

Opinion

Giving corporations an outsized voice in elections

Voters stand to lose out if the Supreme Court treats political spending by businesses and other big-money players as protected speech.

By Monica Youn

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Corporations are pitching a bizarre product -- a radical vision of the 1st Amendment. It would give corporations rather than voters a central role in our electoral process by treating corporate political spending as protected speech. If this vision becomes reality, businesses and other big-money players will spend billions either hyping their preferred candidates or running attack ads against elected officials who don't support their preferred agenda. Voters will be forced into a couch-potato role, mere viewers of the electoral spectacle bought and paid for by wealthy companies.

The Supreme Court's decision in the hotly anticipated campaign finance reform case *Citizens United vs. Federal Election Commission* -- which may be announced as early as Tuesday -- will show whether a majority of the Roberts court is buying their argument.

The case may be the turning point in a concerted, decades-long ideological campaign -- the "corporate free speech movement," as Robert L. Kerr and other scholars have chronicled. As far back as 1971, Lewis F. Powell Jr. (whom President Nixon would shortly nominate to the Supreme Court) sent a confidential memorandum to his friend Eugene Sydnor Jr. at the U.S. Chamber of Commerce arguing that corporate interests needed to take advantage of a "neglected opportunity in the courts." Because "the judiciary may be the most important instrument for social, economic and political change," the memo said, the chamber and other corporate interests should develop a cadre of constitutional lawyers to file lawsuits and amicus briefs to push a corporate-friendly legal agenda in the Supreme Court.

Corporations heeded this call to arms, generously funding the chamber's litigation arm and founding other think tanks. In hundreds of lawsuits and briefs, the chamber and corporations such as Exxon-Mobil and Nike have drilled in the pro-business party line that 1st Amendment protection should extend to corporate political spending -- such as the corporate-funded movie about Hillary Rodham Clinton that is at issue in *Citizens United*. The case, which began on narrow grounds (did restrictions on corporate campaign ads apply to this film?) has become a test of whether restrictions on political speech by corporations should be ended altogether.

Only five years after Powell sent his memo, the Supreme Court in *Buckley vs. Valeo* struck down campaign spending limits on 1st Amendment grounds, with the rationale that such limits

"impose direct and substantial restraints on the quantity of political speech." Two years later, in *First National Bank of Boston vs. Bellotti*, the court held -- for the first time -- that the 1st Amendment extends to corporate political spending, striking down a law that had prevented business corporations from spending shareholder funds to influence the outcome of state ballot measures. By then Powell was on the court, and he wrote the controlling opinion in *Bellotti* and was in the majority in both cases.

As 1st Amendment expert Linda Berger has pointed out, the *Buckley* and *Bellotti* cases planted the seeds of three new metaphors in election law: that money is speech; that corporations are people; and that elections are marketplaces. To equate corporate campaign spending with 1st Amendment-protected speech, you must accept all three. Each, however, is problematic.

First, although spending money may, in some circumstances, have some expressive value (such as clicking a web link to give \$10 to a candidate), it does not follow that money is speech or that the 1st Amendment should shield such spending from regulation. After all, I can drive my car in a way that conveys a message -- disapproval of a tailgating fellow driver, for example -- but that doesn't mean that driving is speech, nor that the 1st Amendment renders traffic laws unconstitutional. When corporations and other monied interests spend vast sums to influence the outcome of an election, they're not trying to communicate an idea but simply to wield economic power and to bid for influence.

Second, as Justice Ruth Bader Ginsburg pointed out at the *Citizens United* oral argument, a corporation "is not endowed by its creator with inalienable rights." After all, corporations are legal entities created for doing business and given special advantages that aren't available to individuals or even other business entities, including limited liability and favorable tax treatment.

Thus, although corporations have certain economic rights -- to enable them to conduct business -- a corporation has no claim to the fundamental constitutional rights held by "We the People." Corporations already have ample means to express their "viewpoints" -- by lobbying, testifying in Congress and conducting public education on issues -- and those corporate employees who wish to advance the corporation's political agenda can contribute to the corporation's political action committee.

Third, and finally, one should not simply import economic free-market principles wholesale into the "free market of ideas." The operating assumption of free-market theory is that, in the long term, buyers' preferences will steer money to the best outcomes, so that those firms that offer the best goods and services will be rewarded with the greatest market success. However, this "invisible hand" assumption -- that money follows or represents merit -- has no application to elections, especially when corporations are involved. The amount of money a corporation can spend lacks even a theoretical connection to the intrinsic worth -- or popular support -- of its political agenda.

For decades, the Supreme Court stopped short of fully endorsing any of the three metaphors, heeding former Chief Justice William H. Rehnquist's warning that to treat corporate spending as the 1st Amendment equivalent of individual free speech is "to confuse metaphor with reality." Instead, as campaign finance law developed, the court struck a balance between the rights of

campaigners -- candidates, parties, PACs and corporations -- on the one hand and the rights of the electorate to a representative, participatory and accountable government on the other.

But since Chief Justice John G. Roberts Jr. and Justice Samuel Alito have replaced Rehnquist and Justice Sandra Day O'Connor on the court, concern for the 1st Amendment interests of the electorate seems to have been jettisoned. Since they joined the court, it has struck down campaign finance regulations in each of the three relevant cases it has heard, championing a 1st Amendment right to spend money freely in political campaigns without regard to the voter's right to a meaningful role in the electoral process.

With Citizens United due to be decided as campaigns for this year's elections get off the ground, political players are keenly aware that the court could open the floodgates to corporate cash. "We the People" can only hope the court steps back from the brink and instead recognizes that in a democracy, voters, not corporations, should be at the center of the political process.

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