

THE
NEW YORKER

MONEY UNLIMITED

*How Chief Justice John Roberts orchestrated the Citizens United decision.***By Jeffrey Toobin**

When *Citizens United v. Federal Election Commission* was first argued before the Supreme Court, on March 24, 2009, it seemed like a case of modest importance. The issue before the Justices was a narrow one. The McCain-Feingold campaign-finance law prohibited corporations from running television commercials for or against Presidential candidates for thirty days before primaries. During that period, Citizens United, a nonprofit corporation, had wanted to run a documentary, as a cable video on demand, called “Hillary: The Movie,” which was critical of Hillary Clinton. The F.E.C. had prohibited the broadcast under McCain-Feingold, and Citizens United had challenged the decision. There did not seem to be a lot riding on the outcome. After all, how many nonprofits wanted to run documentaries about Presidential candidates, using relatively obscure technologies, just before elections?

Chief Justice John G. Roberts, Jr., summoned Theodore B. Olson, the lawyer for Citizens United, to the podium. Roberts’s voice bears a flat-vowelled trace of his origins, in Indiana. Unlike his predecessor, William Rehnquist, Roberts rarely shows irritation or frustration on the bench. A well-mannered Midwesterner, he invariably lets one of his colleagues ask the first questions.

That day, it was David Souter, who was just a few weeks away from announcing his departure from the Court. In keeping with his distaste for Washington, Souter seemed almost to cultivate his New Hampshire accent during his two decades on the Court. In response to Souter’s questions, Olson made a key point about how he thought the case should be resolved. In his view, the prohibitions in McCain-Feingold applied only to television commercials, not to ninety-minute documentaries. “This sort of communication was not something that Congress intended to prohibit,” Olson said. This view made the case even more straightforward. Olson’s argument indicated that there was no need for the Court to declare any part of the law unconstitutional, or even

to address the First Amendment implications of the case. Olson simply sought a judgment that McCain-Feingold did not apply to documentaries shown through video on demand.

The Justices settled into their usual positions. The diminutive Ruth Bader Ginsburg was barely visible above the bench. Stephen Breyer was twitchy, his expressions changing based on whether or not he agreed with the lawyer's answers. As ever, Clarence Thomas was silent. (He was in year three of his now six-year streak of not asking questions.)

Then Antonin Scalia spoke up. More than anyone, Scalia was responsible for transforming the dynamics of oral arguments at the Supreme Court. When Scalia became a Justice, in 1986, the Court sessions were often somnolent affairs, but his rapid-fire questioning spurred his colleagues to try to keep pace, and, as Roberts said, in a tribute to Scalia on his twenty-fifth anniversary as a Justice, "the place hasn't been the same since." Alternately witty and fierce, Scalia invariably made clear where he stood.

He had long detested campaign-spending restrictions, frequently voting to invalidate such statutes as violations of the First Amendment. For this reason, it seemed, Scalia was disappointed by the limited nature of Olson's claim.

"So you're making a statutory argument now?" Scalia said.

"I'm making a—" Olson began.

"You're saying this isn't covered by it," Scalia continued.

That's right, Olson responded. All he was asking for was a ruling that the law did not prohibit this particular documentary by this nonprofit corporation during those thirty days. If the Justices had resolved the case as Olson had suggested, today Citizens United might well be forgotten—a narrow ruling on a remote aspect of campaign-finance law.

Instead, the oral arguments were about to take the case—and the law—in an entirely new direction.

VIDEO FROM THE NEW YORKER

Lies and Truth in the Era of Trump

Supreme Court cases become landmarks in different ways. *Lawrence v. Texas*, the 2003 gay-rights decision striking down anti-sodomy laws, began with a trivial contretemps in an apartment building just outside Houston. On the other hand, the importance of the constitutional challenge to the Affordable Care Act, the signature domestic achievement of the Obama Presidency, was apparent as soon as it was filed. (A decision is expected in June.) The result in *Bush v. Gore* was important, but the reasoning turned out to be perishable; the decision has not been cited again by the Justices.

In one sense, the story of the *Citizens United* case goes back more than a hundred years. It begins in the Gilded Age, when the Supreme Court barred most attempts by the government to ameliorate the harsh effects of market forces. In that era, the Court said, for the first time, that corporations, like people, have constitutional rights. The Progressive Era, which followed, saw the development of activist government and the first major efforts to limit the impact of money in politics. Since then, the sides in the continuing battle have remained more or less the same: progressives (or liberals) vs. conservatives, Democrats vs. Republicans, regulators vs. libertarians. One side has favored government rules to limit the influence of the moneyed in political campaigns;

the other has supported a freer market, allowing individuals and corporations to contribute as they see fit. Citizens United marked another round in this contest.

In a different way, though, Citizens United is a distinctive product of the Roberts Court. The decision followed a lengthy and bitter behind-the-scenes struggle among the Justices that produced both secret unpublished opinions and a rare reargument of a case. The case, too, reflects the aggressive conservative judicial activism of the Roberts Court. It was once liberals who were associated with using the courts to overturn the work of the democratically elected branches of government, but the current Court has matched contempt for Congress with a disdain for many of the Court's own precedents. When the Court announced its final ruling on Citizens United, on January 21, 2010, the vote was five to four and the majority opinion was written by Anthony Kennedy. Above all, though, the result represented a triumph for Chief Justice Roberts. Even without writing the opinion, Roberts, more than anyone, shaped what the Court did. As American politics assumes its new form in the post-Citizens United era, the credit or the blame goes mostly to him.

Floyd Brown had worked around the fringes of the conservative movement for years before he became famous, in 1988. He was the political director of an independent campaign committee called Americans for Bush, which produced and broadcast a commercial featuring Willie Horton, a convicted murderer who received a weekend furlough in Massachusetts and then committed several grisly crimes. When the election was over, Americans for Bush had outlived its usefulness. So Brown embraced the notoriety that came with the co-authorship of the Willie Horton ad, and founded a new organization. He called it Citizens United.

