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Why *Citizen's United* Is a Fraud: A Guide for Non-Lawyers

For those who lack the time to read the 186 pages of opinions in the Court's corporate money decision -- and as progressives challenge the result in Congress or, even a Constitutional Amendment -- here's a 10 point guide to an absurd, abstract, unprincipled, historic game-changer of a decision.

President Obama was right in his criticism of the Supreme Court majority in his SOTU last week -- for over 100 years, federal law and courts had treated corporations differently than people when it came to political donations and First Amendment rights. Until, that is, Justice Anthony Kennedy's 5-4 majority opinion on the exact one year anniversary of Barack Obama's inauguration.

The Court explicitly overruled two prior decisions -- and invalidated the laws of 22 states -- to permit corporate and labor spending on electioneering ads in campaigns. (For now, existing bans on corporate and labor donations to candidates is intact.) The five conservative justices built their decision on two cornerstones: that money is speech and that corporations are people.

It's tempting to expose these rationales as fig leafs for corporate power -- much as "states rights" and "reverse discrimination" were high-minded excuses for keeping African-Americans down -- or just to LOL. John Oliver on *The Daily Show* defended big business as "our oppressed minority"; Stephen Colbert agreed that "Corporations...do everything people do except breath, die and go to jail..."; blogger Matt Yglesias asked, "Will SCOTUS give gay corporations the right to marry?"

But as Democrats gear up for battle, it's essential to appreciate the raw narrative power of the speech and personhood arguments...and to deconstruct precisely how radical, reactionary and consequential the *Citizen's United* decision is. For in effect it replaces votes with dollars and seeks to supplant a progressive voting majority for President and Congress in 2008 with a one vote conservative judicial majority in 2010:

Precedent and History. Kennedy's opinion (for himself, Roberts, Scalia, Alito, Thomas)

overturned and disdained prevailing constitutional law in two decisions. *Austin v. Michigan Chamber of Commerce* (1990) said it was permissible to curtail spending on political ads from corporate treasuries because of "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." And in *McConnell v. FEC* (2003) the Court upheld McCain-Feingold restrictions on "independent" corporate and labor ads that opposed or supported federal candidates.

Dismissing these cases as "outliers," Kennedy repeatedly implied that the majority was simply returning to precedent prior to 1990.

That's disingenuous. It was the 1907 Tillman Act proposed and signed by President Teddy Roosevelt Act first banned corporate donations to candidates using the same arguments that Austin made decades later. The 1947 Taft-Hartley Act specifically prohibited corporate and labor ad expenditures for or against candidates. 22 states also adopted similar provisions. One decision, *Bellotti v. First National Bank of Boston* (1978), did overturn a Massachusetts law that banned corporate ads in state referenda on the basis that there was no candidate to corrupt. And Kennedy repeatedly cited the infamous decision in *Buckley v. Valeo* (1976) that overturned overall spending ceilings on candidates, not on interest groups.

Justice Roberts's concurrence correctly if somewhat defensively concluded that precedent can occasionally be overturned, otherwise "segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants." Here he uses great progressive decisions vindicated by history -- and following a Civil War and Depression -- to justify giving corporations complete First Amendment rights for the first time in 221 years. As one measure of how far he had to reach to change constitutional law, it was Justice Rehnquist in a 1982 case for a unanimous court who wrote that Congress's "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations...warrants considerable deference."

***Narrow Grounds.** It's settled judicial doctrine that if the Court can rule on narrow grounds and avoid a constitutional ruling, which of course cannot be reversed by Congress in a statute, it should do so. In Citizen's United, any thoughtful law student could have written a plausible decision in favor of the plaintiff here by concluding that its anti-Hillary video-on-demand film paid for by individuals was not the kind of corporate electioneering 30 second ads on TV that McCain-Feingold intended to cover, thereby never reaching *Austin* and *McConnell*. Instead it simply asserted that such grounds were "unsustainable" and used a "facial" First Amendment test, even though the plaintiff had not made such arguments part of its original petition and it had not been argued in courts below or in the first Supreme Court hearing.

