

Masthead

Published Mon, Dec 13, 2010 02:00 AM

Modified Mon, Dec 13, 2010 05:21 AM

Campaign reforms, supremely trashed

CHAPEL HILL -- We've now experienced the first installment of Roberts Court, cash-register democracy. The 2010, off-year elections deploying new troves of corporate and union cash were breathtakingly expensive. And given the disheartening confluence of Citizens United and the earlier Wisconsin Right to Life decision, funding was also unusually secretive. Massive expenditures were undertaken without disclosure. All told, the election was the most costly and the least transparent midterm in our history. Not a good start.

There was, you'll recall, much ado about the possibility of foreign corporate influence. But if the Supreme Court's Citizens United opinion is to be taken seriously, independent expenditures by the American subsidiaries of foreign governments or corporations may well be on tap to receive full constitutional protection.

Citizens United held that the identity of the speaker cannot determine whether speech is protected. Government is constitutionally disqualified from dictating the speakers who may address a public issue. Factions are to be checked by permitting them all a free hand, and entrusting the people to decide what is true and false. Americans won't be swayed by the additional offerings of corporations or others .

Citizens United relied, therefore, on the value of information to voters and the impermissibility of speaker-based distinctions. Neither premise is territorially constrained. If the justices mean what they said, China and Saudi Arabia, through their surrogates, will be welcomed as full participants.

But, in candor, I don't believe the Supreme Court is poised to declare that the subsidiaries of foreign corporations have unfettered rights to electioneer. The political benefactors of the Roberts Court majority would not likely approve. And, as important, Citizens United doesn't actually turn, as advertised, on the unacceptability of distinguishing between speakers or on a surpassing faith in the sophisticated prowess of our electorate.

It represents, instead, a burgeoning formal acceptance of the notion that persons of wealth have a constitutionally preordained right to throw their economic weight around in the political process. If rich people effectively enjoy many multiples of the traditional one person, one vote calculus, so be it. Ever has there been a rich person and a poor person's justice. It is, so to speak, the natural order of things.

If any doubted the Roberts Court's commitment to the constitutionalization of economic privilege, they need look no further than the Nov. 29 decision to review Arizona's public campaign financing system.

Last summer, the high court took the unusual step of canceling the Arizona program mid-stream, during the electoral cycle. Almost all observers are convinced the justices will rule that it is unconstitutional to provide matching, or rescue, funds to candidates who are profoundly outspent by opponents refusing to participate in a public funding scheme. It's none of the government's business, the theory goes, if candidates have dramatically different war chests.

If, as a result, sensible office-seekers refuse to unilaterally disarm by participating in public financing programs, so be it. The wealthy will be returned to their natural and deserved advantage.

North Carolina's interesting and innovative public funding program allowing voluntary public financing in appellate judicial races and a handful of Council of State and local government elections will likely fall under this ax. We offer candidates who agree to limit their fundraising practices in favor of public financing a safety valve if they're dramatically outspent by those who opt out.

Reformers have thought such rescues essential to get serious candidates to participate. Not many will choose to restrict their own fundraising efforts if opponents don't have to play by the same rules and then no additional funded opportunity to reply is possible. Our program, as a result, may be rendered useless.

By summer, then, the court will not only have unleashed corporate treasuries to swamp the American democracy in a tide of cash; it will have done in most of the nation's modest public financing schemes.

Citizens United doesn't abolish all campaign contribution limits, it just makes them silly. Why restrict individual contributions to a few hundred, or few thousand, dollars, if wealthy individuals, unions or corporations can spend untold millions? And the Arizona decision won't likely render public financing schemes inherently unconstitutional, it will just render them hapless. That'll be enough.

These are justices uncloseted - in open and unapologetic service of the most powerful forces in American life. Nothing more. Imagine explaining that to James Madison.

Gene Nichol is professor of law and director of the Center on Poverty, Work & Opportunity at UNC-Chapel Hill.