Brown acquired a sidekick, a recent dropout from the University of Maryland named David Bossie. Bossie also had a passion for conservative politics and, like Brown, an entrepreneurial bent. In 1992, Brown appointed Bossie his "chief researcher," and they narrowed their focus to publicizing harsh critiques of the personal and financial affairs of Bill and Hillary Clinton. Eight years later, with the inauguration of George W. Bush, the public profile of Citizens United receded. Bossie, who had become president of the group in 2000, thought that it needed a niche to distinguish it from the other conservative organizations in Washington. Bossie's revelation came in 2004, when he first saw advertisements for Michael Moore's movie "Fahrenheit 9/11." Bossie

recognized that the documentary was doing a kind of double duty. “Fahrenheit 9/11” and the television commercials promoting it were at once political salvos against the reelection of President Bush and a potential source of profit.

Bossie decided to transform Citizens United into a movie studio, which would produce conservative documentaries. In the period leading up to the 2008 election, the Presidential candidacy of Hillary Clinton was an irresistible subject, given Bossie’s long history of opposing her and her husband. “Hillary: The Movie” was typical of the Citizens United oeuvre. It included news footage, spooky music, and a series of interviews with dedicated and articulate partisans. (“She’s driven by the power, she’s driven to get the power, that is the driving force in her life,” Bay Buchanan, the activist and the sister of Pat Buchanan, said. “She’s deceitful, she’ll make up any story, lie about anything, as long as it serves her purposes of the moment, and the American people are going to catch on to it,” Dick Morris, the estranged former Clinton Administration adviser, said. “‘Liar’ is a good one,” Ann Coulter said.)

Bossie wanted “Hillary: The Movie” to come out in late 2007, to tie it to the Presidential election in the way that Moore had pegged “Fahrenheit 9/11” to the previous race. A cable company offered, at a cost of \$1.2 million to Citizens United, to make “Hillary” available for free to viewers, on video on demand. Bossie also engineered a small run of the movie in theatres, but his real priorities were television advertisements and video on demand. Over the years, Bossie had become familiar with federal election law, so he decided he needed a lawyer, and hired James Bopp, Jr.

Bopp was raised in Terre Haute, Indiana, and in 1970 he graduated from Indiana University, where he headed the chapter of Young Americans for Freedom, the student group that propelled many Republican careers. After graduating from the University of Florida law school, he returned to Indiana to practice law in 1973, the year of *Roe v. Wade*. He decided to join the fledgling anti-abortion movement, and was hired as the general counsel to the Indiana chapter of the National Right to Life Committee. In 1978, Bopp became the general counsel to the full National Right to Life Committee.

In 1980, the group issued a series of “voter guides” before Election Day. Some have credited the guides with helping to create the landslide that put Ronald Reagan in the White House and twelve new Republicans in the Senate. They were barely concealed works of advocacy, and the F.E.C. later tried to ban them. Bopp won a First

Amendment challenge to the prohibition, and began working actively to challenge campaign-finance restrictions as well as abortion rights.

In 2002, Congress passed the Bipartisan Campaign Reform Act, usually called the McCain-Feingold law, after its original sponsors. One of the primary targets of the new law was the increasingly meaningless distinction between candidate advertisements and “issue” advertisements. For years, individuals, corporations, and labor unions had spent millions on ads that denounced candidates but technically avoided the specific language that turned a commercial into a “campaign” ad. McCain-Feingold sought to address this problem by prohibiting corporate and union funding of broadcast ads mentioning a candidate within thirty days of a primary or a caucus or within sixty days of a general election.

The McCain-Feingold law prompted the right-to-life group in Wisconsin to go to Bopp with a problem. The state had two Democratic senators, Russell Feingold and Herb Kohl, who supported abortion rights. In the run-up to the election of 2004, when Feingold was on the ballot, the right-to-life group wanted to run radio and television ads that addressed his record of opposing Bush’s judicial nominees. The ads were artfully designed to challenge Feingold without specifically discouraging a vote for him. In that way, they looked like “issue” ads, but because they ran before an election they were prohibited by the McCain-Feingold law.

Bopp wanted to argue that the McCain-Feingold ban on issue advertisements violated the First Amendment. But in 2003, in one of the last major opinions of the Rehnquist Court, the Justices had upheld most of the law against a constitutional challenge led by Mitch McConnell, a Republican leader in the Senate and a dedicated foe of all campaign-finance reform. (The case was known as *McConnell v. Federal Election Commission*.)

How could Bopp challenge a law that had just been upheld? He knew that the 2003 case was a challenge to McCain-Feingold “on its face”—that is, a claim that the law was going to be unconstitutional in all circumstances. A new case would challenge the law “as applied” against Wisconsin Right to Life. He would claim that this specific application of the law violated the group’s First Amendment rights. And Bopp didn’t wait around for the F.E.C. (a notoriously slow-moving agency) to charge his clients.

Rather, he decided to bring a preëemptive lawsuit objecting to the ban on issue advertisements before elections.

Bopp knew that he had an important advantage over the failed challenge to McCain-Feingold in 2003. As part of a five-to-four majority, Sandra Day O'Connor had voted to uphold most of the law, but she had been succeeded by Samuel A. Alito, Jr.

Bopp's confidence turned out to be justified. When *Federal Election Commission v. Wisconsin Right to Life* was decided, in 2007, the Court voted five to four to overturn the limits on the advertisements. Roberts, Scalia, Kennedy, Thomas, and Alito found the restriction on Wisconsin Right to Life unconstitutional; John Paul Stevens, Souter, Ginsburg, and Breyer would have upheld the ban on the commercials.

Chief Justice Roberts assigned the opinion to himself. He was still trying to prove that he was cautious and respectful of precedent, as he had claimed to be during his 2005 confirmation hearing. But now he was part of a majority that was, in effect, gutting a four-year-old opinion. Roberts completed this mission with typical finesse, declaring that “the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.” Roberts did not explicitly call for overturning McCain-Feingold, but he left little doubt where the Court was heading. Referring to the McConnell case, the 2003 decision upholding the law, Roberts wrote, “We have no occasion to revisit that determination today.”

