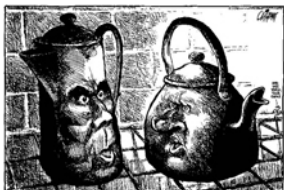
Said the Pot to the Kettle

Citizens United & The Power of Corporate Speech



by Kurt Hohenstein

Analyses of the now famous head nod and mouthed denial, "It's not true" by Associate Justice Samuel Alito during President Obama's 2010 State of the Union speech typically missed the point. The President's assertion that Citizens United v. FEC "reversed a century of law to open up the floodgates for special interests, including foreign corporations, to spend without limit in our elections," was plainly wrong. But Justice Alito's adamant denial, like much of the debate over campaign finance regulation, was even more of a head fake.

The power of corporate funding supporting a candidate yet not coordinated with her campaign does not avoid *quid pro quo* corruption.

In Citizens United, the Supreme Court found unconstitutional that part of McCain-Feingold, which prohibited independent expenditures by corporations on behalf of, but not coordinated with, candidates. It also explicitly overturned the Austin v. Michigan Chamber of Commerce decision where Michigan had prohibited direct expenditures by corporations on behalf of a candidate. But Citizens United did not overturn the Tillman Act, which since 1909 has prohibited direct contributions by corporations, both domestic and foreign, directly to candidates.

The reason both the President and Supreme Court are wrong is because neither party gets it. President Obama can claim no moral high ground after his campaign eviscerated the presidential campaign funding provisions of FECA 1974 by going outside its provisions and raising hundreds of millions of dollars, most of which remain unaudited. Neither party can claim clean hands when they use corporate entities, nonprofit organizations organized under Section 527, to accept and spend unlimited amounts of money from any source, including corporations, on behalf of a candidate. Surely the Court is not unaware of these developments, which have slowly, but inexorably eaten away at the foundations of FECA 1974 and McCain-Feingold to the point where almost nothing of substance remains.

Yet, the Supreme Court remains the problem. Its rigid acceptance of unfettered free speech in the context of campaign finance reform, denies any value to the public interest of promoting equality of speech while protecting individual and communal political interests. All of this hearkens back to the refusal of the Court in the 1976 case of Buckley v. Valeo to affirm the long understood principle of restricting speech in campaigns to promote deliberative equality among citizens.

Instead of following that long-accepted precedent, the court adopted the limited view that lawmakers could only restrict speech where campaign money created the possibility of *quid pro quo* corruption—that corruption which comes from direct contributions of money to candidates in exchange for certain actions. That is why both sides, mired in the historically inaccurate dichotomy—free speech equals money which if given indirectly to candidates cannot be limited—continue to misstate the history to the detriment of us all.

To promote open, complete, informed deliberation in our campaign discourse, we need to encourage both greater and more equal speech. There is little doubt that our political campaigns do not inform citizens well about the issues, focused instead on mini-sound bites and gotcha politics. We are, to a great extent, saddled with blithely ignorant representatives because they use immense funding advantages to remain in office offering the voters the same drivel election after election. The power of corporate funding supporting a candidate yet not coordinated with her campaign does not avoid *quid pro quo* corruption. It is politically unrealistic to argue that the successful candidate won't reward her campaign supporters even if they didn't coordinate that spending with her.

What this new regimen of campaign finance does—the 527's, the indirect, uncoordinated corporate spending approved in Citizens United, the raising of hundreds of millions of dollars outside the presidential campaign system established in 1974—is make the politician less accountable to the people she represents, and beyond the purview of the law, all in the name of freedom of speech.

Free speech remains a foundational, constitutional principle, but in the field of campaign finance, it has never done as much damage as the Courts have inflicted on the electorate by their misreading of history in Buckley and as now exacerbated by Citizens United.

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