Keynote Address
Television is Dead
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Is a fading television incumbency fatally dependent on political anomalies?

By Peter Dekom

Ann M. Ravel (D – Chair of the Federal Election Commission) on the F.E.C.: “worse than dysfunctional.”

I. Citizens United

It started with the Supreme Court ruling in Citizens United vs. Federal Election Commission, announced on January 21, 2010, with the majority opinion written by Associate Justice Anthony Kennedy.

“Citizens United sought an injunction against the Federal Election Commission in the United States District Court for the District of Columbia to prevent the application of the Bipartisan Campaign Reform Act (BCRA) to its film Hillary: The Movie. The Movie expressed opinions about whether Senator Hillary Rodham Clinton would make a good president.

“In an attempt to regulate ‘big money’ campaign contributions, the BCRA applies a variety of restrictions to ‘electioneering communications.’ Section 203 of the BCRA prevents corporations or labor unions from funding such communication from their general treasuries. Sections 201 and 311 require the disclosure of donors to such communication and a disclaimer when the communication is not authorized by the candidate it intends to support...

“By a 5-to-4 vote along ideological lines, the majority held that under the First Amendment corporate funding of independent political broadcasts in candidate elections cannot be limited. Justice Anthony M. Kennedy wrote for the majority joined by Chief Justice John G. Roberts and Justices Antonin G. Scalia, Samuel A. Alito, and Clarence Thomas. Justice John Paul Stevens dissented, joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer, and Sonia Sotomayor. The majority maintained that political speech is indispensable to a democracy, which is no less true because the speech comes from a corporation. The majority also held that the BCRA’s disclosure requirements as applied to The Movie were constitutional, reasoning that disclosure is justified by a ‘governmental interest’ in providing the ‘electorate with information’ about election-related spending resources. The Court also upheld the disclosure requirements for political advertising sponsors and it upheld the ban on direct contributions to candidates from corporations and unions.

“In a separate concurring opinion, Chief Justice Roberts, joined by Justice Alito, emphasized the care with which the Court handles constitutional issues and its attempts to avoid constitutional issues when at all possible. Here, the Court had no narrower grounds upon which to rule, except to handle the First Amendment issues embodied within the case. Justice Scalia also wrote a separate concurring opinion, joined by Justices Alito and Thomas in part, criticizing Justice Stevens' understanding of the Framer's view towards corporations.
Justice Stevens argued that corporations are not members of society and that there are compelling governmental interests to curb corporations’ ability to spend money during local and national elections.”

Oyez.com

Companies, unions and business organizations effectively became “people” entitled to full rights under the First Amendment: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.* The cork was removed from the bottle. The smoke rose from the bottle and drifted into every corner of the land.

In June of 2012, in *American Tradition Partnership v. Bullock*, the Court had one more shot to revisit the reasoning of *Citizens United*. Citing the natural corruption of allowing unbridled spending in a small (population-wise) state, Montana has passed a statute imposing limitations on union and company political contributions. Breaking along the same lines as their 2010 decision, the Supreme Court rejected that Montana statute and reaffirmed the reasoning of *Citizens United*. But there is a vacancy on the court, and that old 5-4 conservative majority is – temporarily? – a 4-4 split with the more liberal faction. Can *Citizens United* face reversal?

Many also wonder whether corruption prevention really has any validity in limiting political spending anymore. The post *Citizens United* political spending by organizations was staggering. As of the end of December 2015, “1,625 groups organized as super PACs have reported total receipts of $320,812,012 and total independent expenditures of $95,030,951 in the 2016 cycle.” OpenSecrets.org. Wow!

II. PACs and Super PACs

Political Action Committees (PACs) and Super PACs realigned the political landscape. For federal candidates in particular, effectively to generate the kinds of underlying donations (de facto donations) necessary to play in a very expensive and now ultra-competitive media-driven world, increasingly they were configuring their platforms to conform to the wishes and policy directives of the special interests funding those Super PACs. Money ruled, and it seemed as if candidates were increasingly going to the highest bidder.

“Technically known as independent expenditure-only committees, super PACs may raise unlimited sums of money from corporations, unions, associations and individuals, then spend unlimited sums to overtly advocate for or against political candidates. Unlike traditional PACs, super PACs are prohibited from donating money directly to political candidates, and their spending must not be coordinated with that of the candidates they benefit. Super PACs are required to report their donors to the Federal Election Commission on a monthly or semiannual basis – the super PAC's choice – in off-years, and monthly in the year of an election.” OpenSecrets.org. Thus, the differences between PACs and Super PACs are significant.

