CITIZENS DISUNITED: MCCUTCHEON V. FEDERAL ELECTION COMMISSION

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BY: ADAM LAMPARELLO

In McCutcheon v. Federal Election Commission, the Supreme Court invalidated aggregate limits on individual contributions to political candidates and committees. Despite the immediate public outcry, Chief Justice Roberts’ opinion, like Justice Kennedy’s opinion in Citizens United v. Federal Election Commission, was constitutionally defensible. It was motivated, in part, by a robust interpretation of the First Amendment, and driven by the desire to increase, not limit, political speech. Indeed, the notion that Congress may limit the extent to which wealthy individuals can express political support for a candidate is, at a visceral level, troubling. The wealthy, like everyone else, are entitled full enjoyment of the Constitution’s express and penumbral guarantees. The problem is that everyone else—including the poor and middle class—also have that right. As a practical matter, however, they do not.

Chief Justice Roberts’ plurality opinion makes it likely that money—and inequality—will continue to plague our political and democratic processes. It was based, in part, on a narrow definition of corruption—the quid pro quo—and failed to adequately acknowledge the real threat to political equality: unequal access to and influence in governance. When money is the proxy for access, it is a recipe for actual and apparent corruption, and it does just as much, if not more, damage to democracy than an outright bribe.

The answer to this problem is found in pragmatism, not in the Constitution’s text. Indeed, there is no objectively correct answer to whether limits on individual or aggregate contributions are prohibited by the First Amendment. The Constitution is simply silent on the issue. Thus, in cases such as McCutcheon and Citizens United, the Court should have taken a

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3 558 U.S. 310 (2010).
pragmatic approach that deferred to Congress’s judgment, and to a regulatory scheme that sought to balance the right to speak with your wallet with the need to ensure the integrity of our electoral process. Instead, the Court substituted its own judgment, which was based on philosophical, not textual differences, and which was contrary to several of its recent decisions.\footnote{Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).}

Ultimately, when combined with the Court’s holding in \textit{Citizens United, McCutcheon} leads to an inequality of the most undemocratic kind, where wealth leads to “special access and influence,”\footnote{2014 WL 1301866 at *49 (Breyer, J., dissenting).} and the ballot box is a symbolic, not meaningful, gesture—except for those cast by individuals working in skyscrapers on Fifth Avenue and living in Beverly Hills’ mansions.

\textbf{The Facts}

Plaintiff Shaun McCutcheon argued that the aggregate contribution limits in the Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign Reform Act of 1971,\footnote{2 U.S.C. §§441a(a)(1) and 441a(a)(3) restrict the amount of money an individual may contribute to a particular candidate or committee, and sets an aggregate limit on the amount that may be contributed to all candidates or committees.} violated the First Amendment.\footnote{2014 WL 1301866 at *7; \textit{see also} 2 U.S.C. §§441a(a)(1) and 441a(a)(3)). For the 2013-2014 election cycle, §§441a(a)(1) and 441a(a)(3) set forth base limits of $2,600 per election to a candidate, $32,400 per year to a national party committee, $10,000 per year to a state or local party committee, and $5,000 per year to a political action committee. The aggregate limits were $48,600 to federal candidates, and $74,600 to other political committees. Additionally, only $48,600 of the $74,600 may be contributed to state or local party committees, and PAC’s. Thus, during each election cycle, individual may contribute no more than $123,200 to candidates and committees.} In the 2011-2012 election cycles, plaintiff had already donated $33,088 to 16 different federal candidates.\footnote{2014 WL 1301866 at *7.} But he wanted to spread the wealth a bit more, and give to various candidates and several Republican National Party committees. The Court agreed that he should be able to do so. The conservative plurality held that the aggregate limits on the amount of money that individuals can donate to candidates, political action committees, and political parties violated the First Amendment.\footnote{Id.} As discussed below, the plurality’s decision will
ensure that wealth is the Constitution’s new ‘citizen,’ the most powerful form of political expression, and primary path to influence.

THE DECISION

In *McCutcheon*, the plurality stated that First Amendment rights are important regardless of whether the individual is, “on the one hand, a ‘lone pamphleteer[ ] or street corner orator[ ] in the Tom Paine mold,’ or is, on the other, someone who spends ‘substantial amounts of money in order to communicate [his] political ideas through sophisticated’ means.”\(^\text{10}\) The Court’s decision, however, diminished the power of the street orator’s voice, and elevated the influence of those who live in a mansion down the street.

