From corporations to activists, U.S. Supreme Court should apply speech protections equally

This past year has featured two notable U.S. Supreme Court decisions related to speech issues – *Citizens United v. FEC*, and *Holder v. Humanitarian Law Project*. In the months since the opinions were handed down, both have had impacts close to home.

Citizens United effectively loosened spending constraints imposed by the McCain-Feingold campaign finance law. At its core, *Citizens* held that direct corporate spending on election-related communications was protected by the First Amendment, and could not be regulated as broadly as federal law allowed.

The local ramifications of the *Citizens United* decision were evident shortly after the majority opinion was released. In the Twin Cities, the Target Corporation donated $150,000 to MN Forward, a business group running ads for Republican gubernatorial candidate Tom Emmer. Prior to *Citizens*, the legal landscape was much less favorable to such direct corporate donations – as well as to the speech that flowed from them.

A few months later, the high court decided *Holder v. Humanitarian Law Project,* which dealt with a federal stature that criminalized "material support for terrorism." *Holder* upheld an interpretation of the law that allowed certain kinds of speech - such as advice or training - to be considered "material support" for terrorism. Such speech could then be punished in the same way as the provision of firearms or explosives. For some activists, *Holder* raised immediate fears that non-violent advocacy could be drawn into the net of activities prohibited by the material support statute, and that advocates could be subjected to criminal sanctions.

Holder appears to have enabled the FBI to pursue an investigation into anti-war activists in Minneapolis and Chicago. For instance, the bureau's search warrants contained specific language related to the federal material support statute. If indictments result from the investigation - and those indictments arise from speech conduct alone – *Holder* will have made it first mark since the opinion was decided.

Political reaction ignores underlying principles

The public reaction to both *Holder* and *Citizens* has been impassioned, and it has also followed a predictable pattern. Conventional opinion on the left contends that both *Citizens* and *Holder* are wrong. This perspective holds that corporations should not be afforded unbridled speech rights, while the

activities of political dissidents should be given great deference. The rejoinder from the right is that both *Citizens* and *Holder* are correct – but for far different reasons.

As a product of human nature, this sort of bifurcated left/right critique is understandable. People, after all, have different tolerances for different types of speech. As a basis for constitutional analysis, this approach is inherently flawed, since it centers on political results, rather than on pure free speech principles. Indeed, the Supreme Court itself has too often engaged in a results-oriented jurisprudence that has secured the rights of some, while constraining the rights of others. A jurisprudence based on principle would deliver more consistent results.

In the arena of speech conduct, a coherent body of case law would begin with the proposition that it should be difficult for the government to constrain speech, regardless of who the speaker is. Such a proposition is guaranteed to generate as many enemies as friends, but it gets much closer to the core of the First Amendment than the selective approach that the Court has applied during this past year.

Speech in *Citizens United*

The propensity for the First Amendment to aggravate can be clearly seen in the *Citizens United* case, which produced one of the decade's most polarizing Supreme Court decisions.

The *Citizens* case arose from an attempt to distribute an anti-Hilary Clinton documentary during the 2008 election season. The program's producer – a conservative advocacy group – feared that distribution on pay-per-view cable prior to the primary season would run afoul of federal law. The group then sought an injunction against the Federal Election Commission, hoping to avoid FEC penalties. The injunction was denied, and the case was litigated all the way to the U.S. Supreme Court.

The Bipartisan Campaign Reform Act (BCRA) contained provisions that barred corporations and unions from using monies from their general funds to pay for "electioneering communications" that advocated the election or defeat of a candidate for public office. The law defined such communications as "broadcast, cable, or satellite" communications that refer to a "clearly identified candidate for Federal office" and are made within 30 days of a primary election.

Thanks to a landmark case with Minnesota roots, the Supreme Court has long prohibited the "prior restraint" of speech – government action that halts the publication or dissemination of expressive materials. In the *Citizens United* case, the Court followed this line of reasoning to strike down a portion of the BCRA.

The Court noted that organizations that wished to avoid sanctions first had to consult the Federal Election Commission for permission to speak. According to the Court majority, this process functioned "as the equivalent of a prior restraint, giving the FEC power analogous to the type of government practices that the First Amendment was drawn to prohibit."

The majority went on to note that the BCRA effectively discriminated against certain parties simply by virtue of who they were – in this case, a non-profit corporation. Said the Court, "there is no basis for the proposition that, in the political speech context, the Government may impose restrictions on disfavored speakers."

Criticism misses a major issue

Since it was handed down, the *Citizens* decision has been denounced by much of the political left - up to and including President Obama. Central to this criticism is a concern that unregulated money can distort the political process. This is not an empty concern - there is certainly ample proof that this can occur. In arguing the government's position in *Citizens*, then-Solicitor General Elena Kagan repeatedly cited a detailed congressional study that illustrated this very fact.

