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CITIZENS UNITED AND THE ROBERTS COURT'S WAR ON DEMOCRACY

Gene Nichol*

There has been much hysteria expressed about the Roberts Court's decision in *Citizens United v. Federal Elections Commission*.[1] The American Constitution Society called it "the most aggressive intervention into politics by the Supreme Court in the modern era."[2] The Washington Post declared that the ruling "shakes the foundation of corporate limitations on federal state elections that stretch back a century."[3] Jonathan Turley said the decision "will bring on a tsunami of sewer money."[4] Fred Wertheimer concluded that the justices "had no idea what they were unleashing."[5] Senator Russ Feingold charged that the members of the majority "completely disregarded their oaths" of office.[6] Ronald Dworkin tagged *Citizens United* as "the decision that threatens democracy."[7] Richard Hasen pronounced January 21, 2010 "a bad day for America."[8] Even our cerebral, too dispassionate President claimed "the Supreme Court reversed a century of law that I believe will open the floodgates for special

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1. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

2. *See* MONICA YOUN, *CITIZENS UNITED*: THE AFTERMATH, AM. CONSTITUTION SOC'Y (June 2010), *available at* http://www.acslaw.org/files/ACS%20Issue%20Brief%20-%20Youn%20Citizens%20United.pdf.

3. Robert Barnes & Dan Eggen, *Court Rejects Corporate Political Spending Limits*, WASH. POST, Jan. 22, 2010, at A1.

4. Jonathan Turley, *Citizens United* Ruling Brings on "Tsunami of Sewer Money," Nov. 3, 2010, http://jonathanturley.org/2010/11/03/citizens-united-ruling-brings-on-tsunami-of-sewer-money.html.

5. Fred Wertheimer, *POLITICO Op-ed by Democracy 21 President Fred Wertheimer: Court's corruption of election law*, DEMOCRACY 21, Dec. 15, 2010, http://www.democracy21.org/index.asp?Type=B_PR&SEC=%7BAC81D4FF-0476-4E28-B9B17619D271A334%7D&DE=%7BD2BF405D-127F-4DCC-B9AD-C95CC2012B46%7D.

6. Robert Barnes, *In Wis., Feingold Feels Impact of Court Ruling*, WASH. POST, Nov. 1, 2010, at A8, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/31/AR2010103104314.html.

7. Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. OF BOOKS, May 13, 2010, at 63–67.

8. *See* Richard Hasen, Citizens United*: What Happens Next?*, POLITICO (Jan. 21, 2010), http://www.politico.com/arena/perm/Richard_Hasen_1FE691B8-7BF2-481C-B3BC-BB4072BC1703.html.

interests—including foreign corporations—to spend without limit in our elections."[9] This apparently goaded Justice Samuel Alito to mouth the words "not true" at the State of the Union address as if he were a mere congressman from South Carolina.[10]

It is my assignment, as I understand it, to contribute to, and expand upon, this unsophisticated hysteria. I am honored to do so. We all have our parts to play. Especially since, unlike most of today's panelists, I'm not really an election law expert. I have, however, worked on an array of these issues as an activist for a good while. And I've surely had more experience losing elections than anyone else you're likely to hear from during these deliberations.

I. PROCESS

I begin by saying there are a few things about the *Citizens United* case that make me cranky. The first, I'm confident, we can agree about. On behalf of law students, professors, and all others not paid by the hour, I am sick of 175, 200, and 250 page opinions. I like Justice Stevens well enough, but an 88-page dissent is absurd, and cruel. I don't care if he did apologize for it.[11]

And speaking of cruelty, especially at a law review conference, in the majority opinion, to bolster his claims, Justice Kennedy wrote: "*Bellotti*'s dictum is thus supported only by a law review student comment, which misinterpreted *Buckley*."[12] Then he cites the unfortunate University of Pennsylvania student comment. Imagine being singled out explicitly in a Supreme Court opinion, explaining how lousy your student work product is. Good lord.

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9. President Barack Obama, Weekly Address (Jan. 23, 2010) (transcript available at www.whitehouse.gov).

10. Martin Kady, *Justice Alito mouths 'not true,'* POLITICO, Jan. 27, 2010, http://www.politico.com/blogs/politicolive/0110/Justice_Alitos_You_lie_moment.html.

11. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 931 (2010) (Stevens, J., concurring in part and dissenting in part) ("I regret the length of what follows, but the importance and novelty of the Court's opinion require a full response.")).

