

Citizens United: Robbing America of Its Democratic Idealism

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Abstract: The 2010 Citizens United ruling has been widely reviewed from the lens of legal precedent. In this critique, the author suggests the need to examine the logic and effects of the ruling from a historical, philosophical, and linguistic perspective. He challenges the Court's basis for providing inanimate entities First Amendment protection to "invest" in politics by equating corporations with individuals and money with speech. He holds that Citizens United employs parallel logic to the syllogism embedded in the most repugnant ruling the Court ever made, the 1857 Dred Scott decision. To justify slavery, the Court in Dred Scott defined a class of human beings as private property. To magnify corporate power a century-and-a-half later, it defines a class of private property (corporations) as people. The effect is to undercut the democratic basis of American governance.

HAVING traveled to every state in the union and spoken with people in hundreds of venues over the past several years, I have become convinced that our country has never been more blessed with extraordinary leadership in almost every field of human endeavor, from business to medicine, from the arts to academia. Yet it is becoming harder for thoughtful, independent-minded leadership to emerge in the political system.

As money conflicts have multiplied and ideological cleavages intensified, the will and capacity of representatives of the people to mediate social differences are breaking down. Compromise may have once been the art of politics, but intransigence is the new art of political survival. If a legislator in today's environment chooses to seek common ground on an issue – that is, compromise – he or she becomes vulnerable to a primary challenge in which participation is low and money games are unforgiving.

When I first ran for public office, the joke was that no smart candidate should ever argue with those who buy ink by the barrel, a.k.a. the press.

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Today, a not-so-funny corollary is that a smart candidate should never argue with those who buy ads by the bushel. Under the contemporary “win at all costs” political ethic, the first thing the new breed of political consultants tells their clients is to throw civility out the window. Civility requires a willingness to consider respectfully the views of others and an understanding that we are all connected and rely on each other. These ideas are anathema to those who now manipulate so much of the political process.

Yet seldom is there only one proper path determinable by one individual or one political party. Public decision-making does not lend itself to certitude. That is why humility is a valued character trait and why civility is an essential component of civil society.

To be clear, civility is not simply or principally about manners. Indeed, on Capitol Hill polite words are sometimes more problematic than raucous ones. Consider this example of a typical conversation between a lobbyist and a legislator walking to or from a vote on the House floor: “Congressman, as you know, we maxed out for you in the last election, and we and our allies sure hope to be able to more than match that support this fall. But please understand that tomorrow a bill of importance to us is coming up on the floor (or in your committee) and we would sure appreciate your support. By the way, how are your wife and kids?” Politely stated, but there is no reference to the common good. Instead, coercively implied is an ongoing, quasi-contractual relationship between an interest group and a public official.

These implicit uncivil contracts can be coercive even if never discussed because corporate power, newly magnified by the 2010 *Citizens United* decision, can so easily reward a candidate or inflict political retribution. On the assumption, for instance,

that politicians have an instinct for political survival, a key component of which is a desire to raise campaign revenues and suppress opponent treasuries, why in a corporatist political system would a politician want to speak up against the drug companies or gambling interests or investment banks if corporate monies can quickly be shoveled into campaigns?

Over our tumultuous history, the U.S. Supreme Court has generally been at the forefront of advancing justice and protecting the rule of law. But from time to time, our politics and the Court have been out of step with our deepest ideals. For almost nine decades after our founders signed the Declaration of Independence, affirming that all men are created equal, a number of states sanctioned slavery; and until the Civil War, the Supreme Court formally upheld this egregious assault on human dignity.

Brazenly, in *Citizens United*, the Court employed parallel logic to the syllogism embedded in the most repugnant ruling it ever made, the 1857 *Dred Scott* decision. To justify slavery, the Court in *Dred Scott* defined a class of human beings as private property. To magnify corporate power a century-and-a-half later, it defined a class of private property (corporations) as people. Ironies abound. Despite overwhelming evidence to the contrary, the mid-nineteenth-century Court could see no oppression in an institution that allowed individuals to be bought and sold. In the *Citizens United* ruling, despite overwhelming evidence to the contrary, the Court implied that corporations were somehow oppressed—in this case considered to be censored—and therefore should be freed to buy political influence and sell opposing candidates down a river of negativity.

