Written by **Thomas R. Eddlem** on September 12, 2012

Are Corporations Entitled to Free Speech?

Senate Majority Leader Harry Reid of Nevada claimed in a July 16, 2012 speech in favor of the DISCLOSE Act — a bill that would require all organized political expression of any consequential size to report donors to the federal government — that the Founding Fathers feared the influence of corporations:

> Mr. President, Thomas Jefferson, one of our greatest Presidents, once said, "The end of democracy … will occur when government falls into the hands of lending institutions and moneyed corporations." Campaign finance reform protections we have in place — and have had for many years — have solved the problem Jefferson talked about by limiting political spending by corporations.

Critics of the U.S. Supreme Court's decision in the 2010 *Citizens United v. FEC* case (which lifted most federal regulations on unlimited corporate election speech) have claimed the will of the Founding Fathers supports their efforts to suppress political speech by corporations, citing the above quote by Jefferson and an apparently similar quote by James Madison. Jeffrey D. Clements, president of Free Speech for People, added in congressional testimony July 7, "James Madison, often considered the primary author of our Constitution, viewed corporations as 'a necessary evil' subject to 'proper limitations and guards.'"

Founding Fathers on Speech

Were the Founding Fathers skeptical of corporations generally? More importantly, did they express concerns about corporate political influence, or not contemplate the political influence corporations would exert in the future?

The answers to these questions are as clear as the fact that Harry Reid's depiction of Thomas Jefferson is deliberately misleading. In the highly edited section of the 1816 Jefferson letter that Reid quoted above, Jefferson was inveighing against the central bank of the United States. Several months prior to Jefferson's letter, Congress had issued a 20-year charter to a Second Bank of the United States, an act Jefferson believed unconstitutional.

Jefferson was unfailingly against government curbs on any type of speech. "The people are the only censors of their governors," he wrote to Edward Carrington on January 16, 1787, calling a free press "the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro' the channel of the public papers, & to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide

whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter." Jefferson did not fear deception by special interests, writing to Judge John Tyler in 1804 that the people "may safely be trusted to hear everything true and false, and to form a correct judgment between them."

James Madison, however, did express some general skepticism of the corporations of his day, though what constituted a "corporation" in Madison's day rarely involved the for-profit business enterprises we think of today. Among those entities classified as a "corporation" in Madison's day were city and town governments, central banks, churches, and a few businesses that operated legal monopolies through special permission of the state legislature. Most for-profit businesses were unincorporated. Madison's words quoted by Clements above came just as the legal monopolies the New York legislature had granted to steamboat inventor Robert Fulton (and others) were crashing to earth in the wake of the 1824 *Gibbons v. Ogden* decision by the U.S. Supreme Court. The full context of Madison's 1826 letter to playwright and naval commander J.K. Paulding is the following:

> The picture you give of both, tho' intended for N. York alone, is a likeness in some degree of what has occurred elsewhere, and I wish it could be in the hands of the Legislators, or, still better, of their Constituents everywhere. Incorporated Companies with proper limitations and guards, may in particular cases, be useful; but they are at best a necessary evil only. Monopolies and perpetuities are objects of just abhorrence. The former are unjust to the existing, the latter usurpations on the rights of future generations.

Madison — though he worried about the accumulation of wealth in churches, which he called "ecclesiastical corporations" — can nowhere be found to have opposed organized political speech using the corporate model, regardless of the form of corporation.

Corporations in Anglo-American Law

Before and during much of the founding era, most for-profit institutions called "corporations" were privileged institutions, usually institutions that were granted special monopolies, as in the case of the British East India Company, Alexander Hamilton's national bank (80 percent private, 20 percent government-owned), or New York's canal and ferry companies that were given monopolies within the state. When states began expanding corporation law in the 1790s and early 1800s, advantages of incorporating became far more limited, eventually amounting only to limited liability of shareholders' personal assets. Today, state and federal governments require some type of incorporation mode for any political association of citizens, usually through the tax code, something that founding era governments never required (because they didn't have personal or corporate income taxes).

