

The Supreme Court of the United States (SCOTUS)

Week 4

Nils Pedersen & Joyce Francis

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Jefferson County Library & The Salish Sea Fellowship

Citizens United: (almost)15 Years Later

Summary of Original Case:

Citizens United made a film about Hillary Clinton in January of 2008 to be released **within 30 days of the Democratic primary**.

A Federal District Court found that this violated the **FEC Act**, which prohibited corporations and unions from **spending money** to expressly advocate for the election or defeat of a candidate **within 30 days of a primary or 60 days of a general election**.

Citizens United: (almost) 15 Years Later (cont.)

The Supreme Court decided that:

- ▶ The FEC **Act is a ban on speech**; laws that burden political speech: strict scrutiny
- ▶ “All **speakers**, including individuals and the media, **use money ... to fund their speech**. and the First Amendment protects the resulting speech.”
- ▶ The **First Amendment “prohibits Congress from (punishing) citizens, or associations of citizens, for simply engaging in political speech.”**
- ▶ “**Political speech cannot be limited based on a speaker’s wealth**” based on the idea that this would be suppressing “political speech based on the speaker’s identity.”
- ▶ Both “**Disclaimer**” and “**Disclosure**” requirements were found to be **constitutional**.

Citizens United: (almost) 15 Years Later (cont.)

IMPACT:

- ▶ The *Citizens United* ruling represented a **turning point on campaign finance**, allowing unlimited election spending by corporations and labor unions.
- ▶ *Speechnow.org v. FEC* (2010) authorized the creation of Super PACs, and *McCutcheon v. FEC* (2014) struck down other campaign finance restrictions.
- ▶ The ruling also influenced the outcome of *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011) in which the **Supreme Court outlawed public funding by states** for candidates who were unable to compete with the corporate donations gained by their opponents.
- ▶ An early study by one political scientist has concluded that ***Citizens United* worked in favor of Republican candidates.**

Citizens United: (almost) 15 Years Later (cont.)

- Between 2010 and 2020, **the ten largest donors and their spouses** spent a total of \$1.2 billion on federal elections. In the 2018 elections, this group accounted for around **7% of all election-related giving, up from less than 1% a decade prior.**
- Over the decade, **election-related spending by non-partisan independent groups jumped to \$4.5 billion**; from 1990 to 2010 the total spending under that category was just \$750 million.
- **Outside spending surpassed candidate spending in 126 races** since the ruling compared to only 15 in the five election cycles prior.
- **Groups that did not disclose their donors spent \$963 million** in the decade following the ruling, compared to \$129 million in the decade prior.

Citizens United: (almost)15 Years Later (cont.)

- **Non-partisan outside spending** as a percentage of total election spending **increased from 6% in 2008 to nearly 20% in 2018.**
- During the 2016 election cycle, **Super PACs spent more than \$1 billion**, nearly twice that of every other category of contributors combined.
- In 2018, over **95% of super PAC money came from the top 1% of donors.**

Citizens United: (almost) 15 Years Later (cont.)

- According to a 2021 study, the ruling **weakened political parties while strengthening single-issue advocacy groups and Super PACs funded by billionaires with pet issues.**
- The ruling made it **easier for self-promoting politicians to undermine political processes and democratic norms** to promote themselves by soliciting funds from such committees.
- **Each respective election cycle has seen record-breaking amounts of spending.** Campaign spending by corporations and other outside groups increased by nearly 900% between 2008 and 2016. In 2020, total election spending was \$14.4 billion, up from \$5.7 billion in 2018, and more than \$1 billion in dark money was spent.
- Additionally, **even though it's illegal for outside groups to coordinate election spending with candidates or political parties, many do** because by and large, the FEC has failed to crack down on candidates and super PACs that work hand-in-glove.

Andy Warhol Foundation v. Goldsmith

- ▶ The work on the **right** is an original photograph by Lynn Goldsmith from 1981.
- ▶ The work on the **left** was made by Vanity Fair & Andy Warhol under license from Goldsmith in 1984.
- ▶ **Conde Nast (owns Vanity Fair) used the 'Orange Prince' version on the left** in a commemorative publication in 2016.



Andy Warhol Foundation v. Goldsmith



Fair use is a copyright doctrine - permits limited use of copyrighted material without having to first acquire permission from the copyright holder.