All courts require that there be a real "case or controversy" before deciding a dispute between parties to avoid a majority of justices from deciding one day that it doesn't like some law or ruling and to assure that a real dispute be fully argued by interested parties. Not here. Roberts simply declared that there was "a difference between judicial restraint and judicial abdication" (a point he did not make in his confirmation hearings), even though not one corporation, union of State had petitioned the court since *Austin* to overturn that precedent. Or as Justice Stevens witheringly put it in his dissent, the court wasn't "asked to reconsider *Austin*" but rather "we have asked ourselves."

***Censorship of Corporations.** To read the majority decision is like an excerpt from *Atlas Shrugged* or a CATO Institute report - corporations are always small and gagged. Again and again the Court decries a " categorical ban" on disfavored speakers" and on the "basis of the speaker's corporate identity"; "the censorship is vast in its reach."

Forgive me but what planet are they on? Of course corporations spend billions on lobbyists, lawyers, advertising and PACS, not to mention owning newspapers and TV/radio stations, allowing them to get their point of view across loud and clear. The McCain-Feingold limits are not trivial but apply only to one form of advocacy -- independent ads using candidates' names and just before an election. Justice Scalia let the ideological cat out the bag when, in the concluding line of his concurrence, he wrote, "to exclude or impede corporate speech is to muzzle the principle agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate."

***Corporate PACs.** If the five justice majority maintain that corporations are significantly disadvantaged in the political arena, how does it explain the reality of thousands of business PACs spending hundreds of millions each election cycle? It doesn't. The court simply announces that PACs are "separate organizations." It's as if they're not created by managers and funded by them and shareholders and as if they're not extensions of the company. As Justice Stevens notes, "that is, of course, the whole point of the PAC mechanism." And can anyone recall the GM PAC arguing for The Employee Free Choice Act and stricter workplace health and safety laws, or the UAW PAC arguing against them?

In case the counter-intuitive assertion that PACs are separate entities doesn't fly, Justice Kennedy adds another tenuous argument: "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." So why are there so many of them? Lobbyists too must comply with reporting requirements in pursuit of their First Amendment right to petition their government, but no one has (yet) challenged their constitutional justification.

***Corporations are Jus' Folks.** The majority opinion used a lot of words to say what Anatole France pointed out in his mocking observation that "the law, in its majestic equality, forbids rich and poor alikes to sleep under bridges, beg in the streets or steal bread."

What none of the five conservative justices admit or face is the obvious fact, to put it inelegantly, that size matters and that corporations aren't natural persons.

It's one thing for a person, even a wealthy person, to speak or run some ads, quite another when at issue are entities controlling trillions of dollars in shareholders funds, just as TR understood in 1907 and McCain-Feingold in 2002. Other laws (securities, antitrust, workplace safety) distinguish between entities of varying size and corporate versus non-for-profit status. No such distinctions, however, in the majority opinion. Or to use a distinction the Court would understand, imagine if one side of a case had three hours to argue before the bench while the other side had three minutes, because of their disparate resources.

The majority has no sense of consequence when it completely ignores both how a) corporations are granted special privileges of limited liability and perpetual life, unlike natural persons and b) can overwhelm and control elections and democracy by the weight of their wealth.

***Shareholders' Money.** The majority does at least acknowledge that shareholders money is being spent out of the corporate treasury. Their analysis is - so what? It blithely maintains

that all political communications are paid for by someone and come from some economic activity, corporate or individual; any problems can be corrected by changes in corporate governance rules.

This is truly form over substance. First, shareholders invest in for-profit corporations to earn a return in the marketplace, not to influence elections, which they can do on their own or in political association with others (the NRA, NARAL, the GOP). It's fundamentally a bait-and-switch to grant corporate charters that allow private actors to raise funds for economic purposes and then permit these vast treasuries to be spent for political candidates.

As for corporate governance giving shareholders a greater say, exactly how often has a shareholders' resolution been passed over management's opposition? (Private observation: in the late 1970s, I would periodically debate lawyer Antonin Scalia before bar and business groups on the issue of corporate governance - he would charmingly and confidently always oppose expanding shareholder and Board prerogatives.)

***Quid Quo Pro Corruption**. A case that the Court frequently relies on, Buckley, said that Congress could limit corporate and labor contributions sent directly to candidates because of the appearance or fact of having a corrupting influence. But Kennedy et. al. simply assert that there can be no such quid pro quo corruption in this case since independent expenditures are "independent" of candidates. Indeed, they approvingly note that, in the *McConnell* opinion, here was no evidence of actual corruption in 100,000 pages of proceedings.