“Today.” To those who know the language of the Court, the Chief Justice was all but announcing that five Justices would soon declare the McCain-Feingold law unconstitutional.

Bopp again took an aggressive tack when he began representing David Bossie's Citizens United group in its effort to broadcast the “Hillary” documentary. The movie had multiple purposes: to advance the conservative cause, to hurt Hillary Clinton's chances for victory, and to make money. The question, then, was how the F.E.C. would classify the movie and the advertisements for it. Under the F.E.C. rules, if “Hillary” was deemed a work of journalism or entertainment, like “Fahrenheit 9/11,” Bossie could show it anytime he wanted. But if the F.E.C. regarded “Hillary” and commercials for it as an “electioneering communication”—that is, as “speech expressly

advocating the election or defeat of a candidate”—then it could not be broadcast during the proscribed election periods.

Bossie went straight to the F.E.C. to get a ruling on “Hillary.” As expected, the F.E.C. ruled that the documentary amounted to an “electioneering communication.” The group then appealed to the federal district court in Washington. A three-judge panel agreed with the F.E.C., holding that the movie “is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her.”

Bossie was determined to appeal to the Supreme Court, and at this point he decided to change lawyers. Bossie may have arrived in Washington as a flame-throwing outsider, but during the previous decade he had become part of the conservative establishment. He knew that Bopp had just won the Wisconsin Right to Life case before the Justices, but Bossie’s financial life and potentially his place in history were on the line in *Citizens United*. He wasn’t going to leave his fate in the hands of a lawyer from Terre Haute.

Instead, he asked Theodore Olson to take the case. Olson was a titanic figure in conservative legal circles. Bossie first met him in the nineties, when Olson and his wife, Barbara, were outspoken fellow-critics of Bill Clinton. (Barbara Olson was killed on the plane that crashed into the Pentagon on September 11, 2001.) As a lawyer at the firm of Gibson, Dunn & Crutcher, Ted Olson had argued and won *Bush v. Gore*, and was rewarded by President Bush with an appointment as Solicitor General. Olson had argued before the Supreme Court dozens of times, and he had a great deal of credibility with the Justices. He knew how to win.

Olson, a litigator more than an activist, quickly shifted tactics in the case. He tried to narrow the issues in *Citizens United*, so that the Court would not have to take any dramatic steps in order to rule his way. He did not focus his challenge on the constitutionality of *McCain-Feingold*; he simply said, as he told the Justices at the oral argument, that the law did not apply to documentaries broadcast with video-on-demand technology, only to commercials. Then Malcolm Stewart, the Deputy Solicitor General, rose to offer his rebuttal, and a single question changed the case, and perhaps American history.

Whenever the federal government is involved in litigation before the Supreme Court, the Office of the Solicitor General handles the representation. In an age when the reputations of many government agencies have suffered, the Solicitor General's office has remained a symbol of excellence: small, élite, and respected by its most important audience, the Justices.

Since the position of Solicitor General was created, in 1870, some of the most distinguished lawyers in the country's history have served in it. William Howard Taft, before he became President and then Chief Justice, was an early S.G., and Franklin Roosevelt put two of his Solicitors General, Stanley Reed and Robert H. Jackson, on the Supreme Court. In the sixties and seventies, the office was consecutively occupied by Archibald Cox, Thurgood Marshall, Erwin Griswold (previously the longtime dean of Harvard Law School), and Robert Bork. Kenneth Starr stepped down from a judgeship in the D.C. Circuit to be George H. W. Bush's S.G.

For all that the Solicitor General serves as the public face of the office, and as an important senior political appointee, the career employees act as its principal representatives to the Court. Only two of the twenty-two lawyers in the office are political appointees, so most move seamlessly from one Administration to the next.

By tradition, the S.G. staff operates according to a different standard from that of the hired guns who generally appear before the Supreme Court. The Solicitor General's lawyers press their arguments in a way that hews strictly to existing precedent. They don't hide unfavorable facts from the Justices. They are straight shooters. This is why, in many cases, even when the federal government is not a party, the Court issues what's known as a C.V.S.G.—a call for the views of the Solicitor General. The lawyers in the S.G.'s office are not neutral, but they are more highly respected than other advocates. They dress differently, too, wearing a morning coat, vest, and striped pants when they appear in the Supreme Court.

Malcolm Stewart, the lawyer in the Solicitor General's office who argued the Citizens United case, embodied the best of the office. A graduate of Princeton and then Yale Law School, he had clerked for Harry Blackmun in the 1989 term. He joined the Solicitor General's office in 1993, and his career thrived through three Presidencies and more than forty oral arguments. He twice won a John Marshall Award, one of the highest honors in the department. Shortly before the Citizens United argument,

Stewart had been named a Deputy Solicitor General, the highest rank for a career lawyer.

The Justices say that oral arguments rarely make a difference in the outcome of cases. But in *Citizens United* Stewart's appearance was an epic disaster.

On the day of *Citizens United*, Samuel Alito appeared miserable, as usual. Alito enjoyed his job well enough, but he was uncomfortable with its public aspects. He liked reading cases and making decisions. He disliked pomp and bureaucracy. (Alito didn't even like hiring law clerks. For years, he chose clerks who had worked for him on the Third Circuit, so that he wouldn't have to interview new ones.) After Thomas, Alito tended to ask the fewest questions of any Justice. But no Justice asked better questions than Alito. It was easy to tell which way Alito was leaning, because his questions were so hard for the lawyer he was targeting to answer. Alito had radar for weak points in a presentation, and in this case he saw a hole in Malcolm Stewart's.

Alito wanted to push Stewart down a slippery slope. Since McCain-Feingold forbade the broadcast of "electronic communications" shortly before elections, this was a case about movies and television commercials. What else might the law regulate? "Do you think the Constitution required Congress to draw the line where it did, limiting this to broadcast and cable and so forth?" Alito said. Could the law limit a corporation from "providing the same thing in a book? Would the Constitution permit the restriction of all those as well?"

Yes, Stewart said: "Those could have been applied to additional media as well."

