The Washington Post

A Test Case for Roberts

By E.J. Dionne Jr.
Monday, September 7, 2009

President Obama's health-care speech on Wednesday will be only the *second* most consequential political moment of the week.

Judged by the standard of an event's potential long-term impact on our public life, the most important will be the argument before the Supreme Court (on the same day, as it happens) about a case that, if decided wrongly, could surrender control of our democracy to corporate interests.

This sounds melodramatic. It's not. The court is considering eviscerating laws that have been on the books since 1907 and 1947 -- in two separate cases -- banning direct contributions and spending by corporations in federal election campaigns. Doing so would obliterate precedents that go back two and three decades.

The full impact of what the court could do in *Citizens United v. Federal Election Commission* has only begun to receive the attention it deserves. Even the word "radical" does not capture the extent to which the justices could turn our political system upside down. Will it use a case originally brought on a narrow issue to bring our politics back to the corruption of the Gilded Age?

Citizens United, a conservative group, brought suit arguing that it should be exempt from the restrictions of the 2002 McCain-Feingold campaign finance law for a movie it made that was sharply critical of Hillary Clinton. The organization said it should not have to disclose who financed the film.

Instead of deciding the case before it, the court engaged in a remarkable act of overreach. On June 29, it postponed a decision and called for new briefs and a highly unusual new hearing, which is Wednesday's big event. The court chose to consider an issue only tangentially raised by the case. It threatens to overrule a 1990 decision that upheld the long-standing ban on corporate money in campaigns.

I don't have the space to cite all the precedents, dating to the 1976 Buckley campaign finance ruling, that the court would set aside if it were to throw out the prohibition on corporate money. Suffice it to say that there is one member of the court who has spoken eloquently about the dangers of ignoring precedents.

"I do think that it is a jolt to the legal system when you overrule a precedent," he said. "Precedent plays an important role in promoting stability and evenhandedness. It is not enough -- and the court has emphasized this on several occasions -- it is not enough that you may think the prior decision was

wrongly decided. That really doesn't answer the question, it just poses the question."

This careful jurist continued: "And you do look at these other factors, like settled expectations, like the legitimacy of the court, like whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments." He paraphrased Alexander Hamilton as saying in Federalist 78, "To avoid an arbitrary discretion in the judges, they need to be bound down by rules and precedents."

Chief Justice John Roberts, the likely swing vote in this case, was exactly right when he said these things during his 2005 confirmation hearings. If he uses his own standards, it is impossible to see how he can justify the use of "arbitrary discretion" to discard a well-established system whose construction began with the Tillman Act of 1907.

Were the courts that set the earlier precedents "legitimate"? This ban was upheld over many years by justices of various philosophical leanings. We are not talking about overturning a single decision by a bunch of activists in robes seizing a temporary court majority.

Are the precedents "workable"? The answer is clearly yes, which is why there is absolutely no popular demand to let corporate cash loose into our politics. Our system would be less "workable" if the court abruptly changed the law.

Has the precedent been "eroded"? Absolutely not. In case after case, no matter where particular court majorities stood on particular campaign finance provisions, the ban on corporate contributions was taken for granted. As the court stated just six years ago, Congress's power to prohibit direct corporate and union contributions "has been firmly embedded in our law." That's what you call "settled expectations."

This case is the clearest test that Roberts has faced so far as to whether he meant what he said to Congress in 2005. I truly hope he passes it. If he doesn't, he will unleash havoc in our political system and greatly undermine the legitimacy of the court he leads.

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