A Note on

CONGRESSIONAL CAMPAIGN FINANCE REFORM

Limiting the Right to Make Campaign Contributions Without Violating the First Amendment

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ABSTRACT

The Supreme Court's decision in Citizens United v. Federal Election Commission has made it possible for individuals who are not eligible to vote in a particular federal election and for organizations, who have no voting rights at all, to make unlimited campaign contributions, expanding their pre-existing right to make contributions with dollar caps. These two groups of contributors without the right to vote already outspend eligible voters in some states by an order of magnitude. Citizens United will simply widen the difference. The dominant role of campaign contributors who are not eligible voters has a serious corrupting effect on the federal election system. Since candidates and office-holders properly listen to the views of all contributors, not just to the views of eligible voters, the ballot speech of the eligibles is substantially diluted, if not entirely overwhelmed, by the money-speech of the non-eligibles. This is true even with respect to donors to independent-expenditure campaigns, since their identity will almost immediately become known to candidates through disclosure requirements. Additionally, their uncapped donations would in some cases be so large as to invite at least the appearance of quid pro quo corruption.

Extending the right to make contributions in a particular election to groups that do not have the right to vote in that election also violates simple logic, since without the right of people to vote there would be no need for contributions.

Eligibility limits with respect to contributions speech should be co-terminus with those for voting speech. Since individuals join together in organizations in order to make their voice more widely and strongly heard, organizations should still be allowed to make campaign contributions but only as conduits for donations by persons who are eligible voters in the election whose outcome the organizations are attempting to influence.

The Supreme Court's 5-4 decision in Citizens United v. Federal Election Commission, 130 S.Ct. 876 (2010), rather than resolving critical issues concerning the rights of corporations, unions, and advocacy groups to make financial contributions to candidates for federal office, has intensified the controversy.

In partially overturning two recent Supreme Court decisions -- Austin v. Michigan Chamber of Commerce, 494 U.S. 650, 110 S.Ct. 1391 (1990), and McConnell v. Federal Election Commission, 540 U.S, 93, 124 S.Ct. 610 (2003) -- as well as century-old campaign finance law, the Court has interpreted the freedom-of-speech portion of the First Amendment to the U.S. Constitution as giving organizations almost the same rights as individual persons with respect to their financial involvement in federal election campaigns. In addition, although the rules governing campaign donations by corporations and other organizations to political action committees (PACs) remain, organizations may now conduct their own independent campaigns for or against a candidate without being subject to any contribution limits if they do not coordinate their activities in any way with those of the candidate they are supporting.

Not surprisingly, the Citizens United decision precipitated the creation of a number of independent-expenditure campaign organizations -- the so-called Super PACs, such as the oft cited American Crossroads -- that poured huge amount of money into the 2010 Congressional races. And they did so without having to reveal the sources of their contributions in timely fashion, contrary to the Supreme Court's clear expectations in this regard. (130 S.Ct. at 913-914) A number of PACs and Super PACs produce advertisements that focus only on issues, not candidates, an activity that was permitted even prior to Citizens United. As long as PACs maintain a focus on issues, they do not have to reveal the names of those who pay for the ads even though the ads themselves may be thinly veiled recommendations for or against a particular candidate.

Possibly because the Citizens United case involved a Presidential Campaign and not a

Congressional race, the Court did not take the opportunity to address what should have been the main question with respect to current campaign finance law: Why should any entity -- whether it be a corporation, union, PAC, or person -- not having the right to vote in a particular election still have the right to directly or indirectly furnish financial assistance to a candidate in that election?

Illustrative of the critical importance of this question is the 2008 election campaign of Montana Senator Max Baucus. In this campaign, Senator Baucus (who has asked the Internal Revenue Service to inquire into the activities of the new Super PACs) himself received a mere 5 percent of his $8.4 million in campaign contributions from individuals and organizations domiciled within the Grizzly state.* And eligible voters in Montana provided an even smaller proportion of the financial support for his successful re-election effort, not even equaling aggregate contributions from the health industry.* Indeed, they were barely in the game at all.

