THE DAILY CALLER

No, the sky isn't falling: A level-headed guide to McCutcheon v. FEC

By Trevor Burrus

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Today the Supreme Court decided *McCutcheon* v. *FEC* and struck down the aggregate contribution limits for contributions in federal elections. Over the course of the next few weeks, if not years, there will be a lot of hyperbolic claims about how the case is another nail in the coffin of our democracy. It will be paired with *Citizens United* as a demonstration that the Roberts Court is doggedly trying to sell our country to the highest bidder.

In reality, the decision is a principled interpretation of the First Amendment that would have garnered wide support from many on the left just 30 years ago. What is truly frightening about the decision is that the four dissenting justices are promoting a vision of the First Amendment that is absolutely incompatible with limited government and free speech.

First, a little background. Since the mid-'70s, campaign finance law has been based on the core distinction between contributions and expenditures. Contributions go to candidates directly whereas expenditures are spent independently of candidates. In the seminal case of *Buckley* v. *Valeo*, the Court held that the government has a more compelling interest in regulating and limiting contributions than expenditures because of the threat of quid pro quo corruption, that is, the one-for-one exchange of contributions for political favors. In fact, preventing quid pro quo corruption is essentially the entire reason we have thousands of pages of campaign finance laws and regulations.

The *Buckley* decision thus upheld the limit on contributions to candidates, the so-called base limit, which is now $2,600. But there is another limit on contributions, the so-called aggregate limit, limiting the total amount that an individual can give to all candidates and political committees to which he contributes.

In the most basic sense, the question the Court was asked in *McCutcheon* was whether the aggregate contribution limit coupled with the individual contribution limit helps prevent quid pro quo corruption or whether it unjustifiably limits political speech. In the 2011-2012 election cycle, the plaintiff, Shaun McCutcheon, an Alabama businessman, had already contributed $33,088 to 16 candidates, but he wanted to contribute $1,776 to 12 more candidates, which would have pushed him over the aggregate limit. Given that every one of his contributions was below the individual limit, was it preventing any quid pro quo corruption to allow him to give $1,776 to eight more candidates, but not nine, 12, or 200? The obvious answer to that question seems to be "no," and it is the answer that five of the nine justices gave, thus striking down the limit.

Chief Justice John Roberts's opinion goes through the stated justifications for the law and examines them in light of two core First Amendment doctrines: First, that the government needs a compelling interest to regulate political speech. In campaign finance law, that interest is preventing quid pro quo corruption. Second, in order to withstand constitutional scrutiny, the law must not only actually go toward preventing quid pro quo corruption, but it must also be narrowly drawn to serve that purpose. Narrow tailoring, as that is called, ensures that the government isn't prohibiting a lot of legitimate speech in the name of combating quid pro quo corruption.

Imagine a park where people went to hand out political pamphlets. Due to the amount of paper, littering becomes a problem, and in order to combat littering the government outlaws all political pamphleteering in the park. Such a law would be struck down as unconstitutional because it addressed a narrow and compelling problem, littering, with a legal sledgehammer that prohibits legitimate and important political speech. The First Amendment requires a scalpel, not a sledgehammer. This goes double for political speech.

The aggregate limit law clearly failed this test for reasons expertly explained by Roberts. The government argued that the aggregate limits were important to forestall circumvention of the base limits. But the scenarios in which such circumvention could occur are improbable or are currently illegal under campaign finance laws. Roberts simply reaffirmed the core principle that, like littering in the park, the government is obliged to tackle the problem as narrowly as possible and is not permitted to ban a significant amount of political speech based on fanciful hypotheticals.

And although this seems like a relatively simple conclusion, four justices disagreed because they have a fundamentally different view of the First Amendment as something that empowers government action rather than limits it. The free marketplace of ideas is now just another marketplace that the left feels it has the duty to regulate in the name of "fairness."

Writing in dissent, Justice Stephen Breyer, joined by Justices Kagan, Sotomayor, and Ginsburg, argued that a new version of "corruption," that is, the corruption of the marketplace of ideas, should become part of the Court's jurisprudence. In that version of corruption, the government is affirmatively in charge of making sure "a few large donations" don't "drown out the voice of the many."

While this may sound initially attractive, a moment's thought makes it clear that this view is untenable. Elected officials cannot be trusted to fairly regulate the process upon which their jobs depend and the government could have no meaningful principle to determine how loud someone should be allowed to speak or even what the "voice of the many" is saying. As Chief Justice Roberts wrote, "the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process."

The frightening thing about *McCutcheon* is that a near-majority of the Court holds this view that turns the First Amendment on its head. If we don't limit the doctrine of corruption to actual candidates, if we empower the government to regulate a "corrupt" marketplace of ideas, then there is no reason to limit it to elections. The subscription base of the *New York Times* is

certainly too large, perhaps we should limit how many copies can be printed? And, Oprah, well she is certainly too influential, so while we'll allow her to speak privately, we'll make it illegal for her to use her network for political speech.

Campaign finance law may be complex, but what's at stake is simple. It is too bad that four justices don't seem to understand this.

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