The John C. Stennis Institute of Government

At Mississippi State University

Policy Matters: Considering Corporate Campaign Finance in Federal Elections – *the new direction in free speech*

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The United States Supreme Court, in the waning days of January 2010, issued a seminal opinion which discarded significant federal controls of corporate campaign contributions. In the decision, *Citizens United v. Federal Election Commission* (2010), the Court overruled *Austin v. Michigan Chamber of Commerce* (1990) and determined that campaign donations by corporations and labor unions should be treated similarly to those contributions made by individuals. *Austin* [and *McConnell v. Federal Election Comm'n*. (2003)] had previously upheld a ban on political speech based on the speaker's corporate identity.

The effect of the *Citizens United* decision is a death knell to various aspects of the McCain-Feingold Act, Public Law 107-155, a/k/a the Bipartisan Campaign Reform Act of 2002. McCain-Feingold significantly changed the focus of campaign finance, the first significant campaign finance reform legislation since the Federal Election Campaign Act of 1971 was passed.

With respect to the application of *Citizens United* to McCain-Feingold, the impetus for change focused on Section 203 of McCain-Feingold, which banned disbursements for electioneering communications

from union or certain corporate funds, except certain tax-exempt corporations making electioneering communications which are paid for exclusively with funds provided by individuals who are citizens or permanent resident aliens and which are not targeted electioneering communications.

Essentially, federal law had prohibited corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection federal elections. 2 USC 441 b (2000 ed.) McCain-Feingold amended section 441 b of the FECA to prohibit "electioneering communication" also. The Federal Election Commission defines electioneering communication as "any broadcast, cable, or satellite communication which refers to a clearly identified candidate for federal office and which is made within 30 days of a primary or 60 days of a general election" (section 434) which is "publicly distributed" (11 CFR 100.29). In addition, corporations and unions were barred from using their general treasury funds for express advocacy or electioneering communications, although they were allowed to establish "separate segregated funds" – known as political action committees or PACS – so long as the funding for the PAC follows the law – donations being limited to stockholders and employees of the corporation or, in the case of unions, union members.

Determining that the exception for political speech allowed for corporations and unions through PACs is insufficient to protect corporate or union free speech, the Court determined that Section 441b's prohibition on corporate independent expenditures are a ban on speech, necessarily restricting the amount of money that a corporation could spend on political communication. The Court reasoned that the risk of restricted campaign contributions could result in reduction of the quantity of expression on campaign issues which are publicly discussed, and, as *Buckley v. Valeo* (1976) indicated, the depth of the exploration of those issues or the size of the audience reached. The Court made a compelling argument by suggesting that if the restrictions of section 441 were applied to individual Americans, citizens would conclude that the purpose and effect would be to silence entities whose voices the Government deemed suspect, rather than to believe that the restriction on speech is limited merely in time and manner of speech.

"The First Amendment protects speech and speaker, and the ideas that flow from each."

Shortly after the U. S. Supreme Court held concluding arguments in *Citizens United*, a Gallop Poll measured citizens' thoughts on campaign finance, and specifically citizen perception of differences in federal regulations governing campaign contributions by corporations, unions and individuals. The results of the poll taken on October 1-2, 2009 showcase the dualism of American political thought on the issues associated with campaign finance.

> ***When asked whether campaign giving is "free speech", 57% of Americans (including 62% of Democrats and 64% of Republicans, but only 48% of Independents) said "YES, campaign donations are a protected form of free speech."***

> ***When asked whether the same rules should apply to corporations, unions and individuals, or should different rules apply to corporations and unions, 55% of Americans said: "The SAME rules should apply to individuals, corporations and unions."***

Compare those responses with the responses that were received in the same poll when the issue was considered in light of the significance of certain groups receiving undue influence over election campaigns.

> ***When asked to make a decision which would prioritize the significance of putting limits on campaign contributions or protecting campaign contributions of any stripe as "free speech", 52% of Americans (54% of Democrats, 49% of Republicans and 53% of Independents) said it was MORE IMPORTANT to place limits on campaign contributions than it was to protect an across the board right to support campaigns as "free speech".***

When asked whether government should be able to place limits on how much money individuals can give to a political candidate, 61% of Americans said that government SHOULD be able to place limits on the amount of individual contributions.

When asked whether government should be able to place limits on how much money corporations and unions can give to a political candidate, 76% of Americans said that government SHOULD be able to place limits on the amount of individual contributions.

What does that tell us? Several things.

1. The Institute believes that the poll results reflect the recognition of another type of "free speech" (campaign contributions as "free speech") in the American panoply – which means that American society has come a long way in the last twenty (20) years since *Texas v. Johnson* (1989), the "flag burning" case caused quite an uproar. *Texas v. Johnson* invalidated legislation that prohibited desecration of the American flag in 48 states, arguing that the act of flag burning was protected speech under the First Amendment to the U. S. Constitution. These findings suggest that in the last two (2) decades Americans have expanded their thoughts on civil liberties and are willing to apply constitutional principles in a less literal way. The majority of Americans may not be strict constructionists of the Constitution of the United States any more – although one could hardly argue that for the majority of the Court.

