McCutcheon vs. FEC: Enhancing the best democracy money can buy

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"Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition."
—Chief Justice John G. Roberts in the McCutcheon vs. Federal Election Commission ruling[1]

In a 5-to-4 decision on Wednesday April 2, 2014, the justices of the United States Supreme Court ruled against certain cumulative caps on individual contributions to political campaigns. The decree comes in the wake of the so-called Citizens United decision that struck down limits on independent expenditures by corporations, associations, or labor unions.[2]

Paving the way for affluent Americans to utterly dominate an already corrupted election process, Chief Justice John G. Roberts, joined by Justice Scalia, Justice Kennedy and Justice Alito ruled that the modest biennial cumulative limits placed on individual campaign contributions by the 1971 Federal Election Campaign Act (FECA) and amendments were unconstitutional. Insisting that these aggregate limits on campaign contributions are a violation of the First Amendment guarantees of free speech, the justices argued, "The 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."[3]

The judgment rests on the legal equivalency of money with free speech, which is protected by the First Amendment of the United States Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." While conceding that the U.S. Congress has the power to regulate campaign contributions "to protect against corruption or the appearance of corruption," the justices held that lawmakers could not set limits "to restrict the political participation of some in order to enhance the relative influence of others."[4] The conservative plurality of the U.S. Supreme Court would appear to hold that restricting the political contributions of well-heeled and powerful individuals is an unwarranted restraint of their political participation and hence, infringes upon their First Amendment rights.

The majority opinion states, "The whole point of the First Amendment is to protect individual speech that the majority might prefer to restrict, or that legislators or judges might not view as useful to the democratic process." It is obvious to most that allowing unlimited campaign contributions by wealthy individuals and thereby unleashing their influence undermines the democratic process, so the learned jurisprudents have concocted clever arguments that contribution caps are a violation of the First Amendment right of free speech. The argument is not new, for in 1976 in Buckley vs. Valeo, the Supreme Court invalidated campaign spending ceilings, ruling that these limits "place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate."[5]

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The issue in the current case was that the appellant, Shaun McCutcheon, CEO of Coalmont Electrical Development in McCalla, Ala., had donated to 16 federal political candidates and wished to contribute to 12 others, but was prevented from doing so by the so-called aggregate campaign limits imposed by the 1971 FECA as amended last in 2002.[6] Adjusted for inflation in odd-numbered years, these biennial limits for the 2013-14 cycle capped contributions to candidate committees at $48,600, and contributions to any other committees at $74,600, of which no more than $48,600 may be given to committees that are not national party committees, for a total of $123,200.[7] These liberal donation restrictions represented an obstacle to less than one-eighth of one percent of all U.S. citizens; the other 99 7/8 percent donate $200 or less.[8] Now, the Supreme Court has removed this inconvenience for these top one-eighth of one percenters.[9]

Throughout the history of the United States, feeble legislative attempts have been made by legislators to reduce the disproportionate and corrupting influence wielded by the wealthy and special interest groups on the election process by restricting the dollar amounts individuals and organizations can contribute to political candidates and parties. The objective has been to eliminate or at least to minimize quid pro quo – the buying of political favors – by means of laws that limit contributions and campaign spending, and to require public disclosure of campaign finances. Unfortunately, these election campaign laws, the first of which was introduced in 1867, have been sadly ineffective and largely ignored.[10] Additionally, the courts have eviscerated many of these attempts under the guise of infringement upon the First Amendment right of free speech.[11]

While the FECA mandated sweeping changes in the way federal election campaigns were financed in the U.S. by requiring full disclosure of campaign contributions and expenses, and placing limitations on amounts spent for media advertisements, no oversight agency existed to enforce the provisions of the law. It was not until 1974, following the rampant abuses which occurred during Nixon's presidential campaign in 1972, that the Federal Election Commission was established to monitor compliance. To its credit, the U.S. Congress enacted legislation establishing campaign contribution limits, but then relaxed provisions of a 1939 law that had prohibited campaign contributions by government contractors, permitting them to establish political action committees (PACs).[12]

Prior to this current ruling in McCutcheon vs. FEC, the courts have held that the FECA prevented quid pro quo corruption and its appearance, and therefore base limits were necessary and that aggregate limits were "no more than a corollary."[13] Obviously, restricting the influence of wealthy individuals like Sheldon Adelson or the Koch brothers should enhance the democratic process, however, based on their current decision, the conservative plurality of the Supreme Court would seem to hold that aggregate limits only guard against hypothetical corruption, and that protection against possible corruption is not an adequate reason for the government to burden First Amendment rights.[14]