In the founding era, the main way to engage in political influence was to start up a newspaper, or secondarily, to print and hand out a short political hand-bill called a "broadside" or similar tract. Most of the newspapers in the 1790s were, according to a Stanford University study, "extremely partisan." In fact, Stanford University researchers noted that "papers in this era nonetheless had strident political leanings." Today, many people complain about how rich corporations have inordinate influence over political debate. But even in the founding era, influence in the press was limited to those wealthy enough to afford to buy or rent a press. Most of the political associations of the founding era were for-profit companies, not non-profits like the 501(c)(4) non-profit or the 527 Super-PACs that have arisen after the *Citizens United* decision. (Citizens United itself is a non-profit, 501(c)(4) cause-oriented organization.)

While for-profit "press" corporations are entitled to freedom of the press, skeptics might argue, other corporations — such as the Super-PACs and the related non-profit 501(c)(4) issue-based organizations that have arisen since *Citizens United* — are not entitled to political speech: These Super-PACs are spending unlimited money on elections, something the Founding Fathers never would have foreseen, and they have far more influence on elections than ever.

But newspapers and political associations in the founding era actually had a far greater influence on politics in their day than do Super-PACs and 501(c)(4) groups today. The "independent expenditures" of the 1790s "Democratic Societies" and their partisan allies in the press destroyed the Federalist Party entirely. By 1804, the party was driven from Congress, except for a small contingent from New England. By the 1820s, the Federalist Party didn't exist at all. It didn't matter whether it was for-profit corporations in the form of partisan newspapers, political tract publishing, non-profits such as the Democratic Societies, or semi-secret fraternal organizations such as the Federalist-leaning Order of Cincinnatus, no Founding Father can be found to question their right to spend unlimited money on political speech. The Founding Fathers assumed that freedom of speech and press included the ability to form organizations to promote their agenda.

American political corporations have been scapegoated since the Jeffersonian "Democratic Societies" of the mid-1790s. Thomas Jefferson suggested that President Washington's mere public criticism of Democratic Societies constituted "an attack on the freedom of discussion, the freedom of writing, printing & publishing" — independent expenditures. Today, Barack Obama's reelection campaign has done much the same as George Washington, criticizing key Republican Super-PAC donors.

Even John Adams, though the Democratic Societies and the Democratically aligned press drove his Federalist allies into complete political extinction, didn't dare ban "independent expenditures." When Adams did draw up the Sedition Act, he did so on the grounds that some of the foreign influences in the societies were seeking violent revolution. Although the Sedition Act was later used for official censorship (and the purported revolutionary violence never materialized), it was mild compared with the type of censorship envisioned today by those who would have government ban speech by associations of citizens organized under corporate form.

By the time Frenchman Alexis de Tocqueville arrived in the United States in the 1830s, political issue organizations (corporations) were more powerful than the political parties and the press. De Tocqueville saw this as a great credit to the United States. "In no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America," he wrote in his 1835 first volume of *Democracy in America*. "An association consists simply in the public assent which a number of individuals give to certain doctrines and in the engagement which they contract to promote in a certain manner the spread of those doctrines. The right of associating in this fashion almost merges with freedom of the press, but societies thus formed possess more authority than the press."

Running On About Reform

But during the 20th century, political parties became dominant. Thus, congressional "reformers" today seek to crush resurgent independent political societies in order to continue to let political parties and their mainstream media allies control the debate on behalf of incumbents. Senator Sheldon Whitehouse (D-R.I.) pointedly complained in a Senate debate this year over the DISCLOSE Act, which would ban anonymous corporate political speech, that candidates and party establishments are no longer controlling the debate:

> Campaigns are no longer waged by candidates and parties fighting over ideas, they are now waged by shadowy political attack groups posing as social welfare organizations run by the likes of Karl Rove and other political operatives and fueled by millions of undisclosed dollars from secret special interests.

