

GUNS AND MONEY

U.S. Supreme Court decisions on campaign spending and gun control will be felt in states for years to come.

BY DAVID SAVAGE

It was good year at the Supreme Court for fans of the First and the Second amendments, but not for those who favor strict gun control and limits on election spending by corporations and unions.

Although freedom of speech and the right to keep and bear arms can hardly be described as new constitutional principles, both gained strength this year. The pair of 5-4 rulings on election spending and gun rights not only highlighted this court term, but their effect is likely to be felt for many years to come.

Campaign finance laws, both state and federal, look to be on shaky ground, particularly if they restrict political spending or equalize spending between candidates. Before 2006, the court's majority had upheld most of these laws in the belief that "big money" could distort elections and corrupt government. Its leading conservatives sharply disputed that view, however. They argued that since the election money at issue buys political speech, the government has no authority to restrict it. The First Amendment, they point out, says Congress "shall make no law ... abridging the freedom of speech."

When Justice Samuel A. Alito Jr. replaced Sandra Day O'Connor early in 2006, the court majority flipped. The conservative bloc had five justices who took the free-speech view of campaign finance. At first, the new majority moved cautiously. The justices struck down a Vermont law that sought to sharply restrict spending and contributions to state candidates, and they partly shielded nonprofit corporations from the McCain-Feingold Act and its ban on pre-election political ads.

This year, the new majority took aim at a much bigger target. For more than a century, profit-making corporations had been treated

differently in the election laws. Congress in 1907 had prohibited corporations and national banks from putting money into election campaigns. Since shortly after World War II, federal law had prohibited both corporations and unions from contributing money to campaigns or spending money to elect candidates. About half the states had similar laws.

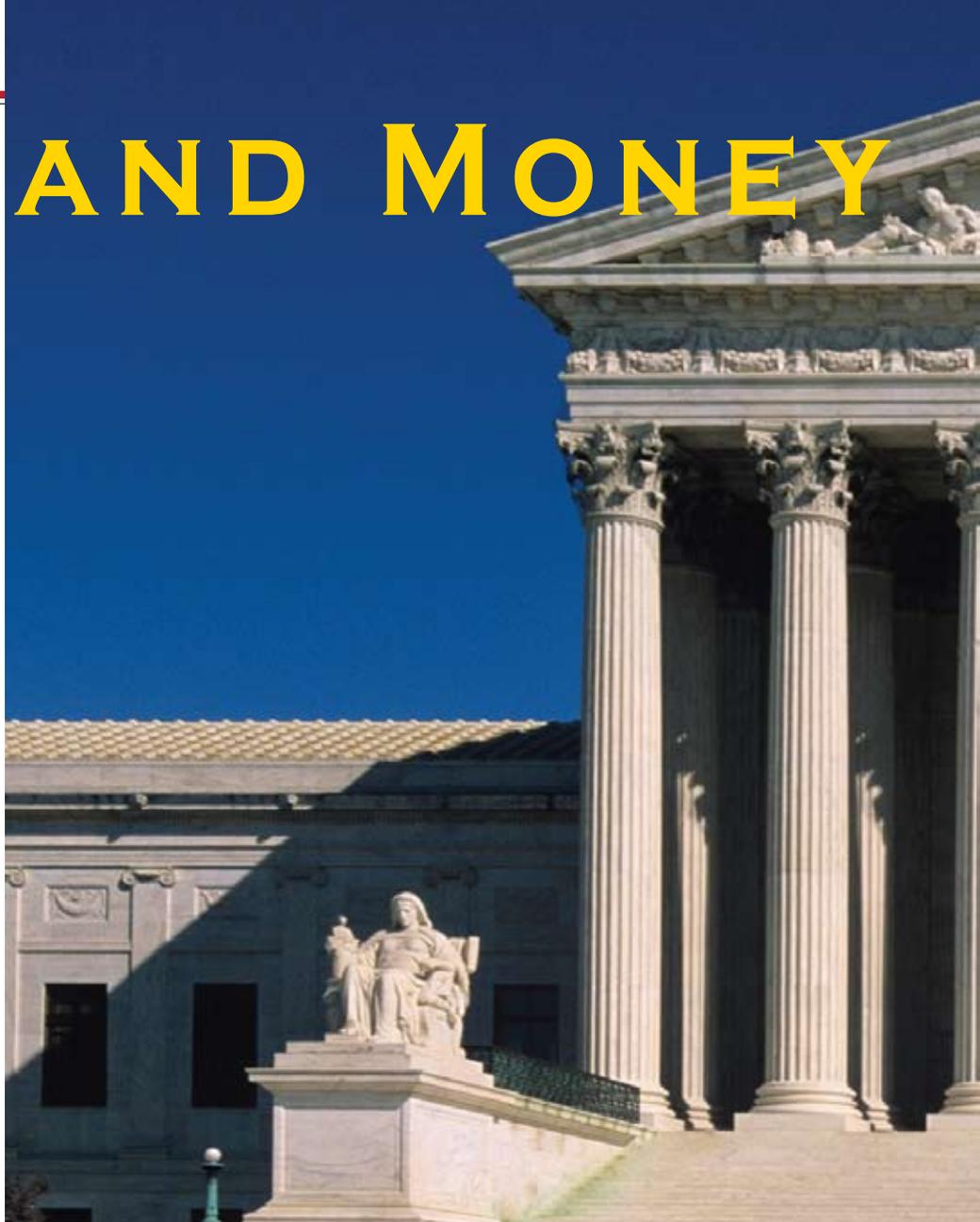
In *Citizens United v. Federal Elections Commission*, the court said "corporate political speech" deserved the same First Amendment protection as speech by individuals, and it struck down the prohibition on direct election spending by corporations as unconstitutional "censorship." Justice Anthony M. Kennedy said these laws "muffled the voices that best represent the most significant segments of the economy," and earlier decisions upholding such laws were overruled.

