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## THE CAMPAIGN FINANCE DEBATE AFTER *CITIZENS UNITED*

**Michael S. Kang**

*Citizens United*<sup>1</sup> is the most important campaign finance decision of the last thirty years and the fitting subject of this symposium, *An Intersection of Laws: Citizens United v. FEC*, hosted by Georgia State University College of Law. Indeed, no decision has received such intense public attention in election law since *Bush v. Gore*. No surprise, then, that this symposium attracted such an esteemed group of scholars and practitioners with a diversity of views about the decision and its implications. It was an honor to participate, and my assignment is to identify themes and ways forward across these many reactions.

First, a quick description of the decision itself. *Citizens United* held that prohibitions on corporate electioneering in federal elections are unconstitutional under the First Amendment.<sup>2</sup> Prohibitions on corporate expenditures had been a pillar of federal campaign finance law for at least sixty years,<sup>3</sup> while broader prohibitions on corporate electioneering communications, as defined by the Bipartisan Campaign Reform Act,<sup>4</sup> were newer but recently upheld in *McConnell v. FEC* less than seven years ago.<sup>5</sup> These prohibitions violated the First Amendment, according to *Citizens United*, because they imposed government “restrictions on certain disfavored speakers,” namely corporations.<sup>6</sup>

This differential regulation of corporations could not be justified, the Court explained, because the only government interest in regulating campaign finance is the prevention of actual or apparent corruption. The Court expressly overruled precedent supporting

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1. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

2. *Id.* at 913.

3. *Id.* at 953 (Stevens, J., dissenting) (noting the historical pedigree of corporate restrictions in campaign finance, including the prohibition on corporate expenditures in the Taft-Hartley Act of 1947).

4. 2 U.S.C. § 441b(b)(2)–(3) (2006).

5. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 224 (2003).

6. *Citizens United*, 130 S. Ct. at 899.

application of this corruption interest to a distinct worry about corporate wealth. Electioneering by corporations could be not be restricted based on the notion that their treasury wealth posed the potential to “distort” the political process through spending disproportionate to the public’s support for the corporations’ ideas.<sup>7</sup> As a result, a prohibition on independent expenditures and electioneering communications by corporations could not be sustained under the First Amendment. Independent electioneering as a categorical matter, whether by individuals or corporations, simply “do not give rise to corruption or the appearance of corruption.”<sup>8</sup>

Gene Nichol and Joel Gora look back to this central reasoning in *Citizens United* and disagree violently about its merits. These opposed contributions of my colleagues to this symposium revisit the classic debate in campaign finance reform between critical democratic values of equality and liberty. Nichol and Gora take polarized positions on *Citizens United* with personal conviction that is rare in drier, less politically salient areas of law, but not unusual for the subject of campaign finance reform.

On one hand, Gene Nichol criticizes the decision and argues that “*Citizens United* renders all campaign finance limitation silly and ridiculous.”<sup>9</sup> For Nichol, campaign finance limitations serve an important democratic purpose in limiting the transfer of economic advantage into advantages in political influence. Campaign finance limitations such as the prohibition on corporate electioneering restrict the ability of the wealthy to exert disproportionate power in the political sphere by dominating democratic discourse and drowning out other voices. Nichol therefore sees *Citizens United* as threatening to the important democratic value of equality and attempts, through campaign finance, to guard against the use of “wealth to dominate the operation of the political process.”<sup>10</sup>

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7. *Id.* at 905–08 *overruling* *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

8. *Id.* at 909.

9. Gene Nichol, *Citizens United and the Roberts Court’s War on Democracy*, 27 GA. ST. U. L. REV. 1007 (2011).

10. *Id.* at 1013.

