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MCCUTCHEON V. FEDERAL ELECTION COMMISSION: AN UNLIKELY BLOCKBUSTER

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Any case that gets to the Supreme Court is important in its own way, but *McCutcheon v. Federal Election Commission* could easily have been one of the least significant cases of the October 2013 term. That it became an important case is all to the benefit of the American people and American democracy, and, oddly enough, mainly the result of the radical First Amendment theories and poor strategic calculations of the dissent.

Shaun McCutcheon, an engineer and successful small business owner from Alabama, wished to contribute $1776—a number obviously chosen for both its substantive impact and its symbolism—to a number of candidates running for Congress whom, he perceived, shared his values and approach to public governance. Federal law limits the size and source of contributions to candidates for federal office. McCutcheon's desired contributions fell well within the legal limit for giving by an individual to any one candi-

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date in an election– then $2500. However, his desire to contribute $1776 to a substantial number of candidates put him afoul of a second federal limit, one that restricted total campaign contributions by any one individual to all federal candidates in a two-year election cycle to $46,200. [1] This meant that McCutcheon could contribute the desired amount to just 26 candidates – or just 13 candidates if he wished to contribute $1776 for both the primary and general elections. Contributing the legal maximum to candidates in both the primary and general elections would limit a donor such as McCutcheon to supporting just nine candidates. McCutcheon did not challenge the $2500 per candidate limit, but argued that the aggregate cap on total giving violated his First Amendment rights by limiting his speech and the number of candidates with whom he could associate, without any compelling government rationale.

McCutcheon was joined as plaintiff by the Republican National Committee, which faced its own limits. While a donor could contribute up to $30,800 to any one national party committee, no more than $70,800 could be contributed to all party committees. Thus, an individual could not contribute the legal maximum to his party's national committee, congressional committee, and senatorial committee, let alone add more for his state or local party committee. The scheme also limited contributions to all candidates, parties, and other committees to $117,000.[2]

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[1] The 2013-14 per candidate limit, adjusted for inflation, is $2600 per election in the 2014 cycle, while the aggregate limit, had it survived McCutcheon v. FEC, 134 S. Ct. 1434 (2014), would have been $48,600. Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold 78 Fed. Reg. 8530, 8531 (Feb. 6, 2013).

[2] The limit on contributions to national party committees is $32,400 in the 2014 campaign cycle. Had it survived *McCutcheon*, the aggregate for party giving in 2014 would have been $74,600, and the total aggregate $123,200. *Id.* Additionally, the Federal Election Campaign Act limits contributions to local and state parties to $10,000, and to political action committees to $5000. These latter two limits are not adjusted for inflation, but are included in the aggregate caps.

In court, McCutcheon laid out a straightforward constitutional argument against this regulatory scheme. First, the Supreme Court has long recognized that restricting political contributions burdens First Amendment rights. Second, the Court has held repeatedly that limiting contributions can only be justified by the compelling government interest in preventing corruption. In particular, the Court has specifically rejected the notion that the state can limit contributions or expenditures in order to equalize voices.[3] McCutcheon then noted that the government has imposed limits on contributions to a candidate in order to prevent such corruption, leading to point three: if the first nine candidates to which McCutcheon or another donor might contribute the legal maximum are not corrupted by contributions of that size, there is no per se reason to believe that the tenth candidate is corrupted by a contribution of the same size. Thus, the aggregate caps served no compelling government interest sufficient to justify the restraints on First Amendment rights.

None of these steps in the argument are controversial. Since the Supreme Court first addressed the substance of a challenge to campaign finance regulations in *Buckley v. Valeo*,[4] twenty justices have sat on the Supreme Court. While the justices have frequently disagreed on how far First Amendment protections extend to particular conduct, only one, Justice Stevens, has argued that such restrictions should not be analyzed as First Amendment issues. [5] All

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[3] Buckley v. Valeo 424 U.S. 1, 48-49.

[4] *Id.* at 1.

