

The Supreme Court's ruling in *Citizens United* has spawned arguments that oversimplify money's real role in politics.

■ By Eliza Newlin Carney



Six Myths About Campaign Money

When the Supreme Court decided in January to toss out the decades-old ban on direct corporate and union campaign spending, U.S. politics changed overnight. ■ In *Citizens United v. Federal Election Commission*, the high court ruled 5-4 that unions and corporations could spend money from their vast treasuries on campaigns. The decision applies to for-profit

■ **STALLED:** A campaign finance disclosure bill written by Sen. Charles Schumer died in the Senate. Schumer reacted to the Supreme Court ruling with (from left) Sens. Russell Feingold, Ron Wyden, and Evan Bayh.

and nonprofit corporations alike, scrambling the deck for political players of all stripes.

The ruling also intensified the never-ending political money wars: Democrats have fought in vain to push through a broad new disclosure bill, and Republicans have renewed their systematic legal assault on the remaining campaign finance laws. The Court, in a deregulatory mood, appears eager to dismantle the rules still further. At the same time, voters are unusually engaged in the campaign finance debate.

It's a critical turning point in the world of election law, but advocates fighting over free speech versus corruption remain as polarized as ever. Both sides trot out arguments that oversimplify money's real role in politics and make it harder to identify solutions and common ground. Each of the following six myths contains a grain of truth but papers over important nuances. Inevitably, regulating democracy is messy and complicated. The solution rarely can be reduced to a sound bite; there often is no silver bullet.

Corporate Money Will Now Overwhelm Elections

President Obama has been among those sounding the alarm that corporations, in the wake of *Citizens United*, will swamp campaigns with private money.

"This ruling opens the floodgates for an unlimited amount of special-interest money into our democracy," Obama declared in his weekly radio address shortly after the ruling. "It gives the special-interest lobbyists new leverage to spend millions on advertising to persuade elected officials to vote their way, or to punish those who don't."

Reform advocates toss around big numbers and dire warnings. They point to ExxonMobil's \$85 billion in profits in 2008 and note that if the company spent just 10 percent of that on politics, the outlay would be \$8.5 billion. That's three times more than the combined spending of the Obama and McCain presidential campaigns and every single House and Senate candidate in that election.

So far, however, no such corporate spending tsunami has materialized. If anything, labor unions have jumped in more quickly to exploit the new rules, dumping millions of dollars into Arkansas's Democratic Senate primary and other high-profile races this year. One reason may be that, unlike corporate executives, union leaders don't risk offending shareholders and customers if they openly bankroll candidates.

Actually, neither unions nor corporations will shift vast new resources into campaigns, some political scientists argue. The reason? These players could spend any of their money on politics, through issue advertising, even before the *Citizens United* ruling. Their one constraint was that they had to avoid explicit campaign messages,

such as "vote for" or "vote against." The high court's ruling will make such issue advocacy less common because corporate and labor leaders are free to pay for unvarnished campaign endorsements and attacks.

"I don't think you're suddenly going to find 1 percent of corporate gross expenditures moving into politics, largely because there were so many ways to spend that money before," says Michael J. Malbin, executive director of the nonpartisan Campaign Finance Institute. Even before the ruling, about half of the states permitted direct corporate and union campaign expenditures—yet that money didn't appear to overwhelm state races.

To be sure, corporate campaign spending often flies below the radar, in both state and federal elections. Corporations tend to funnel their money through trade associations and front groups, making it hard to trace. New business- and GOP-friendly groups have cropped up, pledging to spend tens of millions of dollars in the coming election. Moreover, it's still early: Most big spending doesn't surface until the last two months before Election Day. And the post-*Citizens United* landscape is so uncertain that its real impact may not be felt until 2012, some experts predict.

Still, ominous talk of exponential campaign spending hikes is starting to look overstated. In the short term, at least, the ruling may do more to change the nature of political spending than its volume.

The *Citizens United* Ruling Won't Change Much

In the absence of an obvious corporate money surge, some analysts have downplayed the *Citizens United* ruling's importance, arguing that it does little to alter the political playing field.

"In a lot of ways, this decision is more marginal than cataclysmic in terms of what it will do to the campaign finance system," election lawyer Joseph Sandler, the former Democratic National Committee counsel and a member of Sandler Reiff & Young, maintained in a conference call the day the Court ruled. The decision's fans have tended to pooh-poo the public reaction as so much hysteria and hyperbole.

But, in fact, the ruling has sweeping, long-term ramifications, election-law experts and even some conservatives say. Although spikes in corporate and union spending have yet to materialize,

the decision signals a turnabout on the Supreme Court and a seismic shift in constitutional and campaign finance law.