Despite Whitehouse's criticisms, political corporations have a long and noble tradition in America. During the 19th century, William Lloyd Garrison and the American Anti-Slavery Society — not to mention the rest of the anti-slavery movement — took in thousands of dollars in donations and engaged in millions of "shadowy" and "undisclosed" electioneering messages. These were the same type of independent messages that the modern-day McCain-Feingold law sought to regulate, but no congressmen in the days of slavery sought to censor them or require that abolitionist societies reveal their membership rosters and donors to the government. Indeed, abolitionists drew some much-needed support from the South anonymously. Had the McCain-Feingold law been in place in the 1830s through the 1850s, abolition of slavery would likely have been a lot longer in coming.

But by 1907, some large for-profit corporations had aroused the ire of President Teddy Roosevelt, who called for a bill banning political donations by corporations to campaigns. That cause was taken up in the U.S. Senate by South Carolina Senator Ben "Pitchfork" Tillman. Tillman had disenfranchised nearly all black citizens as South Carolina's governor, and had even boasted about it in speeches as a U.S. Senator. As Supreme Court Justice Clarence Thomas explained in a discussion with students at Stetson University College in 2011:

> Remember that most of the regulation of corporations started with the Tillman Act. Go back and read why Tillman introduced that legislation to regulate corporations.… Tillman was from South Carolina and … he was concerned that the corporations, Republican corporations, were favorable toward blacks. And he felt that there was a need to regulate them.

Thomas explained to the law-school students about the Supreme Court's Citizens United decision: "We've simply said that the First Amendment doesn't exclude you because you've associated in a particular way." He then used the following analogy:

> If 10 of you got together and decided to speak, just as a group, you'll say you have First Amendment rights to speak and the First Amendment right of association. If you all then formed a partnership to speak, you'll say we still have that First Amendment right to speak and of association. Well, what if you put yourself in a corporate form? I found it fascinating that the people that were editorializing against it were the New York Times Company and the Washington Post Company, who were exempted by statute. So then it becomes a statutory right, not a constitutional right. These are corporations.

Hypocritically Hyped

Interestingly, just nine days before the *New York Times* corporate editorial criticizing the *Citizens United* decision, the company's other major paper, the *Boston Globe*, endorsed the Democrat in the Massachusetts U.S. Senate race in a corporate editorial. The New York Times Company could endorse candidates all along since "press" corporations were explicitly exempt from the provisions of the McCain-Feingold law later invalidated by *Citizens United* — yet the *Times* did not mind condemning the right of others to exercise their own freedom of speech.

The *Citizens United* decision resulted in two major changes in corporate donations to political debate. It freed all political organizations — whether taxable 527 Super-PACs or tax-free 501(c)(4) non-profits —

to make independent expenditures without government restrictions. Super-PACs must disclose donors, but 501(c)(4) non-profits do not have to under current law.

DISCLOSE Act sponsor Senator Whitehouse complained loudest in Senate floor debate July 16 about the 501(c)(4) non-profits, which usually are issue-based organizations: "If those motives were good for America and were welcomed by the average American, they wouldn't need and wouldn't want to keep them secret. We need to ask ourselves a very important question: What are they hiding? Why do they demand secrecy?"

Yet the Founding Fathers wrote many anonymous political tracts. Samuel Adams organized the American Revolution with anonymous political letters using pen names such as "Vindex." The Constitution itself was only adopted when Alexander Hamilton, James Madison, and John Jay wrote 84 anonymous tracts as "Publius," which became *The Federalist Papers*. Many of the *Anti-Federalist Papers* were anonymously written as well. Even after adoption of the Constitution and the First Amendment, which should have shielded them, James Madison and Alexander Hamilton wrote anonymous arguments on political policies using pen names such as Pacificus, Americanus, and Helvidius.

Did the Founding Fathers have nefarious motives for hiding their names from their political opinions?