"The government may not suppress political speech on the basis of the speaker's corporate identity," he said.

The decision frees the nation's largest corporations, such as Exxon Mobil or Chevron, to pour vast sums into election races for Congress. They might also choose to spend money through an oil-and-gas-industry coalition or the U.S. Chamber of Commerce. Unions and nonprofit corporations such as the Sierra Club and the National Rifle Association also can spend election money more freely, without the need to rely on a separate political action committee.

MIXED OUTLOOK

Two pillars of the campaign finance laws still stand. First, the court did not tamper with the restrictions on direct contributions



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to candidates. As such, a corporation may not give money directly to Senator Smithers or his opponent, although it now can pay for its own broadcast ads urging the voters to elect or defeat him. Second, the court upheld the principle of disclosure and said the sponsors of broadcast ads can be required to identify themselves and disclose who paid the cost.

The court's rulings have cast doubt on the "clean elections" laws in Arizona and six other states that seek to level the playing field for candidates. Two years ago the justices, in another 5-4 ruling, struck down the so-called "millionaires amendment" in the McCain-Feingold Act that had permitted a candidate to accept larger contributions if her wealthy opponent spent more than \$350,000 of his own money. In *Davis v. FEC*, the majority strongly rejected the

notion that the law can "level electoral opportunities for candidates of different personal wealth," calling it "ominous" and "dangerous."

Earlier this year, a judge in Phoenix cited this ruling in striking down a similar provision in Arizona's law that provided public funds for candidates whose opponents were spending lavishly. In May, the 9th Circuit Court of Appeals reversed the judge's decision and upheld the state law. But on June 8, the Supreme Court issued an order blocking the state from distributing the public money to candidates running for office, including Governor Jan Brewer. While the one-line order is not a final ruling, the court's intervention strongly suggests five justices are inclined to strike down Arizona's public funding provisions.

CLUBS AND BALLOTS

Still, the First Amendment was not always a winning argument this year. In *Doe v. Reed*, the court ruled states may make public the names and addresses of those who sign ballot measures. The 8-1 decision rejected a free-speech challenge to part of Washington's Public Record Act. A group known as Protect Marriage Washington said signing a ballot measure is an act of political speech, and that their members feared harassment if their names were put on the Internet. In ruling for the state, Chief Justice Roberts said the release of ballot signatures "is not a prohibition on speech, but instead a disclosure requirement."

In *Christian Legal Society v. Martinez*, the court rejected a free-speech challenge to a state university's policy that required offi-



Prison Overcrowding: California officials are appealing a ruling that would require the state to release 46,000 prison inmates to relieve overcrowding. A three-judge panel ruled the state's inmates are being deprived of adequate health care and said overcrowding is the "primary cause." The state says the judges overstepped their authority. *Schwarzenegger v. Plata*

Religious Schools: Arizona is defending its law that offers a \$500 tax credit to people who donate money to organizations that provide scholarships to students to attend private schools. Several taxpayers sued, contending the law is an unconstitutional scheme to subsidize religious schools. They won before the 9th Circuit Court of Appeals. *Arizona Christian School Tuition Organization v. Winn* and *Garriott v. Winn*

Violent Video Games: California is defending its never-enforced law that would prohibit the sales of violent video games to minors. The video gaming industry sued and won a ruling striking down the law on free-speech grounds. The state argues the First Amendment gives the state authority to restrict speech or images that could harm children. *Schwarzenegger v. Entertainment Merchants Association*

Immigrant Workers: Arizona is defending its so-called "death penalty" for businesses that continue to knowingly hire illegal immigrants. Enacted in 2007, the measure would take away the business licenses of firms that violate the ban on employing illegal workers. The law was upheld, but the U.S. Chamber of Commerce, several civil rights groups and the Obama administration say it conflicts with federal immigration law. *Chamber of Commerce v. Whiting*

Prisoner Suits: Texas is defending a decision granting it "sovereign immunity" from paying damages to a prisoner who says he was denied his right to exercise religion, including the use of a Christian chapel. The prisoner sued under a federal law that permits claims against state and local officials, but a U.S. appeals court said the state is shielded from the law. *Sossamon v. Texas*

cially recognized student groups to open their doors to all students, including gays and lesbians. A Christian student group had objected to the nondiscrimination policy at the Hastings College of Law in San Francisco and insisted it had a right to confine its membership to students who shared its religious and moral beliefs. This time, the court's liberal bloc prevailed by a 5-4 vote. The majority said that, since the University of California subsidizes

its official campus groups, it may require they admit all who wish to join.

