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Campaign Finance Reform: A Libertarian Primer

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On January 21, the Supreme Court issued its blockbuster opinion in *Citizens United v. Federal Election Commission.* Using that opinion as a platform, I offer this primer – written from a libertarian perspective – on the broad principles underlying campaign finance reform and free speech. (For more detailed background on the case, and a different perspective, see Michael Dorf's *FindLaw* commentary of January 25.)

First, why was *Citizens United* before the Court?

Campaign finance reformers endorse the quixotic idea that money and politics should not mix, so they passed the McCain-Feingold reform law in 2002. Six years later, in the wake of the 2008 election, we discovered how well the reforms worked. More money was spent in that election than in any election in the history of the universe.

McCain-Feingold became the Bipartisan Campaign Reform Act, which the Supreme Court upheld in *McConnell v. Federal Election Commission* (2003). The Court decided in *McConnell* that political expression was entitled to less First Amendment protection than Klan speech, pornography, and flag burning. Each of those is constitutionally protected; but if a corporation such as, say, Random House were to publish a book with the words "Vote for Obama" anywhere in the text, the entire book could be banned. Ditto for any book distributed via Amazon's Kindle that simply named a candidate for federal office within 60 days of a general election or 30 days of a primary. We are not supposed to ban books in America. That's why the Court took up *Citizens United.*

Second, what did the Court say in *Citizens United* that has caused such controversy?

Justice Anthony Kennedy, writing for a five-member conservative majority in *Citizens United*, overturned McCain-Feingold's two most egregious restrictions on corporate and union political speech: first, the prohibition on expressly advocating the election or defeat of an identified candidate; second, the embargo on broadcast ads that merely name a candidate as an election draws near.

The offending speech in *Citizens United* consisted of television ads for "Hillary: The Movie," which was highly critical of presidential candidate Hillary Clinton. Citizens United, the non-profit corporation that produced "Hillary," also wanted to distribute it through cable video-on-demand. That too was barred, although distribution in theatres and on DVDs managed to evade the speech police. Happily, the Court recognized that fully-disclosed corporation and union independent expenditures are not inherently corrupting, nor do they create the appearance of corruption. Moreover, corporations and unions rarely speak with one voice. Corporations may favor policies than unions oppose, and vice versa. Walmart may favor health care reform; Whole Foods may not. Individuals should be free to associate and pool their resources to express themselves as they wish – whether through a union, corporation, partnership, or any other organization.

Under the post-*Citizens United* rules, corporations and unions still cannot contribute directly to candidates; and they still have to disclose when they pay for an advertisement – so we will know who's footing the bill. But the ad itself, if it's independent and not coordinated with the candidate, can be broadcast without restriction. Further, corporations and unions will now be able to say "Vote for [or against] Candidate X." Before *Citizens United*, they had to say "Call Candidate X and tell her you like [or don't like] her views" on a particular issue. Most of us would agree, that distinction makes little sense.

Of course, hardcore reformers are screaming bloody murder – especially the corporate media giants, like the *New York Times*, which inexplicably were exempted from the old restrictions. Likewise, President Obama's reaction to the *Citizens United* decision bordered on apoplexy. He warned of a "stampede of special-interest money in our politics." That was shortly after big unions, drug companies, and insurance companies spent millions of dollars promoting Obama's health bill, which was custom-tailored to feather their nests. Where were the president's complaints when big bucks were pushing Obamacare?

Third, why did the Supreme Court take seven years to revisit McCain-Feingold?

The Court has been reluctant to grasp the notion that politics is essentially a bargain between candidates and the voters. When a candidate promises to pursue an agenda that a voter favors, it should not matter constitutionally whether the voter's return promise is to vote for the candidate, convince his friends to vote for the candidate, write letters to the editor in support of the candidate, pay for an ad that supports the candidate, or donate money to the candidate so he can pay for his own ad. Nor should it matter if the candidate's end of the bargain includes a commitment to meet with the voter, listen to his views or, to put it crassly, give him access and influence. Each of those acts has the same end in mind: getting the candidate elected. And each act operates through the same means: political speech. The exchange of speech for promises by the candidate is not corruption. It is democracy at work. A majority of the nine justices on the Supreme Court now appreciate – if not fully embrace – that guiding principle.

Fourth, are there any campaign contributions or expenditures that should be illegal?

Yes: First, misuse of a government office by favoring donors who seek government contracts and services. That would breach an official's fiduciary responsibility to his constituents. Second, payoffs to a candidate – secretly contributed, then spent on personal pleasures like a new car. Numerous laws are already on the books to prosecute such abuses. But when a candidate fully discloses a donation and puts the money in a segregated fund that can be used only for constitutionally favored political expression, that is not corruption. And the First Amendment does not allow treating advocacy as if it were a bribe. Our system may not be perfect; but it is, after all, the system that the Constitution has established.

Fifth, doesn't the First Amendment relate to speech, not the expenditure of money?

True enough, the expenditure of money is not the same as speech. Butif the expenditure is for the exclusive purpose of generating speech, it should be protected to the same extent as the speech itself. Exercising the right to speak almost always costs money, especially if the speaker intends to reach a large audience. The right to speak necessarily encompasses the right to pay for the speech, just as the right to counsel encompasses the right to hire a lawyer, and the right to free exercise of religion includes the right to contribute to a church of one's choice. In each of those cases, the expenditure of money is protected not because "money is speech" or "money is a lawyer," or "money is religion," but rather because spending money is integral to the right to speak, to have legal counsel, and to exercise religious freedom. Government limits on spending for speech necessarily restrict the speech itself.

Finally, what should be done to prevent corporate interests from unduly influencing the political process?

The largest corporate shareholders are pension funds and mutual funds. Predominantly, they comprise individual employees and investors of modest wealth. Prohibiting less affluent individuals from pooling resources is a recipe for tilting the playing field in favor of the rich. Currently, there are no limits on how much George Soros or Michael Bloomberg can spend of their own money on political speech. Why shouldn't a few thousand others be able to match them by joining forces through an entity such as a corporation that expresses their policy preferences?

Rarely has government been able to prove actual corruption from campaign expenditures. That's why, to justify its regulations, government has insisted that we must prevent, not just corruption, but the "appearance of corruption." That artifice will not work. Mere suspicions are no basis for ignoring the Constitution. Notably, half of our states have minimal campaign finance limitations; yet there's no evidence that politics in those states is more corrupt. Indeed, the realreason for strict laws is not to prevent corruption, but to protect incumbent politicians who wish to be reelected. Restrict political expression and you restrict the ability of upstart challengers to defeat current officeholders.

The proper answer to large expenditures for speech is either more speech or, if the existing system proves unworkable, a constitutional amendment. As for money, it's just a symptom. We have a big money problem because we have a big government problem. By restraining the regulatory and redistributive powers of the state, we can minimize the influence of big money. Restoring the Framers' notion of enumerated, delegated, and limited federal powers will get government out of our lives and out of our wallets. That's the best way to end the campaign-finance racket, and root out corruption without jeopardizing political speech.

Robert A. Levy, is chairman of the Cato Institute and co-author of *The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom*, from which portions of this article are drawn. The Cato Institute filed an amicus brief in the Supreme Court supporting the appellant, *Citizens United*.