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Progress Still Possible

All-in? Money is speech, the Supreme Court says, and politics is a no-limit game. So, place your bets.

Posted by Bob Geary on Tue, Aug 14, 2012 at 4:01 PM

The town hall meeting in Raleigh Monday evening was informative and polite. All of the more than 100 people who packed into Quail Ridge Books & Music were able to express themselves on a topic of high public significance.

Now imagine that each of us at the meeting, while retaining our power to vote at election time, would not be allowed to speak in this town-hall setting without paying for the privilege.

With limited time, only a few slots would be offered, and they'd be reserved for the highest bidders—not necessarily the richest among us, but obviously nobody struggling to make ends meet would be rising to their feet.

And this would be like no-limit poker. There'd be no ceiling on the bids. Indeed, if someone wanted to buy all the slots—and could outbid everyone else—he (or she) would be the only speaker.

Which brings us to the evening's topic, the series of Supreme Court decisions culminating two years ago in [the *Citizens United* case](#). There, the Court by a 5-4 vote allowed unlimited political spending by corporations, striking down much of the McCain-Feingold campaign reform act. Inevitably, this led to a unanimous decision by the D.C. Circuit Court of Appeals in [SpeechNow.org vs. FEC](#), which allowed unlimited political spending by people—because if corporations were people, as *Citizens United* held, then certainly people were people.

(h/t Press Millen for explaining this so clearly.)

SpeechNow.org is why we have SuperPACs. *Citizens United* is why there's no law limiting SuperPACs or any other form of political spending ("expression") by the rich.

Whether this is, as Raleigh attorney Press Millen said, an "appalling" outcome as a matter of public policy is, I suppose, a matter of opinion. (My opinion? Appalling.)

But I would assert it as a fact, not opinion, that political spending can be regulated as a matter of law, and that the Supreme Court's doctrine that it can't is —

— let me think of a polite word apropos of our town hall —

Crap.

John Samples, a staff member at the libertarian Cato Institute in Washington, is not bothered by *Citizens United* or its progeny. On the contrary, Samples told us Monday, *C.U.* "was a good decision." Why? Because it protected freedom of speech. If you let Congress regulate speech, Samples argued, nothing good can come of it. (Samples was in Raleigh for a gig earlier in the day with the John Locke Foundation.)

Samples talked for quite a while. But what he said can be boiled down to this:

- * Money is speech.
- * Speech must be unlimited under the First Amendment.
- * Therefore, the rich must be allowed to spend unlimited sums of money on politics.

Oh, and he said one more thing:

- * Corporations are people, and they must be allowed unlimited political spending too.

Corporations, moreover, are not merely "artificial people" — the corporation bring a legal artifice to protect actual people from liability for their company's actions. No, Samples said. They are "natural people."

And these natural people, Samples said, should be allowed to spend their own money and any money over which they have agency for purposes of political expression. In short, corporate CEOs should be allowed to treat their companies' money as if it were their own.

Now, as you may imagine, the 100-plus folks at Quail Ridge Books included many of the progressive persuasion, and as they listened to this — politely — a few did murmur some polite objections.

I'd have thought Samples, since he does this sort of a thing for a living — he's listed as "director of Cato's Center for Representative Government, which come to think of it is a pretty ironic position — would've welcomed a bit of back-and-forth. Instead, he literally brushed aside such comments with a dismissive wave, restating whatever he'd just asserted as if it had been handed down to Moses.

Or the Koch Brothers.

(For background on the ties between Cato and the Kochs, see [this piece by Simon Johnson of M.I.T.](#); also, [this followup from The New York Times](#).

I don't think I'm being unfair to Mr. Samples when I say that he sees nothing wrong and everything right with the rich controlling American politics; all else — what little there is to his so-called analysis — flows back from the conclusion he's been paid to reach.

Back in the real world, Press Millen suggested that in time *Citizens United*, like [the Plessy case of old](#), will be known by its fruits. *Plessy*, decided in 1896, was the Supreme Court ruling that there was nothing objectionable about "separate but equal" treatment of the races, a decision oblivious (at best) to the facts of white supremacy.

The fruits of *C.U.* are only starting to be seen, Millen said, but the 2012 elections are marked already by far more spending in the presidential election on negative ads by supposedly independent groups and SuperPACs.

The Supreme Court struck down McCain-Feingold with no empirical analysis whatsoever about its central premise, which is that unlimited spending by the rich, corporations and interest groups can and does lead to political corruption, Millen argued.