How are corporations oppressed? Do corporate leaders not have free speech

and the right to give campaign contributions like all other citizens? Have they and the political action committees (PACs) that they control not already been over-empowered to infuse millions into the political process? Is it an accident that as the influence of moneyed interests has increased in American politics, the gap between the rich and poor has widened?

To advance the sophistic argument that more money in campaigns equates to more democracy, the Court had to employ a linguistic gyration. It presumed that *money is speech* and that a *corporation is an individual*. But where in any dictionary or in any founding documents are these equivalencies made?

Speech is the act of expressing thoughts, feelings, or perceptions by the articulation of words. It is a vocalized form of human communication. In pejorative jargon, money may “talk,” but precisely defined, money is a medium of exchange, a measure of value, or a means of payment. In the manner it is used in politics it can be considered a campaign contribution. It is not “speech” in terms of what any strict constructionist could conceivably believe the First Amendment addresses.

A corporation is an artificial creation of the state, which in turn is a creation of the people. To vest an inanimate entity with constitutionally protected political rights makes mockery of our individual rights heritage. While corporations as a “legal fiction” have been given analogous status to individuals in aspects of commercial law, citizenship rights are of a very different nature. A corporation cannot vote or run for office. The inspiring words of our founders were about free men born with inalienable rights. It is they who speak. It is they who can assemble. It is they who are considered equal among each other.

To hold that a corporation is a person with citizenship rights simply does not

square with the Declaration of Independence. All men may be created equal in relation to each other, but not necessarily in relation to corporations or, under *Citizens United*, in relation to how corporations may empower some individuals relative to others. There is great inequality between corporations, no equality of individual and corporate “personhood,” and no equality of individuals when one with many corporate ties may have more capacity to influence decision-making than one with none or just a few.

Multiple personality disorder may from time to time seem to describe a candidate in regard to stances taken, but it never was intended to define the political system itself. More money is not more democracy.

Corporate larceny is at issue; so are democratic values. To presume that corporate money can be construed as “speech,” that speech for many will be coerced rather than free. After all, to tap for political purposes the assets of shareholders or by implication union members, more than a few of whom can be expected to hold different political judgments than management or union stewards, is a “taking” of their assets, a perversion of their “speech,” a diminution of their political rights.

What the Court has done is reason by analogy rather than constitutional logic. But analogy, like metaphor, is more suited to poets than jurists. When used in *Citizens United*, the analogies are not convincing. Music, for instance, is more analogous to speech than money is. Money may be used to buy many things, including influence, and when large amounts are given in the political process, conflicts of interest are created that undercut rather than embellish democracy. Likewise, a monkey or a gorilla is a closer analogy to a human being than a corporation is. But no one suggests that a

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primate be given citizenship rights. A corporation, to be sure, has shareholders, yet there is a distinction between a corporation and its ownership.

The main way “corporate-ness” can be analogized to personhood relates to its hierarchical structure. In the corporate world, one decision-maker or, at most, a collective few are accountable for how corporate resources are allocated. Authorizing corporate leaders to distribute shareholder assets – that is, other people’s money – in political campaigns thus empowers small numbers of insiders. There is no escaping the reality that the precept of corporate personhood pushes American politics in an oligarchic direction. Nor is there escaping the only justification for spending corporate assets in campaigns. Money spent in campaigns must be considered good investments for shareholders, *quid pro quos* that can be banked. Could it be that the Court’s definition of protected “speech” might more accurately be described as influence buying?

Prior to *Citizens United*, the Supreme Court implicitly recognized that citizen expression was different from issue advocacy backed by money. Hence it upheld congressionally established reporting requirements and limits on campaign giving for individuals making campaign contributions. However, in *Citizens United* corporate persons are granted “supra-man” status: limited transparency requirements and unlimited capacity to spew money into the political system. The Court’s lawmaking judgment cannot be challenged by Congress because an activist 5-4 majority has presumptuously held that the moneyed intervention capacities that it has granted corporations in the political process are protected by the First Amendment. And lacking an evidentiary basis and appreciation for

human nature, the majority concluded that independent corporate political expenditures “do not rise to corruption or the appearance of corruption.” Really? Is it not clear that under a free speech guise the Supreme Court has authorized influence wielders, in many cases masked to the public, to use unlimited resources to rob America of our democratic heritage?

