

STUDY PAGES Program 2015-16

Month	Program
January 9	"Money in Politics" General Meeting
January 30	Local and National Program planning as a general meeting with small group discussions
February	Dinner with the League with a Green Umbrella speaker
March	Metropolitan Sewer District (MSD) including renewal of city/county contract and rate issues
April	Education and the Preschool Promise at unit discussions

Money In Politics Consensus - January 9

- Saturday January 9, 9:30 a.m. to 12:30 p.m. at the Mt. Healthy Community Center, 1541 Hill Ave.
- Speaker, Professor Daniel P. Tokaji, Moritz School of Law, Ohio State University

The League of Women Voters is conducting a national update of its position on campaign finance. Supreme Court decisions and the rise of super PACs make it necessary to update our position so we can continue to be a strong voice for reform.

We are extremely fortunate to have one of the nation's leading experts on money and politics to help us understand these complex issues. Professor Daniel Tokaji is a Professor of Constitutional Law and Senior Fellow in Election Law at Ohio State University Moritz Law School. Regularly consulted by the LWVUS, he is author of "The New Soft Money: Outside Spending in Congressional Elections."

At the January 9 general meeting, held jointly with other Southwest Ohio Leagues, Professor Tokaji will provide an overview on money and politics issues. We'll have time for question and answers, and will then break into small groups for each league to discuss the consensus questions.



Professor Daniel Tokaji

Your 3 Steps to Get Ready for Consensus!

1. Read these study page prior to the meeting.
2. Check out the more thorough review, with background reading for each consensus question. This material is available from LWVUS at <http://forum.lwv.org/category/member-resources/our-work/money-politics-review>
3. You can review Dr. Tokaji's book, which is available online at: <http://forum.lwv.org/member-resources/article/new-soft-money-daniel-p-tokaji-renata-e-b-strause-e-book>

Money in Politics Review and Update Study Guide

Goal of study: Address the lack of member understanding and agreement on the extent to which political campaigns are protected speech under the First Amendment.

The study should consider:

- The rights of individuals and organizations, under the First Amendment, to express their political views through independent expenditures and the finance of election campaign activities; and
- How those rights, if any, should be protected and reconciled with the interests regulating campaign finance to protect against corruption of our political process.

I. Introduction: Money in Politics

The goal of campaigning is to convince voters to support a candidate or issue. Thus, campaigning is ultimately about communication. And large-scale communication is not possible without money.

Why regulate money in politics?

- To protect the right of voters to know who spends money to influence their vote.
- To prevent quid pro quo corruption and undue access or influence.
- Because unlimited spending gives an unfair advantage to candidates and donors.
- Because increased spending downplays the role of voters, possibly leading to lower voter turnout.

In the 2010 *Citizens United v. FEC* and 2014 *McCutcheon v. FEC* cases the United States Supreme Court extended its views on free speech to allow unlimited independent spending in candidate elections by corporations and unions. The Court discounted any undue influence other than quid pro quo (“something for something”) corruption. These rulings radically transformed the election landscape and galvanized a campaign finance reform movement.

II. The League Position, Then and Now

Current League Position

Adopted in 1974 and revised in 1982, the LWVUS current Statement of Position on Campaign Finance is:

“The League of Women Voters of the United States believes that the methods of financing political campaigns should ensure the public’s right to know, combat corruption and undue

influence, enable candidates to compete more equitably for public office and allow maximum citizen participation in the political process. This position is applicable to all federal campaigns for public office — presidential and congressional, primaries as well as general elections. It also may be applied to state and local campaigns.”

While supporting controls on money in politics, the current League position does not balance First Amendment (free speech) interests of candidates, donors, independent spenders, and issue advocates against these principles.

The League calls for an updated position.