[5] *See* Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring). Some might place Justice White in this category, but a careful analysis of his opinions indicates that he performs a traditional First Amendment analysis, and simply concludes that the government interest is sufficiently compelling to overcome the First Amendment interests at stake. *See Buckley*, 424 U.S. at 259-263; *See also* First National Bank of Boston v. Bellotti, 433 U.S. 765, 803 (1978)(White, dissenting); *Id* at 804 ("There is now little doubt that corporate communications come within the scope of the First Amendment."); FEC v. Massachusetts Citizens for Life, 470 U.S. 480, 507-08 (1986) (White, J., dissenting)("Congressional regulation of the

nine justices in *McCutcheon* agreed a First Amendment analysis was required. As to the second step in McCutcheon's argument, since *Buckley* the Court has consistently held that only corruption or the appearance of corruption is a sufficiently compelling government interest to justify constraints on political contributions, and this precedent, nearly forty years old, is firmly ensconced in campaign finance jurisprudence. This proposition has rarely been directly challenged, and the few direct challenges to it have usually relied on interests—an alleged general plenary power to regulate corporations, and the need to alleviate the demands for office holders to spend time fundraising[6]—that are plainly irrelevant in *McCutcheon* (and accordingly were not raised by the dissent).

With these two propositions accepted, if only as matters of well-established precedent, the case is remarkably simple and would not normally be seen as a particularly important case in the campaign finance canon. The inevitable result—striking down the

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amassing and spending of money in political campaigns without doubt involves First Amendment concerns, but restrictions such as the one at issue here are supported by governmental interests - … - sufficiently compelling to withstand scrutiny.").

An interesting element of White's *Buckley* opinion is that the section on expenditure and contribution limits cites not a single case or opinion in its analysis. He does open by citing two opinions for Congress's power to regulate elections, but does not contest the fact that spending money raises First Amendment issues. *See* 424 U.S. at 259-264. For why his opening citations are in error under the elections clause, *see* Bradley A. Smith, *Separation of Campaign and State*, 81 GEO. WASH. L. REV. 2038, 2059-60 (2013).

[6] *See* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U. S. 604, 649–650 (1996) (Stevens, J., dissenting, not joined by any other justice)(restrictions are justified to "protect equal access to the political arena"); Randall v. Sorrell, 548 U.S. 230, 281 (2006) (Souter, J., dissenting) (joined by Ginsburg, J. in arguing that a compelling government interest might exist in "alleviating the drain on candidates' and officials' time caused by the endless fundraising necessary to aggregate many small contributions to meet the opportunities for ever more expensive campaigning," and urging remand to consider the question); FEC v. Mass. Citizens for Life, 470 U.S. 480, 521 (1986) (Marshall, J., dissenting)(not joined by any other justice). *See also* Citizens United v. FEC, 558 U.S. 310, 393 (2010) (Stevens, J. dissenting) (arguing that corporations may be "comprehensively regulated").

aggregate caps—would be that a small number of wealthy donors would take money that is currently not spent on politics, or used for independent expenditures, and contribute it directly to candidates and parties.[7] This would, at the margin, positively address two longstanding concerns of regulatory advocates. First, by making more money available from proven donors, it would provide slight relief from the burdens of fundraising for officeholders.[8] Second, it could be expected to bring a small percentage of independent expenditure dollars currently going to organizations with fewer disclosure obligations back to candidates and parties, which have the greatest disclosure obligations—another oft-stated goal of regulatory advocates. Simply put, the practical effects of *McCutcheon* are not very significant,[9] but at the margin they address some of the alleged illnesses of the system that are regularly identified by the dissenting justices and advocates of campaign finance regulation. As

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[7] Just 591 donors reached the aggregate cap in the 2012 election cycle, according to the Center for Responsive Politics. McCutcheon v. FEC, *available at* https://www.opensecrets.org/overview/mccutcheon_about.php, last viewed September 1, 2014.

[8] To the extent such money could be raised through joint fundraising committees, it would further alleviate the burdens of fundraising. Joint fundraising committees are simply combinations of candidate and party committees that, as the name suggests, raise money together. The money is divided among the participating committees according to a pre-arranged formula, with no committee receiving more than the legal limit. So, for example, a state's four congressmen might hold a joint fundraiser in which donors would be solicited for up to $10,400, to be divided proportionately between the candidates, rather than each candidate soliciting each donor for $2600. This reduces both time spent fundraising and administrative costs of fundraising. Rather surprisingly, the dissent in *McCutcheon* would argue that joint fundraising committees were an evil rather than a plus. *McCutcheon,* 134 S. Ct. 1434, 1471-75 (Breyer, J., dissenting), though their arguments for this were specious. *See infra* at 70 and sources cited in note 10.

