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Campaign finance again before the US Supreme Court

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On Oct. 8, when it hears oral arguments in *McCutcheon v. Federal Election Commission*, 893 F.Supp.2d 133 (D.D.C. 2012), cert. granted, 133 S.Ct. 1242 (2013), the U.S. Supreme Court again will turn its attention to the question of the constitutionality of a key provision of the McCain-Feingold Bipartisan Campaign

Finance Reform Act. *Citizens United v. Federal Election Commission*, 424 U.S. 1 (2010), is one of the most important decisions of the Roberts court and declared unconstitutional the act's restrictions on independent expenditures by corporations. In *McCutcheon*, the Supreme Court will consider the constitutionality of restrictions on aggregate campaign contributions in federal elections.

Specifically, *McCutcheon* is a challenge to a part of the act which provides that an individual contributor cannot give more than \$46,200 to candidates or their authorized agents, or more than \$70,800 to anyone else in a two-year election cycle. Within the \$70,800 limit, a person cannot contribute more than \$30,800 per calendar year to a national party committee.

Shaun McCutcheon, the chief executive officer of Coalmont Electrical Development, is the treasurer of a super PAC called the Conservative Action Fund. During the 2011-2012 federal election cycle, McCutcheon contributed to 16 federal candidates and sought to contribute to 12 others. McCutcheon says that except for the limits on aggregate contributions, he would have given \$25,000 to each of three political committees established by the Republican Party.

For almost 40 years, since *Buckley v. Valeo*, 424 U.S. 1 (1976), campaign finance law has been based on the distinction between contribution limits and expenditure limits. In *Buckley*, the court held that contribution limits - restrictions on the amount that a person gives to a candidate or a committee - are generally constitutional. But expenditure limits - restrictions on what a person spends overall - are unconstitutional. *Citizens United* applied this distinction and held that limits on independent expenditures by corporations violate the First Amendment.

McCutcheon provides the Supreme Court an occasion to reconsider this distinction because it focuses on whether aggregate limits on contributions are constitutional. The court certainly could rule on this, even declaring it unconstitutional, without calling into question the constitutionality of all contribution limits. In fact, in *Randall v. Sorrell*, 548 U.S. 230 (2006), the court found Vermont's limits on contributions to be so restrictive as to violate the First Amendment without reconsidering the basic distinction between limits on contributions and limits on expenditures. Vermont law restricted contributions so that the amount that any single individual could contribute

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to the campaign of a candidate for state office during a "two-year general election cycle" was \$400 for governor, lieutenant governor, and other statewide offices; \$300 for state senator; and \$200 for state representative. The court noted that the contribution limits in the Vermont law were lower than those upheld in *Buckley* or in any other Supreme Court decision, that they were the lowest in the country, and that they were not indexed to keep pace with inflation.

The aggregate contribution limits being challenged in *McCutcheon* are much higher and the court therefore could distinguish *Randall*, follow *Buckley*, and uphold them. Or the court could strike them down, invalidating aggregate limits as a violation of the First Amendment, but without calling into question all contribution limits. *Buckley* was based, in part, on the view that large contributions to candidates risk corruption and the appearance of corruption. The court in *McCutcheon* could say that aggregate limits on the amount that can be contributed do not help to prevent such corruption or appearance of corruption.

The court could say that aggregate limits on contributions are really much more akin to expenditure limits and therefore unconstitutional. The court could say that the real purpose of aggregate limits is to equalize political influence, a justification for campaign finance laws that the court expressly rejected in *Citizens United*. Or the court could distinguish aggregate limits to candidate committees from those to non-candidate committees, such as political parties.

Underlying *McCutcheon*, though, is the question of whether the five conservative justices want to reconsider *Buckley's* holding that contribution limits are generally constitutional. In assessing this, it is important to note that three of these justices - Antonin Scalia, Anthony Kennedy and Clarence Thomas - have already called for the distinction between contribution and expenditure limits to be overruled. Justice Thomas declared: "I would reject the framework established by *Buckley v. Valeo*. ... Instead, I begin with the premise that there is no constitutionally significant difference between campaign contributions and expenditures: both forms of speech are central to the First Amendment.' *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996).

In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Supreme Court reaffirmed *Buckley's* distinction between contributions and expenditures, but four justices sharply disagreed. Three justices - Scalia, Kennedy and Thomas - expressly declared their desire to overrule *Buckley's* approval of contribution limits. Justice Kennedy wrote a strong dissent in which he lamented that "[t]he Court's decision has lasting consequences for political speech in the course of elections, the speech upon which democracy depends.' He accused the court of being "almost indifferent' to freedom of speech and said that he would overrule *Buckley*.

Justice Thomas, joined by Justice Scalia, wrote a lengthier dissent, which began by declaring: "In the process of ratifying Missouri's sweeping repression of political speech, the Court today adopts the analytical fallacies of our flawed decision in *Buckley v. Valeo*. ... As I indicated [previously], our decision in *Buckley* was in error, and I would overrule it."

Therefore, it is likely that Justices Scalia, Kennedy and Thomas are votes to strike down the aggregate contribution limits in *McCutcheon* and more generally to find contribution limits to violate the First Amendment. The crucial question in *McCutcheon* will be whether Chief Justice John Roberts and Justice Samuel Alito will join them and how far they are willing to go in reconsidering the distinction between contributions and expenditures

Roberts and Alito were with Scalia, Kennedy and Thomas in *Citizens United* in its strong endorsement of the view that spending of money in election campaigns is political speech protected by the First Amendment and in invalidating limits on independent corporate political expenditures. Roberts and Alito also were with Scalia, Kennedy and Thomas in *Davis v. Federal Election Commission*, 554 U.S. 724 (2008), in declaring unconstitutional the "millionaire's provision" of the Bipartisan Campaign Finance Reform Act unconstitutional. This provision increased contribution limits for opponents of a candidate who spent more than \$350,000 of his or her personal funds. Most recently, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 (2011), these five justices were in the majority to declare unconstitutional a public funding system that increased the contribution and spending limits for those not taking public money based on the amount spent by opponents.

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U.S. Supreme Court

Campaign finance again before the US Supreme Court

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By contrast, Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor strongly dissented in *Citizens United*, and Justice Elena Kagan, who as solicitor general argued for the constitutionality of the law in *Citizens United*, wrote the dissent in *Arizona Free Enterprise Club*. They are obviously much more likely to uphold the challenged provisions in *McCutcheon* and to adhere to *Buckley's* distinction between contributions and expenditures.

Predicting Supreme Court decisions is always tempting and always dangerous. But for what it's worth, my prediction is that the court will vote 5-4 to strike down the aggregate contribution limits being challenged in *McCutcheon* and that it will do so without overruling the distinction between contributions and expenditures that is at the core of *Buckley*. When faced to confront the question in some future case, I fear that Roberts and Alito will join Scalia, Kennedy and Thomas in rejecting this distinction, and they well might signal this in *McCutcheon*.

Declaring contribution limits unconstitutional would radically change federal, state and local elections. The wealthy, including corporations, would be able to contribute unlimited sums directly to the candidates of their choice. The risk of corruption and the appearance of corruption that *Buckley* described from large contributions is real. Yet, I worry that court is will declare contribution limits unconstitutional, perhaps as soon as it decides *McCutcheon v. Federal Election Commission*.

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