However, most criticism of *Citizens* misses a larger point – namely that upholding the BCRA's ban on spending might have opened the door to other, even bigger problems. A ruling for the government would have preserved the law's ill-defined ban on advocacy speech, which might have been used to constrain a wide variety of speakers. Recognizing this, the American Civil Liberties Union filed an amicus brief in support of Citizens United's litigation efforts. According to the brief, the BCRA's broad language invited "arbitrary and discriminatory enforcement" that could potentially ban issue ads paid for by non-profit corporations like the ACLU.

As we have seen in Minnesota, *Citizens* will continue to steer large corporate contributions into elections already awash in money. For many, this is a distasteful proposition. However, support for a pure view of the First Amendment requires a recognition that speech which is truly free, is not always speech whose ends are entirely agreeable.

Holder v. Humanitarian Law Project

This brings us to the sticky area of communication with parties who use techniques widely held to be disagreeable – groups that employ terrorist tactics.

The Supreme Court addressed this issue in *Holder v. Humanitarian Law Project*. In *Citizens*, the Court grappled with a controversial speech issue, and upheld the correct principle. In *Holder*, the Court stared down another

contentious matter, but then blinked.

Holder dealt with American citizens who sought to provide legal advice to further the non-violent aims of violence-prone groups – in this case, the Turkish PKK, and the Tamil Tigers of Sri Lanka. As noted in the Court's opinion, both groups engaged in "political and humanitarian activities" but each had also "committed numerous terrorist attacks."

The plaintiffs in the case stated that they sought to support only the non-terrorist activities of the PKK and Tamil Tigers, and that the federal material support law should not be interpreted to bar non-violent training or advocacy. According to the plaintiffs, such activities involved "training PKK members to use international law to resolve disputes peacefully" and "engaging in political advocacy on behalf of Kurds living in Turkey."

"Coordinated" versus "independent" speech

Federal law has long criminalized speech that results in incitement to commit imminent, criminal activity. The question posed in *Holder* was separate - whether the government could criminalize speech that did not constitute incitement, but which was nonetheless undertaken in association with groups that used illegal tactics.

The court held that such speech could, in fact, be criminalized, if it was "coordinated" with a foreign terrorist organization. "It is wholly foreseeable," said the Court, "that directly training the PKK on how to use international law to resolve disputes would provide that group with information and techniques that it could use as part of a broader strategy to promote terrorism." At the same time, the Court noted that such speech - if undertaken independently - would be protected.

These distinctions troubled Justice Breyer, who authored the Court's dissent in *Holder*. Despite the majority's attempt to draw a narrow line, the distinctions between "coordinated" and "independent" advocacy were too slippery for Breyer, and he feared the possibility of speech conduct being chilled.

As Breyer's dissent recognizes, there can be little doubt that affiliation with the PKK or other violence-prone groups could pose problems. However, so long as an individual's actions do not cross into active support for criminal activity, it would be even more problematic to grant the government the ability to constrain speech alone.

Holder and First Amendment case law

Holder is rare, in that it is among the few opinions where the Court has found a statute to overcome the so-called "strict scrutiny" test that is applied to First Amendment cases. Previously, this legal test provided an almost

total impediment to laws that regulated speech which did not pose an immediate threat. By breaching that barrier, *Holder* might generate unforeseen consequences by damaging the psychological boundary of strict scrutiny, thus making it easier for the Court to validate other prohibitions on speech in the future.

In addition, *Holder* might also be setting the stage for a return to an earlier, more problematic era in First Amendment doctrine – an era which arose from the *Schenck v. United States* case. In that case, anti-war pamphleteer Charles Schenck was arrested for distributing pamphlets that opposed the World War I draft. The Supreme Court upheld Schenck's criminal conviction on the premise that his actions posed a "clear and present danger" to the security of the United States during a time of military conflict.

The Court's opinion in Schenck was later modified by *Brandenburg v. Ohio,* which narrowed prohibitions on "dangerous" speech to cover incitement to imminent, lawless action. However, after *Holder*, we now may be turning the clock back, by allowing restrictions on speech conduct that do not promote actions that are either lawless, or imminent.

The stakes for advocacy

Both *Citizens United* and *Holder* have created substantial - but uneven - changes in the First Amendment landscape. Taken together, these opinions have resulted in an expansion of advocacy speech for some, but a constriction for others.

As the ultimate arbiter of Constitutional rights, the Supreme Court should work to achieve more consistent results. When the speech in question is expressly non-violent advocacy, any adjustments to First Amendment doctrine should be undertaken so as to protect all speakers. This is particularly true in instances where the speech at issue is unpopular - whether that speech relates to giving legal advice to the PKK, or providing corporate donations to run campaign ads.

By responding to such matters according to principle, the Court can aspire to craft a seamless First Amendment tapestry, rather than a patchwork of politically favored circumstances.

Originally published at Minnpost.com | September 30, 2010