“The Supreme Court’s ruling in Citizens United made it easier for corporations and unions to use their treasuries to directly influence elections. Some restrictions remain: if they want to give directly to candidates, they still have to establish political action committees and raise funds for them. But there are limits on how much traditional political action committees can accept in contributions and from whom: Currently, the cap on individual contributions is $5,000 a year. Donors to traditional union and corporate PACS must work for or own shares in those corporations or belong to those unions. They must be identified and the amounts of their donations made public. By contrast, super PACs can accept money in unlimited amounts from unions, corporations and unaffiliated individuals as well as from non-profit organizations that have been incorporated
under innocuous-sounding names and that do not have to report the sources of their funding. That means individuals and entities with whom candidates might not wish to be publicly associated can support their campaigns anonymously...

“Do super PACs have to disclose the sources of their funding? ... That depends on what you mean by ‘disclose.’ Like other political action committees, super PACs do have to file regular financial disclosure forms with the Federal Election Commission. But because they are permitted to accept money from incorporated entities that do not have to make the sources of their funding public, it’s possible for them to keep the names of actual donors undisclosed. In 2010, a super PAC that was active in one of that year’s marquee House races listed a single donor: a 501(c)(4) organization that does not have to disclose its donors. This is what is known among some campaign finance lawyers as ‘the Russian doll problem.’” SunlightFoundation.com. Dark money? Dark intentions?

Not that everyone was railing against this new political order, and there are differing views of the limitations. “One major misconception about Super PACs is the incorrect belief that they do not disclose their donors. In fact, all Super PACs are required by law to disclose their donors. This disclosure includes the name of the individual, group, or other entity that is contributing, the date on which the contribution occurred, and the amount given. Additionally, Super PACs must report all of their expenditures.

“Significant media coverage of Super PACs focused on their ability to spend unlimited amounts, but few journalists took the time to explain why that is. Americans, whether they act individually or in voluntary associations, have the right to spend unlimited amounts of their own money promoting political speech. According to the Supreme Court, limits on contributions to candidates are only constitutionally permissible because of the potential corrupting effects of such contributions. Independent spending, on the other hand, cannot be corrupting due precisely to its independence, and therefore cannot be limited.

“Contributions to PACs are limited because they can donate money directly to candidates; contributions to Super PACs are unlimited because they cannot donate to candidates and must comply with special rules when interacting with candidates. These rules prohibit acting at the request of a candidate or engaging in substantial discussion with a candidate or her agents regarding the specifics of Super PAC communications, including their content, intended audience, and timing...

“In short, Super PACs are far from the bogeyman that many media reports make them out to be. Super PACs cannot give money to candidates and there are strict regulations limiting the ability of such groups to coordinate their activities with candidates or their campaigns. Super PACs must disclose their donors and the amounts they receive from each contributor. Additionally, there is no evidence to suggest that the influence of Super PACs has ‘bought’ any elections whatsoever. Far from an evil entity, Super PACs are responsible for more political speech in elections, makings races more competitive in the process.

“Because of these restrictions, and the fact that independent communications might not be welcomed by the candidates these groups may support, the courts have ruled that contributions to Super PACs do not pose the same risk of corruption as contributions directly to candidates. As the Supreme Court has said corruption or its appearance is the only legal justification for limiting political fundraising, Super PACs are able to raise and spend unlimited amounts.” CampaignFreedom.org, posting a paper from the Center for Competitive Politics.

But watching what were once believed to be “outlier” candidates – “democratic socialist” Bernie Sanders and rather outspoken GOP frontrunner Donald Trump – post impressive primary/caucus numbers succeed without
massive Super Pac support suggests that there is enough voter anger out there to push back against what is perceived to be establishment funding. In fact, the rather significant anti-Trump Super Pac money seemed only to cause his core constituency to dig in their heels. Could the new “I have money to buy influence” vector introduced by *Citizens United* actually create a new unexpected backfire?

Hey, we are protected from increasing and malevolent, rule-violating linkage between candidates, donors and the Super PACs, right? After all, violations will be stopped by the relevant federal watchdog agency, the Federal Election Commission, right? Not exactly!

III. The Federal Election Commission

“The chairwoman of the Federal Election Commission says she's largely given up hope of reining in abuses in raising and spending money in the 2016 presidential campaign and calls the agency she oversees ‘worse than dysfunctional.’

“In an interview with The New York Times, Ann M. Ravel says she was determined to ‘bridge the partisan gap’ and see that the agency confronted its problems when she became its chair [in December of 2014]. She said she had now essentially abandoned efforts to work out agreements on what she saw as much-needed enforcement measures.