That's because the Court's action sets legal precedents that threaten other long-standing pillars of the campaign finance regime, from disclosure rules to party spending curbs, the foreign-money ban, and even contribution limits. *Citizens United* is but one of dozens of campaign finance challenges that conservatives have brought and continue to bring before the high court, emboldened by its deregulatory tilt under Chief Justice John Roberts.

Some of these challenges have fallen short. In *Doe v. Reed*, the Court in June tossed out a suit brought by conservative activist James Bopp Jr. challenging state disclosure rules for



■ Rep. Mike Quigley

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Nick Nyhart, president of Public Campaign, touts the need for public financing with actors portraying the Founders.

voters who sign ballot petitions. Also in June, the Court turned back a Bopp-led challenge to the federal ban on soft (unregulated) money. In *Republican National Committee v. Federal Election Commission*, Bopp had argued that the RNC should be free to collect soft money for independent spending that's not coordinated with candidates.

Still, the high court all but invited further challenges that may succeed down the road. It concluded, for example, that if Bopp could show that petition signers had been harassed, the disclosure rules may, in fact, violate the Constitution. *RNC v. FEC* may also be back. That case was an "as-applied challenge," limited to specific circumstances. But the Court left the door open to a broader, facial attack on the soft-money rules.

"I have little doubt that if a facial challenge is brought to the soft-money provisions, the justices will be ready to hear it," says Richard L. Hasen, a professor at Loyola Law School in Los Angeles.

Most important, the high court's *Citizens United* opinion articulates a new, unusually narrow view of what constitutes corruption. The majority abandoned the position, upheld in previous Supreme Court cases, that campaign finance limits may be justified on the grounds that big money gives its donors "undue influence" or "access."

"The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt," the majority opinion states, explaining that only quid pro quo corruption may be regulated. If access and ingratiation are not corruption, Hasen notes, that places contribution limits, among other regulations, in serious jeopardy.

"It's a very narrow definition of corruption that is going to have, I predict, a range of very negative consequences across the campaign finance spectrum," he says. The upshot: After several decades of straddling the fence on political money but largely upholding regulations, the high court has shifted sharply in favor of free speech. Over time, disclosure and public financ-

ing may be the only regulations that this Court finds constitutional.

Congress Is More Corrupt Than Ever

Given the public's disgust with government these days, it should come as no surprise that most voters think that Washington lawmakers are in the pocket of special interests.

In one poll, nearly 80 percent of respondents told a bipartisan team of researchers earlier this year that members of Congress are controlled by the groups that help fund their political campaigns. By contrast, fewer than 20 percent said that lawmakers "listen more to the voters." Such attitudes cut across the political spectrum, according to pollsters at Greenberg Quinlan Rosner Research (D) and McKinnon Media (R), which conducted the survey.

Yet leading political scientists have found the exact opposite; they've hunted in vain for proof of a correlation between money and votes over a period of decades. In study after study, "the evidence is scant to nonexistent" that political action committee contributions affect roll-call votes, says Stephen Ansolabehere, a professor of government at Harvard University.

Ansolabehere says he began his academic career convinced that campaign contributions "are an important leverage point for corporations and interest groups." But after reviewing some 80 political science analyses spanning several decades, from the 1970s through about 2005, he admits that he was forced to reconsider. The vast majority of studies, he says, conclude that "the probability of success of a bill was unaffected by total contributions."

What really sways lawmakers, the studies suggest, are constituents and party affiliation. "Constituent need trumps all," Ansolabehere says. "And party is also very important. So once you factor in parties and constituents, there is just not much room there for contributors and interest groups to have much influence."

True, reform advocates—and many lawmakers—say that such ivory-tower analyses don't square with real life inside the Beltway. Direct PAC contributions, which these academic studies target, represent only a small slice of the political money pie. Independent campaign expenditures and largely unregulated issue ads play a growing role, as do "bundled" contributions that lobbyists round up to curry favor with candidates.

Policy-making, of course, goes way beyond simple roll-call votes. Millions in corporate profits can ride on whether a bill is postponed, amended, or even scuttled—decisions that take place at the margins and behind closed doors, and leave no trace.

One political scientist who thinks that these academics are "out of their minds" is Rep. Mike Quigley, D-Ill., elected on the heels of the scandal that ousted Gov. Rod Blagojevich, D-Ill., now awaiting a verdict in his corruption trial. Quigley has a master's degree in public policy from the University of Chicago, but he takes issue with his fellow academics.

"I don't need that degree to help me understand the connection between money and policy decisions," he says. "It's very hard to prove an actual quid pro quo. Although some [politicians] are stupid and go over the top, most are careful." Quigley adds that he has heard his House colleagues wonder aloud how their votes will affect PAC contributions: "Members think about their constituencies, of course. But they're also thinking about the PACs."