In its view, the aggregate limits impermissibly encroached upon expressive activity by limiting the *number of individual contributions* that individuals could make in an election cycle.\(^\text{11}\) The majority disagreed with a portion of *Buckley v. Valeo*,\(^\text{12}\) which held that limits on individual contributions imposed a “lesser restraint on political speech because they ‘permit[ted] the symbolic expression of support evidenced by a contribution but d[id] not in any way infringe the contributor’s freedom to discuss candidates and issues.’”\(^\text{13}\)

Unlike *Buckley*, where the statutory limits prevented “large campaign contributions”\(^\text{14}\) while leaving individuals “free to engage in independent political expression,”\(^\text{15}\) the aggregate limits in *McCutcheon* prohibited individuals “from fully contributing to the primary and general

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\(^\text{10}\) Id. at *13 (quoting Federal Election Comm’n v. National Conservative Political Action Comm., 470 U.S. 480, 493 (1985)) (brackets in original).

\(^\text{11}\) 2014 WL 1301866 at *13.

\(^\text{12}\) 424 U.S. 1 (1976).

\(^\text{13}\) 2014 WL 1301866 at *8. Conversely, limits on expenditures—the amount an individual can spend overall—restricted the “the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” These limits would therefore be subject to “the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.” Id.

\(^\text{14}\) Id. at *9.

\(^\text{15}\) Id.
election campaigns of ten or more candidates [based on the 2013-2014 limits].”¹⁶ In other words, “[a]n aggregate limit on how many candidates and committees an individual may support through contributions is not a ‘modest restraint’ at all.”¹⁷ In Chief Justice Roberts’ view, “Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.”¹⁸

THE IMPLICATIONS

1. IT NOT JUST ABOUT A QUID PRO QUO—IT’S ABOUT ACCESS AND INFLUENCE

The Court has previously held that “corporate wealth can unfairly influence elections.”¹⁹ In McConnell v. Federal Election Commission,²⁰ the majority explained that “[w]e have not limited [the anticorruption] interest to the elimination of cash-for-votes exchanges.”²¹ Thus, Congress could “legitimately conclude that the avoidance of the appearance of improper influence is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent.”²² The McConnell majority stated as follows:

> We have repeatedly sustained legislation aimed at ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.’²³

As Justice Stevens stated in Citizens United, “[a] democracy cannot function effectively when its constituent members believe laws are being bought and sold.”²⁴ That compromises “the integrity of the marketplace of political ideas.”²⁵

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¹⁶ Id. at *13.
¹⁷ Id. (emphasis in original) (internal citation omitted).
¹⁸ Id.
¹⁹ Austin, 494 U.S. at 660.
²¹ Id. at 143 (internal citation omitted).
²² Buckley, 424 U.S. at 27.
²³ 540 U.S. at 205 (quoting Austin, 494 U.S. at 660).
²⁴ Citizens United, 558 U.S. at 453 (Stevens, J., dissenting).
In *McCutcheon*, the Court changed its mind. More accurately, the composition of the Court had changed. While acknowledging that the Government has a compelling interest in “preventing corruption or its appearance,”26 the Court held that only *quid pro quo* corruption may be targeted. Thus, legislation aimed at reducing “actual quid pro quo arrangements,”27 and the “appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions,”28 would likely be constitutional. But the Court rejected the notion that “[s]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s duties,”29 implicated *quid pro quo* corruption.

Furthermore, “the possibility that an individual who spends large sums may garner ‘influence over or access to’ elected officials or political parties,”30 is not a reason to infer the presence or appearance of corruption. Justice Roberts went further, stating that “the Government may not seek to limit the appearance of mere influence or access.”31 Instead, relying on language from *Citizens United*, the plurality assured us that “[t]he appearance of influence or access … will not cause the electorate to lose faith in our democracy.”32

In rejecting a broader, influence-driven definition of corruption, the plurality acknowledged that, while the line may “seem vague at times,”33 the First Amendment requires us to “err on the side of protecting political speech rather than suppressing it.”34 And that was

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25 Id. at 438 (*quoting* Federal Election Commission v. Massachusetts Citizens for Life, Inc. 479 U.S. 238, 257 (1986)).
26 2014 WL 1301866 at *3.
27 Id. at *15.
28 Id. (*quoting* Buckley, 424 U.S. at 27).
29 2014 WL 1301866 at *3.
30 Id.
31 Id. at *15 (emphasis added).
32 *Citizens United*, 558 U.S. at 360.
33 2014 WL 1301866 at *16.
34 Id.
required here, because “once the aggregate limits kick in, they ban all contributions of any amount.” Of course, that is already true for most people, who cannot make any contribution of any amount.

Like Justice Stevens in *Citizens United*, Justice Breyer had a much different view. Breyer recognized that corruption extends far beyond a *quid pro quo*. So too did the Court’s precedent, which recognized that criminal laws forbidding “the giving and taking of bribes” did not adequately “deal with the reality or appearance of corruption.” In fact, the Court had “found constitutional a ban on direct contributions by corporations because of the need to prevent corruption, properly “understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder’s judgment.” The aggregate restrictions, therefore, reduce “a significant risk of corruption—understood not as *quid pro quo* bribery, but as privileged access to and pernicious influence upon elected representatives.”

