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More on *McCutcheon v. FEC*

Ammon Simon October 16, 2013

Oral arguments were held last week in *McCutcheon v. FEC*, which could declare aggregate limits to federal campaign donations unconstitutional. Not surprisingly, the Left is throwing a misguided fit.

The day of the arguments, President Obama reprised his role as constitutional-scholar-in-chief, arguing that “there aren’t a lot of functioning democracies around the world that work this way, where you can basically have millionaires and billionaires bankrolling whoever they want, however they want, in some cases undisclosed.” *Mother Jones* worried that *McCutcheon* could “usher in a ’system of legalized corruption,” Dana Milbank breathlessly declared that the “Supreme Court is poised to legalize corruption,” and one liberal site thought “that we would be back to the same kind of huge contributions that constituted legalized corruption” and go “back to the Robber Baron era of the 19th century, when members of Congress were functionally owned by wealthy interests.”

The most disturbing part of the Left’s fear tactics is what’s missing: anything about the First Amendment. The Left may wish that campaign-finance cases didn’t implicate the First Amendment, but as Bradley Smith pointed out, as of early 2009 the last 30 years on the Court have only seen Justice Stevens argue that point. Professor Eugene Volokh has an excellent explanation of why these cases should implicate the First Amendment:

Well, of course money isn’t speech. But so what? The question is not whether the money is speech, but *whether the First Amendment protects your right to speak using your money.*

After all, money isn’t lawyering, but the Sixth Amendment secures criminal defendants’ right to hire a lawyer. Money isn’t contraception or abortions, but people have a right to buy condoms or pay doctors to perform abortions. Money isn’t education, but people have a right to send their children to private schools. Money isn’t speech, but people have a right to spend money to publish *The New York Times*. Money isn’t religion (at least not for most of us), but people have a right to donate money to their church.

Professor Volokh also appears in an excellent, short Federalist Society video on this topic:

http://www.youtube.com/watch?feature=player_embedded&v=7LNTt-JK4T4

In *McCutcheon*, it’s easy to see how aggregate limits hurt First Amendment rights – they functionally limit the range of issues that a donor can support, as Chief Justice Roberts articulated in oral arguments:

The concern is you have somebody who is very interested, say, in environmental regulation, and very interested in gun control. The current system, the way the anti-aggregation system works, is he's got to choose. Is he going to express his belief in environmental regulation by donating to more than nine people there? Or is he going to choose the gun-control issue?

First Amendment aside, it's also striking how misguided the Left's policy arguments are on this topic. As eager as the Left is to make campaign-finance laws about robber barons, Richard Nixon, and legalized corruption, there's actually little evidence that campaign-finance laws do that much good. As Bradley Smith points out, the evidence just doesn't lend itself to the "legalized corruption" theme:

In a 2003 article in the *Journal of Economic Perspectives*, three MIT scholars — Stephen Ansolabehere, James Snyder, Jr., and John de Figueiredo — surveyed nearly 40 peer-reviewed studies published between 1976 and 2002. "[I]n three out of four instances," they found, "campaign contributions had no statistically significant effects on legislation or had the 'wrong' sign — suggesting that more contributions lead to less support." Given the difficulty of publishing "non-results" in academic journals, the authors suggested in another paper, "the true incidence of papers written showing campaign contributions influence votes is even smaller." Ansolabehere and his colleagues then performed their own detailed study, which also found that "legislators' votes depend almost entirely on their own beliefs and the preferences of their voters and their party," and that "contributions have no detectable effects on legislative behavior."

Aggregate donation limits are especially ineffective, and the liberal justice's absurd hypotheticals about donors currying favor with party leaders make that clear. Justice Kennedy got at this in oral arguments, pointing out that rich donors can fund independent expenditures to amass (alleged) influence over a candidate; no need to route donations through 4,000 PACs, contravene federal election regulations, or fund a mythical "joint fundraising committee" of every official party apparatus in the country. Instead, as in the 2012 campaign, big donors can spend millions in independent expenditures to prop up their favored presidential candidate, as did Gingrich-supporter Sheldon Adelson, who not surprisingly secured a meeting with Mitt Romney after the primary. Does anyone think that aggregate donation limits — or any donation limits for that matter — did anything to limit his influence?

The liberal conceit is that money's "corrupting" influence could be limited, if we were only free from the Court's First Amendment jurisprudence. As Justice Kagan put it, "I suppose that if this Court is having second thoughts about its rulings that independent expenditures are not corrupting, we could change that part of the law."

One need only examine campaign-finance history to see how misguided this is — a fact that wouldn't change under any system, no matter how utopian the design. Historically, campaign-finance laws have always been undermined by innovative workarounds; corporations invented ways to avoid corporate contribution bans, while other parties discovered "soft money" to neutralize individual contribution limits.

This circumvention problem isn't something that will be fixed with time, but instead inevitably flows from the misguided belief that we can regulate away money's influence over the political

system. Say policymakers could limit independent expenditures (a ban that would only be effective if the Court dramatically narrowed the First Amendment), what would they do about the elite bundlers, who leverage their contacts to raise millions of dollars for candidates? And any political observer knows that politicians need more than money to win a race. What about the influence of newspapers, pundits, or influential business leaders? What about someone who can offer a candidate 100 volunteers? What about high-profile endorsements?

An overly regulated campaign-finance system won't combat corruption, but it does have unintended consequences – consequences that invalidating aggregate limits could start to address. To list a few (and for a full recounting, check out the Cato Institute's excellent *McCutcheon* [amicus brief](#)):

- Protecting incumbents: A Campaign Finance Institute study found that challengers rely on big donors more than incumbents, because as attorney Eric Wang argues, “Incumbents generally enjoy greater name recognition, made possible through more news coverage, longer histories of constituent service and access to official mail privileges,” while challengers draw from a smaller pool of supporters. Bradley Smith backs this up, pointing out that after passage of campaign-finance reform in 1972, “average incumbent spending advantage over challengers in U.S. House races has soared from approximately 1.5-to-1 to nearly 4-to-1.” And if anything contributes to the decline of our political system, it's when entrenched incumbents don't have the threat of electoral loss to maintain their attentiveness to the needs of their constituencies.
- Stifling alternative political views. A system that protects incumbents undermines the kind of robust disagreements that should occur in a healthy democracy. During the 2012 Republican primaries for example, large donors – albeit through independent expenditures – prevented the establishment candidate, Mitt Romney, from marching easily through to the general election, because they propped up his opponents' campaigns. This also happened with Ross Perot's campaign, whose self-funding allowed him to promote a populist message that both sides that ignored, along with Eugene McCarthy's influential 1968 anti-war presidential campaign, which was sustained by rich donors, the top 50 of which contributed to one-third of his financial support.
- Elevating the importance of fundraising. I doubt the public wants to see our elected officials spend an inordinate amount of time “dialing for dollars,” but our current system forces them to do just that. Absent campaign finance, candidates could raise money from fewer donors and spend more time governing.

No campaign-finance system is perfect – whether deregulated, heavy regulated, or anywhere in between – and money can always be a corrupting influence. But the answer is to limit government, not free speech. As Ilya Shapiro has said:

To the extent that ‘money in politics’ is a problem, the solution isn't to try to reduce the money — that's a utopian goal — but to reduce the scope of political activity the money tries to influence. Shrink the size of government and its intrusions in people's lives and you'll shrink the amount people will spend trying to get their piece of the pie or, more likely, trying to avert ruinous public policies.