Even so, reflexive public cynicism overlooks new rules and attitudes since the Watergate era, when donors carried around briefcases stuffed with cash. Lawmakers now face contribution limits and reporting rules; the soft-money ban enacted in 2002; and the stricter ethics and lobbying rules imposed in 2007 after the Jack Abramoff lobbying scandal.

The atmosphere has changed, too. Ethics-compliance teams and seminars are de rigueur at lobby shops and on Capitol Hill, and the Internet has made it easier for follow-the-money watchdog groups, reporters, bloggers, tweeters, and even average citizens to connect the dots.

"I think the people up on the Hill are bending over backwards to make sure they don't even approach the lines that have been set by the Honest Leadership and Open Government Act and the Senate ethics rules," said William J. McGinley, a partner at Patton Boggs who specializes in political law. "And I think the culture has changed quite a bit."

There is no shortage of controversies, of course—witness the recent Office of Congressional Ethics investigation into more than half a dozen lawmakers who collected donations from Wall Street donors within 48 hours of the House vote on financial services legislation. Still, popular caricatures of a widely corrupt Congress tar all lawmakers with the same brush even as politicians arguably face more-exacting rules, expectations, and public scrutiny than ever.

Money Equals Speech

If money were really speech, as conservatives like to argue, then virtually all election laws would be unconstitutional.

That is not the case—at least not yet.

Certainly, the First Amendment exhorts that "Congress shall make no law ... abridging the freedom of speech, or of the press." In their systematic legal challenge to virtually the entire campaign finance regime, free-speech champions invariably quote this mandate. In its *Citizens United* ruling, the Supreme Court acknowledges that political speech "is central to the meaning and purpose of the First Amendment."

But even this deregulatory high court has not gone so far as to conclude that all election rules violate the Constitution. Contribution limits, for one, are a constitutional means "to ensure against the reality or appearance of corruption," the *Citizens United* majority found. The Court also left other key rules, including the soft-money ban and the disclosure laws, firmly in place.

In equating money with speech,

conservatives cast political contributions in a rosy light. More campaign spending is invariably better, they insist, because donations underwrite ads and communications that enrich the public dialogue. Given how much corporations spend on commercial products such as potato chips, foes of regulation argue, U.S. elections actually cost remarkably little.

"This case will lead to more spending in political elections," enthused former FEC Chairman Bradley Smith, a professor at Capital University Law School and the chairman of the Center for Competitive Politics, shortly after the *Citizens United* ruling. "We expect to see more speech. We think that's a good thing."

But even if blatant corruption is not rampant on Capitol Hill, as many voters presume, private money potentially distorts policy-making—if for no other reason than that lawmakers must devote so much time to begging for it. American democracy, after all, is not fast-food advertising.

"If large concentrations of wealth can move easily and freely, and increasingly without transparency, through the political system, it's bound to have some influence on the nature of those decisions," says Thomas Mann, a senior fellow in governance studies at the Brookings Institution. "It doesn't have to be a quid pro quo to harm the political system."

Over time, the Supreme Court's logic in *Citizens United* may, in fact, lead it to dismantle all but a few core regulations, as some scholars predict. But we're not there yet. In the meantime, limiting campaign cash remains constitutional, and unfettered private money cannot be genuinely equated with freedom of speech.

Disclosure Is the Silver Bullet

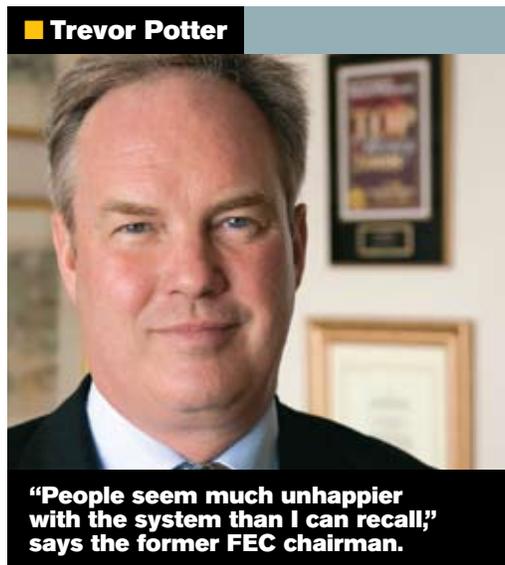
In throwing out the longtime corporate and union spending bans, Associate Justice Anthony Kennedy assured that disclosure laws would safeguard against abuses.

"With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters," Kennedy wrote for the majority in *Citizens United*.

Yet Kennedy's idealized vision of transparency is at odds with the real world of politics, many scholars argue. For one thing, no law requires corporations to tell shareholders whether they're spending treasury money on elections, points out Monica Youn, counsel to the democracy program at New York University School of Law's Brennan Center for Justice.

"Justice Kennedy's decision assumed a background of disclosure laws that simply didn't exist," she says. "When corporate spending does occur, it tends to be covert and to be very hard to track."