[9] Chief Justice Roberts hinted that the Court may not have found the case especially consequential by going out of his way to note that the case reached the Supreme Court as part of its appellate docket, thus requiring the Court to hear the case. *Id*. at 1444.

such, *McCutcheon* would appear to be a loss for the dissenters, but a manageable one.

But campaign finance cases are rarely simple. Since the per curiam decision in *Buckley,* the Court has decided 20 campaign finance cases, with the Court dividing on the core issue in each respective case by an average of six to three, and with an average of 3.5 opinions per case.[10] Only two of the twenty decisions were unanimous, versus a typical average of 40 to 60 percent or more per term, and one of those two, *Wisconsin Right To Life v. FEC (WRTL I),* was simply about whether a prior decision had precluded the possibility of as-applied challenges to a provision in BCRA. Having ruled that it did not, the substantive question reappeared before the Court the next year and was decided 5-4. Not counting *WRTL I,* the

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[10] The cases, with the vote on the core issue and the number of opinions, are:
McCutcheon v. FEC, 134 S. Ct. 1434 (2014): 5-4 with 3 opinions
American Tradition P'ship v. Bullock, 132 S. Ct. 2490 (2012): 5-4, 2 opinions
Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011): 5-4 , 2 opinions
Citizens United v. FEC, 558 U.S. 310 (2010).: 5-4, 5 opinions
Davis v. FEC, 554 U.S. 724 (2008): 5-4, 3 opinions
FEC v. Wisconsin Right to Life, (2007): 5-4 , 4 opinions
Randall v. Sorrell, 548 U.S. 230 (2006): 6-3, 6 opinions
Wisconsin Right to Life v. FEC, 546 Y.S. 410 *(WRTL I)* (2006): 9-0.
McConnell v. FEC, 540 U.S. 93 (2003): 5-4, 6 opinions
FEC v. Beaumont, 539 U.S. 146 (2003): 7-2, 3 opinions
FEC v. Col. Republican Fed. Campaign Comm. 533 U.S. 431 (2001): 5-4, 2 opinions
Nixon v. Shrink Mo. Government PAC, 528 U.S. 377 (2000): 6-3, 5 opinions
Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996): 7-2, 4 opinions
Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990): 6-3, 5 opinions
Mass. Citizens for Life v. FEC, 479 U.S. 238 (1986): 5-4, 3 opinions
FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985): 7-2, 3 opinions (not including Stevens on standing)
FEC v. National Right to Work Comm., 459 U.S. 197 (1982): 9-0
Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981): 8-1, 5 opinions
California Medical Assn v. FEC, 452 U.S. 182 (1981) 5-4, 3 opinions
First National Bank of Boston v. Bellotti, 453 U.S. 182 (1978): 5-4, 4 opinions

Roberts Court has decided seven cases, the first on a 6-3 vote, the last six on 5-4 votes.

The reason for this divide is easy to understand if difficult to reconcile. As Professor BeVier noted well before the highly publicized and highly polarized decision in *Citizens United v. FEC,*[11] the contending sides share neither a common interpretation of the empirical evidence (or even the relevance of that evidence), nor the same assumptions about how democracy works, or ought to work.[12] To the current four-justice minority on the Supreme Court, unrestrained political activity is a serious threat to American democracy, and spending money on politics is its worst manifestation. Empowering the government to regulate speech is consistent with core First Amendment values, to the extent that, the First Amendment's actual language ("Congress shall make no law… ") notwithstanding, there is no room for even a presumption of unconstitutionality of campaign finance laws.[13] To the current five-justice majority, spending money is a necessary and indeed salubrious commitment to political participation and democratic action. Empowering the government to broadly regulate political speech with the claimed objective of assuring that no voice is heard too much and others are heard enough poses a serious threat of self-interested interference in the people's decision-making: "those who govern should be the last people to help decide who should govern."[14]

Thus, it is no surprise that *McCutcheon* provoked yet another lengthy dissent. Indeed, this dissent succeeds in driving the debate in *McCutcheon*, but not in a way likely to be helpful to the dissenters in the long run.

