

Citizens Disunited: *McCutcheon v. Federal Election Commission*

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In *McCutcheon v. Federal Election Commission*, the Supreme Court invalidated aggregate limits on individual contributions to political candidates and committees.¹ Despite the immediate public outcry, Chief Justice Roberts' opinion was constitutionally defensible, just like Justice Kennedy's opinion in *Citizens United v. Federal Election Commission*.² It was partially motivated 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 that wealthy individuals can express political support for a candidate is troubling. The wealthy, like everyone else, are entitled to the 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, the Constitution's written and unwritten rights are alive for the wealthy, merely evolving for the middle class, and on life support for the poor.

Chief Justice Roberts' plurality opinion makes it likely that money and inequality will continue to plague our democratic processes. Roberts' opinion was based on a narrow definition of corruption (the quid pro quo) and failed to adequately acknowledge the real threat to political equality: *unequal access and influence in governance*. Using money as the proxy for justice is a recipe for corruption. This recipe does just as much damage to democracy as 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 the First Amendment prohibits limits on individual or aggregate campaign contributions. The Constitution is simply silent on the issue. Thus, in cases like *McCutcheon* and *Citizens United*, the Court should have taken a pragmatic approach that deferred to Congress's judgment and the existing regulatory scheme. Instead, the Court substituted its own judgment, which was based on philosophical (not textual) differences and was contrary to several of its recent precedents.³ 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"⁴ and the ballot box is merely a symbolic gesture for most.

I. 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

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¹ 134 S. Ct. 1434, 1442 (2014).

² 558 U.S. 310 (2010).

³ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

⁴ 134 S. Ct. at 1472 (Breyer, J., dissenting).

Reform Act of 1971,⁵ violated the First Amendment.⁶ In the 2011–2012 election cycles, McCutcheon had already donated \$33,088 to sixteen different federal candidates.⁷ But, McCutcheon wanted to give more of his wealth to other candidates and several Republican National Party committees. The conservative plurality agreed and 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.⁸ Sadly, the plurality’s decision will ensure that wealth is the Constitution’s new “citizen,” the most powerful form of political expression, and the primary path to influence.

II. 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.”⁹ The Court’s decision diminished the power of the street orator’s voice and elevated the influence of the wealthy.

According to the plurality, the aggregate limits impermissibly encroached upon expressive activity by limiting the *number of individual contributions* that individuals could make in an election cycle.¹⁰ The plurality disagreed with a portion of *Buckley v. Valeo* for maintaining 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.’”¹¹

However, in the eyes of the plurality, the restraints at issue in *McCutcheon* actually infringed a donor’s ability to speak. Unlike *Buckley*, where the statutory

⁵ 2 U.S.C. § 441a(a)(1) and (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.

⁶ *McCutcheon*, 134 S. Ct. at 1443; *see also* 2 U.S.C. § 441a(a)(1), (3). For the 2013–2014 election cycle, § 441a(a)(1) and (3) set forth base limits of \$2600 per election to a candidate (\$5200 total for the primary and general elections), \$32,400 per year to a national party committee, \$10,000 per year to a state or local party committee, and \$5000 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, an individual may contribute no more than \$123,200 to candidates and committees.

⁷ *McCutcheon*, 134 S. Ct. at 1443.

⁸ *Id.*

⁹ *Id.* at 1448 (brackets in original) (quoting *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985)).

¹⁰ *McCutcheon*, 134 S. Ct. at 1452.

¹¹ *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)).

Conversely, the *Buckley* court found that limits on expenditures (the amount an individual can spend overall) restricted “the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” 424 U.S. at 19. These limits would therefore be subject to “the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.” *Id.* at 44–45.

limits prevented large campaign contributions¹² but left individuals “free to engage in independent political expression,”¹³ the aggregate limits in *McCutcheon* prohibited individuals “from fully contributing to the primary and general election campaigns of ten or more candidates [based on the 2013-2014 limits].”¹⁴ 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.”¹⁵ 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.”¹⁶

III. THE IMPLICATIONS

A. *The Real Threat Is Unequal Access and Influence*

The Court has previously held that “corporate wealth can unfairly influence elections.”¹⁷ The mere “potential for distorting the political process” has been enough reason to restrict expenditures.¹⁸