2. The poll results also reflect the fact that the majority of Americans see no difference in the way that an individual or another recognized legal entity (corporation, union, etc.) should be treated with reference to campaign contributions. This seems to suggest the recognition of some concept of "fairness" possibly, although there are a variety of ways that government distinguishes individuals from other legal entities which seem generally acceptable to the majority of Americans (differing tax rates, for instance).

3. Moreover, the results reflect the constant dualism that pervades American political thought. Americans are concerned about the application of such "fair" rules. Even though they espouse, on one hand, the appreciation of free speech in terms of campaign contributions, they nevertheless desire for this speech to be LIMITED – and limited for individuals and their contributions but more so for the corporate community.

4. Significantly, the poll results reflect that a significant percentage of responding Americans are uncomfortable with the magnitude of spending perceived as necessary to win a federal election in the 21st century. While they nod to free speech, the respondents clearly approve of the application of limits on political contributions.

The fact is that Americans realize that *Citizens United* opened the floodgates for both union and corporate funds to pour into upcoming elections. Unions and corporations are no longer limited to "issue based" campaign ads, but can spend directly (not just through their respective PACs) and can spend on ads which directly identify and endorse or vilify an individual candidate.

> ***"The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office."***
> ***Eu v. San Francisco Democratic Central Comm. (1989)***

While the Supreme Court's opinion emphasizes the rights of citizens to inquire of their elected officials or potential officials, to seek, hear, speak and reach consensus about these officials , their opinions and our right to assess this knowledge before we exercise our right to vote in favor or against them, and the ability of each and all of us to help fund the ability of citizens to obtain relevant information, how the relevant information is framed seems to be of import to the American citizens who prioritize limits on campaign spending above the "free speech" rights of campaign finance recognized in *Citizens United*. We don't want elections "bought" by elaborate expenditures and we tell ourselves that we abhor negative campaigning.

Most political scientists will argue that negative campaign ads are particularly effective for the disinterested voter, which unfortunately is most of us. Kenneth Goldstein, author of *Campaign Advertising and American Democracy*, argues that these types of ads catch the attention of the disinterested voter and present basic factual distinctions between the candidate paying for the ad and the candidate being lambasted by it. Dr. Goldstein argues that the American public is not easily manipulated by negative campaigning, but appreciates the contrast drawn between the candidates. "People learn when they see contrasts….If it's white, you don't see it. If it's black, you don't see it. It's when you see the whole painting that there is some contrast." Goldstein (2008).

Through his work with the Wisconsin Advertising Project, which tracks and catalogs political ads, Goldstein determined that the majority of negative ads are designed to teach, while the majority of positive ads are often designed to play on voters' emotions. He also finds that negative ads are more likely to be factually accurate than positive ads because they focus on policy, while positive ads are more "touchy-feely" but are often short on information.

> "***Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."***
> ***Buckley v. Valeo (1976).***

In the early years of the Republic, it was said that electioneering, accompanied by good quality hard cider, could win an election. In 1960, opponents of JFK whispered that his father, millionaire bootlegger and investment financier Joe Kennedy, bought votes in precincts governed by the Daley machine, as well as in the backwoods of Appalachia, via the distribution of crisp, one hundred dollar bills. ("Anything for Jack", he was quoted as saying.)

These memories confirm Goldstein's conclusion that money can affect the outcome of any election and that "negative advertising is a tradition with deep roots in the American political system." Goldstein (2008).

"To say that American politics, 50 years ago, 60 years ago, 100 years, or 200 years ago was this* HIGH-BROW *debate is just simply wrong. …The Declaration of Independence is a negative ad, outlining a bunch of gripes we had with the British. The Lincoln-Douglas debates were negative politics. The major reason Abraham Lincoln did not use negative ads was that TV didn't exist. If it did exist, he would have."

--Kenneth Goldstein

We yearn for the 'good ole days" of politics – with issues. Yet issues are no good to us if we, as voters, do not examine them.

Concluding that laws which burden political speech are always subject to strict scrutiny, the Supreme Court in *Citizens United* could find **no compelling interest** to narrow the rights of a corporation or union to engage in types of political and campaign speech that individuals have historically been allowed.

We will undoubtedly be faced, in this upcoming mid-term federal election, with all manner of "electioneering communication", even in these economic times. In fact, these economic times, in the wake of *Citizens United*, will most likely spur corporate expenditure. We can hope that the process will not unfold as undesirable or unbearable. We can hope that the price tag for House and Senate seats does not rise from its current high of the 2000s. According to the Campaign Finance Institute of George Washington University, the winning house races in 2008 were the most expensive: $1,362,239. The winning senate races in 2006 were the most expensive: $8,835,418 ($9,435,839 in 2008 dollars). Campaign Finance Institute (2008).

