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POLITICAL ACCOUNTABILITY, CAMPAIGN FINANCE, AND REGULATORY REFORM

MICHAEL WALDMAN*

Michael Waldman argues that campaign finance laws are ripe for reconsideration. First, the Supreme Court of the United States' recent decision in Citizens United v. Federal Election Commission has created numerous unexpected consequences, despite the case's young age. Second, the advent of political action committees (PACs), non-profit 501(c)(4)s, and other politically motivated entities poses a threat to both Democrats and Republicans alike, opening the door for reform. And, lastly, Waldman discusses plausible regulatory reforms, ultimately recommending a reform measure that provides public funds to match, by a set ratio, small donor contributions to participating political candidates. Mr. Waldman asserts that this reform will boost the power of the small donors, without seeking to reduce political spending overall or pretending that it will end the power of big money contributions. Ultimately, Waldman concludes by emphasizing the need for Citizens United to be overturned.

I. INTRODUCTION

I come to this issue from at least two perspectives that I want to lay out for you. The Brennan Center for Justice is affiliated with the New York University School of Law, and we are deeply engaged in the study of – and litigation around – campaign finance rules and the constitutional dimensions thereof. Also, in my previous life, I served as the policy aide in the White House working on campaign finance reform in the 1990s. I have been throwing the bricks and ducking from them as well; and, this underscores for me what I hope we can add to the discussion. The financial deregulation of the past several decades took place under a campaign finance rule regime that is no longer in

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existence. It took place in the context of accelerating deregulation of political money. Now, what we have seen in the last few years approaches a complete deregulation of the role of private money in elections, which will begin to play out in a variety of ways in all the issues raised in this conference.

II. DEVELOPMENT OF CAMPAIGN FINANCE REGULATION

How money affects politics and how money in elections affects policy are among the oldest questions in American life. We have a capitalist economy. We want the benefits of a robust market system, and we recognize that this will inevitably create concentrations of capital and wealth; but, we want the benefits of that system, nonetheless. We want the benefits of a democracy, which is rooted in a very different ethic of one-person, one-vote. We know that there may be conflicts between those two sets of values that we have to try to resolve as a society by drawing lines.

The first significant campaign finance law created the civil service. In the late 1800s, before the rise of corporate capitalism, the way you paid for your campaigns was to make the federal employees pay for it. Later, the first federal campaign law relating to corporations, the Tillman Act, was passed in response to an undisclosed contribution from a financial institution to the reelection campaign of Theodore Roosevelt. When it was revealed in the last days of that campaign in 1904, it was such a huge controversy, and Roosevelt was so embarrassed and aghast, that he said there would be a “riotous, wicked, murderous day of atonement” if we did not do something about campaign financing.

A. *The Citizens United Decision*

These issues are not new. We have gone back and forth on them, and I do not want to pretend that everything was halcyon ten or twenty years ago. However, as a society, we have drawn these lines through our democratic process. Then, just three years ago, the United States Supreme Court redrew those lines. They erased the existing line and redrew it in a very different place with the *Citizens United v.*

Federal Election Commission¹ decision. This case followed from a series of decisions, starting with *Buckley v. Valeo*², but accelerating under the Roberts Court, that deregulated campaign finance with a very constricted and even fetishized notion of what the First Amendment requires. *Citizens United* was just as significant, I would argue, as people have said it is. It is important to understand what *Citizens United* actually says. It does not say, in contrast to the bumper stickers, “Corporations are people.” It says that it does not matter whether corporations are people when looking at the campaign spending that they can do. Of course, the most significant holding was that you could no longer bar the making of independent expenditures by corporations in individual elections. *Citizens United* also said something that turned out to have an even more dramatic consequence, which was Justice Kennedy’s statement, as a matter of law not fact, that there could be no corrupting consequence from corporate independent expenditures.³ Some of us thought or hoped that was dicta, but it turned out to be more significant in the short-run than the part of the ruling that dealt with corporations versus natural persons.

B. *Citizens United Raises New Concerns*

Citizens United was significant, and not surprisingly, has given us progeny—new cases throughout the court system implementing it, extending it, and expanding on its logic. The most important one, *SpeechNOW.org v. Federal Election Commission*,⁴ said if there can be no corruption from independent expenditures, then there cannot be limits on contributions from corporations or anyone else to PACS making independent political expenditures.⁵ This is just the first major

1. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (holding, in part, that the First Amendment is violated by a requirement which prohibited electioneering communications funded by independent corporate expenditures).

