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"With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections."[1]

This remark, in President Obama's 2010 State of the Union address, ignited controversy over the decorum of criticizing a Supreme Court decision at an address attended by the Justices.[2] It capped a week of intense media and public discussion of the Court's ruling, with some polls finding public disapproval of the decision as high as 80 percent.[3]

But how did we get to that point? And what does the much-discussed decision, in the case of *Citizens United v. Federal Election Commission*, actually change about how elections work?

A Brief Historical Detour

The answers to these questions start, along with the law at issue itself, in a similar State of the Union speech delivered 105 years earlier.

Theodore Roosevelt, standard-bearer of the Progressive Movement, had been re-elected to the presidency amid growing concerns about the influence of monied interests on society and government (despite accusations that his own campaign had accepted substantial corporate contributions). In his first State of the Union speech after the election, President Roosevelt railed against corporate abuses of power—particularly by insurance companies—and called for an absolute ban on contributions by corporations for any political purpose, citing the risk of corrupt practices associated with such contributions.[4] In 1907, Congress responded, passing the Tillman Act, which prohibited corporate contributions made to influence any election for federal office.[5]


Teddy Roosevelt

Of course, contributing to candidates' campaigns is not the only way to influence the outcome of an election. Supporters also can spend money directly, taking out their own advertisements or sending their own mail, to urge others to vote for their candidates of choice. And unlike its position on campaign contributions, the Supreme Court has held that the amount of such expenditures made without cooperating with the candidate cannot constitutionally be limited.[6] Thus, even after the Tillman Act, corporations could spend their resources to support candidates, so long as their efforts were independent from the candidates' own campaigns.

Congress closed that loophole in 1947, expanding the prohibition on corporate contributions to cover this kind of "independent" expenditure.[7] However, even this change in the law did not exclude corporations from politics entirely. Corporations could still raise and spend money through separate segregated funds: bank accounts managed and controlled by the corporation that collect money from shareholders, executives and administrators and use that money to contribute to candidates or make independent expenditures.[8] They just could not use funds from their general treasuries to make such contributions and expenditures.

In the ensuing decades, corporations and unions made frequent use of the sepa-

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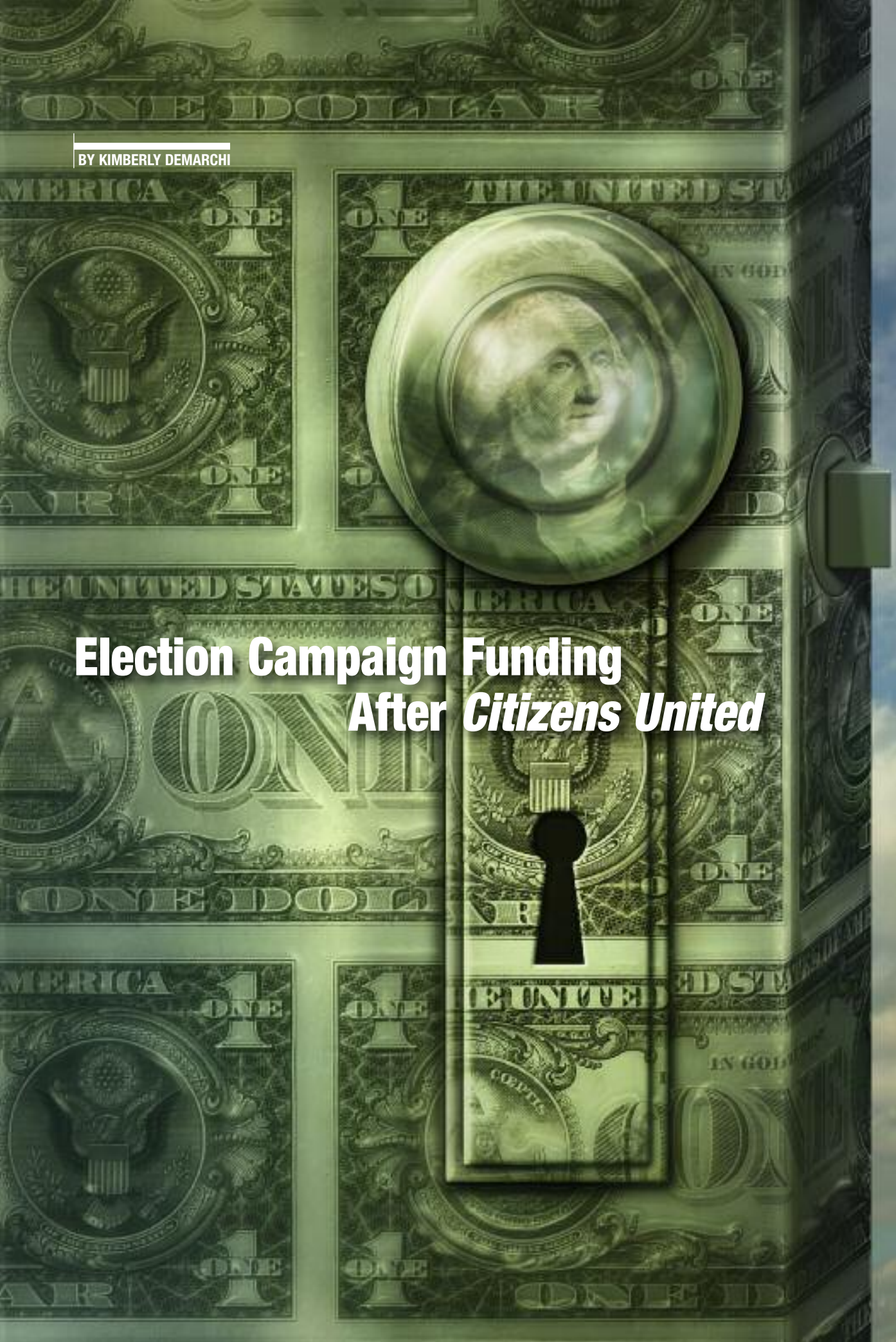