This fall, the court will take up two important First Amendment cases, one involving speech and the other religion. California and six other states have passed laws restricting the sale of violent video games to minors, but all have been struck down on free speech grounds. Lawyers for California appealed and argued that the First Amendment should not stand in

the way of measures to protect children.

And in a case from Arizona, the court will consider another twist on the old question of whether public money can be used to subsidize religious schools. Since 1997, the state has given tax credits to organizations that provide scholarships to students attending private schools. Several taxpayers sued, alleging the law is a scheme to subsidize religious schools. The 9th Circuit Court of Appeals agreed it violated the First Amendment's ban on "an establishment of religion." The court will hear two appeals from those who defend the state's law.

GUN RULES CHANGE

This year's major Second Amendment ruling held that states and municipalities may not infringe the rights of individuals to "keep and bear arms." This decision cleared up one question, but left unresolved many others.

In 2008, the court ruled for the first time that an individual had a constitutional right to own a gun for self-defense. This decision voided a strict handgun ban in the District of Columbia. Before that, the justices had said remarkably little about the Second Amendment, except to suggest it was concerned mostly with protecting state militias. But since the District of Columbia is a federal enclave and not a state, the 2008 ruling did not say whether the right to keep a gun extended to all levels of government. In the 19th century, the court had squarely ruled the Second Amendment restricted only actions by the federal government.

This year, the court heard a challenge to Chicago's ban on handguns, and on June 28, a 5-4 majority ruled the right to a gun is a "fundamental" aspect of liberty. While the decision in *McDonald v. Chicago* spells the end for a total ban on handguns at home, its practical impact beyond that remains unclear. The justices said again the government may set "reasonable regulations" on firearms, but they did not further define what is reasonable. Gun rights advocates are likely to file suits across the country challenging an array of gun control measures.

CRUEL AND UNUSUAL

In the term's most important ruling on crime and punishment, the court decided it is cruel and unusual punishment to sentence juveniles to life in prison without parole for

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crimes short of murder. The decision in *Graham v. Florida* was the first in which the court rejected a type of prison sentence as unconstitutional. In the past, the Eighth Amendment has limited the use of the death penalty, but not jail time. Thirty-seven states had laws that permitted such sentences, but they were used commonly only in Florida.

The famous Miranda warnings were limited in two decisions. In *Berghuis v. Thompkins*, police were told they could continue to vigorously question a suspect who is warned of his rights and then sits silently. A murder suspect in Michigan finally spoke after nearly three hours, and his brief comment helped convict him. In the past, the court said detectives had the burden of showing the suspect had "affirmatively waived" his rights, and on that basis, a U.S. appeals court overturned the Michigan

man's conviction. This year, however, the court said the suspect has the duty "to invoke his or her right to remain silent [and] to do so unambiguously." In *Maryland v. Shatzer*, the court said police may try again to question a suspect two weeks after he has refused to talk. Past rulings had suggested that once a suspect invokes his rights, detectives may not question him again.

Public corruption prosecutions also took a hit. The court trimmed back the broad but vague federal law that makes it a crime to scheme to deprive the public of "honest services." This statute was commonly used—and some said, often abused—to prosecute state and local officials for ethically questionable but not illegal conduct. In *Skilling v. U.S.*, the court ruled the law can be used against "bribes and kickbacks—and nothing more."

PUBLIC EMPLOYERS AND PRIVATE BEACHES

State agencies and other public employers won a clear victory in the first case testing the privacy rights of employees who send text messages on the job. In *City of Ontario v. Quon*, the court unanimously rejected a privacy suit filed by a police officer who sued the police chief after his personal text messages were retrieved and read. The justices said an agency is generally free to check messages sent by an employee on its equipment whenever there is a "legitimate work-related purpose" for doing so.

And what looked to be an important property rights case washed away. Several owners of beach-front lots on Florida's Gulf Coast had won a hearing on their claim that the state's pumping of new sand along an eroded shore violated their rights. Since the new strip was a public beach, they said their ocean-front lots had been converted to ocean-view lots. They sought compensation for their loss in the *Stop the Beach Renourishment v. Florida*. If they had won, the impact could have been felt in all coastal states. But the justices concluded that since the submerged land belonged to the state, it was free to pump more sand onto it. ☰