The Justices leaned forward. It was one thing for the government to regulate television commercials. That had been done for years. But a book? Could the government regulate the content of a book?

"That's pretty incredible," Alito responded. "You think that if a book was published, a campaign biography that was the functional equivalent of express advocacy, that could be banned?"

"I'm not saying it could be banned," Stewart replied, trying to recover. "I'm saying that Congress could prohibit the use of corporate treasury funds and could require a corporation to publish it using its—" But clearly Stewart was saying that *Citizens*

United, or any company or nonprofit like it, could not publish a partisan book during a Presidential campaign.

Kennedy interrupted. He was the swing Justice in many areas of the law, but joined the conservatives in all the campaign-spending cases. Sensing vulnerability on the subject of books, he joined Alito's assault.

"Well, suppose it were an advocacy organization that had a book," Kennedy said. "Your position is that, under the Constitution, the advertising for this book or the sale for the book itself could be prohibited within the sixty- and thirty-day periods?"

Stewart's answer was a reluctant, qualified yes.

But neither Alito nor Kennedy had Roberts's instinct for the jugular. The Chief Justice wanted to make Stewart's position look as ridiculous as possible. Roberts continued on the subject of the government's censorship of books, leading Stewart into a trap.

"If it has one name, one use of the candidate's name, it would be covered, correct?" Roberts asked.

"That's correct," Stewart said.

"If it's a five-hundred-page book, and at the end it says, 'And so vote for X,' the government could ban that?" Roberts asked.

"Well, if it says 'vote for X,' it would be express advocacy and it would be covered by the preëxisting Federal Election Campaign Act provisions," Stewart continued, doubling down on his painfully awkward position.

Through artful questioning, Alito, Kennedy, and Roberts had turned a fairly obscure case about campaign-finance reform into a battle over government censorship. The trio made Stewart—and thus the government—take an absurd position: that the government might have the right to criminalize the publication of a five-hundred-page book because of one line at the end. Still, the Justices' questioning raised important issues. Based on the theory underlying *McCain-Feingold*, could Congress pass any law to ban a book? And was Stewart right to acknowledge that it did?

Stewart was wrong. Congress could not ban a book. McCain-Feingold was based on the pervasive influence of television advertising on electoral politics, the idea that commercials are somehow unavoidable in contemporary American life. The influence of books operates in a completely different way. Individuals have to make an affirmative choice to acquire and read a book. Congress would have no reason, and no justification, to ban a book under the First Amendment.

As for Stewart's performance, his defenders pointed to the unique role of the Solicitor General. A private lawyer could have danced around the implications of the law and avoided making any concession, but Stewart had a special obligation to be straight with the Justices, even if the answers hurt his cause. Stewart's critics—and there were many—said that he had no obligation to try to answer an absurdly far-fetched hypothetical involving the censorship of books. By doing so, according to this view, Stewart wasn't being honest—he was being foolish. He should have asserted that the federal government had neither the obligation nor the right to stop the publication of a book. Like most arguments about the quality of advocacy, this one had no clear resolution. Evidently, though, the damage to the government's case had been profound.

At this point, the vagaries of the Supreme Court calendar played a part in the resolution of the case. Citizens United was argued near the end of the term, in late March. (The last arguments are usually at the end of April, and the decisions are released by the end of June.) So there was not a lot of time for the Justices to reach a consensus. At their initial conference, the vote was the same as for Wisconsin Right to Life, with Kennedy joining the four other conservatives.

A private drama followed which in some ways defined the new Chief Justice to his colleagues. Roberts assigned the Citizens United opinion to himself. Even though the oral argument had been dramatic, Olson had presented the case to the Court in a narrow way. According to the briefs in the case—and Olson's argument—the main issue was whether the McCain-Feingold law applied to a documentary, presented on video on demand, by a nonprofit corporation. The liberals lost that argument: the vote at the conference was that the law did not apply to Citizens United, which was free to advertise and run its documentary as it saw fit. The liberals expected that Roberts's opinion would say this much and no more.

At first, Roberts did write an opinion roughly along those lines, and Kennedy wrote a concurrence which said the Court should have gone much further. Kennedy's opinion said the Court should declare McCain-Feingold's restrictions unconstitutional, overturn an earlier Supreme Court decision from 1990, and gut long-standing prohibitions on corporate giving. But after the Roberts and Kennedy drafts circulated, the conservative Justices began rallying to Kennedy's more expansive resolution of the case. In light of this, Roberts withdrew his own opinion and let Kennedy write for the majority. Kennedy then turned his concurrence into an opinion for the Court.

MORE FROM THIS ISSUE

MAY 21, 2012

ONWARD AND UPWARD WITH
THE ARTS

Stage Secret

By Alec Wilkinson

SHOUTS & MURMURS

Cranial Fracking

By Ian Frazier

FICTION

The Proxy Marriage

By Maile Meloy

THE CUR

Chills

By Antho

The new majority opinion transformed Citizens United into a vehicle for rewriting decades of constitutional law in a case where the lawyer had not even raised those issues. Roberts's approach to Citizens United conflicted with the position he had taken earlier in the term. At the argument of a death-penalty case known as *Cone v. Bell*, Roberts had berated at length the defendant's lawyer, Thomas Goldstein, for his temerity in raising an issue that had not been addressed in the petition. Now Roberts was doing nearly the same thing to upset decades of settled expectations.

As the senior Justice in the minority, John Paul Stevens assigned the main dissent to Souter, who was working on the opinion when he announced his departure, on April 30th. Souter wrote a dissent that aired some of the Court's dirty laundry. By definition, dissents challenge the legal conclusions of the majority, but Souter accused the Chief Justice of violating the Court's own procedures to engineer the result he wanted.

