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Congress shall make no law...

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The Biennial Limit: Good for Incumbents, Bad for the First Amendment

The Supreme Court will hear oral arguments October 8 on a campaign contribution limits case known as *McCutcheon v. FEC*. The Court will review the constitutionality of the biennial limit law that sets a cap on the total aggregate amount that an individual may donate to candidates, parties and political committees.

If Congress wants to limit our First Amendment right to free speech, it should have a good reason, backed by evidence of corruption and abuses, not untested hypotheticals. Even then, if there is a need to limit speech, any remedy should be carefully crafted to solve that problem. A scalpel is needed, not an axe.

There is no evidence that an aggregate limit is needed. Worse yet, Congress used an axe instead of a scalpel. In 2002, as part of the McCain-Feingold law, Congress created an overall biennial limit on how much a citizen can donate to parties, PACs and candidates, which with automatic inflation adjustments is now $123,200. This is broken into two parts: a $74,600 limit on donations to PACs and parties and a $48,600 limit on contributions to candidates.

Give the maximum to 18 candidates, but not 19?

Federal law limits citizens to contributing no more than $2,600 to any one candidate's campaign. With the aggregate $48,600 limit on candidate contributions, that means individual contributors would only be able to support 18 candidates to the legal maximum. Once contributors reach the limit on candidate contributions, the law bans them from giving a penny more, with violations garnering up to a five-year prison sentence. If the first 18 candidates aren't corrupted by accepting the maximum contributions, what is so different about candidate number 19?

A limit on people, but not PACs?

Those who favor limiting First Amendment rights often denounce PACs, which they call tools of special interests. If the aggregate limit is so important, why does it only apply to people and not to PACs? PACs can give to as many candidates as they want, and they can give a lot more to each candidate, up to $10,000 if the PAC donates for both the primary and general election campaigns.

37 states have no aggregate limit of any kind. Many that do are among the worst run.

States are the laboratories of our democracy, and they are doing just fine without aggregate limits. In fact, there is no evidence that the thirteen states with aggregate limits benefit in any way. The Pew Center on the States and Governing Magazine graded all 50 states for the quality of their management (information, people, money and infrastructure). Four of the nine states with the worst scores have aggregate limits. Seven of the eight states with the best scores have no aggregate limit.

The law sets party committees against each other and makes parties less important.

The law only allows an individual to contribute $32,400 to a national political party committee and $5,000 to a PAC, but also imposes a biennial sublimit of $74,600 on all such contributions. So an individual can give the maximum legal contribution to the Democratic National Committee, and to the Democratic Senatorial Campaign Committee, but if the individual does so, he or she can't give the otherwise legal maximum to the Democratic National Congressional Committee or the $10,000 maximum allowed for his or her state party committee.

This sets the party committees up as competitors to each other for limited funds, driving up their fundraising costs and making them less relevant compared to Super PACs.

It helps incumbents because it cuts funds to challengers.

The real reason for the aggregate limit is probably pretty simple. It helps the incumbents who wrote the law. Think about it for a minute.

As of September 25, 2013, the Cook Political Report rated 84 House and Senate races as competitive. This means a citizen, who, for example, wants to help every Republican or Democrat in a competitive race with a maximum contribution, cannot. That contributor would only be able to support nine candidates to the legal maximum, or barely 10% of the competitive races, if he or she donates in both the primary and general election campaigns. As such, challengers feel the pinch of the aggregate cap more than incumbents. Another major source of challenger funding are the party committees, and as already noted, the aggregate caps hurt the parties.

The law threatens freedom of the press.

Individuals are capped at giving maximum support to 18 campaigns. Congress has yet to pass a law placing newspapers or the media under a similar limit. They can give an editorial endorsement – certainly worth much more than $2,600 – to as many candidates as they want. There is nothing special about being a newspaper publisher or editor that entitles a person to more influence than a doctor, a small business owner or a successful architect. Indeed, the principle ultimately threatens freedom of the press. If Congress can set an arbitrary limit on the influence of individuals, what would prevent it from also being able to set a limit on the influence of newspaper owners, publishers and editors?

The First Amendment says "Congress shall make no law … abridging the freedom of speech, or of the press." If the Court upholds this anti-speech law, that ruling endangers freedom of the press too.

The rationale for the caps is bogus.

Supporters of the aggregate caps argue that without them, individuals would avoid the $2,600 limit on giving to a particular race by giving to many candidates and party committees, which would then pass the money on to the intended candidate. This claim is unsupported by law, experience and common sense.

First, the law: any contribution given to one candidate or party, but earmarked for another candidate or party counts as a contribution to the ultimate recipient, so it can't be used to avoid the caps on giving to a single candidate or party committee.

But supporters of aggregate caps argue that it could happen, through a "wink and nod" in which unearmarked contributions are still knowingly intended for, and given to, other candidates and committees. This is where experience and common sense come in. This hypothetical "wink and nod" scenario is possible now: as we've noted, a donor can give to as many PACs as desired. Experience shows there is no evidence that such schemes are used. None. Nor is there any evidence that it occurs in the 37 states without aggregate caps. Indeed, there is no evidence that donors now use contributions to one candidate as fronts for gifts "really" intended for another.

Common sense tells us why. As the federal district court noted in *McCutcheon*, it is "unlikely that so many separate entities would willingly serve as conduits for a single contributor's interests." And because the donations would be subject to the legal restrictions on earmarking, the donor could not express his desires that the money be given to some other candidate.

This is, in short, nothing but conjecture, or, perhaps more accurately, a bogeyman scare tactic to deprive of us First Amendment rights.