The New REPUBLIC

Clarence Thomas Does Not Share the Founding Fathers' View of Corruption

By: Jeffrey Rosen – October 11, 2013

On the first day of the Supreme Court term, the justices debated whether limits on aggregate campaign contributions were necessary to prevent individual donors from corrupting politicians through quid pro quo gifts. As Bobby Burchfield, the lawyer challenging the aggregate limits put it, “The foundation of this Court's jurisprudence in this area is the careful line between independent expenditures, which this Court has held repeatedly do not create a sufficient risk of quid pro quo corruption to justify their regulation, and contributions which do.”

Reaction to the argument has focused on the policy question that tied the justices in knots: namely, does or doesn’t the current political system favor the rich. Liberal justices and commentators say yes; conservative justices and commentators generally say no. But it’s a shame that the Court didn’t focus on the broader constitutional question underlying its recent decisions striking down campaign finance reform: does the First Amendment allow only campaign finance regulations designed to prevent quid pro quo corruption by individuals, or does it allow a broader definition of corruption, designed to prevent the entire political system from being inextricably dependent on a handful of the richest donors? The truth is that the Court adopted an unnecessarily narrow definition of corruption in the Citizens United case, which held, as Burchfield put it, that the “gratitude and influence” that all members of Congress feel toward big money donors to candidates, parties and PACS “are not to be considered quid pro quo corruption.” And a brief filed in McCutcheon, but ignored by the justices in the argument, suggests that this definition is inconsistent with the original understanding of the Framers of the Constitution.

The narrow requirement that campaign contributions can only be regulated when an individual donor threatens to corrupt an individual candidate – by bribing the Secretary of Defense with a Maserati, to use Solicitor General Don Verrilli’s example—led the justices to squabble about whether or not Verrilli was right to claim that “Aggregate limits combat corruption.” By “aggregate limits,” he was referring to the fact that, in a two-year election cycle, a person can donate a total, or aggregate, of $48,600 to all candidates for federal office and another $74,600 to national political parties, state and local political parties, and political groups. Donations are limited to $2,600 per election on contributions to individual candidates for federal office. McCutcheon claims the total limit of $123,200 violates his First Amendment right to freedom of speech.

Verrilli disagreed on the grounds that "aggregate limits combat corruption both by blocking circumvention of individual contribution limits and, equally fundamentally, by serving as a bulwark against a campaign finance system dominated by massive individual contributions in which the dangers of quid pro quo corruption would be obvious and inherent and the corrosive appearance of corruption would be overwhelming." In response, Chief Justice Roberts suggested that if the national parties and state committees were prohibited from transferring money "among themselves and to a particular candidate," that might protect against that "corruption appearance while at the same time allowing an individual to contribute to however many House candidates he wants to contribute to?"

This debate about the definition of corruption has huge consequences for the future of campaign finance reform. In 1976, the Court ruled in *Buckley v. Valeo* that Congress had extensive power to put limits on individual campaign donations to federal candidates as a way to prevent corruption. But the Court said it had less power to restrict expenditures, independent of candidates, by individuals and groups. The court reasoned that limits on contributions, rather than expenditures, were both less likely to raise the specter of corruption and less likely to threaten free speech. Now some conservative justices, led by Clarence Thomas, want to overturn Buckley, and deregulate contributions as well as expenditures, on the grounds that neither threaten quid pro quo corruption.

In fact, however, Thomas's definition of corruption – and the one embraced by the Court in Citizens United -- is far narrower than the one the Framers of the Constitution endorsed. As Professor Lawrence Lessig of Harvard Law School argued in a brief for the Constitutional Accountability Center, "the Framers had a very specific conception of the term 'corruption' in mind, one at odds with McCutcheon's more modern understanding of that term. For the Framers, 'corruption' predicated of institutions as well as individuals, and when predicated of institutions, was often constituted by an 'improper dependence.'" According to Lessig, the Framers sought a House, in particular, "dependent on the people alone," rather than on foreign patrons or other conflicting dependencies, as parliament had been corrupted in England. "The Framers' dominant concern was the corruption of the institutions of government, not individuals," he writes, and "corruption of individual officeholders by bribery or other forms of *quid pro quo* corruption was a real, but secondary, concern." Out of 325 uses of the word corruption in the founding era, Lessig found that more than half of all cases discussed corruption of institutions, not individuals.

Solicitor General Donald Verrilli, unfortunately, was not able to challenge the conservative justices to live up to their own originalist principles by embracing this broader definition of corruption: to do so would have been to emphasize that Justice Kennedy's definition of corruption in the Citizens United Case was inconsistent with the original understanding of the Framers. But no group, liberal or conservative, has challenged Lessig's exercise in liberal originalism. On the contrary, in a recent podcast debate hosted by the National Constitution Center, Ilya Shapiro of the CATO Institute conceded to David Gans of the Constitutional Accountability Center that CAC and Lessig's historical account of "dependence corruption" was historically accurate.

As he did in CATO's brief, Shapiro went on to argue, however, that times have changed, and that new technologies for disclosing the identity of campaign contributors are a better way of avoiding "dependence corruption" than direct limits on contributions or expenditures.

Shapiro's argument parallels one made by the Cause of Action Institute, a conservative reform group. Arguing in its brief that blogging, twitter, and other social media have changed politics today, the Cause of Action Institute argues that "historic assumptions about disclosure and corruption may be obsolete….In less than twenty minutes, a citizen-activist can identify every candidate who has taken a donation from [McCutcheon and the RNC], then tweet, blog, email or text that information to a wider audience."

It's true that publicizing the donation amounts taken by individual candidates is easier in the age of Twitter than it was in the broadcast TV age, when the Court decided Buckley v. Valeo in 1976 and a few gatekeepers controlled access to the airwaves. But publicizing the source of individual donations does little to address the broader concern about "dependence corruption" that concerned the Framers: as Lessig puts it: "Consistent with the Constitution's text and history …. government may regulate campaign contributions in order to reduce opportunities for corruption and prevent candidates and officeholders from becoming dependent on high dollar donors."

In other words, there's no need for a high dollar donor to promise a Maserati to a federal official in order to secure a political favor in return. It's the need for candidates to spend most of their time chasing high dollar contributions from a handful of donors that makes them inevitably dependent on the world view of those donors, rather than being accountable to the American people. The framers had a word for this: corruption. It's time for the Supreme Court to return to the original understanding of corruption rather than continuing to ignore it.