“Instead, Ravel said she plans on concentrating on getting information out publicly, rather than continuing what she sees as a futile attempt to take action against major violations, the Times reported... She said she was resigned to the fact that ‘there is not going to be any real enforcement’ in the coming election, the newspaper reported.

‘The likelihood of the laws being enforced is slim,’ said Ravel, a Democrat. ‘I never want to give up, but I'm not under any illusions. People think the FEC is dysfunctional. It's worse than dysfunctional.’

“The six-member commission is divided evenly between Democratic and Republican appointees. Tie votes along party lines on key issues are common and reflect disagreements over the agency's mission, its interpretation of rules and their enforcement.

“In the wake of the 2010 Supreme Court decision in the Citizens United case — it allowed corporations and unions to spend unlimited funds in support of political candidates — the lines drawn by campaign finance laws have become blurred and bent.

“Commissioners disagree over Ravel's views, the [NY] Times reported.

“‘The few rules that are left, people feel free to ignore,’ said Ellen L. Weintraub, a Democratic commissioner.

“‘Congress set this place up to gridlock,’ said Lee E. Goodman, a Republican commissioner. ‘This agency is functioning as Congress intended. The democracy isn't collapsing around us.’” New York Times, May 2, 2015. Violators will be... er... left alone? The F.E.C. is complete sham, toothless, a waste of taxpayer money designed to fail.

It does get worse. As the F.E.C. grapples with transparency, a path to disclose who some of the dark donors behind Super PACs might be, its intentional gridlock has stopped the effort dead in its tracks. The March 8, 2016 Washington Post explains: “A divided Federal Election Commission cannot agree to investigate whether
super PAC donors used corporations to mask their identities in the 2012 campaign, effectively giving a green light to contributors writing checks through limited-liability companies in this year’s elections.

“FEC Assistant General Counsel William Powers wrote in letters to the nonprofit advocacy group Campaign Legal Center [in early March] that the six-member panel was split about whether to look into corporate donations that were made in 2011 to Restore Our Future, a super PAC backing then-GOP presidential nominee Mitt Romney. At least four commissioners must agree that there is a basis for an investigation before the agency's lawyers can proceed. Absent that consensus, the FEC closed the cases, he wrote.

“At issue were three $1 million donations that Restore Our Future received from corporate entities in 2011. Among the donors was W Spann LLC, a company that had been incorporated in Delaware in March 2011 and was dissolved that July. The Campaign Legal Center and Democracy 21 filed a complaint alleging that W Spann's contribution violated a federal ban on straw donors. Shortly afterward, former Romney business associate Edward Conard came forward and admitted he set up the LLC and made the donation through it.”

Oy! Sounds like the secret societies of ye olde times!

So perhaps money does buy happiness... for those with an agenda and a willing to pay dearly to have their way with the political universe. Isn’t that the definition of a plutocracy? But does the seemingly failing attempt to use Super PAC money to “stop Trump” suggest a change in the political wind... from both sides of the aisle? Citizens-not-so-United?

IV. Money, Media and More Money

Thus our dear industry, media and entertainment, is raking in the newfound money for political advertising, noted above, in wheel-barrows. To too many in the industry, despite the signs of the backfire effect noted above, Citizens United is a saving grace in an industry sinking fast from disintermediation and Web-based alternative content delivery systems. Money, money, money. Back on May 22, 2015, Intercept.com began tracking the salivating media executives, licking their chops:

“At least one small slice of the American public looks forward to the non-stop, sleazy political advertisements set to inundate viewers during the 2016 elections: media executives and their investors.

“Peter Liguori, the chief executive of Tribune Company, said earlier this month that the next presidential campaign presents ‘enormous opportunity’ for advertising sales. Speaking at a conference hosted by J.P. Morgan Chase, Liguori, whose company owns television stations, referenced Super PAC spending as a key factor for why he thinks Tribune Co. political advertising revenue will rocket from $115 million in 2012 to about $200 million for the 2016 campaign cycle.

“Vince Sadusky, the chief executive of Media General, the parent company of 71 television stations across the country, told investors in February that his company is positioned to benefit from unlimited campaign spending, referencing decisions by the Supreme Court. ‘We are really looking forward to the 2016 elections with spending on the presidential race alone estimated to surpass $5 billion,’ Sadusky said, according to a transcript of his remarks.