Election Campaign Funding After *Citizens United*

rate segregated fund option, raising and spending hundreds of millions of dollars on candidate elections at both the federal and state level.[9] This status quo remained in place for more than 50 years.[10]

From Pay-Per-View to Pay-to-Play

The case that changed more than 50 years of campaign finance law did not, at first glance, seem likely to do so. Citizens United, a nonprofit corporation, made a documentary about then-candidate Hillary Clinton, which it sought to advertise and to distribute for free using cable television on-demand services during the period right before the primary election, in states in which Senator Clinton was on the ballot.

Although the video is, in format, a documentary, it is not without a perspective on its subject. By way of example, one preview features Dick Morris, a prominent political commentator, opining that "Hillary is really the closest thing we have in America to a European Socialist."[11] Under governing law, the advertisements for the film were—in context—a plea for voters to vote against Senator Clinton, thus falling squarely within the ban on corporate political expenditures that had been held constitutional nearly 20 years earlier.[12]

Moreover, by the time the case reached the Supreme Court, Citizens United had abandoned its facial challenge to the ban on corporate electioneering communications, focusing instead on arguments that the ban on certain corporate expenditures should not be applied to its particular speech, because of the nature of its organization, the method it was using to distribute the film, or the nature of the film itself.[13]

The video that rocked campaign finance law.

The Supreme Court did not decide the case on that basis. Instead, after hearing two rounds of argument, a five-member majority struck down not just the ban on pre-election communications by corporations, but also the ban on corporate independent expenditures.[14] The Court left in place only the requirements that corporate ads include a statement disclosing the responsible party and that the corporation report to the Federal Election Commission the amount it had spent in preparing and placing the ad.[15]

Because the Court's decision was made on constitutional grounds, it affects the similar laws of states, such as Arizona, that also prohibited corporate independent expenditures.[16]

In reaching its decision, the Supreme Court also addressed procedural issues of more general interest. The majority and dissent hotly contested whether these were circumstances under which it was appropriate to address an issue waived by the parties in the lower court, to reach constitutional issues rather than deciding on a narrower ground, or to overturn settled precedent.[17] Chief Justice Roberts wrote a separate concurrence for the sole purpose of addressing these procedural issues in detail.[18]

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What Happens Next?

Notwithstanding the impassioned public commentary that followed the Court's decision, we are unlikely to see a flood of corporate money into campaign coffers in the months to come.

Even assuming that a corporation, in the current economy, would be willing to add expenses to its budget, some restrictions on corporate speech remain in place. Corporations still cannot make contribu-

tions directly to political candidates and can do so only through their sponsored PACs.[19]

Moreover, corporations that take advantage of the new option to make independent expenditures will need to identify themselves as the sponsor of those advertisements and disclose the amounts they spend. Corporations that have devoted substantial time and effort to building their brands may be reluctant to intervene in controversial political races that could alienate their customers.

Labor unions, many of which are already active in campaigns through their own sponsored PACs, may spend more out of their general treasuries, relying on the common understanding that *Citizens United* implicitly invalidates the similar ban on union-funded candidate expenditures. [21] Corporations and unions both may choose to minimize the exposure associated with expenditures by giving their money to third-party organizations, such as chambers of commerce and issue-focused nonprofits, who will then be publicly identified as the authors of the advertisements and required to disclose only their own expenditures and not their sources of funding.[22] Depending on the volume and content of these expenditures, candidates might shift their own spending either to address or rely on the independently funded advertising.

