

## THE INEVITABLE LIMITS OF CAMPAIGN FINANCE REFORM

by Tabatha Abu El-Haj, Thomas R. Kline School of Law, Drexel University

Many pundits and citizens blame the Supreme Court's 2010 decision in *Citizens United v. FEC* for the recent explosion of money in politics and the outsized political influence of the super wealthy. But experts in the field know that there have long been strong constitutional obstacles to reducing the political influence of moneyed elites. Experts also know that campaign finance legislation hardly ever works, even when accepted by a more liberal Supreme Court. Plugging leaks is all that campaign finance laws ever seem to achieve, because money finds its way into the political process through loopholes in whatever laws are on the books.

The root of this regulatory challenge is the First Amendment itself, which enshrines many routes for Americans, including wealthy citizens, to exercise electoral and political influence through issue advocacy, lobbying, media productions and basic research. In a capitalist economy, where wealth is not equally distributed, the privileged are bound to benefit from the basic constitutional guarantees for lobbying and free expression. This means that it is past time for reformers hoping to curtail the political influence of moneyed elites to come to terms with the limits of campaign finance reforms – and turn to more effective alternative strategies.

### Correcting the Record on *Citizens United*

In his speech at the 2016 Democratic National Convention, Bernie Sanders, echoing other liberals including Hillary Clinton, asserted that *Citizens United* opened the door for “the wealthiest people in America, like the billionaire Koch brothers, to spend hundreds of millions of dollars buying elections.” This may sound good, but it is just plain wrong.

Individual Americans have long been entitled to spend unlimited amounts of money to influence elections, and well before the *Citizens United* decision, savvy, well-represented corporations knew how to do exactly the same thing. Although precise forms of political spending constantly shift in response to legislative and administrative rules, since the Court's 1978 *Buckley v. Valeo* ruling individuals have had a First Amendment right to spend their money to influence elections. The *Buckley* Court dismissed worries about the unequal impact of this ruling by declaring that efforts to create speech equality are “wholly foreign to the First Amendment.” The only compelling justification for laws regulating the flow of election money – for example, from corporations or unions – would be to prevent corruption or its appearance. In contrast, individual spending to encourage preferred issue positions was upheld as fully constitutional.

The primary significance of *Citizens United* was the Supreme Court's return to *Buckley*'s exceedingly narrow understanding of political corruption. In the years prior to *Citizens United*, the Rehnquist Court suggested that the appearance of preferential access and undue influence constitute a form of corruption that legislatures are entitled to address, including by limiting the source and amount of contributions to political action committees. *Citizens United* reversed

course on this point, with Justice Anthony Kennedy asserting that the only form of corruption the government may seek to prevent is *quid pro quo* corruption. Lower courts quickly read this as a signal to deregulate independent expenditures by political action committees, making it easier for groups set up by the Koch brothers and others to coordinate wealthy donor efforts to influence elections. But this legal turn did not change how much such wealthy donors were entitled to give in the first place.

### **Buckley and the First Amendment Inevitably Further Inequality**

As campaign finance reformers need to understand, even if changing the composition of the Supreme Court might tweak the kinds of campaign finance regulations allowed in the United States, it would not likely eliminate or greatly reduce the political influence of wealthy donors. The First Amendment to the U.S. Constitution allows an ample unregulated sphere for political speech and action to influence both who is elected and what policies they adopt. Should wealthy individuals face limits on particular kinds of electoral spending, they would be able to shift contributions to other arenas protected by the First Amendment.

First Amendment protections for unlimited political expression inevitably further political inequalities, because the super wealthy – as individuals and corporate directors – are exceptionally well positioned to take advantage of constitutionally protected avenues for political influence. As prominent figures with millions or billions to disperse, their views are more likely to be sought by reporters and editorial boards. They can use media conglomerates to influence politics, or rely on private foundations that subsidize the inputs relied upon when policy is made in legislative halls and administrative agencies. Constitutional protections for these other forms of influence are even stronger than protections for election spending.

Even if U.S. elections were – implausibly – turned into publicly funded contests with private contributions prohibited during election periods, the First Amendment would protect the continued existence of the twice-yearly donor conclaves run by the Koch brothers on the right and the Democracy Alliance on the left. Bolstered by social ties and large bank accounts, wealthy donors would still wield outsized political influence by influencing ideas, leadership and constituency efforts. No matter what laws Congress passes or regulatory agencies enforce, big money will just move from one constitutionally protected channel to another.

### **Finding Another Way**

Campaign finance reformers should come to terms with the fact that the First Amendment – rather than the ideological composition of the federal courts – poses the principal obstacle to curtailing the political influence of moneyed elites. Even if meaningful campaign finance reforms were passed, the super wealthy could continue to lobby and advance ideas to influence the policies that are debated and enacted or set aside.

But if blocking the wealthy by law will not work, what will? Small-d democrats must develop and build support for reforms aimed at all aspects of political influence, not just election expenditures. Above all, they must aim to empower and mobilize millions of ordinary Americans through civic and political organizations. Attempts at outsized influence from the wealthy must be countered and defeated – because they cannot be legally prohibited.