2. *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that the First Amendment is violated by a law limiting campaign spending and prohibiting independent expenditures, but is not violated by requirements which limit individual campaign contributions).

3. *Citizens United*, 558 U.S. 310, 314 (2010) (“[T]his Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”).

4. *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010).

5. *Id.* (holding, in part, that the First Amendment is violated by requirements which limit individual contributions to exclusively independent expenditures of political committees).

case of many going through the federal courts brought by the same people who brought *Citizens United*, seeking to encourage the Court to deregulate as much of the political rules as they can. This may ultimately yield complete deregulation because of the court cases, the lack of action by the Federal Election Commission, and trends in the political marketplace have led to an anything goes era. But, even if you take a less dramatic view, you now have a situation where candidates are increasingly dwarfed as the actors in the political system by outside forces. In this last election, where between six and seven billion dollars were spent, about half was spent by candidates and their committees. The other half was spent by super PACs, party committees, and by “dark money,” or undisclosed outsized spending by non-profit 501(c)(4)s. This is a phenomenon that is terrifying to candidates and incumbent politicians of both parties, which can create some opportunities for doing something about it. One question I frequently heard from journalists, especially right after the election, was, “Mitt Romney lost. Didn’t the Super PACs not ‘work’?” I do not think this is the right question to ask, at least not now. For starters, this is not only a challenge for one party. Even more so, I quote the famous line from Zhou Enlai, the Communist Chinese Premier, when he was asked what he thought of the French revolution: “Well, it is too soon to tell.” We have only had one presidential election and one midterm election since *Citizens United*. We can see already the kinds of things that did not happen yet. First, there was not much direct corporate spending in campaigns as some people feared. It is true that they found out they did not have to spend directly, i.e., they could give to these other entities such as the U.S. Chamber of Commerce. But, I would suggest it also just reflects a social norm. Right now, it is controversial. But the first time someone does it and lives to tell the tale, it will not be a problem anymore. We are just starting to see the melding of lobbying with Super PACs. We have not seen, until this past month, the essential outsourcing of an entire political campaign and a political party, to the new 501(c)(4) organization, Organizing for Action, that the Obama campaign has created to carry on its work. They will be lobbying on issues, but it creates a new precedent that is very worrisome.

III. PROPOSED REFORM TO EXISTING CAMPAIGN FINANCE LAWS

So, what can we do about it? Let me suggest that there are both immediate regulatory pressure points, legislative solutions, as well as longer term jurisprudential challenges.

A. *Regulatory Pressure Points*

There are things in the short-run that administrative agencies and elsewhere can do, at the very least, to improve disclosure. Justice Anthony Kennedy, in his opinion in *Citizens United*, premised the ruling on the idea that everything would be disclosed. Of course, we now know that less and less is disclosed. So, the Securities and Exchange Commission has begun to move forward with rulemaking. And you have actors in the states, especially attorney generals, that can potentially have a significant role. The Attorney General of New York, Eric Schneiderman, subpoenaed information from 501(c)(4) organizations, and has proposed rules requiring 501(c)(4)s operating in New York making political expenditures over \$10,000 to publicly disclose their donors. That would be quite significant, and there are forty-nine other states and their attorneys general that could do that as well. The Federal Communications Commission (FCC), in its discreet way, has required disclosure electronically of the records of broadcast television stations, which turned out to be controversial with the broadcast industry.

The two agencies that have been silent throughout all of this are the Federal Election Commission (FEC), which is barely functional, and the Internal Revenue Service (IRS). I need someone who is far more fluent in tax law to explain to me why the IRS had to wait for the Attorney General of New York to do something about 501(c)(4) organizations that are basically political committees rather than charities. Those are the regulatory pressure points. They exist, but are limited in their impact.