The reasons for writing anonymously vary widely. Some writers merely want to avoid *ad hominem* arguments, thwarting attacks based upon character assassination. Declaration of Independence signer Charles Carroll wrote in pre-independence Maryland against taxation without representation as "First Citizen." But after several exchanges where Carroll was clearly winning the debate on its merits, his adversary Daniel Dulaney (using the pen name "Antilon") realized his identity and then attacked Carroll as a Catholic who could not vote in 1774 Maryland:

> Who is he? He has no share in the legislature, as a member of any branch; he is incapable of being a member; he is disabled from giving a vote in the choice of representatives, by the laws and constitution of the country, on account of his principles, which are distrusted by those laws.... He is not a Protestant.

Ironically, many of the same voices who complain loudest about Super-PACs and fear anonymous political donations also decry the "shoot the messenger" tenor of political advertisements that anonymous postings would make all but impossible.

Clarence Thomas, in his partial dissent on the *Citizens United* decision, noted that protection of anonymous political speech continues to have relevance today, citing violence against supporters of California's Proposition 8 on traditional marriage that included "property damage, or threats of physical violence or death." Even opponents of Proposition 8 acknowledged this violence. This was an "ugly backlash," in the words of the anti-Prop. 8 *San Francisco Chronicle*, and included, according to the *Orange County Register*, "the mailing of an unidentified white powder to two temples of the Mormons, who contributed significantly to the Prop. 8 campaign."

Indeed, the Civil Rights movement of the 1950s and 1960s may never have gotten off the ground had disclosure laws been in place in the 1950s and 1960s. Consider that the NAACP and most other civil rights organizations are organized under 501(c)(4) of the Internal Revenue Code — exactly the same designation as Citizens United. Disclosure laws at that time would have required the NAACP and other civil rights organizations to reveal a list of their donors and their addresses to every Ku Klux Klan member in the country. Few would have dared to donate. Similar laws today would also require that

Anti-Defamation League affiliates reveal a list of their donors — and where they live — to every neo-Nazi in the world.

Justice Thomas also noted that more subtle political intimidation often occurs when donors' names are released, explaining of the challenger in the West Virginia attorney general's race, "Some members of the State's business community feared donating to his campaign because they did not want to cross the incumbent." In the *Wall Street Journal* story Thomas highlighted the validity of claims about political intimidation by government incumbents because of disclosure, especially when the incumbent is an attorney general with the power to investigate your business. The challenger told the *Journal*: "I go to so many people and hear the same thing: 'I sure hope you beat him, but I can't afford to have my name on your records. He might come after me next.'"

Not only is anonymous political speech not unsavory, the Founding Fathers saw it as a sacred right. Anonymous political speech is as American as *The Federalist Papers*.

Comedian Stephen Colbert in September 2009, anticipating the *Citizens United* decision, quipped: "Corporations do everything people do except breathe, die and go to jail for dumping 1.3 million pounds of PCBs into the Hudson River…. That means corporations have freedom of speech. But they can't speak like you and me. They don't have mouths or hands."

Of course, neither does a church, a union, a newspaper, a television station, a political party, or even — for that matter — a candidate's own political committee. None of those breathe or die or have mouths and hands; even a candidate's own political committees often live long beyond the candidacies, and sometimes the candidates themselves. Yet each of them is a legal corporation of one sort or another. Should they be denied freedom of speech and press too? Or is there also a freedom of association that goes along with the freedoms of speech and press?

Most of the constitutional amendments and laws offered by the political Left exempt some or all of these various institutions from the ban on freedom of speech, in addition to media corporations such as Fox News, MSNBC, and CNN. Time-Warner, not even the biggest of the six mega-media corporations that control 90-95 percent of the information Americans see on a daily basis, had $29 billion in expenditures in 2011, about three times the expenditures expected in all campaigns this year — president, Senate, House, as well as state and municipal elections (including independent expenditures). If corporate freedom of speech is not a right protected by the U.S. Constitution, why should corporate press giants be so privileged? And if not, what is the meaning of freedom of the press if their communications about government require government approval?

— Photo at top: AP Images