

Scalia Shrugged Off Concerns About Influence of Money in Politics

Tony Mauro

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Democratic presidential candidates made a battle cry out of reversing the U.S. Supreme Court's Citizens United decision long before the death of Justice Antonin Scalia. As a consequence of Scalia's death on Feb. 13, will Democrats get their wish?

Campaign-finance experts on both sides agree that Scalia's death leaves the 5-4 ruling vulnerable if he is replaced by a nominee of President Barack Obama or a future Democratic president.

Both of Obama's previous appointees, Sonia Sotomayor and Elena Kagan, dissented from the decision. Scalia was an enthusiastic member of the majority.

"Citizens United is undoubtedly the recent precedent that would most be threatened" if a Democratic nominee is confirmed, said Cato Institute senior fellow Ilya Shapiro, who participated in a brief for the winning side in the case. "All it would take is a conflicting law passed in a blue state that could end up before the new Supreme Court as soon as next term."

Richard Hasen, a critic of the ruling and a professor at University of California, Irvine School of Law, said in an interview, last week that "I think any justice in the mold of a Kagan or Sotomayor would likely vote with them on these issues, particularly since it will be of clear interest to a Democratic president to pick someone who is safe on these views."

Hasen wrote in Politico on Feb. 14 that Scalia's death could mean the end of "one of the country's most hated decisions. ... Maybe, at least for a while, the courts will stop our elections from becoming increasingly bankrolled by the super-wealthy."

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But overturning the decision is not a slam-dunk.

The justices can't just reach out and reverse a past ruling. It could only be done, as Shapiro said, in the context of a new appeal from a state or federal court ruling.

It would also have to overcome the justices' instinctive reluctance to change course quickly. Especially in the decade since Chief Justice John Roberts Jr. and Samuel Alito Jr. came on

board, the court has adopted an increasingly absolutist view that the First Amendment requires nullifying a wide range of campaign finance restrictions.

"Precedential reversals occasioned by personnel changes are often thought to undermine the rule of law," said University of California at Los Angeles School of Law professor Richard Re in a post last week at the PrawfsBlawg website.

In *Citizens United v. Federal Election Commission*, the court said the First Amendment does not permit restrictions on independent campaign expenditures by corporations and unions. It also overturned *Austin v. Michigan Chamber of Commerce*, a 1990 ruling that allowed such restrictions.

Since 2010, the *Citizens United* ruling has been blamed, rightly or wrongly, for a significant increase in large corporate expenditures in election campaigns.

Democratic presidential candidate Bernie Sanders has made overturning the decision a key agenda item. Both he and rival Hillary Clinton have advocated a "litmus test" on potential Supreme Court nominees to be sure they would overturn the decision. And Obama continues to speak out against *Citizens United*, as he did in his State of the Union address in 2010 soon after the ruling was handed down.

On the Republican side, candidate Donald Trump has decried the influence of big donations, and Jeb Bush said he would "eliminate" *Citizens United* if he could.

In a 2012 C-SPAN interview, Scalia defended the ruling, which was written by Justice Anthony Kennedy.

Scalia shrugged off concerns about the influence of money in politics. "We spend less on presidential campaigns than the country spends on cosmetics," Scalia said. "The premise is freedom of speech. The more speech the better."

Scalia also insisted that the *Citizens United* ruling was "not novel. It reversed an opinion that had changed the law from what the law had been in *Buckley v. Valeo*." Scalia was referring not only to the *Austin* decision but to *McConnell v. Federal Election Commission*, which cited *Austin* in upholding campaign finance restrictions.

But that fact may make *Citizens United* more vulnerable to being overturned, said Burt Neuborne, a First Amendment expert at New York University School of Law. "Its claim to stare decisis is weak since it overturned *Austin*," Neuborne said, alluding to the doctrine of adhering to precedent.

Northwestern University Pritzker School of Law professor John McGinnis said "*Citizens United* could easily be overruled. They could say, 'We're overruling a case that itself overruled *McConnell* and *Austin*.' "

Some lower court rulings since 2010 have gone against *Citizens United* and were appealed to the Supreme Court. In 2012, the court reversed a Montana Supreme Court decision that upheld a state ban on corporate campaign expenditures. The high court said arguments made by Montana in defense of the ban "were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."

But it was a 5-4 decision with Scalia in the majority. The four liberal justices dissented. "Were the matter up to me, I would vote to grant the petition for certiorari in order to reconsider *Citizens United* or, at least, its application in this case," Justice Stephen Breyer wrote.

University of Washington School of Law professor Ronald Collins, also a First Amendment scholar, said the court might rule incrementally, giving *Citizens United* a "slow death," in the same way that the late Chief Justice William Rehnquist chipped away at the court's *Miranda v. Arizona* ruling on criminal defendants' right to remain silent.

If the task of replacing Scalia falls to a Democratic successor to Obama, the *Citizens United* "litmus test" advocated by Clinton and Sanders could become controversial. If Sanders or Clinton actually goes through with the idea, opponents would surely seek the recusal of any justice who "passed" the litmus test, on the grounds that the new appointee could not rule impartially.

But Hasen said that potential problem would probably fade from view. "I would expect no self-respecting nominee to answer a president's questions, or a Senate's questions, over how to vote on these issues in advance. The president might demand a litmus test, but won't be able to get it."