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Court's Campaign-Financing Decision Endangers Democracy

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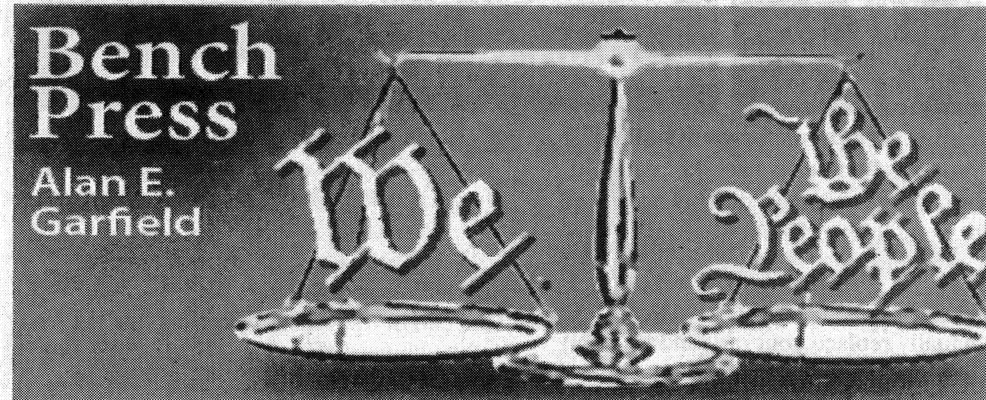

If you think Exxon Mobil and Goldman Sachs have too much power to influence the political process, I've got news for you. Last Thursday's Supreme Court decision, Citizens United v. Federal Election Commission, will allow corporations to inundate political campaigns with expenditures that will dwarf anything you've seen in the past.

The court's five conservative justices – the ones who claim not to be judicial activists – decided that our interest in controlling the corrupting influence of corporate money is not compelling. The fact that most Americans think corporate money is undermining democracy was irrelevant. The fact that campaign-finance laws had bipartisan support was inconsequential. For these justices, there was only one constitutional value at stake: the "free speech" rights of corporations to spend other people's money – that is, shareholders' money – to influence elections.

How did the court reach this result? Where did it go wrong?

The wrong turn did not occur when the court held that regulating money can implicate the First Amendment. Communicating costs money. If the government were free to regulate how much people could spend on speech, the First Amendment would be moot.

The government would simply tell hostile newspapers not to spend more than $100 on their publications.

The wrong turn occurred when the court held that regulating corporate campaign expenditures was unjustified. The majority dismissed the argument that regulating these expenditures was necessary to preserve our democracy's integrity. Exhibiting what Sen. John McCain called "extreme naïveté," it simply declared that there was nothing to fear from unlimited corporate campaign spending.

This naïveté derived in part from a false distinction the court developed in a landmark 1976 campaign-finance decision. In that case, the court distinguished between contributions given directly to a candidate, which the court said government could limit, and expenditures made independently of a candidate but in support of his campaign, which the court said could not be limited.

The court upheld contribution limits because it said contributions pose a risk of corruption. Contributions might be given to secure a political favor from a candidate. And even if there is no deal, the government still has an interest in avoiding the appearance of corruption.

By contrast, the court said, independent expenditures raise no risk of corruption. Because the expenditures are made without consulting a candidate, the court saw no danger of an unlawful bargain. Indeed, a candidate might even dislike an independent party's campaign ad.

This distinction would be credible if it were true. But as Justice John Paul Stevens convincingly argued in his Citizens United dissent, "independent expenditures can be corrupting in much the same way as direct contributions." Political consultants admit that politicians are aware of who is producing supportive ads and feel indebted for the favors. Members of Congress are said to especially appreciate when independent organizations run negative ads so they can run positive ads and appear to be above the fray.

Thus, the notion that independent expenditures are less likely to corrupt the political process than direct contributions is specious. But until last week, the impact of this distinction was mitigated by one important exception. While the court regularly struck down limits on individuals' independent expenditures, it upheld limits on independent expenditures by corporations. In a 1990 decision, Austin v. Federal Election Commission, the court concluded that corporations were different from individuals and these differences justified greater regulation.

But Citizens United overruled Austin. The court now thinks any distinctions between corporations and individuals are irrelevant for First Amendment purposes. So if the First Amendment prevents government from regulating an individual's independent campaign expenditures, it also prevents regulation of a corporation's expenditures.

But in deciding that individuals and corporations were the same, the court merely ratcheted up its "extreme naïveté." The court ignored two obvious, yet important, distinctions.

Corporations are artificial legal entities created for earning profits, not funding political campaigns. Shareholders invest for dividends and stock appreciation, and not to give corporate managers funds to support their preferred candidates.

Yet, as Justice Stevens noted, when managers use corporate money to support a candidate, it is shareholders "who are effectively footing the bill."

Corporations are also different because large ones have vast accumulations of wealth. The New York Times reported, for instance, that political parties spent $1.5 billion during the 2008 election cycle and federal political action committees spent $1.2 billion. During this same period, Fortune 100 companies alone generated $605 billion in profits. If just a fraction of these profits were used to influence elections, it would overwhelm all other expenditures.

Indeed, after Citizens United, one can readily imagine a corporation threatening a politician to do its bidding or face an avalanche of money to support her opponent.

Even before Citizens United, critics of our lax campaign-financing laws said we had "the best democracy money can buy." Thanks to the Supreme Court's latest decision, the influence of special-interest money is likely to get worse.

The court's majority may have thought it was making our democracy stronger. But Justice Stevens captured the majority's mistaken impression perfectly: "While American democracy is imperfect, few outside the majority of this court would have thought its flaws included a dearth of corporate money in politics."

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