12. *Id.* at 909 (majority opinion) (citing Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U. PA. L. REV. 386, 408 (1977)).

Second, on the cranky front, save us from these passive, modest jurists—judges who "just call balls and strikes."[13] Plenty has been said about this grotesque hypocrisy, in this meeting and elsewhere. So I won't go on about it here. My favorite fusillade, thus far, though, is Senator Arlen Specter's claim in his farewell address that Chief Justice "Roberts promised to just call the balls and strikes and then moved the bases."[14] But reaching so hard, overruling so much, dusting off so much, bringing up matters on their own, scheduling re-argument, effectively filing their own action—these are hardly the hallmarks of temperate and restrained justices. Then, remarkably, Justice Kennedy began the opinion explaining that "we are asked to reconsider *Austin*, and, in effect, *McConnell*."[15] I suppose he was reluctant to say, "we've asked" ourselves. Justice Scalia got it right two years ago when he chided that this "faux judicial restraint is judicial obfuscation."[16]

I don't mind all this too much myself. There are, in fact, no non-activists on our high court. But I do wish we could take the "deferential, minimalist, strict constructionist, referee, balls and strikes" jargon out of our judicial-political repertoire. It is nauseating, if nothing else.

Third, speaking of Justice Scalia, God save us from the "occasional originalist."[17] No vision of the original meaning of the First Amendment could support this decision unless it's rooted in such a lofty and controverted level of generalization that it loses all its cabining possibility. And constraint, of course, is the basis for originalism's power.[18] We now require not only a theory of

13. This is the role Chief Justice Roberts declared for himself, famously, in his confirmation hearings. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John Roberts, nominee, Chief Justice of the U.S. Supreme Court).

14. Jennifer Rubin, *Did the No Labels Folks Read Arlen Specter's Speech?*, WASH. POST (POST OPINIONS), Dec. 23, 2010, http://voices.washingtonpost.com/rightturn/2010/12/did_the_no_labels_folks_read_a.html.

15. *Citizens United*, 130 S. Ct. at 886.

16. *See* Fed. Election Comm'n. v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) (Scalia J., concurring).

17. *See* Gene Nichol, *Justice Scalia and the* Printz *Case: The Trials of an Occasional Originalist*, 70 U. Colo. L. Rev. 953 (1999).

18. *Id.*

originalism, but a theory that explains—in the affirmative action cases,[19] the voting rights cases,[20] the Tenth Amendment cases,[21] and the corporate speech cases—when one is, apparently, supposed to reject the theory he otherwise espouses.

Fourth, and more real. These objections are mere matters of etiquette. No one who reads actually thinks John Roberts is an incrementalist or Antonin Scalia an originalist. Campaign finance law is lousy.[22] The Congress and especially the Supreme Court, by constantly leaving only half of various regulatory programs standing, have made it inconsistent, infuriating, and incomprehensible.[23] I don't deny that. It is chocked full of distinctions without a difference and loopholes that are, well, loopy. Still, *Citizens United* marched up the hill to declare—enthusiastically, unnecessarily, and probably unalterably—that corporations are free to spend unlimited amounts of money from their astonishingly ample treasuries in federal, state, and local elections to support or defeat candidates.[24]

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19. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

20. Shaw v. Reno, 509 U.S. 630 (1993).

21. *See* Printz v. United States, 521 U.S. 898 (1997).

22. *See* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985).

23. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (invalidating much of massive campaign finance law and setting up unpersuasive distinctions between contributions and independent expenditures, gift limits and expenditure caps, etc.); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978) (candidate races versus ballot measures); Nixon v. Shrink Mo. Gov' P.A.C., 528 U.S. 377 (2000) (similar); McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (similar); Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008) (invalidating millionaire's amendment).

24.

> Those choices and assessments, however, are not for the Government to make. 'The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people and the Government may not prescribe the means used to conduct it.'

Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 917 (2010) (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 341 (2003)).

