Campaigns, Guns and Jails

States have a lot at stake in the Supreme Court's new session, including a pivotal case on election spending.

BY DAVID G. SAVAGE

A decade before President Teddy Roosevelt pushed through Congress a ban on corporate contributions to candidates, at least five states had enacted their own corporate spending bans in state election races. Kentucky was first in 1891, followed a few years later by Florida, Missouri, Nebraska and Tennessee. These days, many states either prohibit or strictly limit corporate campaign funds.

But all those laws are now in danger of being found unconstitutional at the hands of the U.S. Supreme Court and its hardening view that campaign spending is free speech, regardless of the source of the money. This summer, the court announced it would consider overturning its prior rulings that upheld the power of states and Congress to keep corporate treasury funds out of election races. It held a special argument session in early September to debate the issue.

The move set off alarms among supporters of the campaign finance laws and the state attorneys general. "There is a lot of history behind these laws. This could draw all of them into question," says Montana Solicitor Anthony Johnstone. He filed a friend-of-the-court brief on behalf of 26 states. "The court should not unsettle the foundations of a century of state laws."

The campaign spending case, *Citizens United v. Federal Election Commission*, figures to be the most far-reaching dispute before the Supreme Court as it begins its new term. It's not the only case of importance to the states, however. In a pair of cases from Florida, the justices are being asked to put new limits on a state's power to imprison juvenile offenders for life. The court may also extend the Second Amendment rights of gun owners to challenge state and local gun-control measures.

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A NEW VOICE

Justice Sonia Sotomayor took her seat this fall, and she is—as everyone knows—the first Hispanic and the third woman in the court's history. She will also be its third New Yorker—joining Justices Antonin Scalia and Ruth Bader Ginsburg—none of whom has been shy about sounding off during oral arguments.

By that measure, Sotomayor may differ considerably from the generally reticent and now-retired Justice David H. Souter from New Hampshire. But otherwise, Sotomayor is not likely to change the ideological balance of the court. Souter was a defender of the campaign finance laws, and Sotomayor is expected to be the same. Before becoming a judge, she served on a New York board that enforced the city's campaign funding ordinances.

But recently, the court's majority flipped on campaign finance laws, and the effect of that shift is still being felt. With Justice Sandra Day O'Connor in the majority, the court upheld the McCain-Feingold Act against a free-speech challenge by a 5-4 vote in 2003. But when O'Connor retired and was replaced by Justice Samuel A. Alito Jr. in 2006, the balance tipped toward the free-speech side.

That year, the court struck down Vermont's effort to restrict spending in state election campaigns, including setting very low limits on contributions to candidates. Both parts of this law were declared to violate the First Amendment, the court held in *Randall v. Sorrell*. A year later, the 5-4 majority weakened part of the McCain-Feingold Act that forbids corporate or union-funded broadcast ads that target federal candidates in the two months before the election.

Chief Justice John G. Roberts Jr. said that corporate-funded groups—in this instance, Wisconsin Right to Life Inc.—can sponsor ads that criticize lawmakers, so long as they do not expressly advocate their defeat. "The First Amendment requires us to err on the side of protecting speech rather than suppressing it," he said. Justices Scalia, Anthony M. Kennedy and Clarence Thomas said they would have gone further and struck down this part of the McCain-Feingold Act entirely, rather than merely limit its reach.

"HILLARY: THE MOVIE"

The showdown over campaign finance laws arrived earlier this year, but in a most unlikely case. Conservative activist David Bossie had been impressed by left-leaning film director Michael Moore and his use of a documentary—*Fahrenheit 9/11*—to mock President George W. Bush as he ran for reelection in 2004. Bossie set out to do the same on a smaller scale with a 90-minute video called *Hillary: The Movie*. It featured conservative pundits deriding the former first lady as ruthless and devious.

Bossie envisioned the video being shown widely, including in theaters, through sales of the DVD and possibly through broadcast on TV. He also assumed then-Senator Clinton would be the Democratic nominee for president in 2008.

His plans, like Mrs. Clinton's, did not work out precisely as envisioned. Instead, Bossie became tied up in a legal battle over whether a slashing campaign video produced with corporate funds could be restricted under the federal election laws as an illegal corporate campaign ad. Bossie's group, Citizens United, received only a small amount of corporate money, but the Federal Election Commission said that any use of corporate funds triggered the law.

The Supreme Court agreed to hear Bossie's challenge to the FEC's order. During the first argument in March, however, the justices sounded less interested in whether the law extends to a nonprofit group than in exploring whether the campaign-funding law itself was suspect. At one point, Justice Alito asked whether the government could forbid a corporate-funded book that attacked a candidate for office.

