



10/17/13 Nat'l J. (Full Text) (Pg. Unavail. Online)
2013 WLNR 26309772

National Journal

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October 17, 2013

Get Over It: Campaign Finance Limits Don't Work

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Campaign finance law is a house gutted by fire. After the smoke has cleared, whatever is still standing leaves the homeowner with a choice: Preserve and renovate, or demolish and start anew. And where limits on contributions are concerned, it may be time just to knock the damn thing down.

The Supreme Court hasn't asked whether any limit on campaign spending is unconstitutional, but it's getting there. Last week, the justices took up the latest conservative salvo: *McCutcheon v. FEC*, a case about whether the government can limit the total amount a donor can give to candidates and party committees during a campaign cycle. The Court is expected to strike down some or all of the limits, likely with a 5-4 vote.

That's the same tally by which the Court's right wing prevailed three years ago in the now seminal *Citizens United* case, which allowed corporations to spend endlessly to influence political campaigns and encouraged endless metaphors about gates and floods. The conservatives on the Court, led by Antonin Scalia, are moving toward a no-holds-barred view of political donations as speech unequivocally protected by the First Amendment.

And even if they haven't quite gotten there yet, where they are today isn't a great place to be if you are a good-government type who worries about the gushers of cash flowing into the system. The Center for Responsive Politics has estimated that \$6 billion was spent in the 2012 cycle, nearly \$1 billion more than in 2008, which was itself a record. But if the questions the justices raised during oral arguments last week in *McCutcheon* were any indication, many remain in the dark about the role big money is already playing.

Modern campaign finance jurisprudence was born of the Court's 1976 decision in *Buckley v. Valeo*, in which the justices established an unwieldy (and increasingly ridiculous) distinction between contributions directly to a candidate or party and so-called independent expenditures to influence campaigns, like those flowing from the Koch brothers' Americans for Prosperity. That decision held that limits on direct contributions were acceptable because of fears of corruption and bribery, but that limits on money spent outside of campaigns were unconstitutional impediments to free speech.

Now the snake has swallowed the elephant. *Buckley* unleashed political action committees, which begat super PACs and 501(c)(4) groups, which begat the likes of Foster Friess and Sheldon Adelson sponsoring their own candidates last year via direct contributions to super PACs such as *Winning Our Future*. In the meantime, Court conservatives have been nudging the law

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toward total deregulation, and now the individual and aggregational limits are about the only things left standing—like the one solid beam in the gutted house.

Last week, during arguments, the liberal justices wrung their hands over the contribution limits, as if they were the only thing keeping the political system from ruin—as if the common man still has a voice amid the din of moneyed titans. But Scalia, perceptively, captured the reality he has helped bring about: The risk of corruption, he argued, is just as present when Adelson or American Crossroads spend millions indirectly as when someone hands a check to a candidate. "If gratitude is corruption, don't those independent expenditures evoke gratitude?" Big money already shapes politics, he said. "You can't give it to the Republican Party or the Democratic Party, but you can start your own PAC.... I'm not sure that that's a benefit to our political system."

Give Scalia his due. The system now really does benefit outside groups at the expense of candidates and parties. Other than going back and clamping down on those expenditures, which this Court isn't going to allow, the only way to re-level the field is to do away with the contribution limits entirely. This is, naturally, what Scalia wants and what progressives, with good reason, fear. But that world wouldn't look much different than this one—and could arguably provide more candidate accountability and greater funds for time-honored campaign functions such as voter education and get-out-the-vote efforts.

More important, such a radical move might finally galvanize Congress to bolster transparency, which in the current ecosystem may be the only true safeguard against corruption. Groups such as the Sunlight Foundation argue that technology allows tracking of contributions and expenditures in real time, and advocates for deregulation, such as professor Joel Gora of the **Brooklyn Law School**, say the Internet gives the public a more powerful tool than could have been imagined in the days of Buckley to sniff out quid pro quo arrangements. At the same time, lawmakers could toughen restrictions on shadowy 501(c)(4) groups that aren't required to reveal their donors, while boosting Federal Election Commission and Internal Revenue Service enforcement.

Much of that sounds unrealistic in the current political environment, especially with conservatives increasingly viewing disclosure as a threat to personal liberty. But today, even with the contribution limits, the system is riven with big money, outside groups wielding outsized influence, and opacity. The current Court shows no inclination to alter that dynamic. The Scalias have already won, and the only response, if there is one, may be legislative, not judicial. Better to not live in denial. That house? It's gone. Time to rebuild.

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Language: EN

Other Indexing: (Foster Friess; Joel Gora; Antonin Scalia; Sheldon Adelson)

Word Count: 873

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