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***Citizens United* and Forked-Tongued Candidates**

Trevor Burrus | September 6, 2012

Convention week is a good time to reflect on campaign spending and the controversies over the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*. The battle-lines around that controversial decision have been clearly drawn along partisan lines -- so clearly, in fact, that it seems increasingly impossible to find a not just common ground on the decision but even a common understanding of the opinion. I will be defending *Citizens United* in the hope that, if the two sides cannot find common ground, perhaps there is a common understanding about this controversial case.

Citizens United overturned a law that prohibited a nonprofit, political organization from making available on pay-per-view a movie critical of then-candidate Hillary Clinton. Citizens United -- which describes itself as "dedicated to restoring our government to citizens' control" by using "a combination of education, advocacy, and grass roots organization" -- would have had their movie banned simply because it was made by a corporation.

In 2004, Citizens United tried to use the same law to block advertisements for Michael Moore's *Fahrenheit 9/11*. The Federal Election Commission ruled that Moore's movie did not violate the law because the ads were not aired within 60 days of the general election. Although this attempt by Citizens United was a naked display of partisanship, it also demonstrated how the FEC's rules create a regulatory environment amenable to partisan bickering over arbitrary and meaningless distinctions (why 60 days before an election?).

Citizens United's victory in the Supreme Court helped strip the FEC of some of this arbitrary power. For example, under the law struck down in *Citizens United*, *The Obama Effect*, a recent movie about a man who devotes his life to getting President Obama elected in 2008, could easily have been banned by the FEC as an improper "electioneering communication" financed by a corporation. It would have been left to the discretion of FEC regulators to determine whether the movie is improper political speech. Even movies such as *Zero Dark Thirty*, the upcoming film about the Osama bin Laden assassination, are not exempt in principle from the FEC's watchful eyes.

Because of these concerns, some people believe that Citizens United should have won their case, but on narrower grounds. Perhaps there should be exemptions for nonprofit corporations, "advocacy corporations," as well as "genuine artistic

expression" (to be determined by FEC regulators, of course) so movies like *Zero Dark Thirty* are immune. Perhaps an exception should have been granted for pay-per-view movies. There were many possible narrower outcomes, but every one of them involved increasing the FEC's ability to make arbitrary distinctions between speakers either approved or not approved by the government, distinctions that have no basis in the text of the First Amendment.

Why do we even empower the FEC to make any such distinctions? For one reason so far accepted by the Supreme Court: to prevent candidates from being corrupted by contributions.

Citizens United rightly overturned another short-lived rationale for campaign finance: To prevent the marketplace of ideas from being corrupted by the unequal influence of wealth. In *Austin v. Michigan Chamber of Commerce*, the case *Citizens United* overruled, Justice Thurgood Marshall described this type of corruption as coming from "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."

Note that this rationale is completely independent of the first justification for limiting campaign spending -- that is, to curtail candidate bribery. Instead, this justification empowers government to monitor the national political dialogue and step in when officials believe that the "loudness" of a speaker's voice is not congruent with the "public's support for the corporation's political ideas."

Note too that there is nothing in this rationale that limits it to corporations. Justice Marshall's opinion in *Austin* discusses corporations because that was the issue before the Court. But there are many other situations in which the loudness of a speaker's voice is not congruent with public support for the speaker's ideas -- to name but a few, Oprah, a columnist for the *New York Times*, or even myself, a sole libertarian whose voice is augmented by the generosity of the Cato Institute's supporters. If equalizing the impact of certain voices on elections is the goal, why limit it to any class of speakers?

During a political campaign, politically involved people fight to have an unequal impact on the election. Some, particularly those in the younger generation who tend to have a comparative advantage in free-time, will volunteer for campaigns. Those who have a comparative advantage in rhetoric may focus on blogging or writing op-eds and letters to the editor. Those most gifted in rhetoric and intelligence may have the privilege of writing a column for one of the major papers in the country endorsing a candidate. And some people pool their various

abilities -- rhetoric, financing, administrative, etc. -- together to strengthen their voices, as in the case of the shareholders and donors to Citizens United.

Put simply, a world in which Citizens United lost is not more equal in terms of influence, it is just unequal in a different way.

Ultimately all regulation of campaign spending plays favorites. If you eliminate corporate spending, then you favor volunteers, celebrities, and media entities. If you eliminate for-profit spending, then you favor non-profits and unions. And all regulated environments favor those who have the wherewithal, not to mention the lawyers, to comply with the regulations.

But should government be favoring anyone at all? More specifically, should elected politicians be allowed to play favorites in the realm of campaign speech? As you watch the forked-tongued politicians and candidates speak at the conventions, ask yourself if you're OK with anyone, from either party, who is that obsessed with being elected having any control over who can speak in elections. Maybe then *Citizens United* won't seem like such a bad decision.

This post is part of the HuffPost Shadow Conventions 2012, a series spotlighting three issues that are not being discussed at the national GOP and Democratic conventions: The Drug War, Poverty in America, and Money in Politics.