"Yes," said the lawyer for FEC, although no such law exists. The image of government book-banning hung over the argument. And in late June, rather than issue a decision, the court announced it would hear arguments in September over whether to overrule *Austin v. Michigan Chamber of Commerce (1990)* and *McConnell v. FEC (2003).* The latter upheld the McCain-Feingold Act. The former, however, is of special importance to the states.

The Michigan Chamber had challenged a state law that prohibited corporations from spending treasury funds to support or defeat candidates for state offices.

The court, however, upheld the state's law and said "the unique state-conferred corporate structure" helps these businesses amass large amounts of money. "Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions," wrote the late Justice Thurgood Marshall. Scalia and Kennedy, then newcomers, dissented and called Michigan's law an unconstitutional "censorship scheme."

If the Supreme Court were to overrule the *Michigan* case later this year, it would not necessarily open the door to direct corporate funding of state candidates. It would, however, cast doubt on the many state laws that restrict corporate spending to elect or defeat candidates. And by extension, similar laws restricting direct union spending on campaigns also would be in jeopardy.

PRISONS AND GUNS

In two cases from Florida, defense lawyers are asking the court to rule that it is cruel and unusual punishment to impose a life sentence without parole on a juvenile who commits a crime other than a murder.

One case, *Sullivan v. Florida,* involves a 13-year-old who was sentenced to life for a rape. The other, *Graham v. Florida*, concerns a 16-year-old who was imprisoned for life for an armed burglary. Their lawyers cited an Amnesty International study that found at least 2,225 people in the United States were serving terms of life-without-parole for crimes committed as juveniles.

Justice Alito asked whether the government could forbid a corporate funded book that attacked a candidate and the lawyer for the FEC said "yes".

Until now, the court has employed the Eighth Amendment to limit the death penalty, but not prison terms, said Dan Schweitzer, counsel for the National Association of Attorneys General. "We always hear the argument that 'death is different,' " he said, referring to challenges to capital punishment. "Life without parole was adopted because of concerns about the death penalty. Now, we'll see how much the court will supervise sentences."

Gun rights and the reach of the Second Amendment may also be decided in the coming year. Last year, the court ruled in *District of Columbia v. Heller* that law-abiding people had the right to have a gun for self-defense. Because Washington, D.C., is a federal enclave, not a state, the court did not reconsider the 19th century rulings that held the amendment limits only the federal government, not states and municipalities.

Over the summer, the National Rifle Association appealed on behalf of gun owners in Chicago who seek to void that city's strict limits on gun ownership. If the court, as expected, takes up the case and extends the reach of the Second Amendment, it will open the door to constitutional challenges to state laws that restrict firearms.

State and local prosecutors also are watching an Iowa case that tests whether they can be sued by prisoners who say they were wrongly convicted. In general, prosecutors are immune from being sued. However, a judge and the U.S. Court of Appeals in St. Louis cleared the way for two former prosecutors from Pottawattamie County, Iowa, to be sued for allegedly coaching witnesses to testify against two accused killers. State lawyers say they fear that if this ruling is upheld, it will open the door to many costly lawsuits against prosecutors.

PREEMPTION VICTORIES

The states are coming off a Supreme Court term in which they won in three major preemption cases. The last term did not include major constitutional challenges to state laws. In the areas of prescription drugs, cigarettes and banking, however, the court decided conflicts that arose between federal regulations and state consumer-protection laws.

The Bush administration had pressed the view that a federal agency's regulation of a product or service usually trump or preempt a state's laws. But that view was decidedly rejected. In *Wyeth v. Levine*, the court upheld an injured patient's right to sue a drug maker under a state's consumer protection laws if she was hurt by a prescription drug. In this case, Diana Levine, a Vermont musician, had to have her arm amputated when she developed gangrene after being injected with an anti-nausea drug sold by Wyeth. She argued Wyeth should have placed better warning labels regarding intravenous injections of the drug. The pharmaceutical industry argued that drug makers were immune from being sued if a drug and its warning label were approved by the U.S. Food and Drug Administration.

In *Altria v. Good,* the court said smokers who smoked "light" cigarettes can sue tobacco firms under a state's false advertising laws, despite the federal warning label. And in *Cuomo v. Clearing House*, the court said state attorneys general can enforce their state's fair lending laws against national banks, over the objections of the U.S. comptroller of the currency. It may not last, but the Washington-knows-best theory has gone into retreat, at least at the Supreme Court.