Roberts didn't mind spirited disagreement on the merits of any case, but Souter's attack—an extraordinary, bridge-burning farewell to the Court—could damage the Court's credibility. So the Chief came up with a strategically ingenious maneuver. He would agree to withdraw Kennedy's draft majority opinion and put Citizens United down for reargument, in the fall. For the second argument, the Court would write new Questions Presented, which frame a case before argument, and there would be no doubt about the stakes of the case. The proposal put the liberals in a box. They could no longer complain about being sandbagged, because the new Questions Presented would be unmistakably clear. But, as Roberts knew, the conservatives would go into the second argument already having five votes for the result they wanted. With no other choice (and no real hope of ever winning the case), the liberals agreed to the reargument.

On June 29, 2009, the last day of the term, the Court shocked the litigants—and the political world—by announcing, “The case is restored to the calendar for reargument.” The parties were directed to file new briefs. In plain English, the Court's order told the parties that the Justices were considering overruling two major decisions in modern campaign-finance law. Most important, the Court was weighing whether to overturn its endorsement of McCain-Feingold in the McConnell case of 2003. As every sophisticated observer of the Court knew, the Court did not ask whether cases should be overruled unless a majority of the Justices were already prepared to do so. And Roberts and his allies were so impatient to overturn these precedents that they were not even going to wait for the first Monday in October. (An early argument would also put a decision in place well before the 2010 elections.) The second argument in Citizens United was set for September 9, 2009.

The Supreme Court first addressed the struggle over money and politics in a peculiar, almost backhanded way. In 1886, just before the oral argument in an obscure and uncontroversial tax case called *Santa Clara County v. Southern Pacific Railroad*, Chief Justice Morrison R. Waite told the lawyers, “The court does not want to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution . . . applies to these corporations. We are all of opinion that it does.” In 1978, as then Justice Rehnquist described the *Santa Clara* case, “This Court decided at an early date, with neither argument nor discussion, that a business

corporation is a ‘person’ entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment.”

The historical context for the Court’s decision was clear. In the aftermath of the Civil War, the Court remained what it had been before the war—a very conservative institution. During Reconstruction, Congress and the states passed three new Amendments to the Constitution—the Thirteenth, the Fourteenth, and the Fifteenth—to give the newly freed slaves the full rights of citizenship. Almost immediately, the Supreme Court did its best to undermine these new provisions. At the same time, the Justices became accomplices in the excesses of the Gilded Age. In a series of cases, including *Santa Clara*, the Court thwarted attempts by state and local governments to restrain commercial and corporate interests.

This period of the Court’s history led into what is known as the *Lochner* era, for the most famous case of its day. In an early attempt to protect workers from exploitation, New York passed a law prohibiting bakery employees from working more than sixty hours a week or ten hours a day. In *Lochner v. New York* (1905), the Court declared the state law unconstitutional, on the ground that it interfered with the “right of contract” of both the employer and the employee. For a five-to-four majority, Justice Rufus Peckham found the New York law an “unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family.” In simple terms, the majority in *Lochner* turned the Fourteenth Amendment, which was enacted to protect the rights of newly freed slaves, into a mechanism to advance the interest of business owners. The Court basically asserted that most attempts to regulate the private marketplace, or to protect workers, were unconstitutional. The *Lochner* era reflected conservative judicial activism, which has a long history at the Court. The decisions of the nineteen-thirties, which rejected central aspects of Franklin Roosevelt’s New Deal, also showed how conservative Justices would overrule the democratically elected branches. It was only in the Warren Court era, in the fifties and sixties, that liberal judicial activism became a force at the Court, as the Justices began overturning laws that violated the rights of minorities and women.

The conservatism of the *Lochner* era at the Supreme Court, and in the broader political world, generated a backlash. Antitrust legislation, food-safety rules, child-labor laws, woman's suffrage, a tax on income—all came together under the broad rubric of Progressivism. Theodore Roosevelt, who became President in 1901, made the movement his own.

Roosevelt won a landslide victory in 1904, helped in part by vast campaign contributions from corporations. He drew heavily from railroad and insurance interests, and in the last days before the election he reportedly made a personal appeal for funds to Henry Clay Frick, the steel baron, and other industrialists. Years later, Frick recalled of Roosevelt, “He got down on his knees to us. We bought the son-of-a-bitch and then he did not stay bought.” Almost as soon as Roosevelt won the election, he turned his attention to passing the first significant campaign-finance-reform act in American history—trying to outlaw the very techniques he had just used to stay in office.

In 1907, Congress passed the Tillman Act, named for the eccentric rogue Pitchfork Ben Tillman, the South Carolina senator who sponsored the legislation. The law barred corporations from contributing directly to federal campaigns, and established criminal penalties for violations. Loopholes proliferated, allowing, for example, individuals to give as much as they wanted to political campaigns and to be reimbursed for the contributions by their employers. Still, the Tillman Act was a first step toward what Congress described as its goal: elections “free from the power of money.”

That never happened. In subsequent decades, the power of money in politics only grew. After the Second World War, candidates began to campaign principally by buying advertisements on television, and that strategy created an ever-increasing need for cash. Richard Nixon's obsession with campaign fund-raising was one of the principal motivations that led to the Watergate scandals.

Watergate precipitated the next wave of campaign-finance reform, the Federal Election Campaign Act Amendments of 1974, which supplemented the 1971 law and created much of the regulatory structure that endures today. The law imposed unprecedented limits on campaign contributions and spending; created the Federal Election Commission to enforce the act; established an optional system of public financing for Presidential elections; and required extensive disclosure of campaign contributions and expenditures.

Shortly after it went into effect, a group of politicians, including James L. Buckley, then a senator from New York, and Eugene McCarthy, the former senator and Presidential candidate, challenged the new rules as unconstitutional. The resulting decision, known as *Buckley v. Valeo*, issued in 1976, has gone down in history as one of the Supreme Court's most complicated, contradictory, incomprehensible (and longest) opinions.

To this day, no one even knows who really wrote it. It is signed “per curiam”—“by the Court”—which the Justices usually use for brief and minor opinions. In *Buckley v. Valeo*, however, the label was used by the Court to signal a team effort, of sorts. William Brennan is generally regarded to have written much of *Buckley*, but Brennan's biographers note that sections were also composed by Warren E. Burger, Potter Stewart, Lewis Powell, and William Rehnquist. Not surprisingly, in light of the multiple authors, the opinion is a product of several compromises.

