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'A republic, madam, if you can keep it'

Thu, 07/26/2012 - 9:01am Field Notes From A Battleground [1] Opinion/Viewpoint [2]
Field Notes From A Battleground
By Charles R. Church

Part 1 of 2

Such was Ben Franklin's famous reply, when leaving the Constitutional Convention in Philadelphia, to a well-meaning woman, inquiring what kind of government we would have. Though I normally strain to keep things in perspective, Franklin's words come to mind when I think how the U.S. Supreme Court recently rejected an opportunity to rethink its disastrous decision in "Citizens United v. Federal Election Commission."

Presented with the Montana Supreme Court's ruling upholding the state's century-old ban on the use of corporate funds to support or oppose candidates in state elections, the justices could have revisited their enormously controversial ruling by listing the Montana case for full briefing and oral argument. Instead, in a 5 to 4 vote (no surprise there), they summarily reversed the holding of the state's highest court. Justices Ginsberg and Breyer had already voiced their view that the Montana case would "give the court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates' allegiance, ['Citizens'] should continue to hold sway," but to no avail.

In a frustratingly even-tempered dissent, four justices (you know who) disagreed with the reality-defying holding of "Citizens" that "independent expenditures, including those made by corporations, do not give rise to corruption, or the appearance of corruption." In doing so, again with maddening understatement, they relied upon the dissent by Justice Stevens in "Citizens," while omitting to mention its power. For Stevens, in his devastating 90-page opinion, point-by-point had dismantled the majority ruling by Anthony Kennedy more completely than any dissent I can recall.

As Anthony Piel made clear in his first-rate column in this paper on June 7, very little originally was at stake in "Citizens United." The narrow question presented by the plaintiff's famed lawyer Ted Olson, the victor in "Bush v. Gore," was one of statutory interpretation: whether "Hillary, the Movie" amounted to an "electioneering communication" within the meaning of the Bipartisan Campaign Reform Act. Decide that, and everyone goes home.

The wealthy nonprofit corporation Citizens United had abandoned at the trial court level its claim that the BCRA, on its face, violated the First Amendment, and did not present the issue for decision by the justices. It was Chief Justice Roberts who listed the case for a second argument, while re-injecting the First Amendment into the fray.

The case had nothing to do with whether a corporation might finance electioneering, but simply concerned how it might do so. Under the BCRA, as Justice Stevens made clear, "it could have used [its PACs] assets to televise and promote 'Hillary: The Movie' wherever and whenever it wanted to." Or the corporation could have spent unrestricted funds from its general treasury to broadcast the film at any time other than 30 days before the primary election.

The parties, then, were battling over a single narrow and discrete issue — whether Citizens United had a

right to use the funds in its general corporate treasury (rather than those in its PAC) to pay for broadcasts during that 30-day period. But instead of deciding this reed-slim technical issue, as Justice Stevens so wryly noted, “[F]ive 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.” He closed his onslaught with this condemnation: “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.”

President Barack Obama in his 2010 State of the Union Address decried the Court’s reversal of a century of campaign law that would “open the floodgates for special interests — including foreign corporations — to spend without limit in our elections.”

The Montana Supreme Court had ingeniously viewed as an invitation to provide proof what many simply saw as Kennedy’s statement of a rule of law: that corporate dollars do not even seem to give rise to political corruption. What happens, the Montana justices asked implicitly, when the record before them abounds with facts demonstrating an ironclad link between corporate expenditures and political corruption?

The Montana court thought the answer plain and ruled accordingly, upholding its state statute prohibiting political expenditures by corporations on behalf of, or opposing, candidates for public office. But now that approach has failed, so Americans are stuck with a decision in “Citizens” that consigns us to wonder what could have motivated the majority — since constitutional scholarship so plainly did not.

Next time, I will review possible solutions to the “Citizens United” debacle.

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By Charles R. Church

Part 2 of 2

Last time, I lamented that the Supreme Court had failed to seize a chance to revisit its disastrous decision in "Citizens United." Here, I consider some potential solutions.