Apparently, the prospects of the impact of *Citizens United* on the mid-term elections demoralized. According to a Washington Post-ABC News Poll released on February 17, 2010, eight (8) in ten (10) Americans oppose the *Citizens United* decision, with sixty-five (65) percent of Americans being **strongly opposed**. Seventy-two (72) percent of respondents favored reinstating limits on contributions.

Senator Charles Schumer (D-N.Y.), who, with Representative Chris Van Hollen (D-Md.), is spearheading a legislative effort aimed at limiting the impact of *Citizens United*, was quoted in the Post: "If there's one thing that Americans from the left, right and center can all agree on, it's that they don't want more

special interests in our politics….We hope we can get strong and quick bipartisan support for our legislation, which passes constitutional muster but will still effectively limit the influence of special interests." Eaggen (2010). While Senate Minority Leader Mitch McConnell (R-Ky.), speaking on behalf of the Republicans in Congress , praised the *Citizens United* ruling and signaled the party's intention to oppose any efforts to blunt the impact of the opinion. However, Dan Eggen, Washington Post staff writer, posits that this position will be risky for the GOP in light of the poll results. Per Eggen: "Nearly three-quarters of self-identified conservative Republicans say they oppose the Supreme Court ruling, with most of them strongly opposed. Some two-thirds of conservative Republicans favor congressional efforts to liit corporate and union spending, though with less enthusiasm than liberal Democrats." Eggen (2010)

According to the Post poll, the disagreement with the results of the *Citizens United* decision crosses all demographics; neither age, race, education levels or household incomes seem to bear on American citizens' decisions to oppose the aspect of increased corporate and union interjection into the political process.

And it's no wonder. The Federal Election Commission [FEC] released information which relates to campaign fundraising for federal congressional candidates during the 2008 election cycle. Per the FEC, congressional candidates reported in excess of $1.42 billion in receipts, spending a total of $1.38 during the election cycle. According to the FEC, total receipts declined by 1% from 2006, while disbursements declined by 3% from the same year. According to the FEC, in the 2007-8 election cycle, Senate candidates raised a total of $435.57 million and spent $433.02 million, about 19% less than 2006 levels. House candidates raised $980.35 million, about 13% over 2006 totals, and spent $938.29, or about 10% more than was spent in 2006. However you slice it, we are talking about a great deal of money. And *Citizens United* might result in significantly increased receipts.

Pundits have posited the effects of the decision in *Citizens United*. Most observers seem to believe that the decision will bring more money into campaigns, certainly from business but also from ideological groups and non-profits. Many bemoan the fact that *Citizens United* will allow big money to dictate the issues to the candidates, rather than the political parties and candidates establishing the agendas. By being able to engage in "electioneering communication" themselves, corporations or unions may take the funds that some feel will simply be contributed to the candidate or party and invest these funds into

"issue directed" or "candidate directed" but self-initiated campaign communication. William McGinley believes that this self-initiated campaigning is threatening to party politics.

Is McGinley, a GOP attorney, imitating *Chicken Little* when he said: "Unless the laws change, the political party as we know it is threatened with extinction….The hard money limits have the potential to force candidates and political party committees to a lesser role in the election process." McGinley (2010).

Speculation about the mid-term elections aside, we should make an effort to inform ourselves in a way that is impossible by simply listening to or reading campaign ads.

Thinking is free.

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Lydia Quarles is a Senior Policy Analyst at the John C. Stennis Institute of Government, Mississippi State University. She received her Juris Doctorate from Cumberland School of Law, Samford University, and her MA and BA from Mississippi University for Women, in 1972 and 1971 in political science and communication. After over a dozen years in the private practice of law in Alabama and Mississippi, she joined the Mississippi Workers' Compensation Commission as an Administrative Judge in 1993. Eight years later, in 2001, she was appointed Commissioner of the agency. In 2006, she resigned to join the Stennis Institute. Quarles remains active in bar work, and currently chairs the Women in the Profession Committee, a standing committee of the Mississippi Bar. She is a fellow of the Mississippi Bar Foundation, a recipient of the Mississippi Bar's Distinguished Service Award, and was recently honored by the American Bar Association for her lifetime contribution to Administrative Law and Regulatory Practice by receipt of the Mary C. Lawton Award which recognized her contributions to the Mississippi Workers' Compensation Commission in the areas of alternative dispute resolution and access for Hispanic labor. Quarles serves as a member of the Mississippi School for Math and Science Foundation Board and parliamentarian of Mississippi's First Alumnae Association. Quarles has been named one of Mississippi's 50 Leading Business Women by the Mississippi Business Journal; the Journal recognized her service to the State as a Commissioner as well as entrepreneurial skills developed in her property management business in Starkville, Spruill Property Management, LLC.

About the Institute

Elected to the United States Senate in 1947 with the promise to "plow a straight furrow to the end of the row," John C. Stennis recognized the need for an organization to assist governments with a wide range of issues and to better equip citizens to participate in the political process. In 1976, Senator Stennis set the mission parameters and ushered in the development of a policy research and assistance institute which was to bear his name as an acknowledgment of his service to the people of Mississippi.