2. **SEEKING FAVOR WITH ELECTED OFFICIALS IS NOT AN UNDERSTOOD PREMISE AND AN UNAVOIDABLE ASPECT OF OUR DEMOCRACY**

The plurality was apparently unconcerned with the inequality that might result from its decision. It rejected any notion that attempts to “level the playing field,” or to “level electoral opportunities” are sufficient to justify limits on the number of candidates to whom an individual may contribute.

But Congress is not trying to level the playing field. The aggregate limits implicitly allow a degree of inequality, but try to keep the obvious inequality gap between rich and poor

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35 Id. at *3 (emphasis in original).
36 Id. at *36 (Breyer, J., dissenting).
38 2014 WL 1301866 at *36.
40 2014 WL 1301866 at *15.
41 Id.
from exploding into a broken and unfixable divide. By invalidating the aggregate limits, the Court seemed more concerned with the individual who can only give $5,200 to nine political candidates, rather than the individual who can only fifty dollars to one.\(^{42}\)

As stated above, the Court was insistent that First Amendment rights “are important regardless [of] whether the individual is, on the one hand, a ‘long pamphleteer[ ] or street corner orator[ ] in the Tom Paine mold, or is, on the other, someone who spends ‘substantial amounts of money in order to communicate [his] political ideas through sophisticated’ means.”\(^{43}\) That is true—but not a reason to give individuals like Donald Trump and Warren Buffet, and corporations like Bain Capital and Time Warner, a constitutional right to give every member of their party $5,200, particularly when the average middle class family cannot donate much, if anything, to a single candidate.

3. **INDIVIDUALISM IS NOT INCONSISTENT WITH THE PUBLIC GOOD**

The plurality deemed inapposite “the public’s interest in collective speech,”\(^{44}\) and “generalized conceptions of the public good”\(^{45}\) because the First Amendment protects individual, not collective, freedoms.\(^{46}\) Chief Justice Roberts rejected the notion that Government may “restrict the speech of some elements of our society in order to enhance the relative voice of others [as] wholly foreign to the First Amendment.”\(^{47}\) Regulations of that nature turn impermissibly on a “legislative … determination that particular speech is useful to the democratic process.”\(^{48}\)

\(^{42}\) *Id.* at *13 (quoting National Conservative Political Action Committee, 470 U.S. at 493).
\(^{43}\) 2014 WL 1301866 at *15.
\(^{44}\) *Id.* at *34 (quoting Breyer, J., dissenting).
\(^{45}\) *Id.* at *14.
\(^{46}\) *Id.*
\(^{47}\) *Id.* at *15 (quoting Buckley, 424 U.S. at 48-49) (brackets added).
\(^{48}\) 2014 WL 1301866 at *15.
But Congress is not making value judgments, and the aggregate limits have nothing to do with the utility of speech. They are about money, undue influence, and the access that can be purchased by large monetary contributions.\textsuperscript{49} Furthermore, contrary to the majority’s rationale, restricting the amount of money that an individual or corporation can give to a single candidate does not solve this problem. To begin with, it does “not prevent a person who has contributed to a candidate from also contributing to multi candidate committees that support the candidate.”\textsuperscript{50} And without the aggregate limit of 74,600, a wealthy donor “can write a single check to the Joint [Republican or Democratic] Party Committee in an amount of about $1.2 million.”\textsuperscript{51} To be sure, if individuals donate the maximum base amount to all of their party’s political candidates in a 2-year election cycle, it will result in 2.4 million worth of contributions, for a total of 3.6 million, “all to benefit his political party and its candidates.”\textsuperscript{52} The aggregate limits, therefore, are not about policing speech or prohibiting its robust exercise. It is about fairness.

4. **THERE’S A TIME, PLACE, AND MANNER FOR EVERYTHING**

The Court has repeatedly held that “[r]easonable time, place, or manner restrictions are valid even though they directly limit oral or written expression.”\textsuperscript{53} Indeed, “restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”\textsuperscript{54}

Of course, while the regulations in *McCutcheon* were not based strictly on time and place, they were akin to other restrictions on speech that regulate when, how, and where various

\textsuperscript{49} Id. at *45 (Breyer, J., dissenting).
\textsuperscript{50} Id. (emphasis in original).
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{54} Id. at 293.
political opinions can be expressed. Furthermore, Congress’s aggregate limits on individual expenditures, just like its regulation of corporate expenditures on the eve of primary and general elections, are not attempts to regulate content. They do not seek to ban speech. Instead, they balance the individual and corporate right to express political preferences with money, with the potentially perverse effects that money can have in the political, electoral, and democratic process. Thus, in holding that “Government may not seek to limit the appearance of mere influence or access,” the plurality failed to address a problem that threatens to undermine the integrity of our electoral process.

