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"CITIZENS UNITED" AND ITS AFTERMATH

Nonsense and Worries in Citizens United and Its Aftermath

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Nonsense and Worries in Citizens United and Its Aftermath

Kurt Strasser

Abstract

Do Corporations have a constitutional right to donate money to organizations that engage in electioneering? The US Supreme Court has recently decided that they do. *Citizens United v. Federal Election Commission* held that restrictions on a corporation's expenditures for "electioneering communication" or other speech that advocates the election or defeat of a candidate were unconstitutional under the First Amendment of the US Constitution.

This case has generated an enormous commentary in the legal literature, much of it quite critical of the opinion. Most of the critical commentary has emphasized two bad results that are claimed to flow from the decision. First, these commentators have presumed that, as result of *Citizens United*, the floodgates will be opened, sending a torrent of corporate money gushing in and elections will come to be, in substance, more like auctions than democratic choices. Second, many have been quite concerned that the corporate origins of all this money make it much more destructive to the political process. Part 2 of this essay will discuss why these arguments are overblown and unpersuasive. The floodgates were already open, and the problem is large amounts of money coursing through the political process which has been subject to little effective control for some time. The money, not its corporate origin, is the real concern. (Many of the commentators have emphasized technical points of Constitutional Law and traditional ideas of good practice in constitutional interpretation, topics that are beyond the scope of this essay.)

Yet there are real worries that grow out of this case, and Part 3 will survey these. *Citizens United* is less of concern for what it actually commands in this opinion, but, if it is seen as a major step in a continuing journey, it is of much more concern for what it shows about where the journey is going.

KEYWORDS: corporation, legal fiction, legal person, real entity, constitutional rights, free speech

JEL Classification Codes: K00, K22

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Introduction

Do Corporations have a constitutional right to donate money to organizations that engage in electioneering? The US Supreme Court has recently decided that they do. *Citizens United v. Federal Election Commission*¹ held that restrictions on a corporation's expenditures for "electioneering communication" or other speech that advocates the election or defeat of a candidate were unconstitutional under the First Amendment of the US Constitution.² Although the corporation involved here was not a typical business entity, but a quite specialized one that solicited and accepted donations in order to fund its political advocacy, it was covered by the law because it accepted donations from other corporations as well as individuals. The Court declined to distinguish the case on this basis and instead chose to issue a full throated condemnation of any restriction on corporate political expenditures other than donations to individual candidates for office.

This result builds on three decades of developed jurisprudence in which the Court establishes the core constitutional rules and principles in the area. First, the Court has for some time recognized that expenditures are a form of expression protected by the First Amendment. This principle then established that, in the Court's view, such expenditures and their protection are an important aspect of participation in elections and other activity in a democratic system. As with other activities protected by the First Amendment, this principle means that the Court takes protection of political expenditures quite seriously and will look most carefully at any regulation restricting them. Second, the Court has emphasized a sharp distinction between donations to individual candidates, which can be subject to regulation because of the potential of these donations to lead to "quid pro quo" corruption, and direct donations or expenditures for other political expression. In the Court's view, the latter do not present a risk of quid pro quo corruption and, for this reason, no compelling state interest exists that justifies their regulation. If such expenditures are truly independent of the efforts of individual candidates, and could be reliably supervised to insure so, then this could be a plausible assertion. This essay will argue that they are not now kept independent in any meaningful sense.

The core of the Court's rationale in *Citizens United* emphasizes this second principle and extends it to corporate donations and expenditures: no expenditures for political expression, other than direct donations to individual candidates, can be restricted because such a regulation amounts to restriction on political speech based on the corporate identity of the speaker that is not justified

¹ 558 US ___, 130 S.Ct. 876, 175 L. Ed. 2d 753 (2010).

