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The Court on Politics

ABROAD AT HOME

By Anthony Lewis

Ever since the passage of the 1974 campaign reform law, critics of the complex act have looked to the Supreme Court to cure what they regarded as its defects. There always seemed a certain irony in that: politicians and political commentators giving up on the political process and seeking salvation from judges on a highly political matter.

Now the Court has spoken, holding several parts of the reform act unconstitutional. Political critics of the statute have naturally applauded. But those concerned with the judicial process may well feel differently. As constitutional law, the Court's opinion is unconvincing. It has an arbitrary tone reminiscent of the bad old days before 1937, when judges used to strike down economic reforms on theoretical grounds remote from reality.

One disallowed provision of the campaign law, for example, put limits on a candidate's use of his own or his immediate family's money, a $50,000 ceiling in the case of Presidential candidates. The justices found this a violation of the First Amendment.

The Court reasoned that the use of money in a campaign was a form of expression, protected against abridgment by the First Amendment's guarantee of freedom of speech. The only justification for limiting expenditure on oneself, it said, was the hope of equalizing candidates' financial resources, which was an "ancillary" notion and might not work anyway. It concluded that "the First Amendment simply cannot tolerate restrictions upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy."

In other words, the American system is absolutely powerless to prevent a Rockefeller from spending $4 million in family money to elect himself governor—or to prevent some future billionaire from spending $100 million. There can be no limits whatever.

Does that make any sense? Does it make any constitutional sense? I think the American Constitution is not so simple-minded. It does not require us to live in a never-never land where we know nothing about the power of money in politics. For of course money is a lot more than "speech." We know that money talks; but that is the problem, not the answer.

Or consider what the Court did with two parallel provisions of the act: It held unconstitutional over-all limits on campaign spending, for example $20 million for Presidential candidates. But it approved ceilings on contributions to candidates, for example $1,000 by an individual to anyone seeking Federal office.

The question is not whether those two provisions are wise or unwise—that is not the Court's business. The question is whether the Court has laid down an understandable principle for distinguishing the constitutionality of one from another, of spending from contributions. Principle *is* the Court's business.

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"The act's expenditure ceilings," the opinion said, "impose direct and substantial restraints on the quantity of political speech." It said the aim of these ceilings, to reduce "the allegedly skyrocketing costs of political campaigns," was not a sufficiently strong governmental interest to justify restriction. In our free society, the opinion said, "it is not the government but the people...who must retain control over the quantity" of debate in a campaign.

But a limit on contributions, the Court found, was a less "direct and substantial" restraint on expression. "A contribution serves as a general expression of support for the candidate, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution. . . ."

Can the political experts who praised the Court really find that reasoning persuasive? Do they agree that big political contributors send no message with their money? Do they understand the difference—the constitutional difference—between campaign contributions and spending as "speech"?

Again, the Court found "no evidence" in the record that low ceilings on contributions hurt political challengers. "Challengers can and often do defeat incumbents," the opinion said. It added that they are usually "well known and influential in the community." Can such bromides satisfy Eugene McCarthy, one of the act's critics, who relied on big contributions to start his 1968 challenge to President Johnson?

In general support of its reasoning the Court quoted a statement made in 1927 by the revered Justice Brandeis, "public discussion is a political duty." Yes, Brandeis believed in free speech. But he also spent a lifetime fighting concentrated power. He warned against "the misuse of wealth."

For a particular reason, Brandeis could never have been with the majority of the Court last week. He thought the justices should restrain themselves in the use of their great constitutional power, especially avoiding premature and speculative decisions, waiting for experience. In its haste to deliver what was almost an advisory opinion on a largely untested law the 1976 Supreme Court forgot the restraint that protects its role in our system.