Gold Coins Tip the Scale of Justice

By John He — March 8, 2010 at 3:03 pm

Why the Citizens United *case is a blow to democracy*

The outcome of *Citizens United vs. Federal Election Commission* has rocked the political world by reframing the controversy over corporate influence in political campaigns. In the 5-4 ruling, a majority of the Supreme Court struck down provisions of the McCain–Feingold Act that forbade corporations and unions from directly supporting or opposing candidates for office. The decision leaves candidates more susceptible to corruption by tilting the balance of power in our democracy towards wealthy corporations and interest groups.

DIVERGENT INTERPRETATIONS

The majority opinion took a novel but somewhat expected approach to the monumental case, which saw its beginnings in the recent presidential campaign. In 2008, the Federal Election Commission banned the interest group Citizens United from airing its unflattering attack-documentary against Hillary Clinton on cable television, saying it violated campaign finance restrictions under the McCain–Feingold Act. Citizens United appealed the decision to the Supreme Court, which heard two sets of oral arguments in the case. By asserting the inalienability of free speech while also extending it in an unprecedented way to corporations and other associations, the Court employed both a strict enforcement of the First Amendment and a loose broadening of its application. Justice Anthony Kennedy, speaking for the majority, wrote, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." In effect, the court extended First Amendment protections to interest groups, completely overturning the restrictions permitted by the ruling in *Austin vs. Michigan Chamber of Commerce* in 1990. As John Samples of the Cato Institute explained to the HPR, "The Constitution doesn't mention speakers," only speech, and therefore distinctions between corporations and other speakers are impermissible. The McCain–Feingold law, according to Samples, restrained associations' right to express their political views.

Dissenting justices, led by John Paul Stevens, emphasized their wariness about corporations' influence on government. Stevens lambasted the majority's "rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding," and worried that the decision would "undermine the integrity of elected institutions across the Nation." Drawing on over a century's worth of statutory and constitutional law restricting the sort of influence that the majority has now allowed, the dissenters made a case for favoring the intent or principle behind the First Amendment over a literal interpretation. Harvard Law School professor Mark Tushnet told the HPR that "the dissenters argue that constitutional law should leave more room for policy judgments by Congress than the majority's doctrinal framing allows."

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Regardless of the constitutional merits, it seems unquestionable that the decision will have a negative impact on politicians' susceptibility to corruption, or at least what most of us would call corruption. Corporations, unions, and other interest groups, using their treasuries as threats, will have substantial leverage over representatives. Nevertheless, supporters of the decision, such as Samples, argue that "it is easy to exaggerate the practical effects of this decision" and that "[corporate] speech is not the same thing as results or power." Harvard Kennedy School professor Alexander Keyssar, drawing on recent history, countered that "anyone who's witnessed elections in the past ten years will see the influence of money in elections. Big Pharma doesn't donate to campaigns out of altruism." This influence will expand at the expense of the millions of individuals lacking the means to conglomerate their funds to affect the electoral process. Brookings Institute senior fellow Thomas Mann warned the HPR that "the potential dangers to American democracy are great."

THE FUTURE FOR REFORM

Cautiously working within the confines of the Court's recent ruling, leaders on Capitol Hill are scrambling to mitigate the decision's effects. While a handful of senators, including John Kerry (D-MA), have gone so far as to endorse a constitutional amendment to restrict corporate influence, Keyssar said that its success is "unlikely" and that "it'd take a crisis" for the movement to gain any traction. A more feasible path to some limited reform may be to enact legislation forbidding foreign-owned corporations from influencing American elections, a phenomenon about which policymakers of both parties have expressed concern, but which is of uncertain importance. Others are calling for requirements that corporate political expenditures be approved by shareholders. Indeed, Tushnet emphasized that "the real action should be to shift attention from campaign financing to corporation law, and figure out some ways to ensure that shareholders really do approve of corporate expenditures on political campaigns." Still, the future of reform remains unclear. While Senator Charles Schumer (D-NY) has promised legislation, Senator John McCain (R-AZ), a long-time proponent of reform, has indicated that he "[doesn't] think there's much that can be done."

As Keyssar noted, an implicit deal was once struck between government and corporations: the latter would be protected from antitrust suits in return for a promise that "the political arena would not reflect the imbalance of power represented in the economic arena." The Supreme Court has upset this equilibrium, and it may also have taken away the tools necessary to restore it.

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