B. *A Novel Proposal: A Variation of Small Donor Matching Funds*

There is another response that my organization, the Brennan Center for Justice, is deeply involved in. It does not pretend to solve all

of the problems of money in politics, but it is a revival and a re-thinking of how to implement public financing. Voluntary public financing is still constitutional. The Supreme Court of the United States heard a case on this question last year, which the Brennan Center litigated. The Barry Goldwater Institute had argued that Arizona's public financing system was unconstitutional because it chilled the speech of non-participating candidates. By the time the Court took the case, that question had been narrowed down to whether there were triggers in the law in Arizona where if you are a participating candidate facing a non-participating candidate, a wealthy individual, or someone who just raised a lot of money, you receive extra public financing. And, the Court said in the *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*⁶ case that that trigger was unconstitutional because it potentially chilled the speech of the non-participating candidate. That was not the view that we wanted them to take. But they also said unanimously that voluntary public financing is still constitutional.⁷ And, the version of public financing with the most momentum, and about which I am most excited about, does not pretend that it is getting all the money out of politics but actually seeks to boost spending and participation. It is a version of small donor matching funds similar to the system in New York City and now Los Angeles. In New York City, a small contribution to a city council or mayoral candidate is matched by the public fund six-to-one. New Federal versions of public financing being discussed would have a smaller match, two-to-one or four-to-one. But as it has in New York, it would change the mix of who contributes, fuse organizing with fundraising in a new way, and boost the Internet-fueled rise of small donors.

In a way, there are two big trends in campaign finance. One is the new ways big money is coming in, and the other is the new ways small money is coming in. And, the change in how money is spent would help small money because thirty-second ads are losing ground to social media, which makes it cheaper to run campaigns. So, the purpose of this proposal in effect is to boost the power of the small donors, not to stop the big money, but to create a potential alternative. It is

6. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

7. *Id.* at 2827 ("We have said that a voluntary system of 'public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest.'") (quoting *Buckley*, 424 U.S. at 96 (1976)).

constitutional, it has worked in a lot of places, and it is something that is starting to be talked about a lot in Congress. Governor Andrew Cuomo has made a very big push for this in New York as his next big piece of legislation that he is seeking to enact.

Those are the short-term pressure points, with the very significant impact coming from small donor public financing.

C. *The Need for a Favorable Judicial Landscape*

But in the long run—and this is one way our work at the Brennan Center for Justice comes in—we need a different jurisprudential approach to these issues to be adopted by the Supreme Court. We are all used to seeing campaign finance regulation as plainly and obviously a First Amendment issue in which judges apply strict scrutiny. In fact, it is a very recent phenomenon, since *Buckley v. Valeo* in 1976, that laws that would otherwise have been deemed anticorruption laws are suddenly treated that way. The Court now seems to feel that corruption is very narrowly defined, and that you cannot have corruption from the signaling that occurs between independent spenders and governmental actors. Justice Roberts, in his questioning during oral arguments in *Arizona Free Enter. Club's Freedom Club PAC*, even seemed to imply that if a public financing system had the incidental side-effect of boosting political equality, that might potentially be enough to make it unconstitutional, even if the rest of it was constitutional.

IV. CONCLUSION

So, we are working with a number of scholars and litigators from around the country to build a long-term drive to overturn *Citizens United*, just as there was a drive to enact it. We are looking at what corruption really means, and what the framers really meant by corruption; in other words, corruption was not just handing someone a check. What are the speech rights of voters in hearing both sides? How can we boost speech without it being seen as chilling other peoples' speech? Can speech drown out someone else's speech, and what can you do about that? Is political equality a value that ought to be built into the way we look at the Constitution? The justices have accepted federalism as a Constitutional value, and they have accepted checks-

and-balances as a Constitutional value. But, as Justice Breyer has written and said, they need to accept democracy, a strong democracy, as a Constitutional value too, or we are not going to have one. Recently, Justice Scalia said that he thought the Constitution was “dead, dead, dead.”⁸ What he meant was that his notion of originalism requires us to only look at the words on the page. We have to find a way to keep the democracy “alive, alive, alive,” so that is our long-term goal.

8. Tasha Tsiaperas, *Constitution a 'dead, dead, deal' document, Scalia tells SMU Audience*, DALLAS MORNING NEWS (Jan. 28, 2013, 11:08 PM), <http://www.dallasnews.com/news/community-news/park-cities/headlines/20130128-supreme-court-justice-scalia-offers-perspective-on-the-law-at-smu-lecture.ece>.