On the other hand, Joel Gora praises *Citizens United* as a simple case upholding the core First Amendment value of free speech. Gora argues that eliminating restrictions on campaign finance serves not only this basic liberty but also serves equality by freeing everyone equally of restrictions on speech. Of course, the quick response in the symposium came from Steven Winter on the ground that the elimination of campaign finance restrictions might in theory free everyone to spend more on political speech, but in practice the ability to spend more on political speech helps only those with the resources to do so.<sup>11</sup> In a world where financial resources are distributed unevenly, the elimination of restrictions on campaign finance helps everyone in theory, but only the relatively rich in practice—which is why Nichol criticizes *Citizens United* as “secur[ing] a power for people of wealth to use their disproportionate economic resources to get their way in our politics.”<sup>12</sup>

The heart of Gora’s support for *Citizens United* is grounded in a call for First Amendment liberty. Gora argues that *Citizens United* is “a landmark of political freedom.”<sup>13</sup> The essence of the decision, in Gora’s view, is that the “First Amendment protects all those individuals and groups that would exercise their right to speak and communicate by disabling the government from abridging the freedom of speech.”<sup>14</sup> This view too is grounded in structural benefits for democracy. Gora explains that political speech is essential to an effective democracy, and the democratic discourse benefits more from unrestrained production of as much political speech as the market can bear, than from government-imposed equality of voice.

This disagreement between Nichol and Gora about *Citizens United* reflects a basic value conflict underlying campaign finance law since *Buckley v. Valeo*. As Kathleen Sullivan once put it, “*Buckley* involved nothing less than a choice between two of our most powerful traditions: equality in the realm of democratic polity, and

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11. Steven L. Winter, *Citizens Disunited*, 27 GA. ST. U. L. REV. 1133 (2011).

12. Nichol, *supra* note 9, at 1016.

13. Joel Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935 (2011).

14. *Id.*

liberty in the realm of political speech.”<sup>15</sup> Nichol and Gora are both right in some important measure about the importance of equality and liberty in a healthy democracy, but the question in campaign finance law has always been how to strike the right balance between the two values.

Richard Briffault argues, in his contribution to the symposium, that the Court’s attempts to balance equality and liberty on a constitutional basis have been a disaster. The Court’s management of campaign finance law has produced a “combination of instability, internal inconsistency, and practical unworkability.”<sup>16</sup> On this point, everyone agrees completely with each other, and with Briffault.<sup>17</sup> The Court’s three decades of work with campaign finance law have produced little more than a mess.<sup>18</sup> Campaign finance law is an unsatisfying, unworkable tangle that enormously complicates the practice of politics and makes innovative reform in campaign finance almost impossible. Reviewing this dismal state of the law, Briffault calls for the “dejudicialization” of campaign finance law, with courts deferring to democratic resolution of the proper balance between equality and liberty in campaign finance law.<sup>19</sup>

*Citizens United*, of course, is a gigantic step further away from any dejudicialization of campaign finance law. The Rehnquist Court generally deferred to the government in campaign finance cases for two decades, culminating in the *McConnell v. FEC* decision upholding BCRA in 2003.<sup>20</sup> The Roberts Court since has charted a very different path in which *Citizens United* was the most recent and

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15. Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 667 (1997).

16. Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887 (2011).

17. See, e.g., Nichol, *supra* note 9, at 1010 (“Campaign finance law is lousy.”); Gora, *supra* note 12, at 980 (“[T]he campaign finance regime we have been living under for the last forty years, with its byzantine rules and regulations and IRS-like complexity, its stratification of speech rights in tax code like categories, and provisions and exceptions and exceptions to the exceptions and safe harbors . . . should be on any Top Ten list of incoherent systems.”).

18. See Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 893 (1998) (“Seldom have so many worked so hard and so long to accomplish so little.”).

19. Briffault, *supra* note 16.

20. See Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31 (2004).

dramatic step. Along these lines, Rick Hasen criticizes the rejection in *Citizens United* of equality interests, in the form of the antidistortion rationale, in campaign finance law.<sup>21</sup> In Hasen's view, "political equality is a key state interest to be balanced against First Amendment rights," but *Citizens United* now leaves no room for legislative recognition of that value in campaign finance law.<sup>22</sup> The decision closes off so much of the government interest in regulation that legislatures will have a difficult time justifying as a constitutional matter much new regulation beyond basic disclosure and contribution limits on candidates and parties.<sup>23</sup>

As a result, the best opportunities for campaign finance reform may come, ironically, from outside campaign finance regulation. Ciara Torres-Spelliscy argued during the symposium for reform of corporate law to require greater shareholder control over corporate electioneering. Measures such as the Shareholder Protection Act would require shareholder approval in advance of certain corporate electioneering, as well as mandate regular disclosures of corporate electioneering expenses. Larry Ribstein responded that such legislative efforts to regulate corporate speech through corporate law should encounter First Amendment challenges, even if structured as corporate governance measures instead of traditional campaign finance regulation.<sup>24</sup> Ribstein's concerns are probably well taken to the degree that these corporate reforms are isolated to electioneering restrictions, but less prominent for reforms that are more broadly based guarantees of shareholder approval that check management discretion beyond just such electioneering.