Meanwhile, a flurry of lawmaking proposals has surfaced. Suggested constitutional amendments range from expressly granting Congress permission to prohibit corporate campaign expenditures to broader language restricting the scope of other constitutional rights—such as freedom of speech—to human beings.[23] Some legislative proposals aim to decrease the number and kinds of corporations that can speak, such as by prohibiting corporations with some foreign ownership, corporations that contract with the government, or corporations that accept federal funds from making independent expenditures. Others would require that shareholders vote to approve use of corporate funds; impose taxes on political speech; further regulate lobbying; increase the amount that individuals may contribute to candidates; or increase the required advertising disclaimers and disclosures.[24] The Federal Election Commission also is reexamining its rules about when expenditures are truly "independent" from the activities of a candidate's campaign.[25]

Arizona's Clean Elections system, which provides optional public financing to candidates for statewide and legislative office, has been challenged as violating the speech rights of traditionally financed candidates and other speakers in the political arena.

And the courts may not have spoken their last word. The majority opinion in *Citizens United* expressed skepticism about one of the traditional rationales underlying campaign finance regulation—the connection between monetary support and the appearance or reality of corruption.[26] If the Court continues down this path, it potentially could invalidate the ban on corporate and union contributions to candidates and political parties or even limitations on the amount of candidate campaign contributions. The Court also has taken a case raising the issue of whether anonymity in the political process is necessary to avoid retribution, an issue underlying the sole dissent from the part of *Citizens United* that upheld the disclaimer and disclosure requirements on independently funded political ads.[27]

Arizona Impact?

One Arizona-specific issue with the potential to affect post-*Citizens United* legislation is also percolating through the courts.

Arizona's Clean Elections system, which provides optional public financing to candidates for statewide and legislative office, has been challenged as violating the speech rights of traditionally financed candidates and other speakers in the political arena. Specifically, on the day before the Supreme Court issued *Citizens United*, the U.S. District Court struck down Clean Elections' practice of giving publicly financed candidates extra money to respond to independent expenditures made against them.[28] These matching funds remain in place for the time being pursuant to a stay, but the case is currently before the Ninth Circuit, with a decision likely sometime this summer.[29] Publicly funding elections has been proposed as a response to *Citizens United* at the federal level; whether candidates would be willing to run with public funding may turn, in part, on whether Arizona-style matching funds are permitted.[30]

What comes of the various legislative, judicial and political options in the wake of *Citizens United* remains to be seen. But there is one perennial truth common both to the long history of elections and the current climate: So long as elections matter, people who are interested in the outcome will try to find ways to influence them, and the law will continue to adapt in response.