At its center is a distinction between expenditures and contributions. The Court said that, under the First Amendment, Congress could not restrict campaign expenditures. Spending money was like speech itself, because “every means of communicating ideas in today's mass society requires the expenditure of money.” That included printing handbills, renting halls, and buying ads on television. It is a result of *Buckley* that wealthy candidates like Mayor Michael Bloomberg can spend as much as they want of their own money on their campaigns; it would be unconstitutional to limit their expenditures.

But, according to *Buckley*, limits on contributions were constitutionally permissible. The Court said that a campaign contribution served only as “a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.” In the Court's view, limiting contributions did not significantly inhibit political expression by the person giving the money. This was why the Court concluded that it was permissible for the law to limit how much an individual could contribute to any particular campaign.

In the 1974 law, Congress had tried to set up a tightly controlled system for financing campaigns: the government would monitor and regulate both the inflows and the outflows of money. It is not clear that the proposal would have worked as intended, but at least it made holistic sense. Congress could essentially select a number for the overall price of a congressional or Presidential campaign, and then force candidates to live

within that number. Buckley ended that system before it even started, and imposed a different one, of the Justices' own creation. The court declared that contributions could be limited but expenditures could not, and for two generations that distinction has been the central feature of the constitutional rules of campaign finance. The bottom line was that money is speech.

On the morning of September 9, 2009, a car arrived outside the Justice Department to take the government's team to the Supreme Court for the reargument of *Citizens United*. Elena Kagan, the Solicitor General, took the front seat, and three of her deputies piled into the back. She had been confirmed by the Senate a few days before the first *Citizens United* argument, and the reargument would mark her *début* before the Justices. Kagan, at the age of forty-eight, had never argued a case before an appellate court. *Citizens United* would be the first time.

"C'mon, guys," she said to those in the back. "It's my first day. Psych me up!"

The deputies looked at one another, and, after a lengthy pause, one whispered, "Go get 'em."

"Ugh," Kagan said. "You guys suck!_"—and the laughter broke the tension in the car.

At precisely ten o'clock, the Chief Justice called Ted Olson to the lectern. Like everyone associated with the case, Olson could tell from the new *Questions Presented* that the Court was leaning his way—heading for a ruling that was far broader than the one he had originally sought. Olson argued cautiously, as if protecting a lead. The liberal quartet of Justices, recognizing that their position was probably hopeless, did their best to raise the alarm with the public, if not with their colleagues. Ginsburg brought up one potential source of future controversy.

"Mr. Olson," Ginsburg said, "are you taking the position that there is no difference" between the First Amendment rights of a corporation and those of an individual? "A corporation, after all, is not endowed by its creator with inalienable rights. So is there any distinction that Congress could draw between corporations and natural human beings for purposes of campaign finance?"

"What the Court has said in the First Amendment context . . . over and over again," Olson replied, "is that corporations are persons entitled to protection under the First

Amendment.”

“Would that include today’s mega-corporations, where many of the investors may be foreign individuals or entities?” Ginsburg went on.

Olson was ready: “The Court in the past has made no distinction based upon the nature of the entity that might own a share of a corporation.”

The questioning turned to Kagan. Like many members of the S.G.’s office, Kagan thought that the women’s version of the morning coat looked ridiculous. Through intermediaries, she had asked the Justices if they would mind if she appeared in a normal business suit. None objected, and that was what she wore.

“Mr. Chief Justice, and may it please the Court,” Kagan began, “I have three very quick points to make about the government position. The first is that this issue has a long history. For over a hundred years Congress has made a judgment that corporations must be subject to special rules when they participate in elections, and this Court has never questioned that judgment.

“Number 2—”

“Wait, wait, wait, wait,” Scalia said.

Given the circumstances, Kagan must have known that she had launched herself on a suicide mission. Her best hope was to limit the damage, perhaps by persuading the Court to strike down this particular application of McCain-Feingold rather than invalidate the entire law. Or, as Kagan put it to Roberts, “Mr. Chief Justice, as to whether the government has a preference as to the way in which it loses, if it has to lose, the answer is yes.”

As the argument proceeded, Stevens tried to help Kagan along these lines, suggesting that the Court could resolve the case with a narrow ruling. For example, the Justices could create an exception in the McCain-Feingold law for nonprofits like Citizens United, or for “ads that are financed exclusively by individuals even though they are sponsored by a corporation.” Grasping the Stevens lifeline, Kagan said, more or less, “Yes, that’s exactly right.”

“Nobody has explained why that wouldn’t be a proper solution, not nearly as drastic,” Stevens went on. “Why is that not the wisest narrow solution of the problem before us?”

Ginsburg did Kagan the favor of allowing her to undo some of the damage from Stewart’s argument in March. “May I ask you one question that was highlighted in the prior argument, and that was if Congress could say no TV and radio ads, could it also say no newspaper ads, no campaign biographies?” Ginsburg said. “Last time, the answer was yes, Congress could, but it didn’t. Is that still the government’s answer?”

“The government’s answer has changed, Justice Ginsburg,” Kagan replied, and the well-informed audience in the courtroom laughed. “We took the Court’s own reaction to some of those other hypotheticals very seriously. We went back, we considered the matter carefully.” Kagan said that Congress could not ban a book. But the damage had been done.

After the second argument of Citizens United, the votes were the same as after the first one. Roberts, Scalia, Kennedy, Thomas, and Alito voted to overturn the judgment of the F.E.C., with Stevens, Ginsburg, Breyer, and Sonia Sotomayor (who had replaced Souter) on the other side. Because of the much broader Questions Presented, Roberts was now well within his rights to resurrect the earlier draft opinion and lead the charge to bury decades of campaign-finance law.

So, as the Chief Justice chose how broadly to change the law in this area, the real question for him, it seems, was how much he wanted to help the Republican Party. Roberts’s choice was: a lot.