In *McConnell v. Federal Election Commission*, the majority explained that “[w]e have not limited [the anticorruption] interest to the elimination of cash-for-votes exchanges.”¹⁹ 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.’”²⁰ The *McConnell* majority stated, “[w]e 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’” but do not correspond to the general public’s opinion.²¹

As Justice Stevens stated in *Citizens United*, “[a] democracy cannot function effectively when its constituent members believe laws are being bought and sold.”²² That compromises “the integrity of the marketplace of political ideas.”²³

The Court changed course in *McCutcheon*. While acknowledging that the government has a compelling interest in “preventing corruption or its appearance,”²⁴ the Court held that only quid pro quo corruption may be targeted.

¹² *Buckley*, 424 U.S. at 58.

¹³ *Id.* at 28.

¹⁴ *McCutcheon*, 134 S. Ct. at 1438.

¹⁵ *Id.* at 1448 (emphasis in original).

¹⁶ *Id.*

¹⁷ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

¹⁸ *Id.* at 661.

¹⁹ 540 U.S. 93, 143 (2003).

²⁰ *Buckley*, 424 U.S. 1, 27 (1976) (quoting *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

²¹ 540 U.S. at 205 (quoting *Austin*, 494 U.S. at 660).

²² *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 453 (2010) (Stevens, J., dissenting).

²³ *Id.* at 438 (quoting *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.* 479 U.S. 238, 257 (1986)) (internal quotation marks omitted).

²⁴ 134 S. Ct. at 1450.

Thus, legislation aimed at reducing “actual *quid pro quo* arrangements”²⁵ and the “appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions”²⁶ 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 official duties”²⁷ implicated *quid pro quo* corruption. In addition, “the possibility that an individual who spends large sums may garner ‘influence over or access to’ elected officials or political parties” is not a reason to infer the presence or appearance of corruption.²⁸ Chief Justice Roberts went further, stating that “the Government may not seek to limit the appearance of *mere* influence or access.”²⁹ Instead, relying on language from *Citizens United*, the plurality declared that “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.”³⁰

In rejecting a broader, influence-driven definition of corruption, the plurality acknowledged that the line separating *quid pro quo* corruption from general influence may “seem vague at times,”³¹ but the First Amendment requires the Court to “err on the side of protecting political speech rather than suppressing it.”³² And erring on the side of protecting speech was required here because, “once the aggregate limits kick in, they ban all contributions of *any* amount.”³³ The problem, of course, is that the vast majority of Americans cannot make *any* contribution of *any* amount.

Like Justice Stevens in *Citizens United*, Justice Breyer had a much different view than the *McCutcheon* plurality. Breyer recognized that corruption extends far beyond a *quid pro quo* arrangement. So 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.’”³⁴ 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.’”³⁵ 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.”³⁶

²⁵ *Id.*

²⁶ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 27 (1976)) (internal quotation marks omitted).

²⁷ *McCutcheon*, 134 S. Ct. at 1450.

²⁸ *Id.* at 1451 (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 359 (2010)).

²⁹ *Id.* (emphasis added).

³⁰ *Citizens United*, 558 U.S. at 360.

³¹ *McCutcheon*, 134 S. Ct. at 1451.

³² *Id.* (quoting *Fed. Election Comm’n v. Wis. Right to Life*, 551 U.S. 449, 457 (2007))

(internal quotation marks omitted).

³³ *Id.* at 1452 (emphasis in original).

³⁴ *Id.* at 1469 (Breyer, J., dissenting) (emphasis in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 27 (1976)) (discussing Congress’s attempts to stop both bribery and corruption in the political process).

³⁵ *Id.* at 1469 (quoting *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 155–56 (2003)).