Unleashed by the Court, Millen went on, the rich — with the multi-billionaire Koch Brothers at the front — are smashing President Obama with a fury. But Obama, as the White House incumbent, does have the fundraising juice to fight back. (Samples said it was a good thing that SuperPACs and the rich were keeping Mitt Romney competitive, because otherwise Romney would be overwhelmed by the fact that Obama's contributors far out-number Romney's — insert your own response about democracy here.)

Millen's worries about *C.U.*, he said, are more about down-ballot races in which a six- or seven-figure expenditure on one side can bury a candidate who has no such benefactor(s) on the other side. Millen pointed to the efforts of Massey Coal's Don Blankenship to buy a West Virginia Supreme Court race in 2008.

Yes, [that Massey Coal](#).

This, too, became a **Supreme Court case in 2009**. When you read about it, consider that Justice Kennedy, who wrote the majority decision in *Citizens United*, also wrote for the majority in *Caperton v. Massey Coal* — with Kennedy apparently deciding that the problem of corruption in politics attaches to the office-holder (the Supreme Court justice in the W.Va case) but not to the corporation which did the corrupting. Any other conclusion would make what Kennedy wrote in *C.U.* absurd.

But aren't bribes two-way?

Well, the corruption in politics is everywhere you look — Wall Street, Enron, Blackwater, do I need to go on? — and it's all traceable to people taking money from people they shouldn't to do things they oughtn't. Things that, if they're not illegal, should be except that the folks taking the money — and the ones giving it to them — don't want them to be illegal.

So let's circle back and consider whether there's a way to respect the First Amendment while limiting campaign contributions and corruption.

Of course there is:

- 1) Limit individual contributions to candidates and party committees; require disclosure of contributors' names over a set amount (say, \$100).
- 2) Permit unlimited spending by people expressing their own political views, but distinguish this real form of "independent expenditure" from the fake form that reliably ends with a call to — "Tell Congressman Smith" what a swell egg she is ... or what a miserable excuse he is for a human being.
- 3) Limit spending by individuals in support of a particular party or candidate — the fake kind of "independent expenditure" discussed in No. 2 — in the same way as direct contributions to them are limited. Require disclosure.
- 4) Contributions to organizations using the money for real issues advocacy need not be disclosed by name. **The reason for allowing donors to remain anonymous was made clear in the civil rights era**, when those willing to help the NAACP and other rights groups were doing so at some peril given the unpopularity of ideas like equality.
- 5) Bar corporations from spending money in support of particular parties or candidates. Continue to allow management to organize a PAC and collect money via voluntary contributions —in limited amounts, as the law now provides — from employees and others. But keep the CEOs' hands out of the till when it comes to their substituting their own political judgments for those of their employees, shareholders and customers.

On this last point, by what possible right does Jim Rogers, CEO (once again) of Duke Energy, spend the money I pay Duke for electricity on contributions to candidates or political committees I don't support — but he does?

Ditto the CEOs of any of the hundreds of companies I either buy from or own a tiny piece of via the mutual funds in my portfolio. I have not given my political proxy to them. Bad enough I'm forced to give them a management proxy in the form of my vote for a slate of corporate directors running unopposed.

Unions aren't permitted to spend their members' money on political campaign without a member's assent. (If you doubt this statement, you haven't read the Supreme Court's decision in the case of *Knox v. Service Employees*, decided in June, 2012. *) Why are corporations given more power over their customers' money than a union is over a member's dues?

Notice that no one's freedom of speech or political expression has been limited in any way by this 5-step approach. If I want to buy a full-page ad in every newspaper in the country, and 30-minute infomercials on every TV channel, to tell you why taxes on the rich are too low — I can go ahead and do so. (When I get the bills, I may be a little short :)

The only thing I'm limited in doing is spending money in support of a political party or candidacy. I can still do it. I just can't spend at levels far, far above what my fellow citizens are able to afford.

To allow the rich to make unlimited political contributions is of a piece (I started to say no different, but it's a little different) than giving a weighted ballot to voters when they enter the polls based on their net worth.

Mr. Sample and I both stand for representative government. But representative of what? He seems comfortable with a government that is, without question, more and more representative of the wealthy and corporate interests. I'd rather have a government representative of citizens — of people.

All the people.

* *From Justice Alito's decision for the majority in that, you guessed it, 5-4 ruling against the Service Employees:*

But a “[u]nion should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.”

And in response, the AFL-CIO said, in part —

we are disturbed but not surprised that the conservative majority places special burdens on public sector unions in their efforts to represent working people's economic interests through the legislative process that the Court does not apply to corporations when they spend shareholder money on politics.