The League is pursuing a strategic, multi-dimensional approach at the federal and state levels to overcome or limit the Court’s decision in *Citizens United*. The June 2014 LWVUS Convention called for

“A review and update of the League position on campaign finance in light of forty years of changes since the Watergate reforms, in order to enhance member understanding of the new schemes and structures used to influence elections and erode protections against corruption in our political process, and to review possible responses to counter them in the current environment.”

III. Money in Politics: Before and After *Citizens United*

A. Limited contributions since 1974.

The Federal Corrupt Practices Act of 1925, easily evaded and rarely enforced, was the campaign finance reform act in effect until the Federal Elec-

tion Campaign Act of 1971 (FECA). FECA restricted campaign expenditures on media, limited candidate self-funding, required public disclosure of donations and expenditures, and incorporated pre-existing bans on campaign expenditures by labor unions and corporations.

FECA was amended in 1974 to limit direct “hard money” contributions, impose spending caps, create the Federal Elections Commission, and establish the Presidential Public Financing System. The FECA of 1974 is considered the beginning of the modern campaign finance regime.

B. Preventing corruption, or the appearance of corruption, is a fundamental governmental interest.

The amended FECA was challenged on grounds of First Amendment free speech violations. In *Buckley v. Valeo* (1975), the Supreme Court upheld FECA’s limitations on contributions, public financing, and disclosures on the grounds that preventing “corruption or the appearance of corruption” is a fundamental governmental interest that justifies some limitations on First Amendment freedoms.

This decision also introduced the notion that “money is speech.” The Court reasoned that communication made possible by money may involve: speech, conduct, or some combination of speech and conduct. The dependence of a communication on the expenditure of money does not introduce a non-speech element. Thus, strict First Amendment scrutiny applies to communication made possible by money.

In 1990, the Supreme Court found that corporate campaign expenditures created a “different type of corruption in the political arena” in *Austin v. Michigan Chamber of Commerce*. Corporations receive significant economic benefits that other kinds of associations do not, “such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets....” In 2010, *Citizens United v. FEC* explicitly overruled *Austin*.

C. Bipartisan Campaign Reform Act of 2002

tightens the reigns

In 2002 Congress passed a more comprehensive Bipartisan Campaign Reform Act (BCRA), also known as McCain-Feingold. It closed the “soft money” loophole that allowed unlimited contributions to political parties and banned “electioneering communications” by corporations and labor unions made 30 days before a primary or 60 days before a general election.

Prior to the BCRA, soft money consisted of limitless contributions to a political party for party-building activities. Soft money is barred by the BCRA, but *Citizens United* opened a similarly large loophole by allowing unlimited independent expenditures by corporations, unions and non-profit organizations.

The BCRA was immediately challenged, but in *McConnell v. FEC* (2003), the Supreme Court found that over 100,000 pages of evidence supported most of the BCRA reforms. Regarding the appearance of corruption, the Court stated:

“in speaking of ‘improper influence’ and ‘opportunities for abuse’ in addition to ‘quid pro quo arrangements,’ we [have] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors....”

D. Citizens United

In *Citizens United v. FEC* (2010) the Court overruled its recent decision in *McConnell* and held:

- the BCRA’s prohibition on electioneering communications by corporations impermissibly chilled constitutionally protected political speech; and
- First Amendment protection extends to corporations, including corporate-funded express advocacy.

While acknowledging that the government has a compelling interest in preventing corruption or the appearance of corruption, the Court majority stated that corruption could be found only in the case of a *quid pro quo* exchange, which cannot occur with an independent expenditure because there is no gift to the candidate.

E. After *Citizens United*: The Court allows donations to an infinite number of candidates.

In *McCutcheon v. FEC* (2014), the Court further weakened the BCRA by striking its aggregate contribution limitations—the direct contributions that individuals can make to national parties and federal candidates per year (\$123,200 for the 2013-14 election cycle). Under *McCutcheon*, a donor must keep contributions to individual candidates within the act's limits but can donate to an infinite number of candidates, as well as to national parties.