Roberts assigned the opinion in Citizens United to Anthony Kennedy. It was another brilliant strategic move. When Alito replaced O’Connor, in 2006, the Court was locked into a consistent four-four conservative-liberal split, and Kennedy became the most powerful Justice in decades. On controversial issues—including abortion, affirmative action, civil rights, the death penalty, and federal power, among others—he controlled the outcome of cases. For the previous twenty years or so, O’Connor had most often held the swing vote, though she never controlled as many cases as Kennedy has.

There was a striking difference in the ways that O'Connor and Kennedy handled being the swing vote. O'Connor was a gradualist, a compromiser, a politician who liked to make each side feel that it won something. When she was in the middle in a case, she would, in effect, give one side fifty-one per cent and the other forty-nine. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in 1992, she saved abortion rights; in *Grutter v. Bollinger*, in 2003, she preserved racial preferences in admissions for the University of Michigan law school; in *Rasul v. Bush* and *Hamdi v. Rumsfeld*, in 2004, she repudiated the Bush Administration's approach to the detainees held at Guantánamo Bay. O'Connor split the difference each time. Yes to restrictions on abortion but no to outright bans; yes to affirmative action but no to quotas; yes to the right of detainees to go to court but no to the full constitutional rights of American citizens. In describing her judicial philosophy, O'Connor liked to point to the sculpted turtles that formed the base of the lampposts outside the Supreme Court. "We're like those turtles," she would say. "We're slow and steady. We don't move too fast in any direction."

Anthony Kennedy was no turtle. He tended to swing wildly in one direction or the other. When he was with the liberals, he could be very liberal. His opinion in *Lawrence v. Texas*, the 2003 opinion striking down laws against consensual sodomy, contains a lyrical celebration of the rights of gay people. In *Boumediene v. Bush*, the 2008 case about the rights of accused terrorists, he excoriated the Bush Administration and Congress. "To hold that the political branches may switch the constitution on or off at will would lead to a regime in which they, not this court, 'say what the law is,'" he wrote, quoting Chief Justice John Marshall's famous words from 1803, in *Marbury v. Madison*. No one relished saying "what the law is" more than Kennedy.

But in his conservative mode Kennedy could be harshly dismissive of women's autonomy, as in *Gonzales v. Carhart*, the 2007 late-term-abortion law case. ("Some women come to regret their choice to abort the infant life they once created and sustained," he noted. "Severe depression and loss of esteem can follow.") Kennedy is believed to have written the most notorious sentence in the majority opinion in *Bush v. Gore*, acknowledging that the Court acted for the sole benefit of George W. Bush: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." Kennedy was not a moderate but an extremist—of varied enthusiasms.

All the Justices knew that Kennedy's views were most extreme when it came to the First Amendment. In the Roberts Court, there was often a broad consensus about protecting freedom of speech. Some areas of the law that had once been controversial, such as the suppression of dangerous or unpopular views, were resolved with little disagreement. Still, even in a legal system that protects free speech, the government had long been able to regulate speech in all kinds of ways. Copyright infringement was subject to civil and criminal remedies; extortion and other crimes involving the use of words were routinely punished. Campaign contributions, if they were considered "speech" at all, had been regulated for more than a century.

But Kennedy was extremely receptive to arguments that the government had unduly restricted freedom of speech—especially in the area of campaign finance. Throughout his long tenure on the Court, he had dissented, often in strident terms, anytime his colleagues upheld regulations in that area. In addition, Kennedy loved writing high-profile opinions.

Roberts, during his confirmation hearing, made much of his judicial modesty and his respect for precedent. If the Chief had written *Citizens United*, he would have been criticized for hypocrisy. But by giving the opinion to Kennedy he obtained a far-reaching result without leaving his own fingerprints. Kennedy had already written a draft majority opinion in the case. He would write even more expansively than Roberts had done in his never-published opinion in the case.

Kennedy did not disappoint the Chief Justice. "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people," he wrote for the Court in his familiar rolling cadence. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." These rhetorical flights were a long way from the gritty business of raising and spending campaign money.

Kennedy often saw First Amendment issues in terms of abstractions. *Citizens United*, at its core, concerned a law that set aside a brief period of time (shortly before elections) when corporations could not fund political commercials. To Kennedy, this was nothing more than censorship: "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to

use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each."

Moreover, Kennedy wrote, "The Court has recognized that First Amendment protection extends to corporations." This had been true since 1886, and speech, especially political speech, could never be impeded. "The censorship we now confront is vast in its reach," Kennedy wrote. "The Government has muffled the voices that best represent the most significant segments of the economy. And the electorate has been deprived of information, knowledge and opinion vital to its function. By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.

"If the First Amendment has any force," Kennedy concluded, "it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."

So McCain-Feingold, and two Supreme Court precedents, had to be mostly overruled. The Constitution required that all corporations, for-profit and nonprofit alike, be allowed to spend as much as they wanted, anytime they wanted, in support of the candidates of their choosing. For the moment, at least, the ban on direct corporate contributions to candidates remained intact.

John Paul Stevens was just short of ninety at the time of Citizens United, and he belonged to a vanishing political tradition—that of the moderate Midwestern Republican. His first sponsor for a federal judgeship was Senator Charles Percy; Gerald Ford appointed Stevens to the Court based on the recommendation of his Attorney General, Edward Levi, who had been the dean of the University of Chicago Law School. For decades, moderate Republicans had played crucial roles on the Supreme Court: John Marshall Harlan II, in the fifties; Potter Stewart, in the sixties; Lewis Powell, in the seventies and eighties; and O'Connor, in the nineties and the new millennium. In his early years on the Court, Stevens settled into the ideological center, between William Brennan and Thurgood Marshall, on the left, and Rehnquist, then an Associate Justice, and Chief Justice Warren Burger, on the right. Stevens's voting record

was roughly in line with the Republican appointees such as Stewart, Powell, Harry Blackmun, and O'Connor.

But as Justices were replaced by more contemporary Republicans, Stevens often found himself described as a liberal. He did move to the left, especially on the death penalty. But his evolution into the leader of the liberal wing was mostly the result of the rest of the Court moving so far to the right.

