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The Right to Buy Politicians

The United States Supreme Court, in the case of *McCutcheon v. Federal Election Commission*, decided on April 2, 2014, that the federal individual aggregation donation cap of $123,200 per election cycle is unconstitutional, in violation of the First Amendment.

The First Amendment says nothing about the right to buy a politician. The First Amendment addresses the right to free speech. Nevertheless, the Supreme Court of the United States has found a right to give political contributions unencumbered by any limits to be a constitutional guarantee.

This incredible expansion of the United States Constitution is without justification. The opinion of the Court was announced by Chief Justice Roberts. His opinion was supported by Justices Scalia, Kennedy and Alito. That makes only four Justices. Justice Thomas filed an opinion concurring in the judgment. The four dissenters were Breyer, Ginsburg, Sotomayor and Kagan.

In the second paragraph of the opinion, Justice Roberts wrote that the right to participate in democracy through political contributions is protected by the First Amendment. Justice Roberts equated the right to flag burning, funeral protests and Nazi parades with a right to buy political power. It almost seems as though the majority of the Court resents the sweep of the First Amendment and therefore has ruled that if liberals want the First Amendment broadly interpreted, the majority will ram it down the throats of those who believe that the right to spend money is not protected by the First Amendment.

Justice Roberts argued that corruption may be prevented. How to prevent corruption, when there can be no limit on spending to buy political power, is anyone's guess.

The aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of 10 or more candidates, even if all contributions fall within the base limits Congress views as adequate to protect against corruption. The limits, stated the court, deny the individual all ability to exercise expressive and associational rights by contributing to someone who will advocate for the donor's preferences. A donor, under the federal statutory scheme struck down by the Court, must limit the number of candidates he supports and may have to choose which of several policy concerns he will advance.

The majority attempts to present itself as the preserver of democracy. "The First Amendment burden is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies." Roberts then writes, "Other effective methods of supporting preferred

candidates or causes without contributing money are reserved for a select few, such as entertainers capable of raising hundreds of thousands of dollars in a single evening." *Sub silentio* is the majority's view that Democrats are supported by the entertainment industry.

Much of the majority opinion attacks the dissenters who express concern about the corrosive effect of money and politics. The majority sees less of a risk of corruption than when money is given to a PAC or a committee. In other words, the law struck down by the United States Supreme Court is not as bad as other ways of corrupting political candidates.

The majority opinion proceeds to lecture Congress that there are other ways which it can serve the government's interest in having fair and free elections. The conservatives, in their role as legislators, provide "multiple alternatives" to Congress that would serve the government's interest. For example, the Court lectured Congress in connection with targeted restrictions on transfers among candidates and political committees. It is breathtaking to see a court, especially one made up of conservatives, suggest specific legislation that would satisfy the majority of the Court.

The dissent is on a relatively narrow basis. The dissenters believe that the plurality opinion striking down the campaign restrictions substitutes the judges' understanding of how the political process works for the understanding of Congress.

The clash between conservatives and liberals could not be more evident than in this case. In *McCutcheon*, it is the conservatives who are activist in striking down a law and instructing Congress how it should do its job properly. The liberals counsel judicial restraint in the face of legislative prerogative. It is the conservatives who argue for a broad view of the First Amendment when it comes to the influence of money and politics and the liberals who argue for a restricted view.

Typically conservatives believe that their party will raise the most money and be able to influence elections against the wishes of the unwashed riffraff. That is not necessarily true since wealthy donors are now smart enough to buy off both parties. Nevertheless, it is still the prevailing view of those with lots of money that money should equate to political power. Those who believe they represent the interests of the less wealthy and influential attempt to defuel candidates driven by dollars. As I have written after the *Citizens United* decision, we have reached a point in our political history where counting money is going to be more important than counting votes. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

The democracy in Athens and the nascent republic in Rome were both brought down by political corruption. When wealthy landowners could buy

senators, the triumph of despots was not far behind. So too will be the experience in the United States. As money becomes the sole demarcation separating winners from losers, we will no longer function as a democratic republic but rather as a corporation whose shareholders have no real power.

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