5. WHERE HAVE YOU GONE, JUSTICE STEVENS?

Instead, we hear former presidential candidate Mitt Romney declare that “corporations are people, my friend.” Corporations were treated like people in Citizens United, when the Court invalidated a law that prohibited corporations and unions from using general treasury funds that “expressly advocate[d] the election or defeat of a candidate . . . and is publicly distributed . . . within 30 days of a primary election.” The majority, led by Justice Kennedy, held that the law “silenc[ed] certain voices,” and thus infringed “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus.” The voices—and citizens—to which the Court referred, however, were those of corporate CEO’s at Halliburton and Citigroup, not ordinary citizens.

Ironically, however, the majority characterized its decision as one that protected the UPS drivers who live in small-town America, stating that it compromised an “essential mechanism of

55 2014 WL 1301866 at *15.
57 558 U.S. 310.
58 Id. at 320-21 (quoting 2 U.S.C. § 434(f)(3)(A)) (the statute also prohibited expenditures within sixty days of a general election).
59 558 U.S. at 339 (emphasis added).
democracy.” In Justice Kennedy’s view, “[t]he fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. The people should have the ultimate influence, but they do not. And corporations do not speak for the people. They speak for their stockholders—or their self-interests. They speak with money, as the National Rifle Association did when torpedoing legislation that sought to regulate gun ownership in the wake of the Sandy Hook tragedy. Of course, there is nothing wrong with that—corporations, unions, and lobbyists certainly have a right to use money to express their views. But when money becomes the proxy for influence, it corrupts the political system, and justifies regulatory limits like those that the McCutcheon plurality invalidated.

Justice Stevens’ dissent in Citizens United chastised the majority for overruling Austin, which recognized that corporations have “special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.” Justice Stevens also reminded the Court of its decision holding that “a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.”

In Stevens’ view, because the “the distinction between corporate and human speakers is significant,” Congress has “a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.” By prohibiting Congress from enacting legislation that would stop

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60 Id. at 312.
61 Id. at 360 (emphasis added).
64 Citizens United, 558 U.S. at 394 (Stevens, J., dissenting).
65 Id.
the majority’s decision “threaten[ed] to undermine the integrity of elected institutions across the Nation,” 66

6. A CORPORATE OR CONSTITUTIONAL DEMOCRACY?

The McCutcheon plurality summarized is view of the First Amendment—and citizen participation in democracy—as follows:

The First Amendment ‘is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us ... in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.’ 67

Thus, “the First Amendment safeguards an individual’s right to participate in the public debate through political expression and political association.” 68

The Court’s decision, however, actually undermined public debate by compromising its integrity. As Justice Breyer noted in his dissent, the “justification for aggregate contribution restrictions is strongly rooted in the need to assure political integrity and ultimately in the First Amendment itself.” 69 To be sure, the “threat to that integrity posed by the risk of special access and influence remains real.” 70

Ultimately, the plurality’s decision did not facilitate a fairer and more participatory political process. Instead, it “substitute[d] judges’ understandings of how the political process works for the understanding of Congress; [and] that fails to recognize the difference between

66 Id. at 396.
67 2014 WL 1301866 at *13 (internal citation omitted).
68 Id.
69 Id. at *49 (Breyer, J., dissenting).
70 Id.
influence resting upon public opinion and influence bought by money alone.” That alone is the biggest threat to a democracy—a concentration of wealth that leads to influence by the few.

CONCLUSION

The wealthy are democracy’s darlings, the middle class are its stepchildren, and the poor are its orphans. And the Constitution’s written and unwritten rights—which were undercut in cases such as Citizens United and McCutcheon—are alive for the wealthy, merely evolving for the middle class, and on life support for the poor. Corporate giants like Goldman Sachs and AT&T line the pockets of senatorial candidates—and purchase influence—while average citizens walk into a polling station, often encounter voter suppression tactics, and cast a largely symbolic vote. Stated simply, the political process is dominated by money, and it has created a soft inequality. Like the “soft bigotry of low expectations,” soft inequality has created a liberty gap between the prosperous and poor, corporate PAC’s and concerned citizens, and ordinary people and the political process. McCutcheon was an opportunity to bridge this gap. Instead, it maintained the status quo by holding that Congress could only regulate against the quid pro quo. In so doing, McCutcheon ensured that many voices would remain silent, which damaged our democracy and undermined the integrity of our political institutions.

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71 Id. at *50.