Stevens became the senior Associate Justice after Blackmun stepped down, in 1994, and during the next decade he was confident that he could pull together majorities for his side. Toward the end of the Rehnquist Court, Stevens had a string of good years, as O'Connor became a frequent ally, especially on issues relating to Guantánamo. Kennedy, too, joined Stevens's side on gay rights and some death-penalty cases. More often than his liberal colleagues, Stevens voted to review controversial cases. Ginsburg and Breyer, fearing disaster if the Court took these cases, tended to prefer not to address them.

But John Roberts and Samuel Alito sapped John Paul Stevens's optimism. In less than five years, the pair of Bush appointees, joined by Scalia, Thomas, and, usually, Kennedy, had overturned many of the Court's precedents. Unlike his new conservative colleagues, Stevens, like Souter, thought that the law should develop slowly, over time, with each case building logically on its predecessors. The course of *Citizens United* represented everything that offended Stevens most about the Roberts Court.

In some ways, Stevens's greatest objections were procedural. Like Ginsburg (and almost no one else), Stevens had a deep fascination with the mysteries of federal procedure. He was happy to wade into the subject for hours. (Stevens was the only Justice who generally wrote his own first drafts of opinions.) So it was especially galling that the Court converted *Citizens United* from a narrow dispute about the application of a single provision in McCain-Feingold to an assault on a century of federal laws and precedents. To Stevens, it was the purest kind of judicial activism.

Or, as he put it in his dissenting opinion, "Five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law." The case should have been resolved by simply ruling on whether

McCain-Feingold applied to “Hillary: The Movie,” or at least to nonprofit corporations like Citizens United.

Stevens was just warming up. His dissent was ninety pages, the longest of his career. He questioned every premise of Kennedy’s opinion, starting with its contempt for stare decisis, the rule of precedent. He went on to refute Kennedy’s repeated invocations of “censorship” and the “banning” of free speech. The case was merely about corporate-funded commercials shortly before elections. Corporations could run as many commercials as they liked during other periods, and employees of the corporations (by forming a political-action committee) could run ads at any time.

Stevens was especially offended by Kennedy’s blithe assertion that corporations and human beings had identical rights under the First Amendment. “The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare,” Stevens wrote. “Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.” Congress and the courts had drawn distinctions between corporations and people for decades, Stevens wrote, noting that, “at the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act.”

As for Kennedy’s fear that the government might regulate speech based on “the speaker’s identity,” Stevens wrote, “We have held that speech can be regulated differentially on account of the speaker’s identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees.” And Stevens, a former Navy man, could not resist a generational allusion: he said that Kennedy’s opinion “would have accorded the propaganda broadcasts to our troops by ‘Tokyo Rose’ during World War II the same protection as speech by Allied commanders.” (Stevens’s law clerks didn’t like the dated reference to Tokyo Rose, who made propaganda broadcasts for the Japanese, but he insisted on keeping it.)

Stevens’s conclusion was despairing. “At bottom, the Court’s opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent

corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt,” he wrote. “It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.” It was an impressive dissent, but that was all it was. Anthony Kennedy, on the other hand, was reshaping American politics.

Six days after the Court’s decision, President Obama gave his State of the Union address. Picking up on the issue that Ginsburg had raised in the oral argument—the possibility of foreigners buying influence in American elections—the President declared, “With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.” The Democrats in the chamber rose in a standing ovation as Obama continued, “I don’t think American elections should be bankrolled by America’s most powerful interests or, worse, by foreign entities.” Cameras caught Alito mouthing the words “not true” when Obama mentioned foreign corporations. Alito had a point. Kennedy’s opinion expressly reserved the question of whether the ruling applied to foreign corporations. But, as Olson had argued before the Justices, the logic of the Court’s prior decisions suggested that foreign corporations had equal rights to spend in American elections.

In any event, the implications of *Citizens United* were quickly apparent. In March, 2010, the D.C. Circuit ruled that individuals could make unlimited contributions to so-called Super PACs, which supported individual candidates. This opened the door for Presidential campaigns in 2012 that were essentially underwritten by single individuals. Sheldon Adelson, the gambling entrepreneur, gave about fifteen million dollars to support Newt Gingrich, and Foster Friess, a Wyoming financier, donated almost two million dollars to Rick Santorum’s Super PAC. Karl Rove organized a Super PAC that has raised about thirty million dollars in the past several months for use in support of Republicans.

These developments have drawn some criticism, but the Court appears determined to extend the deregulatory revolution that it began in *Wisconsin Right to Life* and

Citizens United. Last year, the Court struck down Arizona's system of public financing of elections, which the state had passed after a series of political scandals involving fund-raising. The Arizona system gave additional funds to candidates for certain state offices who were being heavily outspent by their privately funded opponents. By the customary vote of five-to-four, with an opinion by Roberts, the Court declared the system unconstitutional. As Kennedy had in *Citizens United*, Roberts said that governments could never take steps to equalize opportunities for candidates in electoral contests. " 'Leveling the playing field' can sound like a good thing," he wrote. "But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas.' " The Roberts Court, it appears, will guarantee moneyed interests the freedom to raise and spend any amount, from any source, at any time, in order to win elections. ♦



Jeffrey Toobin has been a staff writer at The New Yorker since 1993 and the senior legal analyst for CNN since 2002. He is the author of, most recently, "American Heiress: The Wild Saga of the Kidnapping, Crimes and Trial of Patty Hearst." [Read more »](#)

CONDÉ NAST

© 2018 Condé Nast. All rights reserved. Use of and/or registration on any portion of this site constitutes acceptance of our [User Agreement \(updated 5/25/18\)](#) and [Privacy Policy and Cookie Statement \(updated 5/25/18\)](#). [Your California Privacy Rights](#). The material on this site may not be reproduced, distributed, transmitted, cached or otherwise used, except with the prior written permission of Condé Nast. *The New Yorker* may earn a portion of sales from products and services that are purchased through links on our site as part of our affiliate partnerships with retailers. [Ad Choices](#)