Equally disturbing, Montanans did not even have an adequate voice in the selection of the Senatorial candidates they would get to vote on. Outside interests not only overwhelmed eligible Montana voters during the campaign itself, they almost certainly deterred possible candidates for the Baucus seat from even getting into the race. After looking at the Senator's huge, largely out-of-state financed war chest, some potential candidates would reasonably have concluded that it made no sense to challenge him.

The financing of Senator Baucus' campaign is, of course, not an isolated example. All Congressional campaigns are funded to a large extent, both directly and indirectly, by those who are not eligible to vote in the election whose outcome they are seeking to influence. The Citizens United decision merely opened up new sources of support.

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* Compiled from the list of contributor names, addresses, and contribution amounts filed with the Federal Election Commission.

Although the advocacy activities of these new sources must by law be kept independent of the campaigns of the candidates, they are obviously intended to benefit the candidates and they do so. Were they not undertaken, the candidates would alter the amount and form of their own expenditures.

As affirmed in the Citizens United decision, both the direct donations to Congressional candidates through traditional PACs and the indirect support that is provided through the independent-expenditure campaigns of Super PACs rest on the following reasoning:

A. the broadest possible First Amendment protection should be accorded political speech;

B. in most elections, financial resources are needed by candidates to make it possible for their political speech to be heard;

C. restricting financial support of candidates for federal office has the potential, therefore, of restricting political speech sufficiently to violate the First Amendment, a point elaborated on by Justice Scalia in his dissent in McConnell v FEC.

Money is, of course, not only necessary to make it possible for political speech to be heard by potential voters. It is also necessary if politicians are to listen to non-constituents. In this sense, money does talk. Indeed, if non-constituent money were unable to "talk" to candidates, contributions would soon dry up, and a First Amendment issue regarding campaign finance support would not arise. Elected officials should be expected, therefore, to do their best to represent their non-constituent contributors as well as voters, because both groups are instrumental to the success of their campaigns. Through their donations, non-constituent contributors, not just voters, become constituents to be served.

Perhaps because this fact is so obvious, it is taken for granted. But allowing contributors who are not eligible voters to nevertheless become constituents of a successful candidate on an equal footing with eligible voters automatically diminishes the First Amendment rights of the eligible voters. The money-speech rights of the non-eligibles lessen the ballot-speech rights of the eligibles. They do so by offsetting to varying degrees the efforts of eligible voters to affect election outcomes and to influence the views of their elected representatives. The speech of eligible voters is often not even heard by those at whom it is directed. It is blocked out by the money speech of those who are barred from casting a vote. This is unavoidably so, even if the outside money does not talk too much; that is, lead to quid pro quo corruption.

Such blocking out and its associated undue influence on candidates and office holders by other than eligible voters is equally the case with respect to PACs and Super PACs alike. Super PACs have been exempted from the contributions limits that are imposed on regular PACs on the assumption that if independent expenditure campaigns are indeed totally independent of the campaigns of candidates whom the PACs are supporting, the incentives for quid pro quo corruption are unlikely to materialize, as they might in connection with the direct contributions of regular PACs. This notion is at best naïve. It is impossible that candidates would not become aware of the names of major Super PAC donors. And that they would not occasionally feel obliged to reward these donors in ways that would suggest at least a tinge of quid pro quo corruption is very unlikely.

Even more important, allowing campaign contributions, especially unlimited contributions, by those who are not eligible to vote corrupts the core structure of the federal election system. Even if money pouring into a particular Congressional election from ineligible voters and non-persons has a small net impact on the distribution of votes among the candidates, the money is corrupting in at least four other ways: (a) in discouraging people from standing for office or voting; (b) in forcing

candidates and office holders to spend an inordinate amount of time in fund-raising; (c) in shaping legislation in ways that favor the interests of those whom the office holder has not been elected to represent; and (d) in nationalizing Congressional elections with a correspondingly significant shift of political power away from the state electorates.

