



Saying what the law is

On campaign finance, it's not just for the Court; Congress has a co-equal say.

BY LOUIS FISHER

Writing for the U.S. Supreme Court in *Citizens United v. FEC*, Justice Anthony Kennedy claimed that judicial rulings on campaign finance law are final unless the Court changes its mind or the Constitution is amended. Although he acknowledged that the Court "must give weight to attempts by Congress to seek to dispel either the appearance or the reality" of improper influences from independent expenditures, he added: "The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule."

Decide, yes; final, no.

For Kennedy, "our law" is what the Court announces. Legislative bodies "have enacted bans on corporate expenditures believing that those bans were constitutional." Does the congressional voice prevail? Not to Kennedy. Legislative statutes "could prevent us from overruling our own precedents, thereby interfering with our duty 'to say what the law is.' *Marbury v. Madison*, 1 Cranch 137, 177 (1803)."

Those words from Chief Justice John Marshall in *Marbury* never meant that judicial rulings are final until the Court reverses itself. After Justice Samuel Chase had been impeached and the Senate was debating his removal, Marshall wrote to Chase on Jan. 23, 1805, stating that, if Congress disagreed with a ruling, it did not have to resort to impeachment: The judiciary "should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions

deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing of his fault." In short: The Court can say what the law is; so can Congress.

In his first inaugural address, Abraham Lincoln said that Supreme Court rulings are binding on the parties. Yet if the policy of the government "upon vital questions affecting the whole people" are to be "irrevocably fixed" by the Court, "the people will have ceased to be their own rulers." For more than two centuries, Congress has often used the legislative process to reverse and alter decisions by the Court. Examples of this constitutional dialogue include the areas of federalism, the commerce power, slavery, child labor regulation, religious liberty, free press, privacy, women's rights and separation-of-power disputes. At times Kennedy seems to understand this larger canvass, as when he quotes from a 1957 Court decision: "Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen."

A concurrence by Chief Justice John Roberts Jr. discusses the principles of judicial restraint and stare decisis. He disagreed with the dissenters' argument that the Court indulged in judicial overreach: "there is no way to avoid *Citizens United*'s broader constitutional argument." In so doing, Roberts opened the door to the Court having to rethink its doctrines. For example, when considering whether to re-examine a prior holding, "we must balance the importance of having constitutional questions decided against the

importance of having them decided right."

In the field of campaign finance, the Court is not standing on solid ground. It necessarily builds on two judicial creations: Corporations are "persons" and money is "speech." Those two doctrines have been challenged from the start. Congressional hearings should be held to seek expert testimony on the corrupting influence of money on democracy. It is entirely appropriate for Congress to conclude that *Citizens United* was not decided correctly.

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As Roberts notes, "we must keep in mind that stare decisis is not an end in itself." Borrowing language from a 1986 decision by the Court, he writes that it is the means we use to ensure that the law "will develop in a principled and intelligible fashion." When fidelity to a particular ruling "does more to damage" a constitutional ideal than to advance it, Roberts advises that "we must be more willing to depart from that precedent."

What other guidelines invite fresh thinking? Roberts says that, when a precedent's validity "is so hotly contested that it cannot reliably function as a basis for decision in future cases," it is necessary to alter a Court ruling. When a precedent's "underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake," it is time to rethink.

Roberts also writes that an unyielding commitment to stare decisis "would effectively license the Court to invent and adopt new principles of constitutional law solely for the purpose of rationalizing its past errors, without a proper analysis of whether those principles have merit on their own." Such an approach "would allow the Court's past missteps to spawn future mistakes." Legislation is needed to identify past missteps and correct them.

There are no grounds for Congress to defer to the Court as the "last word" on constitutional meaning. In the area of campaign finance, the legislative branch has equal, if not superior, competence, authority and legitimacy. Instead of trying to analyze case law, Congress should start from scratch and produce a coherent, principled, evidence-based and intelligible law on campaign finance. For more than 30 years, the Court has shown it is incapable of doing that. In the 1978 Bellotti case, Justice Byron White accurately observed that, with regard to campaign finance, "the expertise of legislators is at its peak and that of judges at its very lowest."

Careful and persuasive analysis by lawmakers can send this message to the Court: "With all respect, you got it wrong. We are passing new legislation to regulate money in political campaigns. The level of spending is corrupting our political system, draining power from the people and weakening Congress as an independent branch."

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