II. IMPACT

There are many things that can be said about that. The one I can't get past is this. Let's say that North Carolina Senator Kay Hagan is trying, as she was a few months ago, to decide whether to support a bill taxing these obscene, hand-out driven, bank bonuses. Assume, for purposes of discussion, that she is troubled by the notion that bonuses for millionaires and billionaires, who wrecked the economy, are wrung from the modest wages of waitresses and coal miners. After *Citizens United*, Bank of America's lobbyist can come into her office and say, I would suppose, directly or indirectly, vaguely or bluntly, privately or publicly: "If you're our friend in this, if you're supportive of banking freedom and the marvels of free financial markets, we're prepared to spend a couple million in ads on your behalf next year. If you're against us, we're inclined to spend a couple of million to take you out. Here's to Thomas Jefferson and the First Amendment."[25]

Perhaps it will be necessary to be somewhat veiled about it. Though, I don't think so. As the *New York Times* has reported, the nation's most prestigious and lucrative lobbying firm lawyers indicate that they are, unsurprisingly, informing their clients that "lobbyists can now tell any elected official: if you vote wrong, my company . . . will spend unlimited sums advertising explicitly against your re-election."[26]

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25. I readily concede, of course, that the "independent" expenditure bullying that *Citizens United* opens up for corporate and union treasuries could, already, likely occur at the hands of wealthy individuals, and perhaps various political action committees or 527s. *See* Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008) (invalidating millionaire's amendment). In my judgment, this too is wrong, and at odds with a sensible interpretation of the ground rules of an egalitarian democracy. But the volume of such expenditures—given the size of corporate treasuries—embraced by *Citizen United* will literally swamp any system of campaign finance regulation. I have little doubt that is the ruling's purpose.

26. David D. Kirkpatrick, *Lobbies' New Power: Cross Us, And Our Cash Will Bury You*, N. Y. TIMES, Jan. 22, 2010 at A1, *available at* 2010 WLNR 1385477 ("The Supreme Court has handed lobbyists a new weapon. A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election . . . . 'We have got a million we can spend advertising for you or against you—whichever one you want,' a lobbyist can tell lawmakers, said Lawrence M. Noble, a lawyer at Skadden Arps in Washington and former general counsel of the Federal Election Commission.").

Or, in the alternative, lobbyists might now simply re-trace the pattern described by Judge Michaels of the Fourth Circuit in his opinion in *Right to Life v. Leeke*.[27] There, representatives of commercial hog farmers filmed threatening advertisements and brought them in for individualized screenings with the congressmen. They learned, then, that it was unnecessary to actually purchase and run the spots. The battle was won without the necessity of firing the shot. And what is now true for presidential and congressional elections, is, of course, true across the land, at all levels of government, and in all branches of government, including judicial elections. It is fascinating, as others have noted,[28] and comical to compare *Caperton v. Massey Coal*[29] with *Citizens United*.

A few months ago in North Carolina we celebrated the fiftieth anniversary of the sit-in movements launched in Greensboro. After the courageous demonstrations had been underway for a couple weeks, Dr. Martin Luther King came to town to support the students. He said, pointedly, that these four young men had shown that the brutal practices of segregation and the high promises of the Constitution couldn't be squared.[30] He then added, in a statement I've long loved, "[A]nd all the dialectics of all the logicians in the world can't make them lie down together."[31]

The *Citizens United* ruling is not as important as integration. I'm not saying that. But the notion that "if you don't come my way, I'm dropping a couple million to take you out"—which is now lionized, sanctified, beautified, beatified, and deemed essential core sacred political discourse—is a reality that cannot "be made to lie down" with the concept of egalitarian democracy. And all the wrangling and linguistics and hermeneutics and metaphysics of "all the" constitutional theorists "in the world" can't make it otherwise. And I think we know it. It's like Lyndon Johnson once said, "We may not

27. N.C. Right to Life v. Leake, 535 F.3d 274, 335–36 (4th Cir. 2008) (Michael, J., dissenting).

28. Youn, *supra* note 3.

29. Caperton v. Massey Coal Co., 129 S. Ct. 2252 (2009) (large independent expenditure in judicial election creates sufficient appearance of corruption to require recusal as matter of due process).

30. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63, at 244–277 (1988).

31. *Id.* at 275.

know much, but we know the difference between chicken shit and chicken salad."[32]

III. MAKING REGULATION USELESS

Citizens United renders all campaign finance limitations silly and ridiculous. That may be the purpose, of course. I have worked for decades to foster various caps on campaign contributions. But even I think it is absurd to say that an individual should be limited to giving one or two or three or four thousand dollars when a corporation, across the county or across the country, can spend millions to affect the outcome of an election. If *Buckley v. Valeo*[33] has created an unsatisfactory set of distinctions and compromises to undergird and shadow the regulation of money in American politics, *Citizens United* shoves the wobbling structure over the cliff. What's left in its place, of course, is an inviolate right to use wealth to dominate the operation of the political process.

