Appraising *Citizens United*

Robert F. Bauer

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The fame, or some would say notoriety, of *Citizens United* is largely tied to views of the rightful place of corporations in the elections. The Court freed them to intervene directly and without limit in campaigns, after many years in which it was believed that they could not, except through their political action committees. This decision meant that a new breed of PACs, the free-spending Super PACs, could now solicit funds directly from corporate coffers. *CU* and Super PACs became closely associated in the public debate; Super PACs were a beneficiary of *CU*, even if not its creation. These new PACs, along with *CU*, individually and in combination, appear to have transformed campaign finance in barely two years.

CU would be important for these reasons alone, but there are others. The case was decided in a period of instability in the campaign finance laws and continued heavy—and by some measures, increased—spending on elections. In the Presidential election campaign immediately following *CU*, the major party Presidential nominees' campaigns spent, with the assistance of their parties, in excess of $1 billion. Groups and committees spent hundreds of millions more. Senate races at their most expensive ranged from $21 million to $81 million; the costliest House races could run up tabs of $5 to $24 million. The campaign finance rules enacted after Watergate adapted with difficulty to this era of accelerated fundraising and spending, much of it taking place through new forms of political action. And, there was no general agreement that any such adaptation was merited: the regulators were bitterly divided over the ends of enforcement and the means of achieving it. This is setting for evaluating *CU* and what it has to say, which turns out to be a great deal, about the durability of the l970's "Watergate reforms'.

The discussion begins with campaign costs, because those costs, more than scandal or concerns about political equality, first moved campaign finance into the sphere of public policy activity. Progressives in the l920s worried about the escalating expense of campaigns. By the l930s, the question framed by one of the earliest political scientists specializing in campaign finance was: "With the cost of campaigning mounting rapidly, how are we to make it possible for all candidates and groups to present their cases to the voters?" LOUISE OVERACKER, MONEY IN ELECTIONS 375 (l974). In l962, President Kennedy established a Commission to study the problem, and it reported on the "rocketing costs of Presidential campaigns, and the recurring difficulties parties encounter in meeting those costs". PRESIDENT'S COMMISSION ON CAMPAIGN COSTS, FINANCING PRESIDENTIAL CAMPAIGNS 2 (l962). By 1971, the time of the first Federal Election Campaign Act, Congress briefly tried its hand at

containing campaign costs by mandating limits on expenditures for broadcast advertising. Without doubt, campaign finance as a matter of legislative action invited partisans to engineer legislative outcomes favorable to their self-interest, but in the beginning were the real pressures of cost.

As Alexander Heard, the pioneering scholar, straightforwardly stated the problem in l960: "Problems of campaign finance have cluttered the Congressional calendar for decades. They arise, basically, because it costs money to conduct free elections. . . . Politicians spend money because each, in the situation he finds himself in, cannot avoid it." ALEXANDER HEARD, THE COSTS OF DEMOCRACY 371 (l960). Heard was careful in method and restrained in drawing conclusions. He was not one to credit the most fevered anxiety that spending was raging out of control or that democracy would fall to the power of the dollar. But he concluded that campaign finance presented legitimate public policy issues and proposed what he took to be a sensible way of thinking about them. Of the three key "requirements" for a well-constructed "system" of campaign finance, Heard cited first, resources: "that sufficient money be available . . . to assure the main contestants an opportunity to present themselves and their ideas to the electorate", but, second and third, that any plan for delivering these resources neither favor "special political interests" nor fail the test of public confidence. *Id.* at 430–31.

If the government does not provide the necessary funding, but leaves individuals and private organizations with the bill, the argument necessarily shifts to the question of who will pay these costs of democracy. For decades, campaign finance debates have bogged down in disagreement about who will put up the cash, and how much those tapped for funds will be given leave to contribute. Out of this have come the distinctions drawn between "clean" and other sources, and in a later version, between "hard" and "soft" money. These arguments have cast campaign finance discussions into stalemate over the question of corruption and its appearance. After all, if some but not all are putting up the money, then some sense of obligation may develop among officeholders and candidates toward those who are giving and spending, and those left out of the system, or afforded more limited opportunity to participate in it, will cry foul, fearing that even in the absence of disreputable bargains, the process will be skewed to the campaign financiers.

