election. The Supreme Court's decision levels the playing field with the leftist "media corporation" hypocrites. The *Boston Globe* also editorialized against the court's *Citizens United* decision allowing corporate election spending, claiming that "corporations … don't merit special protections" in an

editorial published less than 10 days after they had exercised their special corporate protection under McCain-Feingold by corporately endorsing Coakley in the special election.

The *Citizens United* decision, written by Justice Anthony Kennedy, found "there is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not." The New York Times Corporation clearly disagrees, preferring to keep to themselves the ability to dole out election advice to voters from on high. Kennedy wrote that "by its own terms, the law [McCain-Feingold] exempts some corporations but covers others, even though both have the need or the motive to communicate their views." The Court also observed that the whole concept of a "media corporation" threatens to become obsolete anyway. "With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred."

The declining official media represented by the *New York Times* claims that the ruling threatens to turn Congress into a creature of corporations. "If a member of Congress tries to stand up to a wealthy special interest," the *Times* argues, "its lobbyists can credibly threaten: We'll spend whatever it takes to defeat you." But large corporations can already do this by starting up political action committees, or PACs, and the electoral results have been lackluster thus far. The real change will occur in small, independent businesses and citizens groups. The Court noted that "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward [etc.]... This might explain why fewer than 2,000 of the millions of corporations in this country have PACs." Under the court's *Citizens United* ruling, small businesses lacking the array of lawyers and accountants needed to run a PAC are free to contribute to the political debate.

The Court essentially ruled that the only solution to the perception that that there are too many advertisements is really to have more advertisements from a wider array of perspectives. And what rational person can earnestly say that all the voters are too well informed on election issues? "Factions should be checked by permitting them all to speak," the court ruled, roughly paraphrasing James Madison in *The Federalist* #10 "and by entrusting the people to judge what is true and what is false. The purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public."

Kennedy notes that McCain-Feingold "prohibitions are classic examples of censorship." But the dissent by John Paul Stevens claimed that it was not trying to censor people. Of *Hillary: The Movie*, Stevens wrote: "It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election. Neither Citizens United's nor any other corporation's speech has been 'banned.'" But the majority exploded this claim, noting, "It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short time frames in which speech can have influence." In essence, the court asks: What good is political speech if it occurs after the election?

The *New York Times* claims, "The founders of this nation warned about the dangers of corporate influence." By "founders," the *New York Times* must have meant Karl Marx, since Jefferson, Washington, Adams, and Madison (and all the other Founders) go unquoted in the editorial. The four dissenting justices do quote Thomas Jefferson out of context in a letter that vaguely mentions corporations in a negative light. But the historical record is void of Founding Fathers trying to censor the speech of corporations.

Congress and the courts have traditionally claimed that they possess the right to regulate political campaigns because Congress was given the power to "make or alter" state regulations on the "times, places and manner of holding elections" under Article I, Section 4 of the U.S. Constitution. But political campaigns are clearly speech, not elections. The Founders recognized this, and never attempted to limit political speech on these grounds. James Madison explained in his notes on the 1787 constitutional convention that the election provision applies to "whether the electors should vote by ballot, or viva voce [voice vote]; should assemble at this place or that place; should be divided into districts or meet all at one place; should all vote for all the Representatives, or all in a district vote for number allotted to the district."

The First Amendment says, "Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." Even if the elections clause of Article I could have been understood to reach corporate speech at the time of the 1787 constitutional convention, then the First Amendment must be seen as an attempt by the Founders to strike that understanding down. Corporations are little more than the people peaceably assembled. The operative clause in the First Amendment is "no law" with respect to the infringement of freedom of speech.

The only flaw in the *Citizens United* decision is that the majority did not fully come to the conclusion that Congress may not pass a law restricting freedom of speech. Four of the justices in the majority decision upheld federal requirements that donors to political speech activities report their names to the Federal Election Commission. Only Justice Clarence Thomas dissented on this one point, noting the First Amendment protected even anonymous speech for very practical reasons. Thomas wrote that disclosure of supporters of California's Proposition 8 (which defined marriage as a man and a woman) resulted in vandalism and death threats against those who dared speak. "Some opponents of Proposition 8 compiled this information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result.… I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or preemptive and threatening warning letters as the price for engaging in [speech protected by the First Amendment]."

Anonymous speech has a long and important role in American history. The 13 colonies may never had achieved independence had Samuel Adams not repeatedly written anonymously under pen names like "Vindex." The U.S. Constitution would likely not have been adopted without the anonymous *Federalist Papers* from Madison, Hamilton, and Jay under the pen name "Publius." (The anti-federalists also published anonymously using names such as "Brutus" and "Cato.") Even after the Constitution was adopted, Alexander Hamilton and James Madison debated President Washington's neutrality policy in newspapers anonymously using the names Pacificus, Helvidius, and Americanus.

Kennedy argues that "if the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in free speech." Amen to that. The only downside to the decision was that eight justices failed to appreciate the importance of anonymous political speech and four justices — nearly a majority — could so blatantly ignore the clear meaning of that simple declarative English sentence that is the First Amendment to the U.S. Constitution.

> **Author's note:** The 2002 McCain-Feingold "Bipartisan Campaign Reform Act" was repeatedly criticized by *The New American* (and this author) from 1998 through 2002 as an unconstitutional

"end run around the First Amendment."