² An "electioneering communication is "any broadcast, cable or satellite communication" that "refers to a clearly identified candidate for federal office", is made within 30 days of a primary election and is "publicly distributed". 2 U.S.C. §434(f)(3)(A) and 11 CFR §100.29(a)(2).

by a sufficiently strong state interest. Crucial to this result is a series of unexamined factual assertions. First, the Court asserts that spending for political speech that supports a direct expression of political views, rather than a donation to a particular candidate, does not lead to improper influence in the political process because it is not “quid pro quo” corruption. “The fact that speakers [and donors to speakers] may have influence over and access to elected officials does not mean that these officials are corrupt.”³ Indeed, the court goes further to say that such “influence and access” do not supply a sufficient state interest to justify regulation, one presumes because the Court concludes they are not corrupting. Second, the Court asserts that the influence and access that these donations and spending buy “will not cause the electorate to lose faith in our democracy.”⁴ Part I of this essay will explain why these assertions are nonsense.

This case has generated an enormous commentary in the legal literature, much of it quite critical of the opinion.⁵ Most of the critical commentary has emphasized two bad results that are claimed to flow from the decision. First, these commentators have presumed that, as result of *Citizens United*, the floodgates will be opened, sending a torrent of corporate money gushing in, and elections will come to be, in substance, more like auctions than democratic choices. Second, many have been quite concerned that the corporate origins of all this money make it much more destructive to the political process. Part 2 of this essay will discuss why these arguments are overblown and unpersuasive. The floodgates were already open, and the problem is large amounts of money coursing through the political process which has been subject to little effective control for some time. The money, not its corporate origin, is the real concern. (Many of the commentators have emphasized technical points of Constitutional Law and traditional ideas of good practice in constitutional interpretation, topics that are beyond the scope of this essay.)

Yet there are real worries that grow out of this case, and Part 3 will survey these. *Citizens United* is less of concern for what it actually commands in this opinion, but, if it is seen as a major step in a continuing journey, it is of much more concern for what it shows about where the journey is going.

1. Nonsense In the Opinion

The Court asserts that direct political advocacy spending is not corrupting to the political process, and thus there is no legitimate state interest in controlling it. For some time the Court has acknowledged the potential for “quid pro quo”

³ 130 S.Ct. 910.

⁴ 130 S.Ct. 910

⁵ A recent Westlaw search of law reviews turned up 85 articles, and this number is surely increasing.

corruption in donations to individual candidates and thus found a legitimate state interest in regulating these donations. “The Buckley Court recognized a ‘sufficiently important governmental interest in the prevention of corruption and the appearance of corruption’. *Buckley v. Valeo*, 424 U.S. 1 (1976) at 25. This followed from the Court’s concern that large contributions could be given to secure a political *quid pro quo*.”⁶ Thus, for some time now regulation of donations given directly to candidates has been allowed, while regulation of independent expenditures has been suspect under the First Amendment. The regulation was allowed because the donations could be corrupting. The Court’s first nonsense assertion in *Citizens United* is that independent expenditures are not corrupting in the way that donations to candidates can be, and thus that there is no state interest in regulating them.

To reach this result, the Court uses a very narrow idea of corruption—that it only exists, or perhaps that it is only of concern, when there is a direct *quid pro quo* exchange of money for specific political action. This deeply questionable assertion began with the Buckley case and has been part of the fabric of law in this area ever since.⁷ The assertion is wrong: a nominally independent third party can advance a candidate’s or an interest’s agenda quite serviceably, thereby earning the political favor and influence every bit as well as direct donations can. Whatever the merits of this assertion when it was made in the Buckley case 30 years ago, it is now abundantly clear that nominally independent expenditures on political activity can serve the purposes of political powers that be, and thus corruptly earn political favor and action, every bit as well as any straightforward *quid pro quo* donation.

The ways in which use of a nominally independent “Super Pac” can serve an individual candidate’s interest as well as direct donations are now well understood and serve as a vivid illustration. For example, consider Governor Rick Perry, a candidate for the Republican presidential nomination. Two of his chief political aids have formed the nominally independent group “Make us Great Again” which plans to raise and spend \$55 million to help him win the nomination.⁸ Donations to these efforts are not regulated because the activities they support are nominally “independent” of the Perry campaign. Of course, the

⁶ *Citizens United*, supra n. 1, at 901.

