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The War on Political Free Speech

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Two years ago the Supreme Court upheld the right of an incorporated nonprofit organization to distribute, air and advertise a turgid documentary about Hillary Clinton called, appropriately enough, "Hillary: The Movie." From this seemingly innocuous and obvious First Amendment decision has sprung a campaign of disinformation and alarmism rarely seen in American politics.

From the start, reaction to *Citizens United v. Federal Election Commission* has bordered on the hysterical. Rep. Alan Grayson (D., Fla.) called it the "worst decision since *Dred Scott*"—the 1857 decision holding that slaves could never become citizens. In his State of the Union message, within days of the ruling, President Obama lectured Supreme Court justices in attendance that they had "reversed a century of law" to allow "foreign companies to spend without limit in our elections." Neither statement was true.

In 1907, Congress passed a law—the Tillman Act, named for segregationist South Carolina Sen. "Pitchfork" Ben Tillman—prohibiting corporations from contributing to political campaigns. This law was extended to unions in 1943, and in 1947 a provision of the Taft-Hartley Act extended the prohibition to cover spending done independently of campaigns.

Citizens United overturned only the 1947 independent-spending restriction, not the earlier prohibition on corporate contributions to campaigns. Not until 1990 did the Supreme Court uphold a prohibition on corporate political expenditures independent of campaigns. *Citizens United*, therefore, overturned not "a century of law," but a precedent 20 years old.

Moreover, the court specifically noted that it was not ruling on the viability of the prohibition on foreign political spending—and earlier this month it summarily upheld a lower-court ruling finding that the prohibition on foreign political expenditures was constitutional.

Meanwhile, regardless of the 1947 federal law, the majority of states—including many of the best governed, scandal-free states such as Virginia, Utah, Oregon, Florida and Washington—have long allowed unlimited corporate spending in state elections.

None of this has slowed the decision's critics. Then-Senate Judiciary Committee Chairman Patrick Leahy (D., Vt.) began a committee hearing in September 2010 by arguing that in his small state, "it's easy to imagine corporate interests flooding the airwaves. . . . The rights of Vermonters . . . to be heard should not be undercut by corporate spending." Vermont has never prohibited corporate spending in state elections, yet it survived with its citizens' rights intact.

Mr. Leahy, at least, limited himself to foolish remarks. His junior colleague, Bernie Sanders (I., Vt.), proposed a constitutional amendment last month that would not only prohibit corporations from speaking on political elections, but would prohibit any group of citizens organized "to promote business interests" from speaking about elections. Presumably, this could extend to everyone from the Heritage Foundation and the National Federation of Independent Business to the Republican National Committee and local citizens organizing against a sales-tax referendum.

Because most newspapers are incorporated, UCLA law Prof. Eugene Volokh believes that the Sanders Amendment and a companion bill in the House would even authorize the government to prohibit newspaper editorials about elections.

A national coalition, Move to Amend, seeks a constitutional amendment providing that "artificial entities, such as corporations, limited liability companies, and other entities . . . shall have no rights." The coalition seems oblivious to the fact that this would apply to campaign committees and nonprofits such as the NAACP and the Sierra Club, and would allow legislatures to make the advocacy of Move to Amend's goals illegal for most of the coalition's "endorsing organizations" (which are themselves corporations).

These amendments are based on the leftist cry that "corporations aren't people," but the Supreme Court has never said that they are. "Corporate personhood" is a legal fiction that allows natural people to sue and to be sued, to own and transfer property, and to carry on their affairs as a group. Corporations have rights because the people who own them have rights.

As Chief Justice John Marshall explained nearly 200 years ago in *Dartmouth College v. Woodward*, corporations allow "a perpetual succession of many persons . . . to manage [their] affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand." The legal concept of a corporate "person" has been with the United States since its founding, recognized in literally hundreds of Supreme Court decisions.

If Move to Amend got its way, police could search businesses, unions, clubs and nonprofits at will, without a warrant. The state could seize business property without due process or just compensation, leaving pension funds and individual shareholders holding worthless stock. Partnerships and corporations would have no legal rights in court. Incorporated churches would have no right of worship.

The absurdity should be obvious. Yet city councils around the country, including New York and Los Angeles, have passed resolutions calling for such an amendment.

Super PACs have become the latest villain du jour of the anti-speech crowd, which plays off the general public distaste for the political rancor that surfaces every election year. Critics including Mr. Sanders say that Super PACs don't disclose their donors and rely on "secret" money. This is simply not true. Super PACs, like the traditional political action committees that have existed for decades, disclose all expenditures and all donors over $200.

There are organizations that spend on politics but don't disclose their donors: traditional nonprofits such as the NAACP, the NRA and Public Citizen. These groups have never had to disclose their donors—and the Supreme Court, over 50 years ago, upheld their right to keep supporters anonymous. But reformers intentionally seek to blur the lines between these traditional groups and Super PACs in order to whip up criticism of *Citizens United*.

The goal of this misinformation is clear. Reformers, who sit mainly on the political left, and their Democratic Party allies hope to silence voices that they perceive to be hostile to their political interests.

Two years after *Citizens United*, American democracy seems as robust as ever. This may be what its critics fear most—a vibrant debate that they cannot control and fear they will lose.

The U.S. government argued in *Citizens United* that it had the right to ban the publication of books, pamphlets and movies that advocated the election or defeat of a candidate if they were produced or distributed by unions or corporations, such as Random House, Barnes & Noble and DreamWorks. That position is the one that deserves scorn. Fortunately, no new amendment was needed to defeat it—only the First Amendment and a Supreme Court willing to uphold it.

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