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Citizens Disunited: McCutcheon v. Federal Election Commission

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In *McCutcheon v. Federal Election Commission*,\(^2\) the Supreme Court invalidated aggregate limits on individual contributions to political candidates and committees. Despite the immediate public outcry, Chief Justice Roberts’ *McCutcheon* opinion, like Justice Kennedy’s opinion in *Citizens United v. Federal Election Commission*,\(^3\) was constitutionally defensible. Both were 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 to fully enjoy the Constitution’s express and penumbral guarantees. But everyone else—including the poor and middle class—also have that right. Yet, as a practical matter, the full constitutional guarantees do not reach those groups.

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 prerequisite to 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

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2 --- S.Ct. ----, 2014 WL 1301866 (full date here).
3 558 U.S. 310 (2010).
issue. Thus, in cases such as *McCutcheon* and *Citizens United*, the Court should have taken a pragmatic approach that deferred to Congress’s judgment, and to a regulatory scheme that sought to balance the right to speak with your wallet against 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.4 Ultimately, when combined with the Court’s holding in *Citizens United*, *McCutcheon* leads to an inequality of the most undemocratic kind, where wealth leads to “special access and influence,”5 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.

**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 1971,6 violated the First Amendment.7 In the 2011-2012 election cycles, plaintiff had already donated $33,088 to sixteen different federal candidates.8 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 statutory aggregate limits on the amount of money that individuals can donate to candidates,

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5 2014 WL 1301866, at *49 (Breyer, J., dissenting).
6 2 U.S.C. §§ 441a(a)(1), (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.
7 2014 WL 1301866, at *7; see also 2 U.S.C. §§ 441a(a)(1), (3). For the 2013-2014 election cycle, §§ 441a(a)(1), (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.
8 2014 WL 1301866, at *7.
political action committees, and political parties violated the First Amendment. Its decision will ensure that wealth is the Constitution’s new ‘citizen,’ and the most powerful form of political expression.

THE DECISION

In *McCutcheon*, Court stated that First Amendment rights are important regardless 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.” 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 contributions individuals could make in an election cycle. The majority distinguished *Buckley v. Valeo*, which held that limits on individual contributions imposed a “lesser restraint on political speech because they ‘permit[ed] 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.’”

Unlike *Buckley*, where the limits prevented “large campaign contributions,” while leaving individuals “free to engage in independent political expression,” the aggregate limits in

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9 *Id.*
10 *Id.* at *13 (quoting Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 493 (1985)).
13 *Id.* 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.”
15 *Id.*
*McCutcheon* prohibited individuals “from fully contributing to the primary and general 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.”\(^{17}\) 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**

**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 Court held that “[w]e have not limited [the anticorruption] interest to the elimination of cash-for-votes exchanges.”\(^ {21}\) Indeed, 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.\(^ {23}\)

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\(^{16}\) Id. at *13.  
\(^{17}\) Id.  
\(^{18}\) Id.  
\(^{21}\) Id. at 143 (internal citation omitted).  
\(^{22}\) *Buckley*, 424 U.S. at 27.  
\(^{23}\) 540 U.S. at 205 (internal citation omitted).
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.”\(^{25}\)

In *McCutcheon*, however, the Court changed its mind. More accurately, the composition of the Court had changed, with the majority deciding to give Plaintiff more than nine lives. 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.

Amazingly, however, 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. Likewise, “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. In fact, “the Government may not seek to limit the appearance of *mere* influence or access.”\(^{31}\) As the Court assured us in *Citizens United*, “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.”\(^{32}\)

\(^{24}\) *Citizens United*, 558 U.S. at 453 (Stevens, J., dissenting).

\(^{25}\) *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.

\(^{32}\) *Citizens United*, 558 U.S. at 360.
Moreover, in rejecting a broader, influence-driven definition of corruption, stating that, while the line may “seem vague at times,” the First Amendment requires us to “err on the side of protecting political speech rather than suppressing it.” And that was 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. Their economic status imposes a de facto ban on contributions, while the Court’s decision ensures that the wealthy will have a de facto seat at the legislative table.

Like Justice Stevens in Citizens United, Justice Breyer had a much different view. He recognized that corruption extends far beyond a quid pro quo. So too did the Court’s precedent, which was unequivocal in its assertion that Congress could reasonably conclude that criminal laws forbidding “the giving and taking of bribes” did not adequately “deal with the reality or appearance of corruption.” As Justice Breyer noted, 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.” In other words, the restrictions reduce “a significant risk of corruption—understood not as quid pro quo bribery, but as privileged access to and pernicious influence upon elected representatives.”

