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Thanks, Citizens United, for This Campaign Finance Mess We're In

By Adam Skaggs

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Before a Senate Judiciary subcommittee Tuesday, the Cato Institute's [Ilya Shapiro](#) became the latest to come out swinging against critics of *Citizens United*, testifying that the case is one of the most misunderstood high court decisions ever and claiming that "it doesn't stand for half of what many people say it does." Shapiro joins a chorus of *Citizens United* defenders, including First Amendment lawyer [Floyd Abrams](#) and his son [Dan](#) -- the latter of whom has railed against what he calls the media's "shameful, inexcusable distortion" of the case -- as well as the *New York Times Magazine's* chief political correspondent, [Matt Bai](#), who recently wrote that liberal criticism of the decision is "just plain wrong."

To be sure, it would be an oversimplification to suggest the decision is the *only* cause of our current Wild West campaign finance environment. But those criticizing the critics of *Citizens United* miss the forest for the trees. Their myopic focus on debunking overstatements about the case downplays the major role *Citizens United* played in ushering in current conditions -- and how it fits with the Roberts Court's ongoing project to put our democracy up for auction.

The defense of *Citizens United* rests on two primary claims about the case, one factual and one legal. Its defenders contend, first, that while *Citizens United* only concerned corporate election spending, the facts show that it is spending by individuals -- not corporations -- that counts this year. Next, they argue that, as a legal matter, individual spenders have been free to make unlimited political donations since long before *Citizens United*. They're wrong on both counts.

It's true that individuals have donated more than corporations to super PACs, but it's misleading to suggest corporate dollars don't matter. A recent analysis by the *Washington Times*, for example, showed that "nearly 200 companies gave \$8.6 million to super PACs in June" -- the highest total yet this year -- including "many repeat givers who have given a total of \$18 million."

And corporate donations to super PACs are just the tip of the iceberg. More corporate money is flowing into non-profit "social welfare" groups and trade associations like the U.S. Chamber of Commerce, which spend millions of dollars on electioneering but don't reveal their donors. Corporate donors afraid of alienating customers prefer these groups because they allow the corporations to remain anonymous -- except when a company like [Aetna](#) accidentally reveals that it gave more than \$7 million to such groups to influence elections. As the *New York Times* recently reported, secretive tax-exempt groups outspent super PACs by a 3-to-2 margin in 2010, and "such groups have accounted for two-thirds of the political advertising bought by the biggest outside spenders so far in the 2012 election cycle."

Just as misguided as downplaying corporate election spending this year is suggesting that there's nothing new about the unlimited contributions that individuals are making -- like the up to \$100 million that casino magnate Sheldon Adelson has pledged to defeat President Obama. Defenders of *Citizens United* say individuals like Adelson have had the right to spend unlimited sums since 1976, when the Supreme Court decided the seminal campaign finance case *Buckley v. Valeo*.

True, *Buckley* struck down expenditure limits -- but it upheld contribution limits. So, after *Buckley*, Adelson could have made his own political advertisements and bought the air time to run them. But few chose to do so. Most donors prefer not to get their own hands dirty; they'd rather give to political action committees run by campaign professionals. Before *Citizens United*, there were strict contribution limits on how much an individual could donate to a PAC.

Some tried to circumvent these limits by giving to so-called 527s -- like the Swift Boat group in 2004 -- but as election law expert Rick Hasen [has written](#), doing so was of dubious legality. The FEC levied fines of several hundred thousand dollars against 527 groups after they got involved in the 2004 election. [Hasen explains](#) that if Adelson had donated tens of millions to a 527, "you can bet that there would be a criminal investigation and very serious charges considered."

Not anymore. The federal appeals court in Washington [determined](#) that *Citizens United* outlawed contribution limits to groups that make only independent expenditures, giving rise to super PACs that accept unlimited contributions and spend unlimited sums. This year, leading candidates for President have super PACs that function as a *de facto* arm of the campaign -- and that accept million-dollar donations that would be illegal if given directly to the candidate.

Super PACs are the progeny of *Citizens United*, not *Buckley*. *Buckley* upheld contribution limits because, the Court said, they are necessary to deal with the "corruption inherent in a system permitting unlimited financial contributions." By paving the way for super PACs, *Citizens United* delivered that inherently corrupt system of unlimited contributions in time for the 2012 election.

It is either naïve or disingenuous to minimize the role *Citizens United* played in shaping the current election -- it was hugely important. But its real significance is as but one in a series of destructive decisions from the Roberts Court. [Hasen](#), [Professor Nate Persily](#), and the [Huffington Post's Paul Blumenthal](#) have all explained that the tide began to turn as soon as Chief Justice Roberts and Justice Alito replaced William Rehnquist and Sandra Day O'Connor, radically transforming the Court.

Five times in the five years after Alito joined the Court, it considered common sense legislation designed to mitigate the distorting effects of big money on our elections and government. All five times, the Court struck down laws designed to promote political participation and protect democratic values.

The Roberts Court's conservative bloc may have fractured in the contentious Obamacare decision. On matters of money in politics, though, they are marching in lockstep to impose a vision of the First Amendment that ensures democracy is for sale to the highest bidder.