³⁶ *Id.*

*B. Favoritism and Influence Are Not the Necessary Evils of Our System*³⁷

The *McCutcheon* plurality was apparently unconcerned with the inequality that will result from its decision. It rejected the 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.³⁸

But Congress is not trying to level the playing field; Congress is trying to maintain the integrity of our political system. The aggregate limits implicitly allow a degree of inequality, but try to keep an obvious inequality gap from shattering the entire system. By invalidating the aggregate limits, the Court seemed more concerned with the individual who can “only” give \$5200 to *nine* political candidates, rather than the individual who can only give fifty dollars to one candidate.³⁹

As stated above, the Court was insistent that First Amendment rights are crucial regardless of whether the speaker is using large amounts of money to express political views or is vocally proclaiming his views from a street corner.⁴⁰ The protections of the First Amendment are essential, but those protections are not a reason to give individuals like Donald Trump and corporations like Bain Capital a constitutional right to give every member of their party \$5200. To do so would incentivize elected officials to pander primarily to the wealthy, particularly since the average middle class family cannot donate much, if anything, to *any* candidate.

C. Individualism Is Consistent with the Public Good

The plurality deemed inapposite “generalized conception[s] of the public good”⁴¹ and “the public’s interest in preserving a democratic order in which collective speech *matters*”⁴² because the First Amendment protects individual, not collective, freedoms.⁴³ 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.”⁴⁴ Regulations of that nature impermissibly rely on a “legislative . . . determination that particular speech is useful to the democratic process.”⁴⁵

³⁷ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 297 (2003) (Kennedy, J., dissenting) (“Favoritism and influence are not, as the Government’s theory suggests, avoidable in representative politics.”).

³⁸ *McCutcheon*, 134 S. Ct. at 1450.

³⁹ *Id.* at 1448–49.

⁴⁰ *Id.* at 1448 (quoting *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985)).

⁴¹ *Id.* at 1449 (plurality opinion).

⁴² *Id.* at 1467 (Breyer, J., dissenting) (emphasis in original).

⁴³ *Id.* (“The whole point of the First Amendment is to afford individuals protection against such [laws that restrict free speech]. The First Amendment does not protect the government, even when the government purports to act through legislation reflecting ‘collective speech.’”).

⁴⁴ *Id.* at 1450 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976)) (internal quotation marks omitted).

⁴⁵ *Id.* at 1449.

But Congress is not making value judgments, and the aggregate limits have nothing to do with the utility of speech. Rather, the aggregate limits are about money, undue influence, and the access that can be purchased.⁴⁶ Furthermore, contrary to the plurality's rationale, restricting the amount of money that an individual or corporation can give to a *single* candidate does not solve this problem. The aggregate limits "do not prevent a person who has contributed to a candidate from also contributing to *multi* candidate committees that support the candidate."⁴⁷ 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."⁴⁸ To be sure, an individual could donate a total of \$3.6 million if he or she donated the maximum amount to all of his or her party's political candidates in a two-year election cycle, "all to benefit his political party and its candidates."⁴⁹ The aggregate limits, therefore, are not about policing speech or prohibiting its robust exercise. Limits are about fairness.

D. 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."⁵⁰ 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."⁵¹

The regulations in *McCutcheon* were not based strictly on time and place. Instead, the limits were akin to other restrictions on speech that regulate when, how, and where various political opinions may be expressed. Furthermore, Congress's aggregate limits on individual expenditures (like its regulation of corporate expenditures on the eve of primary and general elections) are not attempts to regulate content. Congress did not seek to ban speech. Rather, these regulations balanced the right to express political preferences through the spending of money with the potentially perverse effects that money can have on the political process. Thus, by holding that "Government may not seek to limit the appearance of *mere* influence or access,"⁵² the plurality failed to recognize a problem that threatens to undermine the integrity of our electoral process.

⁴⁶ *Id.* at 1470 (Breyer, J., dissenting) ("The Court in *McConnell* upheld these new contribution restrictions for the very reason the plurality today discounts or ignores. Namely, the Court found they thwarted a significant risk of corruption—understood not as *quid pro quo* bribery, but as privileged access to and pernicious influence upon elected representatives.").

⁴⁷ *Id.* at 1476 (emphasis in original).

⁴⁸ *Id.* at 1472.

⁴⁹ *Id.* at 1473.

⁵⁰ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 n.8 (1984).

⁵¹ *Clark*, 468 U.S. at 293.

⁵² *McCutcheon*, 134 S. Ct. at 1451 (emphasis added).

