



CONSTITUTIONAL OPINIONS

Money Business

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Government can give, and it can also take away. With \$3.55 trillion in annual federal spending, \$2.5 trillion in regulatory compliance costs, and federal tax burdens of more than \$2.9 trillion, every corporation has something to gain or lose in modern elections. After the *Citizens United* argument Wednesday, the Supreme Court seems poised to overturn campaign finance prohibitions on direct corporate advocacy in elections. Regardless of the outcome in this case, corporations will continue to rent-seek in exactly the same ways they do now.

Citizens United started as a case about arcane campaign finance laws prohibiting the video-on-demand distribution of a 90-minute, anti-Hillary documentary paid for by an ideological, non-profit corporation. In oral argument before the Supreme Court last spring, the case suddenly became a lot more interesting: The government conceded that Congress could ban the publication of a book funded with corporate money, if the book included a call to "vote for X."

The prospect of book banning obviously did not sit well with the justices. The Supreme Court ordered re-argument to consider whether it should overrule two of its previous cases -- *Austin*, which upheld a ban on corporate electoral advocacy, and *McConnell*, which upheld McCain-Feingold's ban on broadcast communications that mention candidates within so many days of an election.

The essential issue in the case is now the scope of First Amendment protection afforded to corporate speech. Political speech is the core of the First Amendment, but do corporations have a right to engage in such speech directly, rather than through their political action committees? For example, do corporations not only have a right to publish political advocacy in books, but also to make "independent expenditures" on television ads that support or oppose candidates.

The prevention of corruption and the appearance of corruption have justified decades of campaign finance restrictions. But even this rationale has proven insufficient to justify a ban on direct expenditures by individuals. Wealthy individuals like George Soros can spend millions in campaign

advertisements, because restricting these expenditures would strike a deathblow to the First Amendment's core -- the right to speak your opinion and persuade others about who should hold public office.

The conservative organization Citizens United argued that corporations have political interests as well, and a right to advocate on behalf of them. Trillions of dollars are at stake in every election. Just as individuals vote on issues that affect them -- taxes, environmental and energy policy, federal spending -- so do corporations have a desire to elect candidates who are knowledgeable about and have good records on issues that matter to them. Congress and the President establish the regulatory and legal environment in which corporations do business, setting the tax and regulatory code, handing out government contracts to some, creating new markets for some, and handing out subsidies to others. A corporation's ability to survive could depend on who is in office enacting what laws.

At the same time, corporations have an immense potential to influence elections, and to use this influence to distort the market in which they do business. Government operates as a sword as well as a shield, and there are many ways in which large corporations can use the government to procure favorable laws and regulations to drive away competition, or to ensure their survival where they might otherwise fail. This year's experience with the auto-industry and financial services industry bailouts should be enough to prove that. U.S. corporations' total net worth was \$23.5 trillion in 2005, and total spending in the 2008 election cycle was estimated at \$5.3 billion. This leaves quite a lot to be spent electing candidates who will advocate a corporation's preferred positions on policy issues.

It seems clear that the Supreme Court will rule in favor of Citizens United. It's just a matter of whether the Court will rule narrowly (by exempting ideological, non-profit corporations from the prohibition on independent expenditures, for example), or whether it will rule broadly, prohibiting bans on corporate independent expenditures. The Court has the necessary votes for either option.

If the Court should opt for the latter, we are unlikely to see any sweeping decay of our democracy. Corporations can already spend (and do spend) mass amounts of funds on "issue advertising." As long as advertisements don't use certain words like "election" or "candidate" that trigger campaign finance prohibitions, corporations can already spend limitless amounts of money to thank candidates for their votes on S-CHIP or to urge them to vote against health care reform. Moreover, corporate and union PACs spent \$840 million in the last election cycle, and the institutional media, large corporate conglomerates all of them, are exempt from the corporate spending prohibitions.

The government has proven itself a poor protector of the "integrity" of the political process. Where there is gain to be had, people will find a way to gain it; hence, every new campaign finance law spawns its own set of loopholes. There is simply no way to protect the political process from special interests when seemingly all the government does is hand out benefits and burdens in favor of one special interest and at the expense of another. If Congress wants to protect the integrity of our democracy, there is a clear solution: shrink the behemoth. The less money there is to gain from political advocacy, the less money will be spent.

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