- ▶ The doctrine is intended to **balance the interests of copyright holders with the public interest** in the wider distribution and use of creative works by allowing certain limited uses.
- ▶ Classic 'fair use' is for purposes such as criticism, comment, news reporting, **teaching (including multiple copies for classroom use)**, scholarship, or research. That is how I get away with copying both of these images here 😊.
- ▶ A recent and key consideration in 'fair use' analysis is whether the later work is **'transformative.'** A transformative work transcends, or places in a new light, the underlying work on which it is based.

Andy Warhol Foundation v. Goldsmith



SCOTUS Decision:

- ▶ In May 2023, the Court ruled 7–2 that AWF's use of Goldsmith's photographs was **not protected by fair use**.
- ▶ **Justice Sonia Sotomayor** wrote for the majority that *the works shared a similar purpose in the depiction of Prince in magazine articles and are both a commercial product*.
- ▶ Her opinion contained many footnotes disparaging **Justice Elena Kagan's combative dissent**, which was equally harsh on the majority as she defended the value of transformation in art.
- ▶ Commentators in the art world feared for the future of **appropriation art**, popular with artists inspired by Warhol, like Richard Prince and Jeff Koons, if artists are deterred from creating works by fear of litigation or prohibitive license fees.

Andy Warhol Foundation v. Goldsmith



Decision (cont.):

- ▶ For a work to be **transformative**, it must be productive and **must employ the underlying work in a different manner or for a different purpose than the original**. A use of copyrighted material that either repackages or republishes the original is unlikely to pass the test.
- ▶ On the other hand, **if the secondary use adds value to the original**—if the underlying work is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understanding—this is **the very type of activity that fair use doctrine intends to protect** for the enrichment of society.
- ▶ The Supreme Court accepted this aspect of fair use of copyrighted works in a holding that rap group **2 Live Crew's** parody of **Roy Orbison's "Oh, Pretty Woman"**, which the publisher had refused to license to them, was not an infringement.
- ▶ It was noted that there was a bit of a **split between the 2nd Circuit** (the CA in this case) **and the 9th Circuit** (our CA, also California's) on 'transformative' works.

Andy Warhol Foundation v. Goldsmith



Decision (cont.):

- ▶ **Sotomayor:** The use of a copyrighted work may nevertheless be fair if, among other things, the use has a purpose and character that is sufficiently distinct from the original. In this case, however, **Goldsmith's original photograph of Prince, and AWF's copying use of that photograph** in an image licensed to a special edition magazine devoted to Prince, **share substantially the same purpose, and the use is of a commercial nature**. AWF has offered no other persuasive justification for its unauthorized use of the photograph.
- ▶ **Gorsuch** wrote a concurring opinion in which he said that if the AWF displayed the Prince series "in a nonprofit museum or a for-profit book commenting on 20th-century art, the purpose and character of that use might well point to fair use."
- ▶ **Kagan** dissented in what, for the Supreme Court, became a bit of a pissing contest between Sotomayor and Kagan.

SCOTUS OT24 PREVIEW OF TRENDS & CASES

University of Chicago School of Law

<https://www.youtube.com/watch?v=S-dA5ULmDpE>

Alison L. LaCroix, Professor of Law & History (14:38→27:19)

- Ongoing legal and economic **consequences of the Trump immunity ruling**, particularly “new law” of “presumptive immunity.”
- **SCOTUS shift toward “intrusion/interference on the Executive Branch,”** and away from public interest in fairness of our legal system in Nixon/Watergate.
- Expects **more challenges to the Administrative State** from 5th Circuit.
- **Mounting pressure on Court.** Will SCOTUS be left to police itself?

SCOTUS OT24 PREVIEW OF TRENDS & CASES (cont.)

David Strauss, Professor of Law (27:19→42:00)

- ▶ ***Glossip v. Oklahoma*** - State's suppression of evidence. Defendant denied post-conviction relief, despite support from State Prosecutors.
- ▶ ***United States v. Skrmetti*** - Tennessee law prohibiting healthcare providers from prescribing puberty blockers or hormones to minors.
- ▶ **Two Themes of this Court:**
 - Continuation of **Challenges to the Administrative State**
 - More **Solicitude for White Collar Criminals**
- ▶ Contrast of Trump decisions with Watergate/Nixon decision reveals **troubling sign of where SCOTUS is today.**



THANKS FOR YOUR INTEREST
IN THE SUPREME COURT

Hope to see you next October
for another term of SCOTUS!

--Nils & Joyce