For decades, it has been believed that there was an answer—that somewhere in the universe of donors could be found enough money to make a difference politically, but also only from sources, and in ways, that will protect the government from what is often termed "undue influence" and from the danger of forfeiting public confidence. To address the problem, the law since the l970's, and proposals to reform campaign finance on this post-Watergate model, have sought to achieve a balance of source restrictions and contribution limitations, buttressed by disclosure requirements. This has made for complicated law—differentiated contribution limits for different givers, cost-of-living increases for some but not all contributions, rules governing the timing of contributions, fundraising rules, and a host of other regulatory devices and fine-tuning.

In the middle of all this falls *Citizens United*. Certainly it enlarges the community of financiers, and hence the pool of suspects whose spending could invite corrupt government. True, the Court limited the spending to the "independent" variety—not coordinated with any candidate—and it has labored to explain that independent spending does not present any meaningful risk of corrupt understandings with officeholders. But many doubt this reassurance, some to the point of incredulity.

So if for the sake of argument, we agree that *CU* opened new avenues of spending and therefore of corruption in fact or appearance, is that the primary problem with the decision? Critics of the decision have chosen to pin their hopes on empirical demonstrations of the decision's ill effects. Attention has been turned to whether corporations and unions have begun to seize their chance, pushing up campaign spending and with it, the risks of corruption. But, like many such arguments in campaign finance, differences of opinion on the point will remain unsettled. Further, it may too soon to say. *CU* was decided two years ago and the experience of two election cycles does not support a considered conclusion about the direction in which this case may eventually drive campaign spending.

Another critique holds that *CU*, far from being just a case about corporate spending, has encouraged aggressive spending by individuals who see the Watergate reforms as collapsing and the way now clear to donate passionately to Super PACs and other adventurous activities, with little fear of legal repercussions. Plausible as this may be, it is not possible to know if it is true. What wealthy individuals might have done in the absence of *CU* is unknowable, but they certainly had options, as any moderately competent campaign finance lawyer would have told them—and probably did. It is reasonable to assume that the likes of Sheldon Adelson or Foster Friess would have closely considered the alternatives.

Along with disputes over the practical impact of the decision have come other complaints, but more about jurisprudence. These include criticisms of the expanded protections for corporate political action, of the hard blow dealt the equality rationale for campaign finance regulation, and of the aggressive jurisprudence of a decision that pushed past more restrained holdings to issue a sweeping constitutional judgment and throw out the contrary precedent. Whatever the strength of the claims, they lack the power to move any but those already inclined to agree with them. Legal academics, practitioners, activists and commentators who are aligned with one school of thought or the other in this field tend to host fast to their positions; they specialize in rebuttals more than they remain open to persuasion.

What may matter more in the long run is the Court's biting skepticism about the entire project of campaign finance regulation launched a half century ago. Justice Kennedy, writing for the majority, objects to the legislative choice to advantage some spenders over others:

> *Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.*

130 S.Ct. 876, 899. But federal campaign finance law and its relatives in the states are made up of just such distinctions among spenders. Federal contractors cannot give, except in certain ways, such as through PACs. Multicandidate PACs can give more than others on meeting certain tests of broad support and activity, and their giving is unconstrained by certain aggregate or overall limits imposed on individual contributors. Foreign nationals cannot give, unless they have qualified for legal resident ("green card") status. Partnerships contribute as entities but also on behalf of its individual partners, and two sets of limits apply, one to the entity and the other to the individuals. Trade associations can establish PACs but can only solicit specified classes of contributors and through regulated procedures. And so on.

The Court in *CU* notes, but not approvingly, this very complexity, finding it constitutionally questionable: Kennedy raises an eyebrow over the sheaf of regulations that has expanded over the years to implement these distinctions. He writes, for the Court (citations omitted):

> *Campaign finance regulations now impose "unique and complex rules" on "71 distinct entities." These entities are subject to separate rules for 33 different types of political speech. The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975. In fact, after this Court in* WRTL *adopted an objective "appeal to vote" test for determining whether a communication was the functional equivalent of express advocacy, the FEC adopted a two-part, 11–factor balancing test to implement* WRTL *'s ruling.*
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> *This regulatory scheme may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place. As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit. Because the FEC's "business is to*

> *censor, there inheres the danger that [it] may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression".*

Id. at 895.