“In 2012, Les Moonves, president and chief executive of CBS, memorably said, ‘Super PACs may be bad for America, but they’re very good for CBS.’
“His views appear unchanged. In a February [2015] investor call, Moonves predicted ‘strong growth with the help of political spending,’ particularly on television. He added dryly, ‘looking ahead, the 2016 presidential election is right around the corner and, thank God, the rancor has already begun.’

“In recent months, executives from media companies such as Nexstar Broadcasting, Gannett, and E.W. Scripps Co. have told investors that they are expecting a big jump in revenue from the 2016 political ad buys.

“The New York Times and Bloomberg have chronicled the rising political revenue to broadcast media companies, a trend accelerated by the Supreme Court’s Citizens United decision, which effectively removed limits on individual, corporate and union spending. A single station in Columbus, Ohio, for example, ‘grossed about $50 million in advertising [in 2012], of which at least $20 million was attributed to campaign spending,’ according to the Times. And the 2016 campaign cycle is expected to be the first time digital advertising alone will reach $1 billion, making big money groups a lucrative source of revenue for online publications.”

Needless to say, media outlets jacked-up their rates to the max. So high, in fact, that more than a few Super PACs began to rethink whether they were spending their money effectively. “Soaring advertising costs in early primary states are compelling major ‘super PACs’ to realign their tactics, de-emphasizing costly broadcast commercials in favor of the kind of nuts-and-bolts work that presidential candidates used to handle themselves.

“They are overseeing extensive field operations, data-collection programs, digital advertising, email lists, opposition research and voter registration efforts.

“The shift away from the broadcast television buys that had been the groups’ main role in past presidential campaigns is among the most significant developments in outside political spending since the Supreme Court’s 2010 Citizens United decision, which paved the way for super PACs. Originally conceived as a vehicle to raise and spend unlimited money on television, the most expensive part of a White House run, the groups now are seeking to relieve campaigns of much of the vital infrastructure that candidates would otherwise have to assemble and manage.

“The results of their efforts, which cannot be coordinated directly with the candidates, are unproven. It is not yet known whether field and data efforts spearheaded by outside groups will be as effective as they are in the hands of a candidate.

“Yet the groups’ success or failure could help decide the Republican nomination: Super PACs control the vast majority of the money being spent in the primary, leaving the contenders largely at the mercy of the groups supporting them.

“The shift away from TV commercials comes after summer advertising blitzes by groups backing Jeb Bush and Gov. John R. Kasich of Ohio failed to give them much of a lift and exposed an important weakness: While candidates are guaranteed by law access to the lowest unit advertising rates, super PACs must pay whatever the market will bear. There are also more super PACs than ever, each competing for time slots and driving prices higher.

“In some parts of Iowa and New Hampshire, super PACs are paying almost nine times what a campaign would pay — largely erasing even the advantage held by a group like Right to Rise, which is supporting Mr. Bush and
has raised more than $100 million, when compared with the smaller amounts of hard money raised by individual campaigns.” New York Times, December 22, 2015. Gee, that sounds fair and healthy!

With media time so desperately expensive, are candidates finding ways to generate free publicity? Is being outrageous a financing strategy, since the media spotlight follows you wherever you are? Is Saturday Night Live a campaign must? Late night talk shows? And what does the “equal time” rule say about this trend?

V. Future Trends or Just Buying Time?

Programming that is best viewed live is one of the few elements that is keeping traditional television alive. 98% of major sports competitions are viewed live. Political debates and high-profile awards programs (e.g., the Academy Awards) draw those live audiences as well. Must-see-live-events have the most valuable ad slots in the country, where viewers are most likely to stay tuned in order not to miss the event… or because the ads themselves are the attraction.

But television is increasingly a “C-7” medium (original telecast plus all reruns in all formats within seven days), where more and more of what is watched is viewed in digital alternatives. What do you call a large screen television in a college dorm? A video game!

But for those of us in media and entertainment, the money needed to pay for new and original programming may be increasingly dependent on such ad money, regardless of the source. Television does best in event years, particularly in years of general elections and the Olympics. There are lots of questions we all will face.

Will political contributions continue to be the backbone of traditional media advertising? Will Citizens United be reversed or contained? How does the failure of huge Super PAC money to “stop Trump” or candidate Sanders’ ability to generate voter support without serious Super PAC money change the landscape? What will happen in future years, as the entire television industry migrates to a streaming alternative? How does digital media take over this lucrative cash cow? How do streaming services take advantage of this revenue flow? How do politicians and those fomenting their political agendas change the way they spending their influencing dollars? And how are we, as lawyers representing the creative community, impacted in our representation? What do you think will happen? Can we keep making the deals we do, at the levels we do, without this newfound wealth?