That reminds of me former Speaker Carl Albert's observation that he'd "feel a whole lot better if just one of them [judges] had run for sheriff once." There are of course few proven cases of quid pro quo corruption because it's hardly likely that a donor and candidate would voluntarily admit to a criminal motive when they can always cite some vague principle to justify legislatively interested money ("free enterprise", "limited government", "workers' rights"). And there's no need to tell an incumbent what will happen if s/he votes "wrong" since no one gets elected being so dumb as not to understand what may happen if you oppose ExxonMobil or The Chamber of Commerce on a matter of real interest to them. (One former Massachusetts congressman told me that when he complained about implied threats from a lobbyist for a big trade group, the lobbyist answered, "you think I like this any more than you do?")

Also, during an election and certainly after one, there's no chance that a successful candidate won't know who spent money "independently" to secure his victory and who s/he might "owe." That's not criminal but certainly has the appearance of influence if not corruption.

***First Amendment Exceptions.** The very first amendment is a bulwark of democracy, but of course the judiciary has carved out various exceptions to the explicit words that "Congress shall make no law..." A speaker cannot set up a 100 decibel sound system at midnight in a residential neighborhood; civil servants can't give to candidates under the Hatch Act; prisoners and soldiers can't speak without constraint, nor can foreign nationals; and pornography to children isn't constitutionally protected.

So could there also be come constraints on the political pornography of going back to the Guilded Age when candidates and corporations merged, when there was by all appearances a Senator from Standard Oil?

The *Citizen's United* majority discounts all such exceptions as, well, exceptional. Laws limiting civil servants, prisoners and the military are said to be necessary to the effective administration of government functions; that's true. But that reasoning could easily conclude, as the Congress and half the states have, that McCain-Feingold and state limitations were necessary to the effective functioning of elections.

Courts rightly have said that only a "compelling reason" under a "strict scrutiny" test could constrain speech. Isn't the avoidance of corporate dominance of elections and the appearance of purchased politicians such a compelling reason?

***Media Corporations.** The majority makes the interesting slippery-slope point that if McCain-Feingold can limit the expression of corporate opinions, could a court apply that reasoning to newspapers owned by corporations or even books; it actually rhetorically asked if the novel *Mr. Smith Goes to Washington* could be banned.

Only very smart lawyers dancing on the head of a pin could make this *reductio ad absurdum.* First, this issue was not before the Court since *Citizen's United* was a private not-for-profit entity, not a media company. Second, the Founders were very clear about protecting the freedom of the press, not the freedom of corporations which were nowhere mentioned in the Constitution. Last, courts can easily distinguish between Merck or Mobil and *The New York Times* or *Mr. Smith*. Of course, if a person or group wanted to create a media company or subsidiary to promote their point of view, they can do so, and have - like *The Washington Time.*

***Speculation.** Finally, when confronting other unanswerable questions about its unprecedented decision, the court majority just surmises away. They in passing note that McCain-Feingold might just be an "incumbent protection act," a motive that the Court can't know and one which completely contradict Chief Justice Roberts's pious prior pronouncements about deference of the legislative branch.

Then the majority opinion concludes that a rise in corporate spending and influence "will not cause the electorate to lose faith in our democracy." Since Congress and many state legislatures have concluded the opposite - and with headlines and polls today blaring the opposite - what is his evidence for this editorial opinion? None is offered.

In fact, the *Citizen's United* decision is grounded in repeated speculation, assertion, leaps of logic, selected use of dissents, exaggerated hypotheticals
and a complete indifference to the reality of elections. (But why should only conservative jurists use the slippery slope? If the Court's reasoning is correct, why can't corporations vote or run for office as equivalent natural persons can? Like corporate logos on racing cars in the Indy 500, let's just make it official.)

So why did five justices really go out of their way to reverse a century of law and precedent? Because they could.

This is the ultimate example of what conservatives used to call a results-oriented decision. Like *Bush v. Gore* before it, instead of law and reality leading to a conclusion, a conclusion created law and reality.

And as Congress and the grassroots respond to this deeply radical result, there will be a backlash producing new laws or new justices that make clear that Kennedy, Roberts, Scalia, Alito and Thomas will eventually enjoy the same reputations as those justices who

passionately argued in *Dred Scott* and *Plessy v. Ferguson* why the law required white supremacy.