⁷ Michael S. Kang, “After *Citizens United*, 44 Ind. L. Rev. 243 (2010); Richard Briffault, “Corporations, Corruption and Complexity: Campaign Finance after *Citizens United*, 20 Cornell J. > & Pub. Pol’y 643 (2010-2011). *McConnell v. Federal Election Commission*, 540 U.S. 449 (2003) undercut this idea to a substantial degree, but it has been partially overruled by *Citizens United*.

⁸ Eduardo Porter, “How the Big Money Finds a Way In” N.Y. Times September 17, 2011, <http://www.nytimes.com/2011/09/18/opinion/sunday/how-the-big-money-finds-a-way-in.html?ref=eduardoportor> (Last visited November 9, 2011) “With New Political Committees, Possible Channels for Unlimited Anonymous Donations, N.Y. Times, October 16, 2011, p. G24.

independence is purely fictitious for there can be no question but that they will in fact be spent on Governor Perry's behalf, and that they will be well coordinated with his campaign strategy because they are directed by politically savvy Perry loyalists. In a surprisingly unguarded moment, a consultant to another of the nominally independent groups supporting the Perry campaign says of its efforts: "What we're trying to do is look down the line from the campaign's standpoint and say, what can we do that they would like to but don't have the time or resources to do?"⁹ While relevant rules prohibit these groups from overtly coordinating their activities with the candidate's campaigns, the reality is that such coordination is quite easy to achieve in fact although it is denied in public protestation. For example, Mitt Romney recently attended a fund raising event held by his nominally independent support group, "Restore Our Future", in New York for dozens of his wealthiest supporters.¹⁰ Of course, the pretense of independence was maintained; actual fund raising and campaign briefing was delayed until after Mr. Romney's presentation and his departure from the event. The notion that such activities are in fact independent of the campaign, and thus present no potential for corruption, is simply fanciful.

Lest one criticize Governor Perry and Governor Romney unfairly, note that virtually all the candidates for the republican presidential nomination are using the same strategy, as is President Obama.¹¹ President Obama's group, "Priorities USA" was formed by a pair of his aides just two months after leaving their jobs at the White House. The extent to which these are not truly independent efforts is illustrated by the Democratic Party PAC's use of this mechanism to pay for advertisements that feature the Senator Ben Nelson, a candidate who is nominally independent of the organization.¹² Again, the pretense of independence and lack of coordination are only the smallest of fig leaves; this is part of the campaign strategy in all but name. These are donations and expenditures with exactly the same effect as direct donations to the candidate; regulation of those is permitted because they can lead to corruption and regulation of these is needed for the same reason. The corruption potential is heightened by the fact that most of the money appears to come from a small group making very large donations; The Center for Responsive Politics has recently reported that as of August 2011 more than 80 percent of the \$17.61 million raised by Republican leaning super PAC's

⁹ Nicholas Confessore, "Lines Blure Between Candidates and PAC's With Unlimited Cash, N. Y. Times October 10, 2011,

http://www.nytimes.com/2011/08/28/us/politics/28donate.html?_r=1&scp=48&sq=nicholas+confessore&st=nyt (last visited November 9, 2011,, quoting Bob Schuman, a consultant to the nominally independent group "Americans for Rick Perry".

¹⁰ Confessore, supra n. 9.

¹¹ Confessore, supra n. 9.

¹² Eric Lichtblau, "Democratic Senator's Ads May Break New Ground". N.Y.Times, October 13, 2011, p. A17.

came from just 35 donors, while more than 80% of the \$7.61 million raised by liberal leaning PAC's came from just 23 donors.¹³ Indeed in the Court's 2003 McConnell opinion a different group of justices noted the "crabbed view of the political realities"¹⁴ reflected in this distinction between the corruption potential of donations and independent expenditures. Of course, in *Citizens United*, McConnell gets rather harsh treatment and is partially overruled, as indeed it must to support the Court's nonsense. Overall, total federal election spending is increasing rapidly, and it is driven in substantial part by the dramatic rise in such nominally independent spending.¹⁵