Citizens United won't fix the tedium and inconsistency of campaign finance law. It just swamps it in a corporate tide. We will still be in the business of drawing absurd lines. A lot of state legislatures, like my own, are not happy with the decision. So they will now pass corporate governance laws to try to get at the problem. Perhaps shareholders will be required to bestow permission for such political expenditures. Maybe statutes will even require stockholder super-majorities. The five Justices constituting the *Citizens United* majority will, no doubt, rebel at this. No one wants to let his landmark ruling be sidestepped by mere fancy corporate-governance footwork. So we will, soon, constitutionalize various principles of corporate organization. And we will do that, rather obviously, out of whole cloth. Such are the wages of recognizing the inherent, natural rights of artificial, state-created entities. Wait and see.

32. *See* Intelligence Quotes, http://www.amusingquotes.com/h/i/Intelligence_1.htm (last visited Mar. 24, 2011).

33. 424 U.S. 1 (1976).

Nor will even the political supporters of *Citizens United* ultimately be thrilled, I'm guessing, when the corporate subsidiaries of various foreign governments are unleashed into the American electoral process. Relatively few of our leaders would take delight in the prospect of the Chinese or Saudi Arabian governments debating, in each cycle, how much money to invest in our elections. So, I assume, eventually, we'll get laws against that and then constitutional constraints on those laws—even though they'll be inconsistent with the theory of *Citizens United*.[34] But we'll develop rules about foreign ownership; how much foreign ownership, how much stock? I support the "one shareholder" rule myself—if a corporation has even a single foreign shareholder, it would be barred from exercising the rights declared in *Citizens United*. Again, the Court would likely invalidate such a move, but I'm not sure, analytically, how one distinguishes between one percent and seventy-five, or fifty, or thirty. Whatever rules unfold, they will be endless and arbitrary and unrooted in the American Constitution.

The core of *Citizens United* is premised on an assumption that no one, literally no one, involved in politics believes to be true. Justice Kennedy's lynchpin is the following: the "absence of prearrangement and coordination of expenditures"—the formal independence from a campaign—"defeats concerns for corruption or the appearance of corruption, and eliminates the risk of improper influence on or commitments by candidates."[35] Interesting, I suppose. But no one who has been within one hundred yards of an electoral campaign believes it.

Now we shall have the disclosure battles as well. The 2010 off-year congressional races were deluged with massive, secretive, purportedly independent, expenditures. The election was, all told, the most costly and least transparent midterm in our history.[36] In it, we witnessed embarrassing claims by the Chamber of Commerce and

34. *Citizens United* purports to reject distinctions in speech regulation based on the identity of the speaker. The notion would not seem to be geographically bound.

35. Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876, 902 (2010).

36. Gene Nichol, *Campaign Reforms, Supremely Trashed*, RALEIGH NEWS & OBSERVER, Dec. 13, 2010, at A8, *available at* 2010 WLNR 24649360.

various other corporate millionaires about the essential requirement of anonymity in the funding of electoral expenditures.[37] The need to throw one's financial weight around without being held accountable by customers or shareholders was equated, shamefully, with the threat of terror directed against NAACP members in civil rights era Alabama.[38] I guess there is not much people won't say.

I don't think of myself as a campaign finance scholar. But, as I've said, I have worked on this issue, in one way or another, for many years. Like Yogi Berra, I'm also not much of a prognosticator. Especially about the future. But I do remember thinking, and arguing, over two decades ago, against spirited claims for the total deregulation of campaign finance. The best system, the theory then went, rejects all limits on contributions and expenditures, in favor of quick and complete disclosure. I remember arguing, in response, that the moment powerful corporate economic forces achieve deregulation, we will begin to hear claims that disclosure, too, must be barred. Big spenders, the assertion goes, should not be made to risk their profits while funding the political opponents of their customers. Not even the market should get in the way of rich folks purchasing politics. For once, it seems, I was right.

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37. Eric Lipton et. al., *Top Corporations Aid U.S. Chamber of Commerce Campaign*, N.Y. TIMES, Oct. 22, 2010, at A1, *available at* http://www.nytimes.com/2010/10/22/us/politics/22chamber.html?scp2&sq=chamber%20election&st=cse.