Indeed, disclosure rules are particularly spotty when it comes to independent campaign expenditures. Unlike PACs that donate directly to politicians, which must exhaustively report every penny that comes in and



■ Trevor Potter

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goes out of their coffers, groups that spend money independently from candidates need not tell much about their funding sources.

Such independent spenders must report only the money explicitly *ear-marked* for an ad. That means that overhead costs paid for by a corporation or a union might never see the light of day. Money transfers between committees also routinely obscure funding sources. For their part, nonprofit advocacy groups, which are increasingly a magnet for political money, face virtually no reporting requirements.

These loopholes prompted Sen. Charles Schumer, D-N.Y., and Rep. Chris Van Hollen, D-Md., to write a broad disclosure bill in response to *Citizens United*. The measure would block big spenders from hiding behind shadowy groups with patriotic names, the lawmakers said, by forcing those running campaign ads to report their top donors and appear in on-air disclaimers.

But the bill died by filibuster in the Senate last month after winning approval in the House. Controversial provisions involving government contractors and foreign-owned corporations hurt the so-called Disclose Act—Democracy Is Strengthened by Casting Light on Spending in Elections. Republicans assailed it as pro-union, and critics blasted a last-minute exemption for the National Rifle Association and other big national groups.

The Disclose Act's real problem, however, was that it imposed elaborate reporting rules not only on unions and corporations but also on all incorporated groups—including advocacy and nonprofit organizations on the Left and Right. It's one thing, it turns out, to require politicians and political parties to publicly report their activities; it's another to ask grassroots groups to do the same.

This helps explain why Republicans, having argued for decades that disclosure is the solution to regulating political money, have reversed course. If anything, conservatives are pushing for less transparency, not more, in a series of legal and regulatory challenges. Disclosure is under fire, says Richard Briffault, a Columbia University law professor, in part because it is taking center stage as one of the few remaining campaign finance restrictions that this Supreme Court appears likely to uphold.

"Disclosure has many values," Briffault says. "But we are becoming more aware of the down sides of disclosure, and we may need to focus more carefully on what we need to know."

It would be nice if disclosure could offer up a clean, popular solution to the campaign finance mess. But like so many facets of election law, disclosure is turning out to be incomplete, complex, and controversial.

Public Financing Will Never Happen

It's true that public financing fixes in their current form will probably not win approval in this Congress, or even the next. But the mantra that public financing will *never* pass overlooks some important recent developments.

- An innovative model for public financing that would provide multiple matching funds to reward candidates for collect-



ing small, low-dollar donations has the potential to resuscitate the debate and bridge partisan divides.

- Advocates are better funded and organized than ever. A pair of good-government groups has pledged to spend \$5 million this year and as much as \$15 million over the next 18 months on a high-profile lobbying and advertising campaign to promote the Fair Elections Now Act to publicly fund congressional candidates. The House version of this bill has 159 co-sponsors, and 30 more will soon sign on, its backers say.

- Voters are unusually angry about political money. Anti-Washington sentiment; the *Citizens United* ruling; and high-profile lobbying wars over health care, Wall Street, and climate-change legislation have all thrust special-

interest money into the public eye. Voters overwhelmingly object to the *Citizens United* decision, and a majority of them support the Fair Elections Now Act, recent polls show.

Outside the Beltway, "people seem much unhappier with the system than I can recall," observes former FEC Chairman Trevor Potter, president of the nonpartisan Campaign Legal Center. "And I think that inevitably pushes public funding, and new forms of the match, to the forefront."

Public financing faces big hurdles, of course. A Republican takeover of one or both chambers on Capitol Hill this fall will kick the can farther down the road. Recession and unemployment may make it harder to convince voters that lawmakers deserve what critics call taxpayer-financed campaigns.

Half a dozen states offer public financing to statewide and legislative candidates, but even these efforts are under fire. Recent lawsuits, including one heading for the Supreme Court, challenge state rescue funds that give more money to publicly financed candidates who face deep-pocketed opponents. If these suits prevail, fewer candidates may want to participate in the system.

The Achilles' heel of both the presidential and the state public financing models is that they impose spending caps on candidates who opt into the system. That makes the money unappealing and explains why presidential candidates, including Obama, have abandoned public financing.

This problem, however, is easy to fix: Simply drop the spending caps. Leading political scientists argue that it's time to adopt a "floors-not-ceilings" approach that matches small donations without limiting spending. Such a model appeals to some conservatives and may move to the fore if the high court continues to roll back existing rules.

"There's donor fatigue, there's candidate fatigue, and there's lobbyist fatigue," says ex-Rep. Bob Edgar, D-Pa., the president of Common Cause, which has teamed with Public Campaign to push for public financing. The two groups just launched their first wave of TV ads. It may be a quixotic quest, but slowly, over time, public financing may gain traction. ■

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