E. Where Have You Gone, Justice Stevens?

Instead, we hear former presidential candidate Mitt Romney declare that “corporations are people, my friend.”⁵³ Corporate personhood is a legal fiction.⁵⁴ Nevertheless, corporations were treated like people in *Citizens United*⁵⁵ when the Court invalidated a separate set of campaign finance regulations.⁵⁶ 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.”⁵⁷ The voices—and citizens—to which the Court referred, however, were those of corporations, not ordinary citizens.

Ironically the *Citizens United* majority characterized its decision as one that protected the UPS drivers who live in small-town America, stating that the FEC regulations undercut an “essential mechanism of democracy.”⁵⁸ 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.”⁵⁹

The people should have the ultimate influence, but they do not. Corporations speak for their shareholders and self interests, not for the people. Corporations speak with money, as the National Rifle Association did when it shot down 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 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 v. Michigan Chamber of Commerce*, which recognized that corporations have “special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.”⁶⁰ Justice Stevens also reminded the Court 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.”⁶¹

⁵³ Philip Rucker, *Mitt Romney Says ‘Corporations are People’*, WASH. POST, Aug. 11, 2011, http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html.

⁵⁴ *E.g.*, *Samantar v. Yousuf*, 560 U.S. 305, 315 (2010) (explaining that corporate personhood “typically refers to the legal fiction that allows an entity to hold personhood separate from the natural persons who are its shareholders or officers”).

⁵⁵ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 336–42 (2010).

⁵⁶ *Id.* at 320–21 (Federal law prohibits “corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections.”). *See also* 2 U.S.C. § 434(f)(3)(A) (prohibiting expenditures within sixty days of a general election).

⁵⁷ *Citizens United*, 558 U.S. at 339 (emphasis added).

⁵⁸ *Id.*

⁵⁹ *Id.* at 360 (emphasis added).

⁶⁰ 494 U.S. 652, 658–59 (1990).

⁶¹ *First Nat’l Bank of Boston v. Belotti*, 435 U.S. 765, 787 n.26 (1978).

In Stevens' view, because "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."⁶² By prohibiting Congress from enacting legislation that would stop the majority's decision, the Court "threaten[ed] to undermine the integrity of elected institutions across the Nation."⁶³

F. A Corporate or Constitutional Democracy?

The *McCutcheon* plurality summarized its 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."⁶⁴

Thus, "the First Amendment safeguards an individual's right to participate in the public debate through political expression and political association."⁶⁵

The Court's decision in *McCutcheon* actually undermined public debate by compromising the integrity of our democratic system. 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."⁶⁶ To be sure, "[t]he threat to that integrity posed by the risk of special access and influence remains real."⁶⁷

Ultimately, the plurality's decision did not facilitate a fairer political process. Instead, it "substitute[d] judges' understandings of how the political process works for the understanding of Congress; [and so] fails to recognize the difference between influence resting upon public opinion and influence bought by money alone."⁶⁸ This difference is the biggest threat to our 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. Corporate giants line the pockets of senatorial candidates—and purchase influence—while average citizens walk into a polling

⁶² *Citizens United*, 558 U.S. at 394 (Stevens, J., dissenting).

⁶³ *Id.* at 396.

⁶⁴ *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1448 (2014) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

⁶⁵ *Id.*

⁶⁶ *Id.* at 1480 (Breyer, J., dissenting).

⁶⁷ *Id.*

⁶⁸ *Id.* at 1481.

station and cast a largely symbolic vote. Stated simply, money creates a soft inequality by dominating the political process. Like the “soft bigotry of low expectations,”⁶⁹ the soft inequality embedded in our political system has created a liberty gap between the prosperous and the poor. *McCutcheon* was an opportunity to bridge this gap. Instead, the Court enshrined the status quo by holding that Congress could only regulate against quid pro quo corruption or its appearance. In so doing, *McCutcheon* ensures that many voices will remain silent.

⁶⁹ Nick Gillespie, *The Soft Bigotry of Low Expectations for State of the Union Addresses Has Got to Stop*, REASON.COM HIT & RUN BLOG (Jan. 29, 2014), <http://reason.com/blog/2014/01/29/the-soft-bigotry-of-low-expectations-for>.