The New York Times Discovers That Corporate Speech Isn't A Bad Idea After All

Doug Mataconis · Tuesday, February 8, 2011 · 14 Comments

Ever since it was handed down last year, the Supreme Court's decision in Citizens United v. FEC has been the subject of unrelenting criticism from the political left ranging from the President of the United States himself (while the Supreme Court sat mere feet away from him) to average political pundits. When the decision was first handed down, for example, the New York Times published this editorial:

> With a single, disastrous 5-to-4 ruling, the Supreme Court has thrust politics back to the robber-baron era of the 19th century. Disingenuously waving the flag of the First Amendment, the court's conservative majority has paved the way for corporations to use their vast treasuries to overwhelm elections and intimidate elected officials into doing their bidding.
>
> (…)
>
> As a result of Thursday's ruling, corporations have been unleashed from the longstanding ban against their spending directly on political campaigns and will be free to spend as much money as they want to elect and defeat candidates. If a member of Congress tries to stand up to a wealthy special interest, its lobbyists can credibly threaten: We'll spend whatever it takes to defeat you.

This reaction from the Times' editors pretty much mirrored what we heard from the political left in the wake of *Citizens United*, although so far none of their horror tales have come to pass. Now, with the one year anniversary of the decision having just passed, the Times' legal writer Adam Liptak discovers that maybe the corporate speech doctrine set forth in Citizens United isn't such a bad idea after all:

> [The liberal] critique is incomplete. As Justice John Paul Stevens acknowledged in his dissent, the court had long recognized that "corporations are covered by the First Amendment." Justice Anthony M. Kennedy, writing for the majority, listed more than 20 precedents saying that.
>
> But an old and established rule can still be wrong, and it may be that the liberal critique is correct. If it is, though, it must confront a very hard question. If corporations have no First Amendment rights, what about newspapers and other news organizations, almost all of which are organized as corporations?

> The usual response is that the press is different. The First Amendment, after all, protects "the freedom of speech, or of the press." Since "the press" is singled out for protection, the argument goes, media corporations enjoy First Amendment rights while other corporations do not.
>
> But the argument is weak. There is little evidence that the drafters of the First Amendment meant to single out a set of businesses for special protection. Nor is there much support for that idea in the Supreme Court's decisions, which have rejected the argument that the institutional press has rights beyond those of the other speakers.

Moreover, as Justice Scalia noted in his concurrence in Citizens United, the idea that media corporation would somehow be entitled to greater First Amendment protection by virtue of the kind of business they engage in doesn't make any sense historically:

> It is passing strange to interpret the phrase "the freedom of speech, or of the press" to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish. No one thought that is what it meant. Patriot Noah Webster's 1828 dictionary contains, under the word "press," the following entry: "Liberty of the press, in civil policy, is the free right of publishing books, pamphlets, or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or to the peace of the state." 2 American Dictionary of the English Language (1828) (reprinted 1970). As the Court's opinion describes, ante, at 36, our jurisprudence agrees with Noah Webster and contradicts the dissent. "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion." Lovell v. City of Griffin, 303 U. S. 444, 452 (1938) .

Liptak quotes Eugene Volokh as putting the dilemma that critics of *Citizens United* face rather bluntly:

> ***"If ordinary business corporations lack First Amendment rights, so do those business corporations that we call media corporations."***

Which brings us to the central issue of *Citizens United*, the issue of "corporate rights," an issue that The Cato Institute's Ilya Shapiro addressed shortly after the decision came out:

> [The argument that corporations lack Constitutional rights] demonstrates a fundamental misunderstanding of both the nature of corporations and the freedoms protected by the Constitution, which is exemplified by the facile charge that "corporations aren't human beings."

Well of course they aren't — but that's constitutionally irrelevant: Corporations aren't "real people" in the sense that the Constitution's protection of sexual privacy or prohibition on slavery make no sense in this context, but that doesn't mean that corporate entities also lack, say, Fourth Amendment rights. Or would the "no rights for corporations" crowd be okay with the police storming their employers' offices and carting off their (employer-owned) computers for no particular reason? — or to chill criticism of some government policy.

Or how about Fifth Amendment rights? Can the mayor of New York exercise eminent domain over Rockefeller Center by fiat and without compensation if he decides he'd like to move his office there?

So corporations have to have *some* constitutional rights or nobody would form them in the first place. The reason they have these rights isn't because they're "legal" persons, however — though much of the doctrine builds on that technical point — but instead because corporations are merely one of the ways in which rights-bearing individuals associate to better engage in a whole host of constitutionally protected activity.

That is, the Constitution protects these groups of rights-bearing individuals. The proposition that only human beings, standing alone, with no group affiliation whatsoever, are entitled to First Amendment protection — that "real people" lose some of their rights when they join together in groups of two or ten or fifty or 100,000 — is legally baseless and has no grounding in the Constitution. George Mason law professor Ilya Somin, also a Cato adjunct scholar, discusses this point here.

Corporations don't have rights because they are corporations. They have rights because they are entities made up of individuals who have Constitutional, and natural, rights. To accept the "no corporate rights" argument, one would also have to accept that individuals lose their rights any time they act as a group toward a common purpose. One would think that this would have come as something of a shock to Martin Luther King, Jr and the Southern Christian Leadership Conference, or the members of the American Civil Liberties Union. However that, and the rather ambiguous question of why a corporation that happens to own a newspaper possesses rights if a corporation that sells toilet paper doesn't, is the reason that the Court was largely right in *Citizens United*, and why the critics arguments are so dangerous.