Rights & Wrongs *by Jan Edwards*

graphic: Matt Wuerker

Is it Commercial Speech? or Political Speech?

It's 2, 2, 2 Loopholes in 1

The Citizens United v. FEC case recently before the Supreme Court posed the question: Is a TV ad for a political movie an advertisement for a product, or a political campaign ad? If it were commercial speech to promote a product, it would have been considered legal. If it were political speech aimed at a candidate, it would have been illegal under existing campaign finance laws.

Another recent case, Nike v. Kasky, has an interesting parallel structure. The Nike case asked the question: Does the First Amendment give a corporation the right to speak lies? Specifically, Nike Corporation had been claiming in ads that it did not use sweatshop labor to make its shoes, when it actually did. Marc Kasky sued under California's "truth in advertising" law. The corporate lawyers responded that Nike was a legal person and as such had First Amendment rights.

Furthermore, they claimed that sweatshop labor was a political topic and that they were engaging in "protected political speech" in the ads. Un-truths, even lies, are protected political speech. The California Supreme Court upheld Kasky's suit, saying the corporation was engaged in advertising, not political speech. Nike appealed to the Supreme Court which heard the case in 2003 before referring it back to the lower Court. Instead of further litigation, a settlement was reached, which helped curb Nike's sweatshop practices, and the lower court ruling held. The Supreme Court's decision not to decide relieved activists who had feared a sweeping expansion of corporate free speech. But it did not answer the Constitutional question: Are lies by a corporation, whether buried inside printed ad copy (Nike v. Kasky) or in a movie promotion (Citizens United v. FEC) protected speech?

I was struck by the looking glass effect the Court often has on legal interpretations. In the Nike case, the corporation wanted their advertisements for a product to be considered political speech, to gain protection under the First Amendment. Citizens United wanted their political opinions to be considered advertisements for a product to get around the campaign finance laws. Corporate lawyers pick and choose among definitions to game the system for their clients, morphing the law to fit their client's desired outcome, and too often the Court goes along with the masquerade.

Beyond interpreting the laws, the Supreme Court sometimes redefines basic words, changing the original intent. This is nothing new, of course. The ink was barely dry on the Constitution in 1819 when the board of Dartmouth College shape-shifted their corporate charter into a contract with the blessings of the Court. A corporate charter could be controlled by the state legislature but a contract was protected under the Contracts Clause of the Constitution.

The Court cases leading up to the redefining of the word "person" in the 14th Amendment shifted a corporation from a legal fiction into a legal person. This is the deep background for the current questions, for if a corporation were not a legal person, it could not claim any sort of speech rights. It would have only the privileges the states choose to give it.

Instead of three equal parts of government (as our civics teachers claim, checking and balancing each other), the only un-elected branch, the Supreme Court, has given itself the power to prescribe rules for the government of the other two branches. Historically, these judge-made laws have favored corporate rights over the right of people. In 1803 when the Supreme Court declared itself supreme in Marbury v. Madison, Thomas Jefferson warned: "The Constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."

Jan Edwards is the creator of the "Tapestry of the Commons," which is online at www.thealliancefordemocracy.org. She is a member of the Redwood Coast Chapter of the AfD.

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