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[11] 558 U.S. 310 (2010).

[12] Lillian R. BeVier, *First Amendment Basics Redux*: Buckley v. Valeo *to* FEC v. Wisconsin Right to Life, 2006-07, CATO SUP. CT. REV. 77, 106–07 (2007).

[13] STEPHEN BREYER, ACTIVE LIBERTY (2005), Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 399 (2000) (Breyer, concurring).

[14] *McCutcheon*, 1334 S. Ct. at 1441.

First, the dissent chose, once again, to avoid a straightforward attack on *Buckley's* rejection of egalitarian rationales for the law. Rather, it seeks to redefine "corruption" to mean any vague, ill-defined unhappiness with the balance of political power—what it calls the "subversion of the political process," presumably as determined by a majority of the legislature and the courts at any given point in time.[15] But this is not political "corruption" as most people understand the term, and while the Court has periodically veered off in this amorphous direction, such decisions are not faithful to *Buckley* and ultimately hinge on the egalitarian rationale rejected in *Buckley*.[16] The term "corruption" is used in these cases mainly to attempt to swing the votes of justices committed to the *Buckley* framework.[17] Elsewhere, the dissent attempted to define "corruption" as a candidate's being "appropriately grateful,"[18] as if candidates were not supposed to be grateful to those who helped them gain election.

Moreover, it is worth noting that while in this short essay I follow conventional practice in calling this an "egalitarian" rationale, *Buckley's* actual language is that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others."[19] An actual "egalitarian" outcome is not crucial, nor even important, to *Buckley's* understanding of the First Amendment. More importantly, it is not crucial, or even important, to the standard adopted by the dissent in *McCutcheon*. As the dissent makes clear, it would allow almost unlimited regulation by the

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[15] *Id.* at 1468 (Breyer, J., dissenting).

[16] *See* Allen Dickerson, McCutcheon v. FEC *and the Supreme Court's Pivot to* Buckley, 2014 CATO SUP. CT. REV. 95 (2014).

[17] *See* Elizabeth Garrett, *Justice Marshall's Jurisprudence on Law and Politics,* 52 HOW. L. J. 655, 665-679 (2009); Richard L. Hasen, Buckley *is Dead, Long Live* Buckley: *The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 32 (2004).

[18] 134 S. Ct. at 1475.

[19] 424 U.S. at 48-49.

government in order to "secure government action," to "form a public opinion,"[20] and to limit "free political discussion *to the end* that government may be responsive to the will of the people," as determined, of course, by the government.[21]

These standards, if adopted, would present no check whatsoever on the legislature's regulation of political speech, beyond what a majority of the Court might decide, at a given point in time when faced with a given set of facts, was unreasonable. And Justice Breyer's bizarre insistence that the First Amendment cannot be interpreted as even a presumption against regulation because there are "First Amendment interests … on both sides"[22] simply cannot be squared with the actual language of the First Amendment—"Congress shall make no law." Such language presumes a means as well as an ends, and that means, by its plain absolutism, cannot be interpreted as anything less than a presumption against regulation.

This precatory dissent forced the *McCutcheon* plurality to focus more carefully on the concept of corruption and the meaning of *Buckley* than in opinions such as *Citizens United*. This refocus on *Buckley*, in turn, swept away years of careful dicta, obfuscation, and fudging by those who never quite bought into *Buckley's* rejection of egalitarianism. The *McCutcheon* dissenters cite these snippets and occasional holdings repeatedly, but ultimately they are unconvincing, because the effort is not, in fact, true to *Buckley*.[23] *McCutcheon's* first doctrinal holding, then, is to make clear that that the type of

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[20] 134 S. Ct. at 1467.

[21] *Id.* (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)(emphasis added)). The dissent gets the point of *Stromberg* backward here--in the passage cited, Chief Justice Hughes argues that this purpose necessarily prevents the government from limiting individual speech, not that it enables the government to regulate speech, or shows that there are "First Amendment values on both sides of the equation."