If we want further evidence that donations and expenditures can corrupt, even if spent independently rather than given directly to candidates, one needs to look no further than the Court's recent *Caperton* decision by a different majority of the members of the Court.¹⁶ In that case, large electioneering expenditures made by a nominally independent organization lead to the election of Brent Benjamin to the West Virginia Supreme Court, despite the fact that he was a former state party treasurer with no judicial experience. The money had come from Massey Energy, a large corporation, to fund the organization which mounted the ultimately successful media blitz on behalf of Mr. Benjamin. At that time, the West Virginia Supreme Court was considering an appeal from a \$50 million judgment against Massey and Mr. Benjamin's election was intended to buy a seat on the West Virginia Supreme Court as a way to influence the outcome of that appeal. The effort was unsuccessful only because the US. Supreme Court recognized the corruption for what it was. Ultimately the Court held that Justice Benjamin was required to recuse himself from deciding the Massey case because it involved a major political supporter. "There is a serious risk of actual bias. . .when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge in the case by raising funds . . .when the case was pending or imminent."¹⁷ To allow such bias violates due

¹³ Spencer MacColl, "Who's Who in the World of Super PAC's", OpenSectetsblog, August 24, 2011, <http://www.opensecrets.org/news/2011/08/world-of-super-pacs.html#> (last visited November 7, 2011).

¹⁴ *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) at 152.

¹⁵ Porter, *supra* n. 8. Confessore, *supra* n. 9. note that these groups are increasingly taking on tasks that were previously done by the candidates' campaigns themselves, and continues: "The 2012 race is already being widely viewed as a laboratory for political operatives, some of whom say that super PAC's founded to support individual candidates may soon become a feature of Senate and even House races if they are used successfully—and without legal headaches—by allies of the presidential candidates."

¹⁶ *Caperton v. A.T. Massey Coal Co., Inc.* 556 U.S.868 (2009). In fairness, one should note that the majority in *Caperton* was made up the four dissenters in *Citizens United*, plus Justice Kennedy who joined them here, but then joined the *Caperton* dissenters to make up a different majority in *Citizens United*.

¹⁷ *Caperton*, *supra*. at 2263-4. See Hazen, p. 584.

process. In other political elections, the likelihood of such bias is virtually identical. As such, it should surely justify regulating the political expenditure as well as requiring a justice to recuse himself from a case. The *Citizens United* court sought to distinguish *Caperton* in one paragraph, arguing that due process rights to fair trial were different, and ignoring the virtually identical risks of corruption presented in each situation. Given the reality of financially induced bias flowing from large independent political expenditures, this distinction between judicial elections and other elections simply does not make sense.

The Court continues with this nonsense in asserting that the purchase of influence and access in the political process is not corrupting, and that it “will not cause the electorate to lose faith in our democracy.”¹⁸ The first part of this is the assertion that “The fact that speakers [and donors] may have influence over or access to elected officials does not mean that these officials are corrupt”; it can only be based on the curiously narrow interpretation of corruption noted above. Its self-delusion or naivete is myopically unrealistic in the finance driven reality of modern political campaigning in today’s media age. The second assertion rests on this soft and slippery foundation. The Court says that the electorate will not lose faith in a democracy in which purchased “access and influence” is so prevalent, although the court does not consider the reality that these purchases will grow because campaigning today is dependent on large infusions of money.

This second assertion appears to determine the question as a fact, although there was neither finding below nor judicial notice of it taken here. In this author’s view, the assertion that the electorate will not lose faith in a system so compromised by large amounts of money is simply wrong. The electorate has lost faith in the democratic process precisely because it is so infused with large amounts of effectively unregulated money, much of which is offered strategically to purchase “access and influence”. Even a casual glance at contemporary political discourse and commentary confirms this beyond a doubt. One hopes that the five Justices claiming otherwise don’t really believe what they are saying; if they do, they really do need to get out more. The American political system is awash in influence purchased for money, everyone except these justices knows it, and faith in the system has been seriously eroded. Justices who must rely on this nonsense to justify their conclusions should seriously reconsider the conclusions.