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33 2014 WL 1301866, at *16.
34 Id.
35 Id. at *3.
36 Id. at *36 (Breyer, J., dissenting).
37 Id.
38 Id.
BUYING INFLUENCE WITH ELECTED OFFICIALS IS not AN UNDERSTOOD PREMISE AND AN UNAVOIDABLE ASPECT OF OUR DEMOCRACY. 39

The majority was unconcerned with the inequality that would inevitably result from its decision. It rejected any notion that attempts to “level the playing field,” 40 or to “level electoral opportunities” 41 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 base and aggregate limits implicitly allow a degree of inequality, but try to keep the obvious inequality gap between rich and poor from exploding into a broken and unfixable divide. By invalidating the aggregate limits, the Court was more concerned with the individual who can only give $5,200 to nine political candidates, than with the individual who can give to none. 42

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 Buffett, and corporations like Bain Capital and Time Warner a constitutional right to give every Senator $2,600, particularly when the average family of two cannot donate more than $200. 44

40 2014 WL 1301866, at *15.
41 Id.
43 2014 WL 1301866, at *15.
EQUALITY ENHANCES INDIVIDUALISM

The Court deemed inapposite “the public’s interest in collective speech,” because the First Amendment protects individual, not collective, freedoms. Moreover, the Court’s jurisprudence already accounts for the collective good by permitting regulations on speech that protect important public interests. The notion that Government may “restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,” and turns impermissibly on a “legislative . . . determination that particular speech is useful to the democratic process.” That would prohibit individuals from “robustly exercising” their expressive freedoms, which was sufficiently injurious—even if it meant that some individuals could not exercise them at all.

But Congress is not making value judgments, and the aggregate limits have nothing to do with the utility of speech. The limits are about money, undue influence, and the access that can be purchased by large monetary contributions. Furthermore, and 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.” 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.” Additionally, if an individual donates the maximum base amount to all of the party’s

46 Id.
47 Id.
48 Id. at *15 (quoting Buckley, 424 U.S. at 48-49).
49 2014 WL 1301866, at *15.
50 Id. at *13 (quoting Davis v. Federal Election Comm’n, 554 U.S. 724, 739 (2008)).
51 2014 WL 1301866, at *40 (Breyer, J., dissenting).
political candidates in a two-year election cycle, it will total $2.4 million, for a total of $3.6 million in contributions, “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. They are about fairness.

**WHERE HAVE YOU GONE, JUSTICE STEVENS?**

Instead, we get former presidential candidate Mitt Romney. He declared that “corporations are people, my friend.”\textsuperscript{53} Although *McCutcheon* involved an individual, the Court’s reasoning embraced that view that individuals can, like corporations, use wealth to buy influence.

It all began in *Citizens United v. Federal Election Commission*,\textsuperscript{54} where 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.”\textsuperscript{55} Why? 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.”\textsuperscript{56} The voices—and citizens—to which the Court referred, however, were those of corporate CEOs 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. As such, the law compromised an “essential mechanism of democracy.”\textsuperscript{57}

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

\textsuperscript{52} Id. at *40.
\textsuperscript{54} 558 U.S. 310.
\textsuperscript{55} 2 U.S.C. § 434(f)(3)(A) (the statute also prohibited expenditures within sixty days of a general election).
\textsuperscript{56} 558 U.S. at 339 (emphasis added).
\textsuperscript{57} Id. at 312.
over elected officials.\textsuperscript{58} They should, but they do not. Corporations do not speak for the people. They speak for their stockholders—or their self-interests. And 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. When money becomes the prerequisite to influence, inequality results, and reasonable regulation is necessary.

Justice Stevens dissented, chastising the majority for overruling \textit{Austin}, where the Court recognized that corporations have “special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.”\textsuperscript{59} Likewise, in \textit{First National Bank of Boston v. Belotti}\textsuperscript{60} the Court held 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.”\textsuperscript{61}

In Stevens’ view, because the “the distinction between corporate and human speakers is significant,”\textsuperscript{62} 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.”\textsuperscript{63} By prohibiting Congress from enacting legislation that would stop something missing here the Court’s decision “threaten[ed] to undermine the integrity of elected institutions across the Nation,”\textsuperscript{64}

\textsuperscript{58} Id. at 360 (emphasis added).
\textsuperscript{59} Austin, 494 U.S. at 658–59.
\textsuperscript{60} 435 U.S. 765 (1978).
\textsuperscript{61} Id. at 788, n.26.
\textsuperscript{62} Citizens United, 558 U.S. at 394 (Stevens, J., dissenting).
\textsuperscript{63} Id.
\textsuperscript{64} Id. at 396.
A CORPORATE OR CONSTITUTIONAL DEMOCRACY?

The majority 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.”65

Thus, “the First Amendment safeguards an individual's right to participate in the public debate through political expression and political association.”66

But the Court’s decision undermined the public debate by compromising its integrity. As Justice Breyer noted, the “justification for aggregate contribution restrictions is strongly rooted in the need to assure political integrity and ultimately in the First Amendment itself.”67 And “threat to that integrity posed by the risk of special access and influence remains real.”68 Most importantly, the majority’s decision “substitutes judges' understandings of how the political process works for the understanding of Congress; [and] that fails to recognize the difference between 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.

65 2014 WL 1301866, at *13 (internal citation omitted).
66 Id.
67 Id. at *49 (Breyer, J., dissenting).
68 Id.
CONCLUSION

We have a separate but unequal Constitution. 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 are alive for the wealthy, merely evolving for the middle class, and dead 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, we now live in a society of soft inequality. Like the “soft bigotry of low expectations,” soft inequality has created a liberty gap between the prosperous and poor, corporate PACs and concerned citizens, and ordinary people and the political process.

*McCutcheon* gave the Court an opportunity to bridge the soft inequality that persists in our society. Instead, it maintained the *status quo* by holding that Congress could only regulate 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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