endnotes

1. Barack Obama, *Remarks by the President in State of the Union Address* (Jan. 27, 2010).
2. *See* Robert Barnes, *Reactions Split on Obama's Remark, Alito's Response at State of the Union*, WASH. POST, Jan. 29, 2010.
3. Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST, Feb. 17, 2010.
4. Theodore Roosevelt, *State of the Union Address*, 40 Cong. Rec. 96 (1905); *see also United States v. UAW-CIO*, 352 U.S. 567, 570-84 (1957) (summarizing history of Corrupt Practices Act). Roosevelt also urged other legislation to prevent corruption in politics, including laws preventing bribery and a restriction on the use of corporate funds to influence legislation.
5. Tillman Act of 1907, 34 Stat. 864 (Jan. 26, 1907). This prohibition was extended to labor unions in 1943. War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943) (also known as the Smith–Connally Act).
6. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976).
7. Taft–Hartley Act, 61 Stat. 136 (1947).
8. Unions also may sponsor and control separate segregated funds that collect contributions from their members. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), relevant provision codified at 2 U.S.C. § 441b(b)(2). These provisions also allow corporations and unions to communicate with their restricted classes on any subject and to engage in nonpartisan voter registration and get-out-the vote efforts aimed at that same class. *Id.*
9. Many states, including Arizona, adopted guidelines similar to those of the federal law: Corporations and unions could act through the political action committees they controlled and sponsored, but could not use their own money for political contributions or expenditures. A.R.S. §§ 16-919, 16-920.
10. With the ban on corporate political expenditures firmly in place, further campaign finance legislation focused on regulating other campaign-related activities, such as speech that does not expressly advocate for a candidate but addresses "issues" in a manner likely (and often intended) to influence the outcome of elections. *See* Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002), relevant provisions codified at 2 U.S.C. § 441b, 2 U.S.C. § 441i(e)(1)(A)), 11 C.F.R § 114.2 (banning political parties from accepting corporate funds to finance issue advocacy and restricting communications made shortly before elections that refer to clearly identified federal candidates).
11. Trailer for *Hillary: The Movie*, available at www.hillarythemovie.com/trailer.html.
12. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding Michigan's ban on corporate independent expenditures). Because Citizens United accepts some contributions from corporations, it does not fall within a narrow exception articulated by the Court that permits independent expenditures by nonprofit corporations, without shareholders, that exist only for political purposes and do not take corporate or union contributions. *Federal Elections Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).
13. *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 888-91 (2010).
14. 130 S.Ct. at 913.
15. *Id.* at 913-14. Eight of the Court's nine members joined this part of the opinion, with only Justice Thomas dissenting. *Id.* at 886.
16. Approximately half of the states banned corporate campaign expenditures at the time of the *Citizens United* decision. *See* National Conference of State Legislatures, *Life After* Citizens United, *available at* www.ncsl.org/default.aspx?tabid=19607.
17. 130 S. Ct. at 892-96, 936-42 (Stevens, J. dissenting). The Court also discussed, in some detail, the difference between facial and as-applied constitutional challenges, in the context of reviving *Citizens United*'s facial challenge to the corporate expenditure ban.
18. 130 S. Ct. at 917-24 (Roberts, C.J., concurring).
19. Press Release, Federal Elections Commission, FEC Statement on the Supreme Court's Decision in *Citizens United v. FEC* (Feb. 5, 2010), *available at* www.fec.gov/press/press2010/20100205CitizensUnited.shtml (indicating that FEC will continue to enforce disclaimer requirement of 2 U.S.C. § 441d and disclosure requirements of 2 U.S.C. § 434).
20. *Id.* Arizona had no comparable requirement for disclaimers and disclosure by speakers other than registered political committees, except for special reports that must be filed when independent expenditures are made in races subject to the Citizens Clean Elections Act. *See* A.R.S. § 16-912 (disclaimer requirement applies only to political committees formed for the primary purpose of influencing elections); § 16-940(D) (requirement to report certain independent expenditures to the Secretary of State). Legislation is currently pending that would add disclaimer and disclosure requirements for corporate and union independent expenditures. HB 2788 & SB 1444, 49th Leg., 2d Reg. Sess. (Ariz. 2010). The legislation, if passed, would need to be precleared by the Department of Justice under Section 5 of the Voting Rights Act before it could take effect.
21. *See* Press Release, *supra* note 19.
22. *See* Tom Hamburger, *U.S. Chamber of Commerce Grows Into a Political Force*, L.A. TIMES, Mar. 8, 2010 (discussing the Chamber's program of political activities, funded by donations from corporations).
23. *See* R. Sam Garrett, *Campaign Finance Policy After* Citizens United v. Federal Election Commission: *Issues and Options for Congress*, Congressional Research Service (Feb. 1, 2010); L. Paige Whitaker et al., *Legislative Options After* Citizens United v. FEC: *Constitutional and Legal Issues*, Congressional Research Service (Mar. 8, 2010).
24. *Id.*
25. *See* Press Release, *supra* note 19.
26. *Citizens United*, 130 S. Ct. at 908-11 (discussing inadequacy of corruption rationale as basis for ban on corporate independent expenditures).
27. *Doe v. Reed*, No. 09-559 (involving public release of identity of individuals signing initiative petitions) Concerns over possible retribution formed the basis of Justice Thomas's dissent from the Court's endorsement of disclaimer and disclosure requirements. *See Citizens United*, 130 S. Ct. at 980-82 (Thomas, J., dissenting); *see also* Bradley A. Smith, *In Defense of Political Anonymity*, CITY JOURNAL (Winter 2010). The Court also expressed concern about the effect that retribution or threats might have on the behavior of witnesses in its unsigned, 5–4 opinion barring the U.S. District Court for the Northern District of California from broadcasting proceedings in the trial over the constitutionality of California's Proposition 8. *Hollingsworth v. Perry*, No. 09A648 (S. Ct. Jan. 13, 2010.)
28. *McComish v. Brewer*, No. CV08-1550-PHX-ROS (D. Ariz. Jan. 20, 2010). Clean Elections is also under legislative scrutiny; pending bills would refer measures to the voters to either eliminate the system or transfer its funds to other programs. SCR 1009 & SB 1043, 49th Leg., 2d Reg. Sess. (Ariz. 2010).
29. Order, *McComish v. Bennett*, No. 10-15165 (9th Cir. Jan. 26, 2010) (staying District Court decision pending argument); Order, *McComish v. Bennett*, No. 09A736 (U.S. Feb. 16, 2010) (Kennedy, J.) (declining to lift stay given pending oral argument, but noting that motion to lift stay could be re-filed if the Ninth Circuit has not decided the case by June 1, 2010).
30. *See supra* note 23 (discussing possible legislative responses, including public financing of federal elections).