38. Theodore Olson, winning counsel in *Citizens United*, spoke critically of the Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 4795, 111th Cong. (2010), arguing, "Though it comes wrapped up in language of 'transparency', the plain intent of the Schumer and Van Hollen legislation—the purpose invoked by its sponsors—is to discourage people from exercising their right to free speech." Press Release, U.S. Chamber of Commerce, U.S. Chamber: Schumer & Van Hollen Bills are Brazen Attempt to Silence Free Speech on Eve of Elections (Apr. 29, 2010), *available at* http://www.uschamber.com/press/releases/2010/april/us-chamber-schumer-van-hollen-bills-are-brazen-attempt-silence-free-speech (quoting Theodore Olson, Counsel for Citizens United)). Olson compared the right of corporations to "speak" with the right to be free from harassment articulated in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); *see also* Brennan Center, Campaign Finance Disclosure, http://www.brennancenter.org/content/section/category/disclosure.html (last visited Mar. 23, 2011).

IV. WEALTH AND DEMOCRACY

What increasingly emerges from the Roberts Court's campaign finance decisions, like a mountain appearing through the receding mists, is a foundational conclusion that the United States Constitution, ultimately, secures a power for people of wealth to use their disproportionate economic resources to get their way in our politics. It is unsurprising, therefore, than even public funding programs are now decidedly within the Court's sights. The upcoming *McComish* case[39] will likely invalidate funding plans that employ "rescue" funds—triggered when opponents massively outspend participating publicly-financed candidates. This will, no doubt, render many public funding plans unattractive to competitive candidates. Who wants to unilaterally disarm with no corresponding means of reply? But I doubt that this half-step will prove sufficient, in the longer course, for the *Citizens United* majority. After all, if the natural order of things calls for the wealthy to have a disproportionate share of political power, any public financing move disturbs the claims of inherent worth and justice.

As one contemplates the Supreme Court's moves to augment the protection of economic influence in our democratic decision-making, it is helpful, if jarring, to note Larry Bartels' highly-regarded study, published two years ago, entitled "Unequal Democracy: The Political Economy of the New Gilded Age."[40] In it, Bartels demonstrated, by an extensive exploration of floor votes, polling data, constituent preferences, economic status, campaign contributions and the like—for a six year period in the United States Senate—that the "views of poor people had no direct effect on the behavior of either Democrats or Republicans after they were elected."[41] Senators showed an "utter lack of responsiveness to the views of millions of people whose only

39. *See* Robert Barnes, *Supreme Court to Weigh Constitutionality of Arizona Public Campaign Finance Law*, WASH. POST, Nov. 29, 2010, at A2, *available at* 2010 WLNR 25816267; *see also* Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y. 283 (2010).

40. LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2008).

41. *Id.* at 280–82 (emphasis omitted).

distinguishing characteristic is their low income."[42] Economic inequality, Bartels claimed, "has pervasive, corrosive effects on political representation and policy-making in contemporary America."[43] In Aristotelian terms, he concluded, we operate as oligarchy, not democracy. The "opinions of . . . ordinary citizens in the bottom third of the income distribution have no discernible impact on the behavior of their elected officials."[44]

Bartels study mirrored another, broader, report published by Martin Gilens, in 2005. It concluded that "the well-off are vastly more likely to see their views reflected in subsequent policy changes" than their economic inferiors. Influence over "actual policy outcomes appears to be reserved almost exclusively to those at the top of the income distribution."[45]

Citizen United, *Davis*,[46] *Wisconsin Right to Life*,[47] and, I fear, *McComish*[48]—these decisions say, at bottom, that there is something about our Constitution that means we are flatly powerless to deal with the scourge of purchased politics. This cannot be so. It is dangerous and demeaning to the world's strongest democracy to suggest that it is.

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42. *Id.* at 285.
43. *Id.* at 284.
44. *Id.*
45. Bartels, *supra* note 41, at 286 ("[R]epresentational biases of this magnitude call into question the very democratic character of our society." (quoting Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OP. Q. 778–96 (2005)).
46. Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008). .
47. Fed. Election Comm'n v. Wisc. Right to Life, 551 U.S. 449 (2007).
48. *McComish* presents a challenge to Arizona's public campaign financing program. It is being argued before the Supreme Court in March 2011. The consolidated cases are *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett* (No. 10-238) and *McComish v. Bennett* (No. 10-239).