So, what do we do? Anthony Piel seems enthusiastic about one possibility — amending the U.S. Constitution. And he thinks that, even if the effort fails, the attempt would send a grassroots message to the pinnacle of U.S. government that: "Americans want to take their democracy back."

Alas, it's here that I respectfully must part company with him. In this near-demonically polarized political climate, I can see no real possibility that the U.S. Congress, by two-thirds majorities in both houses, might propose such an amendment, or that, on application by two-thirds of the state legislatures, would convene a constitutional convention to do so, and that thereafter three-fourths of the state legislatures or their conventions would ratify. In fact, I fear the chances would be near zero.

The chance that a groundswell of political sentiment might influence the U.S. Supreme Court in some way, while intriguing, to me does not bear scrutiny, though there is precedent of a sort.

When the highly conservative justices of the Supreme Court struck down a key piece of FDR's plan to pull the country out of the Depression in 1935, and for the next year and a half kept leveling other central features of the New Deal, the president devised his famous scheme to "pack" the court with his own appointees. He proposed that, for any justice over age 70 who refused to retire, the president could appoint a new justice to the court. If the plan passed (since nothing in the Constitution fixes the number of justices) Roosevelt could appoint six new and liberal justices, even if no one retired. Whereupon, as if by magic, the court suddenly began upholding New Deal measures, and then a conservative justice retired, giving FDR an appointment. FDR's proposal died, but it had done its work.

Could extreme pressure on the justices work again? I fear not. Given the enormous partisan divides in Congress, President Obama cannot credibly attempt to exert the pressure FDR did in those unholy precincts. Mere unpopularity packs less wallop.

Justice Thomas, for one, may even thrive on public fury, given how widely and long he's been scorned. (Among other things, he's in year six of his unfathomable silence on the bench). Neither is Chief Justice Roberts a candidate; it was he, after all, who put the First Amendment back into the case. Nor are the conservative doctrinaires Justices Scalia and Alito. Justice Kennedy? He wrote the terrible majority opinion. Dahlia Lithwick, who covers the Supreme Court for Slate, concurred in her June 25 posting, subtitled: "The Court's conservatives don't care how much you hate 'Citizen's United.'"

Given their ages, none of the five is likely to die anytime soon on the basis of longevity alone. Cancer survivor Justice Ginsberg's age, almost 80, does heighten concerns about her, and very noticeably she did not retire in time for Obama to nominate a replacement; my hope, of course, is that she has divined the

outcome of the coming election and wants to let Obama replace her next term. Chief Justice Roberts had serious health problems, but seems robust enough now. And that's all to the good, because death watches are too morbid a preoccupation.

Merely awaiting retirement by the "right" justices is a wholly unsatisfying option. It's far too passive, and who knows how the retirements will shake out? Justice Ginsberg, after all, is the oldest. Scalia, whose pugnacity and wit make him great fun for Court watchers, is 76; Kennedy has 75 years and Breyer is about to turn 74. So what's to be done?

Whatever the Supreme Court does with them, disclosure requirements seem a frail vessel in the oceans of money washing over the political landscape and, as noted, their application is limited. So I am stumped, and very, very worried.

Professor Laurence Tribe of Harvard wrote on June 13 that, in the 2010 election cycle, there were 84 active Super PACs; now there are 577. And, the Times made clear, the corporate cash funneled into "social welfare" and other tax exempt entities vastly exceeds that flowing into Super PACs, because the former can offer anonymity to their donors. The Congressional Progressive Caucus claimed on June 6 that corporate spending soared during the 2010 election cycle to $294 million, 427 percent over the previous midterm elections in 2006.

Franklin, as we have seen, wondered aloud whether we could keep our republic. I fear that we already have lost some of it, on account of the role of big money, corporate and other, in elections.

I'm not yet prepared to say we cannot take it back, but most assuredly the tide is running the wrong way.

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