[22] *Id.* at 1466. *See also* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 48 (2006); *Nixon v. Shrink Missouri Government PAC,* 528 U.S. at 401(Breyer, concurring).

[23] Dickerson, *supra* note 16, at 109-17.

"corruption" that can justify government intrusions on core First Amendment liberties is "quid pro quo" corruption—"dollars for political favors."[24] Thirty-five years of chipping away at this standard was washed away.

Second, to buttress the idea that its argument was about corruption rather than rationing speech, the dissent spent pages of text and appendices attempting to demonstrate that *McCutcheon* would lead to actual quid pro quo corruption, using a series of hypotheticals ranging from the highly improbable to the blatantly absurd to the simply illegal.[25] This fundamental ignorance of both the realities and the law of campaign finance first surfaced during oral argument, when Justice Kagan opined that the FEC would never find a violation in conduct that it has repeatedly, in fact, found violates the law.[26] The dissenters chose to double-down on such nonsense in their opinion.

Again, this triggered a lengthy response from the plurality, noting that schemes "illegal under current campaign finance laws," "highly implausible" scenarios, "speculation," and hypotheticals "divorced from reality" could not justify actual restraints on speech.[27] Thus is created the second doctrinal element of *McCutcheon*—the harms or circumvention alleged by the government must

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[24] 134 S. Ct. at 1441.

[25] *Id.* at 1472-87 [Part III A and appendices] (Breyer, J., concurring). For the absurdity, *see* Dickerson, *supra* note 16, at 123-25; Zac Morgan, *McCutcheon's Wild Hypotheticals,* CENTER FOR COMPETITIVE POLITICS, Dec. 11, 2013, *available at* http://www.campaignfreedom.org/2013/12/11/mccutcheons-wild-hypotheticals/); Bradley A. Smith, *Fantasyland at the Supreme Court,* NATIONAL REVIEW ONLINE, Oct. 9, 2013, *available at* http://www.nationalreview.com/article/360805/fantasyland-supreme-court-bradley-smith.

[26] *See* Smith, *Fantasyland, supra* note 25. Kagan's assertion appears at p. 10 of the *McCutcheon* oral argument transcript. For one example of the FEC holding that exactly the behavior she described constituted illegal earmarking, *see* Federal Election Commission, MURs 4568, 4633, 4634 and 4736 (various settlements between June 26, 2001 and Nov. 3, 2003) (Statement of Commissioner Smith, dissenting), *available at* http://eqs.fec.gov/eqsdocsMUR/28044192441.pdf.

[27] 134 S. Ct. at 1452-56.

be grounded in realistic probability, not hypothetical doomsday scenarios of what might legally be done under the most extreme and unlikely assumptions, unsupported by actual evidence.

Finally, the *McCutcheon* dissenters argued that the aggregate caps passed the requirement that any restrictions on speech must be "narrowly tailored" to meet the compelling state interest. Admitting that the plurality suggested numerous less restrictive means for addressing the government's concern, the dissent would have placed the burden on the speaker to demonstrate conclusively that such alternatives "could effectively replace aggregate contribution limits."[28] The majority, in response, made clear that it was up to the government, not to the speaker, to make a showing that "limits are appropriately tailored"[29]—the third doctrinal holding in the case.

Absent the vigorous dissent, *McCutcheon*, a case in which the Court might likely have denied cert but for the special provisions of the Bipartisan Campaign Reform Act of 2002 insisted upon by its supporters, would likely have broken little new ground. True, it would have knocked out one more campaign finance law. But the provision at issue was of relatively little practical importance in a world of unlimited independent expenditures and limits on contributions to candidates and committees. One could easily have envisioned a short, cursory opinion that did not clarify and reestablish *Buckley's* emphasis on quid pro quo corruption, address the type of evidence necessary to demonstrate a compelling government interest, or clearly place the burden on the government to demonstrate that its restraints were narrowly tailored solutions to actual, rather than hypothetical, problems.

By choosing to make a stand for their radical departure from longstanding understandings of the First Amendment on some of the weakest terrain imaginable, the dissent made *McCutcheon.* The

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[28] *Id.* at 1479.
[29] *Id.* at 1458.

result is a good and important decision that clarifies doctrine in this key area of First Amendment jurisprudence.