



Summary of "Who Speaks for Me? Free Speech, the Constitution and Corporations"

by Ron Seyb, Joseph C. Palamountain, Jr. Chair in Government, as presented at the June 5, 2011 Annual Meeting of the League of Women Voters of Saratoga County

The United States Supreme Court's ruling last year in *Citizens United v. FEC* changed the financing of federal campaigns. Not all of these changes are, however, well understood by most Americans. This confusion is understandable. Justice Kennedy's majority opinion in *Citizens United* is long and difficult to parse, and the ruling's focus on corporations' (and, by inference, unions') right to political expression has prompted as many visceral as thoughtful responses.

Perhaps the two most pervasive misconceptions about the Court's holding in *Citizens United* are that (1) The Court ruled that corporations can use general treasury funds to contribute *directly* to federal campaigns and (2) The Court allowed corporations for the first time to spend unlimited amounts of money on federal campaigns.

The Court in *Citizens United* did not overturn the Tillman Act, the 1907 federal statute that prevents corporations from using their assets to contribute *directly* to federal campaigns. It did, however, overturn the provision of the Taft Hartley Act of 1946 that prohibited corporations and unions from making "independent" or "uncoordinated expenditures" "on behalf of" federal candidates. An independent or uncoordinated expenditure is "a political campaign communication which expressly advocates the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with or at the request of a candidate, a candidate's authorized committee, or a political party."

The Court held in *Buckley v. Valeo* in 1976 that Congress cannot cap such independent expenditures without violating the 1st Amendment speech rights of the source of the expenditure. The Court reasoned that because such expenditures do not create the perception of a "fee-for-services" arrangement between the source of the expenditure and the candidate, they, unlike direct contributions to a candidate's campaign, do not create a "perception of corruption" and thus cannot be limited. The Court did, however, in *Buckley* uphold the provision of the Taft-Hartley Act that prohibited corporations and unions from tapping general treasury funds for independent expenditures.

Corporations and unions could make independent expenditures after *Buckley* and prior to the Court's holding in *Citizens United*, but to do so they were required by the 1976 amendments to the Federal Election Campaign Act to establish a Political Action Committee (PAC), whose funds would be acquired through "voluntary" contributions from supporters of the corporation's or the union's political interests. The now notorious "Willie Horton" or "Crime Quiz" ad that so severely damaged the presidential candidacy of Michael Dukakis in 1988, for example, was funded not, as many thought at the time, by the George H.W. Bush campaign but by "The National Security PAC," which maintained that the ad was made without consulting with the Bush campaign and was hence an "independent expenditure."

Corporations and unions because of the Court's holding in *Citizens United* now have the constitutional authority to use general treasury funds or union dues to spend unlimited amounts of money supporting the campaigns of one or several federal candidates. The change prosecuted by the Court in *Citizens United* was hence not, as many commentators have suggested, to allow corporations for the first time to spend unlimited amounts of money "in support of" federal candidates via independent expenditures. What the Court did do in *Citizens United* was allow corporations for the first time to draw on their profits, rather than voluntary contributions to their PACs, to fund such unlimited expenditures.

One does not detect a discernible difference in corporate spending on congressional races in the 2010 election cycle as a consequence of the Court's ruling in *Citizens United*. If anything, it appears that unions such as the SEIU and the AFSCME increased their independent expenditure activity above what it had been in 2008. One explanation for corporations' apparent reluctance to exploit the new opportunity created by the Court's ruling in *Citizens United* to use their assets to support federal candidates is that they fear antagonizing their customers and shareholders. A second possible explanation is that corporations did increase their spending in the 2010 cycle, though this increase was cloaked by their choice to contribute to 527 organizations such as Karl Rove's American Crossroads. American Crossroads can, as a 527 organization, spend unlimited amounts of money on "issue advocacy" ads. Since 527 organizations are regulated by the IRS rather than by the FEC, finding their contributors by sifting through mounds of IRS records is a taxing enterprise for curious journalists and scholars. American Crossroads has also established a so-called "Super PAC," or an organization that, in keeping with the D.C. Circuit Court's ruling in *Speechnow.org v. FEC*, can raise unlimited amounts of money from corporations, unions, associations, and individuals and can spend unlimited amounts of money expressly advocating the election or defeat of particular federal

candidates, provided that those expenditures are “uncoordinated.” American Crossroads invested through its 527 and its Super PAC over \$21 million in congressional races in 2010, an amount outstripping the second ranking “outside group,” “America’s Families First Action Fund,” by almost \$16 million.

The majority’s decision in *Citizens United* to decide the case on constitutional rather than narrow statutory grounds precludes congressional efforts to reverse the Court’s ruling. Some Democratic members of Congress, however, have proposed two different pieces of legislation to offset what they view as the most pernicious effects of *Citizens United*, one of which, sponsored by Senator Dick Durbin and Representatives John Larson and Walter Jones, Jr. seeks to provide candidates who raise a sufficient amount of money in small donations (i.e., \$100 or less) with federal subsidies or “public financing.

It is this rekindled congressional interest in campaign finance reform that is perhaps the most salutary consequence of the Court’s ruling in *Citizens United*. Congress has been loath to address the, admittedly, tangled and recondite issue of campaign finance since it enacted the Bipartisan Campaign Reform Act in 2002, an Act whose primary purpose was to close the “soft money loophole.” The one proposition with which both critics and supporters of *Citizens United* agree is that the campaign finance system remains flawed. That the Court has re-focused Congress’s attention on a question fundamental to the continued health of American democracy was, undoubtedly, not its intent, but it is a consequence of its ruling, nonetheless. *Citizens United*, pace Alexander Pope, has, by exposing “the part,” might eventually allow us to “see the whole.”