Using First Amendment protection as the argument for allowing those who are ineligible to vote in a particular election the right to make contributions either to candidates in that election or to independent-expenditure campaigns also defies simple logic. Unlike the broad First Amendment right of everyone to be heard on all issues, the right to express one's opinion through voting is highly circumscribed, being provided only to persons who are eligible to vote by reason of age, legal place of residence, and citizenship. Since the right to make campaign contributions emanates from the right to vote (i.e. without candidates' need to attract votes, the need for campaign contributions would not arise), it makes no sense that the right to influence the outcome of an election through contributions speech is more broadly extended than is the voting right itself in that election. *Eligibility limits with respect to contributions speech should be co-terminus with those for voting speech.*

Congress could move toward the implementation of such a requirement by enacting a law permitting States to stipulate that in Congressional elections only eligible voters would be allowed to financially support, either through direct contributions/or indirectly through their own independent expenditure campaigns, candidates in that election (a restriction similar to the financial contribution restriction already the law in Alaska for State elections). Candidates would not be allowed to accept financial support or material benefit from persons who are ineligible to vote, nor from organizations of any type except when the organization acted only as a direct conduit for allowable earmarked donations from eligible voters. Equally, ineligible voters and organizations would be prohibited from financially supporting or opposing candidates either directly or through shadow campaigns.

Such a restriction recognizes that individuals usually must join together in organizations if they are able to amass the dollars necessary to get their message heard. The legal form of their organization should not matter with respect to their right to provide campaign support, only whether all of the contributions by the organization came from eligible voters. Just as British citizens and British organizations are not allowed (at least on paper) to financially support candidates for federal office in America, Californians and California organizations using money raised in California and elsewhere would no longer be allowed to similarly interfere with Congressional elections in Montana. Similarly, Montana organizations could not make political contributions with funds obtained from out-of-state employees, members, stockholders, customers, or other supporters.

Contrary to its possible surface appearance as being a radical departure from current federal campaign finance law, this proposal finds its conceptual underpinnings in the persuasive argument made by Frederick Schauer and Richard Pildes in "Electoral Exceptionalism and the First Amendment" (Texas Law Review, Vol. 77, 1999, pp. 1803-1836) that in political campaigns, limits on First Amendment protection do not necessarily violate the Constitution. Other considerations sometimes take precedence.

In the Citizens United decision, the Supreme Court concluded that only the danger of quid pro quo corruption or the appearance of such corruption constituted sufficient reason for narrowing First Amendment protection. The Court stated that "the fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt" and that "ingratiation and access ….. are not corruption" (130 S.Ct. at 910). This paper argues simply that Citizens United has: (a) opened up the possibility of extensive quid pro quo corruption associated with large uncapped contributions to independent expenditure campaigns by persons easily known to the candidates whom they are supporting; and (b) engendered a new and more serious type of corruption of the entire federal election system by allowing those who are ineligible to vote in a particular election to heavily influence the outcome of that election through campaign contributions that in aggregate far exceed those of eligible voters.

The immediate consequence of permitting only eligible voters to make contributions to PACs and Super PACs (beyond the inevitable court challenge) would be a drop in contributions to such organizations, and in particular to Super PACs, and a greater and more ingenious use of information advertising.

Realistically, of course, there seems little chance that Congress will show any interest in campaign finance reform at this time. Two campaign finance proposals -- the Disclose Act requiring more detailed and timely disclosure of political ad sponsors, and the Fair Elections Now Act providing partial public funding of Congressional campaigns -- that were introduced after the Citizens United decision have received little legislative support. In view of this Congressional sentiment, major reform such as proposed here is unlikely to soon occur. At some point, however, Congress and the Supreme Court will have to deal with the adverse impact that inadequately constrained contributions speech has on ballot speech and with how this partial disenfranchisement of voters undermines the Congressional electoral process more generally. Although the particular campaign finance reform proposal that is outlined here leaves untouched certain concerns that have been voiced regarding issue ads and campaign contribution limits in both Presidential and Congressional elections, it would restore a measure of integrity to the federal electoral process and related legislation deliberation.