¹⁸ *Citizens United*, supra at 910.

2. Weaknesses in the Commentary

Citizens United has prompted a virtual avalanche of commentary.¹⁹ While many points beyond the scope of this essay have been advanced, including a number of technical Constitutional Law issues, one central concern figures prominently in many. *Citizens United*, it is argued, opens the floodgates to a torrent of corporate money washing into the political process, a torrent which will sweep before it all restraint, turning elections into spending contests for media and other campaigning and thereby gravely weakening our democracy. Certainly we see such a torrent today and anticipate it to only continue to rise.²⁰ Yet the criticism misses the mark when it argues that this opinion opens the floodgates; they were already open and the result here simply straightens the channel and eases the flow. “Even before *Citizens United*, corporations or, more precisely, persons and entities with substantial accumulated wealth, already had, and frequently took advantage of, the opportunity to exert enormous influence over American politics, both directly and indirectly.”²¹

As others have noted, in politics money is like water and it can flow easily throughout the system. There are varied channels and some complexity in the details, but the basic idea is that an organization that is nominally independent of a candidate, such as a Political Action Committee, can garner large and sometimes unlimited contributions, and then spend them in ways that are functionally equivalent to campaign activities by the candidates.²² As noted above, these are not in reality uncoordinated from the candidate’s campaign, and donations to finance them present the same risks of corruption as donations to campaigns. Prior to *Citizens United* there was a thin layer of regulation of these activities, with limitations on the amount of contributions for some types of organizations, and required disclosure of the identity of donors is still permitted

¹⁹ A simple Westlaw search looking only for the case name has turned up over eighty five symposia and individual articles, and a sophisticated search would doubtless find many more.

²⁰ Eduardo Proter, “The Cost of a Vote Goes Up”, N.Y. Times November 6, 2011, <http://www.nytimes.com/2010/11/07/opinion/07sun3.html?ref=eduardoproter> (Last visited November 9, 2011); Nicholas Confessore, “Without Super PAC Numbers, Campaign Filings Present an Incomplete Picture” N.Y. Times October 20, 2011, <http://www.nytimes.com/2011/10/21/us/politics/campaign-finance-filings-present-an-incomplete-picture.html?scp=9&sq=Money%20in%20Politics&st=cse> (Last visited November 9, 2011). For a summary of fund raising expenditures by candidates and others for the current presidential race, see <http://www.opensecrets.org/pres12/index.php> (last visited November 9, 2011).

²¹ Michael C. Dorf, “The Marginality of *Citizens United*”, 20 Cornell J. L. & Pub. Pol’y 739 (2010-2011). See Briffault, *supra* n. 7, at 644: “Prior to *Citizens United*, corporations were already able to spend virtually as much as they wanted in connection with elections, due in part to a prior decision of the Supreme Court that received far less attention.”

²² A most illuminating chart diagramming the various pathways and limits on this process is presented in “With New Political Committees”, *supra* n. 8.

by the decision. However, even the latter disclosure requirement is easily evaded; wealthy donors, both individual and now corporate, can give to non-profit organizations set up as charities under section 501(c) of the Internal Revenue Code and those non-profits can then make donations to the political organizations. The identity of the donor in the second transaction—the non-profit—must be disclosed, but not the real donor in the first. The result is that, with careful use of the proper organizational forms, practically unlimited and undisclosed donations can be made to political organizations to be used as functional equivalents to fund campaign activities. The great bulk of this system pre-dated *Citizens United* and it was profitably exploited prior to the case. Of course, at that time corporate money had to flow from the corporation to officers, employees and shareholders to then reach the political process, although in practice this was only a minimal impediment. While *Citizens United* eased the few restrictions that were in place, and probably made it easier for corporate money to flow to political activity, the change is at most one of degree rather than one of kind.