In his dissenting opinion, Justice Breyer cited Buckley vs. Valeo, which upheld the contribution limits of the 1971 FECA as "appropriate legislative weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign

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contributions."[15] Sharply criticizing the plurality of the court in the current decision, he wrote that the biennial aggregate limits in combination with the individual limits were needed to restrain people "who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party."[16]

Others, however, insist to the contrary that the current decision still falls short of the mark for the moneyed elite. One conservative author writing in the right-wing financial magazine Forbes lamented that the court had not gone far enough; that it failed to examine the constitutionality of individual campaign contribution limits. Senior attorney Paul Sherman with the Institute for Justice stated, "McCutcheon was a golden opportunity for the Court to adopt a rule of law that would have called the individual limits into question, but the Court decided to pass."[17]

Justice Breyer rightly accused the plurality of too narrowly defining corruption as overt bribery and of misunderstanding "the constitutional importance of the interests at stake." Previously, a lower 3-judge U.S. court had ruled against McCutcheon in September 2012, agreeing with the Supreme Court minority opinion that aggregate limits are justified by the government's interest in preventing the circumvention of base contribution limits. Additionally, the judges opined that the U.S. Congress had more expertise in the matter than the judiciary.[18] For his part, McCutcheon claimed, "I really believed strongly in the concept of free speech, your right to score as much political activity as you want to as long as you're a citizen of the U.S."[19] Instead of "score" McCutcheon should have said "buy" to be clear about his intentions.

By removing aggregate restrictions on individual campaign contributions, the justices have adjudicated into a First Amendment right for the rich the potential for fraud and abuse through improper influence, effectively obliterating any remaining residue of a democratic electoral process in the United States. In short, the honorable justices of the Supreme Court have interpreted the United States Constitution to destroy democracy rather than to enhance it.

Endnotes

[1] "McCutcheon et al. v. Federal Election Commission," *United States Supreme Court*, Argued October 8, 2013—Decided April 2, 2014, accessed April 6, 2014, http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf.
[2] "Citizens United v. Federal Election Commission," *United States Supreme Court*, Argued March 24, 2009—Reargued September 9, 2009—Decided January 21, 2010, accessed April 6, 2014, http://www.supremecourt.gov/opinions/09pdf/08-205.pdf.
[3] "McCutcheon et al. v. Federal Election Commission," ibid.
[4] "McCutcheon et al. v. Federal Election Commission," ibid.
[5] "Buckley v. Valeo," *Legal Information Institute*, Cornell University School of Law, Argued: November 10, 1975, Decided: January 30, 1976, accessed April 6, 2014, http://www.law.cornell.edu/supremecourt/text/424/1.
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[7] "The Biennial Contribution Limit," *Federal Election Commission*, February 2004, updated January 2013, accessed April 6, 2014, http://www.fec.gov/pages/brochures/biennial.shtml.
[8] "Donor Demographics," *OpenSecrets.org*, accessed April 6, 2014, https://www.opensecrets.org/overview/donordemographics.php.
[9] "Before and After the Supreme Court's Ruling," *New York Times*, April 2, 2014, accessed April 6, 2014, http://www.nytimes.com/interactive/2014/04/02/us/politics/supreme-court-ruling-campaign-finance.html.
[10] "The Federal Election Campaign Laws: A Short History," *Federal Election Commission* website, accessed April 6, 2014, http://www.fec.gov/info/appfour.htm.

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[11] "Buckley v. Valeo," ibid.
[12] "The Federal Election Campaign Laws: A Short History," ibid.
[13] "McCutcheon et al. v. Federal Election Commission," ibid.
[14] "McCutcheon v. Federal Election Commission," Cornell University School of Law, ibid.
[15] "Buckley v. Valeo," ibid.
[16] "McCutcheon et al. v. Federal Election Commission," ibid.
[17] Paul Sherman, "John Roberts Didn't 'Eviscerate' Campaign Finance Law, But He Should Have," *Forbes*, April 3, 2014, accessed April 6, 2014, http://www.forbes.com/sites/instituteforjustice/2014/04/03/no-john-roberts-didnt-eviscerate-campaign-finance-law-but-he-should-have/.
[18] "McCutcheon v. Federal Election Commission," Cornell University School of Law, ibid.
[19] Antrenise Cole, "Meet the Alabama CEO who changed the campaign finance game forever," *Birmingham Business Journal*, April 3, 2014, accessed April 6, 2014, http://www.bizjournals.com/birmingham/blog/2014/04/meet-the-alabama-ceo-who-changed-the-campaign.html.

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