It is surprising, in any event, that Torres-Spelliscy and Ribstein agree that greater shareholder input on corporate political activity is likely to restrain corporate electioneering. Torres-Spelliscy and Ribstein predict that measures like the Shareholder Protection Act

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21. Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989 (2011).

22. *Id.* at 1002.

23. See Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 245–46 (2010).

24. Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019 (2011).

would effectively limit corporate electioneering, though they disagree whether that is likely to be a good result.<sup>25</sup> The bulk of the corporate scholarship, though, finds as a general matter that management tends to get its way in shareholder voting.<sup>26</sup> One might suspect the same empirical pattern would hold true for shareholder votes on corporate electioneering as well, though it would depend a great deal on the details of the reform.

What then for campaign finance reform? Heather Gerken, in her keynote address for the symposium, argues that lobbying reform is the next best step for the regulation of money in the political process. This move builds on an interesting intuition. Campaign finance and lobbying are natural counterparts, with campaign finance spending typically serving as a lever for access to lobby its beneficiaries once in office.<sup>27</sup> As *Citizens United* closes off campaign finance law to reform, perhaps the best alternative is to regulate any implicit quid pro quo on the back end by regulating lobbying ex post.<sup>28</sup>

The practical obstacles to lobbying regulation, though, appear as daunting as those for campaign finance reform. The First Amendment offers a textual basis for protection of the right to petition government<sup>29</sup> that is at least as strong as that for campaign spending on elections. It is not clear at all that the Court would construe the First Amendment as vigorously in defense of lobbying as it has for campaign finance, but the textual hook is at least as sure. For this reason, lobbying regulation has generally been restricted to disclosure of lobbying activity, with limited exceptions.<sup>30</sup> What is more, more aggressive regulation of lobbying such as expenditure limitations are

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25. Anne Tucker, in her symposium contribution, argues that such restraint would be a good thing, because it would preempt a prisoner's dilemma among corporations to accelerate spending in competition with one another. Anne Tucker, *Rational Coercion: Citizens United and a Modern Day Prisoner's Dilemma*, 27 GA. ST. U. L. REV. 1105 (2011).

26. See, e.g., Yair J. Listokin, *Management Always Wins the Close Ones*, 10 AM. L. & ECON. REV. 159 (2008).

27. See Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105 (2008); Elisabeth Bassett, Comment, *Reform Through Exposure*, 57 EMORY L.J. 1050 (2008).

28. See Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. (forthcoming 2012).

29. See *United States v. Harriss*, 347 U.S. 612, 625 (1954).

30. See Briffault, *supra* note 27, at 110.

likely to run into definitional problems in legally identifying the basic regulated activity of lobbying. Much lobbying operates on a social and informal basis that makes any formal definition of lobbying almost certainly underinclusive and prone to strategic avoidance.<sup>31</sup> In other words, the basic constitutional and regulatory challenges of campaign finance reform apply with similar force to lobbying reform as well.

*Citizens United* therefore leaves no promising avenue to reform for those concerned about the influence of money in politics. The decision, I think, closes off further campaign finance regulation to a substantial degree. Indeed, even basic campaign finance disclosure is being challenged and might eventually go the way of corporate source prohibitions if critics of campaign finance regulation get their way with the Roberts Court.<sup>32</sup> *Citizens United* is not only a turning point in campaign finance law, but a turning point away from campaign finance regulation. For those concerned about money in politics, the right move now is to look outside campaign finance regulation, whether it is to corporate law or ex post regulation such as lobbying reform or even legislative recusal.<sup>33</sup> Even so, those avenues appear to me equally complicated and difficult; there is no easy way after *Citizens United*.

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31. See generally Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131 (2005) (explaining how legal definitions addressing political activity are prone to avoidance by sophisticated political actors).

32. See Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057 (2011); Anthony Johnstone, *A Madisonian Case for Campaign Finance Disclosure*, 19 GEO. MASON L. REV. (forthcoming 2012).

33. See Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217, 231–33 (2010); John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 81–103 (2000).