Of course, outside the channels that were straightened and streamlined by *Citizens United*, Corporations had other ways to use their resources to buy political influence.²³ Issue advertising has not been subject to restrictions on corporate contributions since *FEC v. Wisconsin Right to Life, Inc.*²⁴ One way to do this was by using so-called 527 organizations, which spent \$400 million in 2004, compared to the \$84.1 million offered to each candidate under public funding of presidential campaigns in 2008. Beyond this, lobbying by corporations is a most effective way for money to be used in politics; in 2009 at total of \$3.5 billion was spent lobbying Congress and federal agencies.²⁵ While these are not campaign expenses as such, they are certainly a useful way to gain and exploit political “access and influence” by those able to afford it. Wealth, corporate and otherwise, has been used directly and indirectly to buy influence in the political process before *Citizens United*. The floodgates were already open and the changes wrought by *Citizens United* in this respect, while notable, are not a shift in the paradigm.

A second theme in the commentary emphasizes that *Citizens United* is of greater concern because it specifically authorizes an influx of corporate money, which is seen as being of more concern than an influx of money from individuals, even very wealthy ones. Here again, the commentary appears misguided. First, as noted above, there has been a lot of corporate money in the political process for some time. Further, a majority of states allow direct corporate contributions in

²³ Dorf, *supra* n. 21, at 748-751.

²⁴ 551 U.S. 449(2007).

²⁵ See Lobbying Database, Center for Responsive Politics, <http://www.opensecrets.org/lobby/index.php> (last visited November 4, 2011).

state elections.²⁶ Second, a distinction between corporate money and individual money is most unlikely to be workable in practice. If the rules are different for corporate money than money from individuals, moving the money from the corporations to individuals isn't and hasn't been difficult. Inflated executive salaries are one clear and straightforward way to make the transfer, and shareholder dividends would be another. While there are tax consequences to using these channels, and thus they may be somewhat more expensive, this should prove no more than a limited inconvenience to the purchase of influence by great corporate wealth. The problem is large amounts of unregulated expenditure being used to buy political influence and results, not the corporate source of the funds.

“The debate about limits on corporate spending has been in some respects a proxy for the debate on the role of private wealth—and the hugely unequal distribution of private wealth in contemporary America—in elections campaigns. That latter debate—what Judge Guido Calabresi has called ‘the huge elephant—and donkey—in the living room in all discussion of campaign finance reform’—was shut down by the refusal of the Court in *Buckley* and later cases to treat wealth inequality as a concern for limited spending. As a result, one focus of reform shifted from inequality per se to corporate spending as a rough surrogate for inequality.”²⁷

Yet, as a surrogate, this focus on corporate wealth is very rough indeed. For the most part, it doesn't matter whether the money buying influence comes from a corporation or an individual, rather it is the unregulated amount of buying that is allowed. However, two limited qualifications should be noted here. First, the corporate form is often a usefully efficient vehicle for assembling and holding a lot more wealth. Second, the corporate form may be a useful way of disguising the real source of the money in the political process, and this may be of special concern with foreign funding being put to use in domestic politics. In contrast, corporate wealth may be subject to a limiting factor; corporations may feel some measure of restraint in overtly pursuing political agendas if they fear that pursuit may alienate customers.²⁸ While these qualifications are worth noting, they are

²⁶ “[M]ore half of our fifty States allow ‘spending of the sort endorsed in [this] decision [and] political scientists have not been able to identify differences in corporate influence in the two sets of states.’” Adam Liptak, “A Drop in the Bucket”, *Colum L. Sch. Mag.* Aug. 31 2010 at 31, quoted in Roy a Schotland, *The Post-Citizens United Fantasy-Land*, 20 *Cornell J. L. & Pub. Pol’y* 753 (2011) at 755.

²⁷ Briffault, *supra* n. 21, at 656.

²⁸ Wert, Gaddis & Bullock, “Of Benedict and Beatrice: Citizens United and the Reign of the Laggard Court”, 20 *Cornell J. L. & Pub. Pol’y* 469 (2011).

only marginal limitations to the basic point that wealth matters and its corporate or individual source does not.²⁹ Yet *Citizens United* does prompt some real concerns, beyond the floodgates and corporate origin of the money.