Our founders were moral philosophers as well as political activists. They dwelled on a subject the Court ignores: human nature. To constrain what was implicitly considered a natural instinct of public figures to aggrandize power, John Hancock, Benjamin Franklin, and their fellow delegates to the Constitutional Convention followed James Madison’s lead and adopted a governance framework for the American republic based on Montesquieu’s separation of powers doctrine. Divided governmental authority was established in the Constitution with a similar legislative/executive/judicial model triplicated in decentralized fashion at the state, county, and city levels. The overlaps and continuous tension created between levels and branches of government were designed to bifurcate and constrain power. I note this background to underscore the human dimension of abstract principles. No politician will ever acknowledge that campaign contributions affect his or her votes or judgment. But for the public to assume that candidates whose campaigns are supported by large amounts of money from interest groups do not become indebted to these groups is to deny human nature. It is to flout how our founders thought about power and the role of citizenship.

At our country’s founding, propertyless people as well as women and slaves were denied the right to vote, and there was an original constitutional acceptance that slaves could be considered three-

fifths of a person for legislative and Electoral College apportionment. But none of our founders ever advanced the notion that one individual could be several persons and have magnified influence based on control of corporate assets.

The arc of our history that has bent toward justice has suddenly with the *Citizens United* decision twisted back to that part of our constitutional heritage that was self-evidently unjust. Property considerations have again become accentuated in a key aspect of citizenship, the injustice of which weakens the links between government and the people.

Corporatist politics has several other ramifications of a very different dimension than our founders considered. When our constitutional system was established, the founders assumed that individuals elected to Congress would come from many different backgrounds and that they would be prepared to represent vigorously their state, its interests, and its people. A consequence of Court-enhanced corporatist power is the nationalization of local elections. Candidates across the country become indebted to the same corporate groups. Candidates in farm states, for example, increasingly find that their campaigns are supported by oil companies on one side and out-of-state unions on the other, causing indebtedness to groups that often do not reflect the same views as the majority of their constituents.

Secondary effects apply to political parties. Because the new financial empowerment under *Citizens United* is provided to unions as well as corporations, the tendency will be for the Democratic Party to become more like the old, union-dominated Labour Party in Great Britain and the Republican Party less like the pro-environment, trust-busting party of Teddy Roosevelt. The irony would remain, how-

ever, that corporate power often operates with one troubling bipartisan dimension. Corporations have a tendency to align with those in either party who hold positions that may affect issues of direct concern to their interests. Corporations are generally blind to the party affiliation of those they support in legislative committees that have jurisdiction over their interests. Surprising to some, *Citizens United* thus increases the likelihood that financial interests will increase their donations to both sides of banking-oriented committees; commodity groups to both sides of the agriculture committees; the military-industrial complex to both sides of the armed services committees; and so on. Ideology has its place, but power in the commercial sphere supports power in the political domain.

Tertiary effects involve empowerment of foreign interests. Granting to corporations the right to muscle further into the political fray is complicated by the fact that shareholding by sovereign wealth funds and foreign individuals in American corporations is substantial and growing. Foreign governments, citizens, and corporations have historically been barred from making political contributions. Under the new ruling, a door has been opened to allow them to be able to influence, explicitly or implicitly, how American institutions exercise political power, whether through companies that they control as U.S. incorporated subsidiaries or through stock owned in American companies on or off public exchanges.

Equally consequential, an American corporation controlled by American shareholders may have vested interests different from the national interest. In a global economy, corporate leadership is assumed to be profit driven. When an industry outsources jobs and facilities to foreign countries, its advocacy "investments" in the American political system

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may be unaligned with citizen interests. The corporate personhood precept established in *Citizens United* thus gives foreign countries and foreign nationals with American corporate ties the prospect of becoming more powerful factors in American elections than many American citizens.

As a candidate who campaigned seventeen times for Congress, eschewing PAC and out-of-state contributions, I can attest that a troubling effect of corporate-controlled giving is that it diminishes citizen respect for the political system, the desire to vote, and even the willingness to engage in the political process by giving small contributions. Over the years, for example, constituents would come up to me on the street or at Rotary or Farm Bureau meetings and say that they had sent a check for \$20 or \$30 to my campaign that they wouldn't otherwise have if I had not adopted a policy of not accepting PAC funds. The public understands that it is of marginal significance to make a modest contribution to a candidate if that candidate receives tens of thousands of dollars, sometimes now millions, from corporate- and union-controlled funds.