F. Reform Efforts

The explosive growth of independent expenditures is the most visible effect of *Citizens United*, which cleared the way for corporations—from for-profit international corporations to local charitable groups, from trade associations to labor unions—to spend unlimited amounts of money in candidate elections.

Proposed constitutional amendments in response to *Citizens United* have focused on reversing the Court's ruling that corporations have full political speech rights and that funding a political campaign is protected speech. These proposals would give Congress and the states authority to regulate “the raising and spending of money by candidates and others to influence elections.”

IV. Evidence of Corruption

Unlike the 2003 *McConnell* decision, Court majority opinions in the more recent *Citizens United* and *McCutcheon* cases have not relied upon systematically collected empirical evidence from public opinion surveys, participant experience or scholarly research.

1. Public Opinion: Public opinion has indicated a high level of criticism for expanding the rights of corporations to make unlimited campaign contributions. For example, a May 2015 New York Times and CBS News poll found 84% of the respondents believe money has too much influence in politics. This view was shared across the political spectrum (80% of Republicans, 90% of Democrats, and 84% of independents).

2. Participants in the Political Process: The *McConnell* Court reviewed Congressional hearings at which an experienced lobbyist testified:

“There is no question that money creates the relationships. Companies with interest before particular committees need to have access to the chairman of that committee, make donations, and go to events where the chairman will be... The large contributions enable them to establish relationships, and that increases the chances they'll be successful with their public policy agenda.”

In a 2014 Ohio State University Moritz School of Law study, researchers interviewed former legislators and found that the primary impact of independent campaign spending is the implied and sometimes explicit threat that independent spending will target incumbents in the next election if they do not support a donor's position. The second effect was agenda-setting. The amount of campaign contributions can affect whether an issue is given attention or not in the next Congressional session.

3. Academic Studies: Empirical political science research literature has not found evidence of significant impacts of money in politics on election outcomes or legislative decisions. However, strong evidence supports the view that legislators are more responsive to the interests of the upper-income segments of society than middle-income and lower-income constituents.

A 2014 study titled “Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens” presented evidence about the level of influence average citizens, economic elites, and interest groups had on public policy across 1,779 issues from 1981-2002. Researchers tracked what happened on each issue over a 4-year period following a public opinion survey. They found that average citizens and broad-based interest groups (ex: AARP and Veterans of Foreign Wars) have little influence on policy. But economic elites and business and professional interest groups have substantial influence on policy.

VI. Summary

Before *Citizens United*, the Court recognized that campaign contributions are or, at least, appear corrupting, especially if those contributions are large or from a corporation. Historically, the League has argued through successful litigation and legislative action for contribution limits and the exclusion of corporations from participating directly in the political process. The League has supported enforcement mechanisms and other reforms. Member responses to the consensus questions will help the League advocate for good public policy in this transformed election landscape.

VII. Definitions for Money in Politics Terms

Official definitions for many terms are found in the statutes dealing with campaign finance reporting.

For convenience, unofficial definitions of some of important terms are listed below; however it is important to know that for legal purposes many of these have detailed and well-established meanings in law that are only approximated here.

Candidate's Committee or Party Committee.

These have the purpose of aiding an individual candidate or a particular political party respectively.

Contribution. Gifts, money, loans, or anything of value given for the purpose of influencing an election (candidate or ballot initiative), including services paid for by a third party. Services provided by volunteers are excluded.

Coordination. An expenditure for express advocacy made in "cooperation, consultation or concert" with or at the request of a candidate, or an agent of the candidate's committee or of a political party committee. However, the FEC's interpretations exclude many common-sense examples of cooperation.

Corruption. The Supreme Court has ruled that corruption or the appearance of corruption is a justification for limiting free speech rights in campaign finance law. The current Court has

narrowed the definition of corruption to a *quid pro quo* exchange. This fails to recognize the corruption of the political process when donors can spend unlimited sums in an election or the subtle influence or favored access granted to a large donor by an elected official supported by big spending.