3. Continuing Concerns After Citizens United

The American political system is awash in large amounts of money seeking to purchase political influence, raising deep concerns about the political legitimacy of the system. While *Citizens United* did not create these problems and its contribution to them is notable but not paradigm shifting, it does make a real contribution to legitimizing this state of affairs and promoting further developments of it. In today's media age, access to large amounts of money has become a necessary condition for a realistic chance of most political success. Interests that cannot generate such access will, over time, be less successful in the political process. Interests that do have such access and use it successfully will thereby gain an extra measure of political power and influence that can be leveraged to generate ever more money. While such leveraging could be done through tax policy, regulatory enforcement, trade and industrial policy, or countless other means, the details of the means that may be used are not our primary concern. Money can be used to generate political influence, which then can be used to generate more money; the details of the mechanisms don't really matter. In spreading the cloak of the First Amendment over an important part of this money-political influence machine, *Citizens United* legitimates it and paves the way for future Court decisions and other policies to protect it.

Consider the Court's recent decision in *Arizona Free Enterprise Club's Freedomclub PAC v. Bennett*³⁰ which held unconstitutional Arizona's plan for public funding of elections. The plan created a financing system for public funding of state elections in which candidates who chose to participate agreed to abide by some campaign restrictions and, in exchange, received a specific level of campaign funding. The problem arose because candidates who opted for public funding were given increased levels of funding if their opposing candidates and independent groups spent more than the public funding available. In essence the system matched public funds to those being privately spent. The Court held that

²⁹ Reuven Avi-Yonah (2011) "Citizens United and the corporate form," *Accounting, Economics and Law – A Convivium*, 1 (3) offers a most interesting history of the theory of the nature of the corporate entity and how it has changed back and forth over time; if one can predict what theory will be in use on a particular type of question at a given point in time, this will be most useful in predicting how the Court will rule on the extent of First Amendment rights of corporations in political spending. This essay, in contrast, approaches the issue from the perspective of its impact on the political system.

³⁰ 79 USLW 4640, June 29, 2011.

this violated the first amendment rights of the candidates who chose not to take public funds but rather raised and spent private funds. The matching plan, in the Court's view, burdened private fund raising and spending by non-participating candidates, and was not justified by any compelling state interest. In doing so, the Court relied on *Citizens United* to conclude that levelling electoral opportunities by equalizing spending is not a permissible goal for public campaign funds.

We have repeatedly rejected the argument that the government has a compelling state interest in 'levelling the playing field' that can justify undue burdens on political speech...[W]e have, as noted, held that it is not legitimate for the government to attempt to equalize electoral opportunities in this manner.³¹

Continuing in this vein, the Court reiterated the *Citizens United* nonsense that independent expenditures, in contrast to campaign contributions "do not give rise to corruption or an appearance of corruption." Of course, this is still nonsense; I have discussed the nonsensical character of this conclusion above and there is no need to reiterate it here. But the fact that it is now established dogma in *Citizens United* made it a useful rhetorical support for further limiting regulation of the purchase of political influence in this case. *Citizens United*, broadly read as principle, here supports an extension that, in effect, finds constitutional protection for a wealthy or well supported privately funded candidate's ability to outspend one's publicly funded political opponents.

The mischief will doubtless not stop here, as two specific examples will illustrate. First, while the *Citizens United* opinion purported to defer the question of donations by foreign corporations to another day, it in fact opens a readily usable channel for foreign entities, corporate or individual, to attempt to purchase influence in American elections. The problem is not fanciful: a recent New York Times article reports on the attempts by Pakistan's military to funnel donations to members of congress and presidential candidates.³² Of course, the schemes alleged there are illegal and individuals alleged to be responsible are being prosecuted. Yet as a practical matter, foreign interests, whether corporate, individual, governmental, or other, can quite feasibly form domestic US corporations and participate in US elections through them. Perhaps the Court would find a compelling state interest in stopping such influence, although it is not clear how in view of the rationale of *Citizens United* emphasizing that there is

³¹ 79 USLW at 4640. .