How far the Court may take this critique in future decisions may soon become clearer as it considers whether to take up two new cases. One is a challenge to the "aggregate contribution limits" on individual giving. These limits operate on two levels—an overall limit of $117,000 on all contributions individuals make over a two year federal election cycle, but also various internal or subsidiary limits that apply to how much of that sum individuals can allocate to parties, non-party political committees and candidates. Here we have the complexity that troubles Justice Kennedy, defined by differentiation among different spenders. Only individuals—not, for example, PACs—are subject to this limit, and the effect of the limit varies by spender, as well, through limits on how the total amount can be divided up. A three-judge court upheld the limits but also noted "the troubling possibility that *Citizens United* undermined the entire contribution limits scheme". *McCutcheon v. Federal Election Commission*, 2012 WL 4466482 (D.D.C. Sept. 28, 2012) at *7.

The other case the Court may hear is a direct challenge to the prohibition on any corporate contributions to candidates. *United States v. Danielcyzk*, 683 F. 3d 611 (2012). Seemingly settled by the Court's decision in the *Beaumont* case, 539 U.S. 146 (2000), the question has been raised again because of *Citizens United*. The issue is raised in part one of the opinion by distinguishing among spenders: the law now treats corporations as no different in kind from other entities that cannot contribute at all, even within limits made available to individuals, partnerships, sole proprietors, and political committees. The Solicitor General, in opposing Court review, insists that "Congress could . . . permissibly conclude that corporations require a different rule." Brief in Opposition n. at *15, *Danielcyzk,* 683 F. 3d 611 (No. 12-579), 2013 WL 137190. And he cites a l981 case for the proposition that "entities have differing structures and purposes, and . . . therefore may require different forms of regulation in order to protect the integrity of the electoral process." *Id.* (quoting *California Med. Ass'n v. FEC*, 453 U.S. 182, 201 (l981)).

Kennedy seems to have his doubts about this, expressed pointedly in his comments about complex regulations that "impose 'unique and complex rules' on "'71 distinct entities'" that are "subject to separate rules for 33 different types of political speech." And he wonders, just as remarkably, about the purpose of it all. He suggests that all this regulatory activity might be, in the end, futile. "Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws." 130 S. Ct. at 912.

All in all, the view of campaign finance regulation emerging from the *CU* majority opinion seems grim. The decision answers one of Professor Heard's objectives, by

freeing up more resources for use in electioneering, but it stops there. It takes a narrow view of the sway of private interest spending,"[i]ngratiation and access, in any event, are not corruption", *Id.* at 910, and it does not speak to the larger effect of campaign finance activity on public confidence in government.

And what of the continuing rise in the costs of campaigns? Kennedy makes note of the concern and then makes short work of it. "*Buckley* was specific in stating that 'the skyrocketing cost of political campaigns' could not sustain the governmental prohibition. The First Amendment's protections do not depend on the speaker's 'financial ability to engage in public discussion.'" *Id.* at 904 (*citing* Buckley v. Valeo 424 U.S. 1, at 26, 49 (l976)). It is true that Buckley, in l976, spared little space on cost, but years later, in the time of billion dollar Presidential campaigns and multi-million dollar Congressional campaigns, the question of campaign expense as a public policy concern might have received more attention in the Court's analysis. In the field of campaign finance, cost is the ground from which spring all other issues of consequence. The *CU* Court, so aggressive in confronting what it considered bad reasoning and faulty precedent, peremptorily dismissed, in two sentences, the issue of cost.

The Court's subsequent decision in *Arizona Free Enterprise v. Bennett,* 131 S. Ct. 2806 (2011) still further narrowed the options for addressing campaign costs and its effects. *CU* was about limits on private funds, while *Bennett* was about the availability of public money; having dispensed with the private spending restrictions in the first case, the Court proceeded to cripple public funding alternatives in the second. Elections must be paid for, and the price rises ever higher, yet the Court has put into question whether there is any role at all for policy-makers to devise acceptable and constitutional responses. In the Court's defense, it could be claimed that the Justices have merely set the limits for policy, but it is not clear how, within those limits, any policy—particularly effective policy—might be crafted. In this one-two punch of *CU* and *Bennett*, *CU* was the first blow: the one aimed most squarely at the basic framework for controlling campaign finance established in the l970s.

In a short story by Joshua Cohen entitled *Emission*, drugged and inebriated party-goers share for group discussion the most intriguing, often raunchy and debatable questions they have on their minds, and the Supreme Court is responsible for one of them: "Is there a future for campaign-finance reform after . . . *Citizens United v. FEC*?" 53 THE PARIS REVIEW 87, 95 (2011).

Good question.