It is no accident that our tax laws are loaded with loopholes, that corporate muggings are frequent in American politics. Nor is it an accident that many Americans, from tea party advocates to middle-class homeowners to the Occupy Wall Street movement, believe that they are not being listened to, that vested interests hold an improper, behind-the-scenes sway in the political life of our country.

Nuances aside, the main casualty of the *Citizens United* ruling is idealism. At a time when the country needs to pull together, the Supreme Court has chosen a path to magnify public cynicism. It has deter-

mined to protect moneyed influence peddling that obscures citizen speech and eviscerates the capacity of citizens and policy-makers to weigh competing views in balanced ways.

At issue is whether a new analytical paradigm about the First Amendment more consistent with linguistic logic, American history, and democratic values is in order. Absent a clear directive from the Constitution, absent carefully expressed views of the founders, should not the courts follow a strict constructionist approach to the meaning of our individual rights-centered democracy? Rather than conflate a corporation with a person and money with speech, should not the focus be shifted to the transactional relationship inherent in speaking and listening?

If all men are created equal, surely it follows that all citizens are entitled to have their views respectfully listened to in the public square and, after elections, to have the representatives they choose be in a position to seek common ground in pursuit of the common good, unconstrained by having their ears plugged with corporate money.

In the wake of the *Citizens United* ruling, a distinguished former justice, Sandra Day O'Connor, has been speaking out about the need for states that elect their Supreme Court justices to change to a system in which governors nominate and legislatures confirm high court nominees. Justice O'Connor sees a conflict of interest problem potentially exploding in states like Texas where huge amounts of corporate money can quickly be marshaled in support of or opposition to judicial candidates.

I share Justice O'Connor's concerns but would add that the goal of advancing equal justice under the law applies just as much to the making and administering of laws as it does to their adjudication in a courtroom. Indeed, the objective of ad-

vancing equal justice begins in the first and second estates before it becomes the responsibility of the third estate, where judges, generally speaking, are tasked with interpreting and enforcing rather than making law – *Citizens United* being a sparingly embraced, lawmaking exception.

The standard of judiciousness in the making of law is fairness, while the standard of judiciousness in the adjudication of law is allegiance to the letter of law and its constitutional framework. Hence from an equal justice perspective, the judiciary should be acutely concerned about lawmaking that empowers deep-pocketed special interests to the detriment of the common good. No judge should be placed in the position of having to uphold patently unfair laws designed to appease corporate power brokers to whom legislators or elected executives may be indebted. In this circumstance, public confidence in the judicial as well as the legislative and executive branches of government is jeopardized. A citizenry simply cannot be expected to have confidence in a judicial system in which the standard becomes equal application of unfair laws. Equal justice requires that the law itself be fair.

Many are familiar with the saying, sometimes attributed to Bismarck, that the public should not look too closely at laws or sausages being made. Law- and sausage-making are different, but what unites them is a public concern that the seen and unseen ingredients of each be integrated in as “clean” a manner as possible.

In America, process is our most important product. Our founders recognized human frailty and thus went to great lengths to attempt to erect a system that would be democratic rather than aristocratic or oligarchic. Individuals could be expected to make mistakes, but the political system was to be above reproach,

capable of evolving in ever fairer, more equalitarian ways. *Jim Leach*

Many good people enter politics only to find that the system causes the low road to become the one most traveled. Politicians routinely develop conflicts that do not technically rise to a legal standard of corruption because legislated law and now judicial fiat have weakened that standard.

The low road is traveled because it is the shortest path to office and justified because other contenders generally stampede alongside, though increasingly far from the center stripe. If a candidate chooses a less-conflicted route where few travel, the likelihood is that candidate will come up short.

Speech is thus at issue from two perspectives. At one end, uncivil speech must be protected by the courts, but filtered by the public; at the other, moneyed “speech” must not be allowed to weaken the voices of the people. The Constitution begins “We the people,” not “We the corporations.”