³² Charlie Savage and Eric Schmitt, "Pakistan's Military Plotted to Tilt U.S. Policy, F.B.I. Says" N.Y. Times July 19, 2011, http://www.nytimes.com/2011/07/20/us/politics/20agent.html?_r=1&scp=1&sq=Charlie%20Savage%20and%20Eric%20Schmitt%20Pakistan&st=cse (last visited November 9, 2011).

no corruption threat in independent spending.³³ But even if such a control is allowed in principle, its enforcement would be deeply problematic. Identifying the nationality of the real party in interest providing any corporate financing can become quite complex, particularly if the party in question wishes to disguise its identity through trusts, subsidiaries, family members, or other intermediaries. Determining that a domestic US corporation is “really” a foreign entity because of the nationality of its financing sources will be quite problematic and the resulting designed complexity must limit real world enforcement in practice. Here the fact that these are rights of corporate political donors may make a substantial difference.

As a second example, consider whether the current limits on corporate campaign donations are sustainable in the face of *Citizens United*’s rationale. One district court has recently held they are not, building on *Citizens United* to conclude that stricter limitations on corporate donations than individual donations to candidates also violate the First Amendment.³⁴

“If human beings can directly contribute *within FECA’s limits* without risking *quid pro quo* corruption or its appearance, and if ‘the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity’, *Citizens United* 130 S.Ct. at 903, then corporations like Galen [the defendant here] must be able to do the same.”³⁵

Of course, this case is surely headed for appeal, so the last word is yet to be written. Further, if the Court persists in its view that the influence purchase that *Citizens United* authorizes really doesn’t lead to corruption, and the real world experience continues to show so clearly that these independent expenditures are functionally equivalent to campaign contributions, then the distinction makes no sense. While denying the corruption potential of such donations certainly appears to be a fantasy, it is no more fanciful than the Court’s current assertions about direct expenditures. Once constitutional doctrine is based on nonsense, it is difficult to predict at what point common sense may yet be recognized and used to justify reasonable regulation.³⁶

³³ Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 Michigan L. Rev. 581 (2011), pp. 605-611.

³⁴ *United States v. Danielczyk*, 791 F. Supp. 2d 513 (E.D. Va. June 7, 2011).

³⁵ *Id.* at 3.

³⁶ For further discussion of other problematic applications of the doctrine, particularly in the areas of commercial speech and securities law regulations, see Randall P. Bezanson, “No Middle Ground? Reflections on the *Citizens United* Decision”, 96 Iowa L. Rev. 649 (2011) at 658-660. Further concerns are also discussed in Hasen, *supra* n. 33, at pp. 611-618.

Conclusion

One of the major contemporary American political problem is large amounts of unregulated expenditure in elections. It funds media and other campaigning, and thereby buys political influence and results; it is undermining the legitimacy of the system. While a different majority of the Court has recognized this problem in donations to candidates, noting its potential for corruption, the *Citizens United* opinion has used a convenient bit of nonsense to overlook the problem for functionally equivalent expenditures made by nominally independent entities. It simply doesn't make sense to say that donations to nominally independent entities don't have a corrupting influence on the political process, particularly as those entities are used today. Similarly, it doesn't make sense to say that such donations and the resulting political expenditures are not undercutting the legitimacy of the system. Yet the Court uses this nonsense to ground its decision that the First Amendment protects such donations and spending. It should do better than this.

Some of the commentary on this case is similarly misguided. In contrast to a frequently expressed opinion, *Citizens United* did not open the floodgates to a flood of corporate money into politics—they were already open. Similarly, while many bemoan the corporate origins of the flow of money that *Citizens United* protects, the larger problem is not the corporate origins but the potential of money in this vast quantity to buy results in the system. Corporateness matters a bit in specialized circumstances, but the major problem is lots of money, wherever it comes from. The real concerns about *Citizens United* are what it does to legitimize the vast flood of money used to buy political influence and results, and the ways in which that enhanced authority and legitimacy can further weaken our democracy.

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