Published on *The Root* (http://www.theroot.com)

Judicial Activism From the Right

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Posted: January 24, 2010 at 6:20 PM

The Supreme Court's recklessness in the corporate speech case is in sharp contrast to another decision it issued the same day.

It's hard to appreciate the full measure of how aggressively the conservative five-justice majority imposed its will in *Citizens United*, the Court's decision declaring limits on corporate political speech unconstitutional, unless you read it alongside another of the Court's decisions released the same day, *Wood v. Alabama Department of Corrections*. By now we all know that in *Citizens United v. Federal Election Commission,* the Court upended decades of jurisprudence by declaring unconstitutional provisions of the McCain-Feingold Act that barred certain televised political speech by corporations and trade unions in the final days before an election (radio and print communication was left untouched by the statute).

By finding these provisions of McCain-Feingold unconstitutional, the Court reversed over 100 years of jurisprudence in which the Court had affirmed Congress' authority to regulate corporate campaign speech, and directly overturned several key precedents - including two cases decided in 1990 and 2003, respectively. As many commentators have noted, the Court need not have taken such a drastic step to strike down Congress' limit on corporate televised speech. Yet the Court deliberately (and even clumsily) stretched its opinion to make a sweeping change where a narrow ruling would have sufficed. As Justice Stevens pointed out in his stinging dissent, the question of whether McCain-Feingold was unconstitutional was not even advanced by Citizens United. The brief for Citizens United, Stevens noted "never so much as cited . . . . the key case the majority today overrules." Reaching out to take up the question of the constitutionality of McCain-Feingold was, according to Stevens, a "procedural dereliction."

On the same day that *Citizens United* was decided, the Court also decided *Woods v. Alabama Department of Corrections.* In that case, a seven-member majority that included Justices Roberts, Alito, Scalia and Thomas - the four most conservative justices on the Court, and four of the five-member majority in *Citizens United* - held that it was not unreasonable for a state court to find that the failure of an inexperienced defense counsel to put on mitigating evidence at the sentencing phase of a capital case might have been a "strategic" decision. Holly Woods was convicted of murdering his girlfriend in 1993. Kenneth Trotter, the defense attorney at the sentencing phase of Wood's trial had only been admitted to practice for five months when he was assigned to handle the portion of the case that would determine whether Woods would be executed. Clearly in over his

head, Trotter tried on several occasions to get more supervision and direction from more senior counsel. Frustrated and overwhelmed, Trotter failed to further investigate or present evidence that Woods had been regarded as borderline retarded by his teachers - a well-recognized mitigating factor in death penalty cases. The jury voted for the death penalty.

In an opinion written by Justice Sotomayor, the Court first found that it was not unreasonable for the state court to conclude that Trotter may have made a "strategic decision" not to present Wood's mitigating factors to the jury. But even more disturbingly, the Court refused to address the question of whether it was unreasonable for Trotter to leave this critical information out of the sentencing hearing. Judge Sotomayor conceded that the two questions were "related" and even "complementary." But she narrowly - even torturously - parsed the questions presented for review and determined that the question of the actual reasonableness of Trotter's conduct is "not before [the Court]." The opinion confirmed the expectation that Justice Sotomayor - a former prosecutor and trial judge - would prove to be a careful and even rigid adherent to the record developed and the questions presented by counsel for review.

The seven-member majority's refusal to decide whether Trotter's conduct could reasonably have been considered "strategic" rather than as Justice Stevens concludes "inattention and neglect" - a question implicit in the questions presented for review and explicitly raised in Wood's petition to the Court - stands in stark contrast to the five-member conservative majority's overreach in *Citizens United*. That Justices Roberts, Alito, Scalia and Thomas joined with Justice Sotomayor in her stingy reading of the scope of review in *Wood* (a case in which a man faced the death penalty) but so freely reached out to overturn precedent in *Citizens United* when the question was not even raised by the petitioners in the case, is evidence that that the conservative core of the Court has abandoned even the appearance of consistency. (Justice Kennedy - continuing his role and unpredictable swing vote -wrote the majority opinion in *Citizens United* and joined Justice Stevens' dissent in *Wood*)

As the Court's leader, Chief Justice Roberts should come in for particular scrutiny. He, like Justices Alito and Scalia, joined the opinion of Judge Sotomayor and its parsimonious reading of the questions before the Court in *Wood*, but wrote his own forceful concurring opiinion in *Citizens United* to justify his bold reach outside the questions presented for review by the attorneys and to overturn precedent. In a desperate attempt to head off his detractors, Roberts takes the tried-and-true stance of invoking *Brown v. Board of Education*, arguing that if the Court never departed from precedent, "segregation would be legal." But waving *Brown* as a cover for an indefensible power grab only further diminishes the integrity of Roberts' position.

As the Chief Justice well knows, by 1954 ‘separate but equal' ran contrary to the Court's own jurisprudence, which had repudiated the doctrine in a series of cases striking down segregation in higher education. By the time *Brown* reached the Supreme Court, ‘separate but equal' stood on a hill of sand and no longer ran contrary to the Court's own recent precedents. This is in stark contrast to the landscape this year when the Court decided *Citizens United*. As Justice Stevens harshly observes, "[t]he only relevant thing that has changed since. . . [the 1990 and 2003 precedents overturned in *Citizens United*] . . . is the composition of this Court."

It's sobering to recall that it was Roberts who said at his confirmation hearing that court decisions should be overturned only if it they have "proven to be unworkable, they don't lead to predictable results, they're difficult to apply . . . [and]. . . .if the bases of the precedents have been eroded." Roberts also noted that "[i]t is a jolt to the legal system to overrule a precedent, and that has to be taken into account, as well as the different expectations that have grown up around it." None of those features were present in McCain-Feingold's narrow limitation on televised corporate campaign speech in the weeks immediately preceding an election. To the contrary, limitations on corporate campaign speech have long been recognized as within Congress' power, so long as they serve a compelling interest and are narrowly tailored.

Citizens United is an odious decision on its own merits. But it also marks a new level of brazen determination by the Court's conservative majority to reach the conclusions it wants by any means necessary. This is what judicial activism looks like.

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