Dark Money. Political spending, the source of which is not disclosed under current regulations. This is typically accomplished through an arrangement whereby the donor contributes to a nonprofit corporation (that is not required to disclose) that in turn makes an expenditure under the name of the corporation rather than the originating donor.

Electioneering Communication. Broadcast, cable or satellite transmissions that refer to a clearly identified candidate, targeted to the relevant electorate and made within 30 days before a primary election or 60 days before a general election.

Expenditure. Any purchase, payment or other use of money or anything of value for the purpose of influencing an election. It includes the transfer of money or anything of value between political committees. It does not include any news story, or editorial; any nonpartisan voter registration or get out the vote activity; or communications by an organization to its members.

Express Advocacy. Political communications that explicitly advocate for the defeat or election of a clearly identified federal candidate. *Citizens United* allowed corporations, unions and nonprofit groups to use general treasuries to fund express advocacy so long as it was not done in coordination with a candidate.

Federal Election Commission (FEC). The six-member, bi-partisan federal commission with enforcement, regulatory and interpretative authority over federal campaign finance law. Four votes are required for the FEC to act.

Hard Money. Direct contributions to a political candidate. These contributions may only come

from an individual or a political action committee, and are limited to \$2,600 per election for an individual. They are subject to broad disclosure rules set by the FEC. Corporations and unions may not contribute directly to federal candidates.

Independent Expenditure. Spending expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or at the request or suggestion of a candidate or political party committee.

Issue Advocacy. Political communications in the form of advertising that is framed around an issue. Outside the election cycle, many groups use issue ads as part of their lobbying campaigns. Issue ads that explicitly mention or depict a candidate that are broadcast within 30 days of a primary election or 60 days of a general election must be reported to the FEC as electioneering communications.

Political Action Committee (PAC). A political committee organized for the purpose of raising and spending money to elect and defeat candidates. Most PACs represent business, labor or ideological interests. PACs can give \$5,000 to a candidate committee per election.

Public Financing. Money provided by governments in order to reduce candidates' dependence on private money. Inflation, the rise of soft money and unlimited independent expenditures have outweighed public financing in the presidential system.

Quid Pro Quo. Latin: "this for that." In political campaign finance, it refers to the kind of corruption that justifies limits on First Amendment rights. The Supreme Court has narrowed its definition of quid pro quo corruption so it is virtually the same as bribery -- an explicit agreement by a candidate or elected official to perform a specific act in exchange for something of value.

Soft Money. Money donated to political parties to support general political activities rather than a particular candidate, and thus not subject to regulations or limits that govern campaign contri-

butions.

SuperPAC. A political action committee that makes unlimited independent expenditures. SuperPACs run ads, send mail or communicate in other ways and may advocate the election or defeat of a particular candidate. There are no limits or restrictions on the sources of funds or on the amounts of SuperPAC expenditures. Both PACs and Super PACs are required to disclose donor information.

VIII. Resources

All content from the League's Study Guide for the Money In Politics Consensus website:

<http://forum.lwv.org/category/member-resources/our-work/money-politics-review>.

Consensus Questions with background materials:

<http://forum.lwv.org/member-resources/article/money-politics-consensus-questions-links-background-papers>

For more on campaign finance regulation, see Ch. 1, sections "The New Rules of the Game," p. 17-23 and "The Players," p. 23-27 of The New Soft Money, Daniel P. Tokaji & Renata E. B. Strause (free e-book).

Join us for Local and National LWV Program Planning!

Sat. Jan. 30, 10 a.m. to noon.

Mt. Auburn Presbyterian Church, Geier
Room

Every two years the League offers its members an opportunity to review program positions and suggest old positions be updated or deleted and propose new topics for study.

To prepare, **review the current positions at:**

LWVUS positions:

<http://lwv.org/content/public-policy-positions>

LWV Cincinnati Area positions

<http://www.lwvcincinnati.org/positions.html#s06>