McCutcheon's Supreme Cynicism

By Brendan Fischer

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One of the many outrageous aspects of the U.S. Supreme Court's *McCutcheon v. FEC* decision is how blatantly it served the interests of the very wealthiest. After all, the plaintiff, Shaun McCutcheon, was complaining that his free speech rights were being infringed because he was prohibited from spending more than $123,200 in aggregate direct contributions to politicians.

But who in America can afford to spend that much?

According to a Public Campaign analysis, in the 2012 elections just 1,219 people in America even came close to the aggregate limits the Court struck down. That is four people out of every million.

This was a decision not for the 1 percent but for the top half of the 0.001 percent.

Chief Justice John Roberts, writing for the majority, said limits on giving money amount to a "burden on broader participation in the democratic process." But the impact of the decision won't result in "broader participation" by more people. It means that the same small handful of individuals who are already dominating the political game will now do so more broadly.

As Justice Stephen Breyer noted in his *McCutcheon* dissent: "Where enough money calls the tune, the general public will not be heard."

This is the latest step in a long-term project by the Roberts Court to dismantle legislatively passed limits on money in politics, a mission in sharp contrast with Roberts's statement during his confirmation hearings that his role as chief justice is to be an "umpire."

"It's my job to call balls and strikes, not pitch or bat," he said. "Umpires don't make the rules; they apply them."

Yet in recent years, Roberts has changed the rules around campaign finance law entirely, striking down laws enacted by democratically elected representatives and laying the groundwork for the complete annihilation of all efforts to limit money in politics.

"Turning the pro-democracy First Amendment into a tool for use by the wealthy to dominate politics didn't happen by accident," says Adam Lioz, counsel at Demos, a liberal think tank.

Roberts's willingness to dismantle campaign finance jurisprudence has also been aided by relentless challenges to campaign finance law pushed by well-funded actors like the U.S. Chamber of Commerce, James Bopp, and the Center for Competitive Politics.

"As corporations and wealthy individuals focused more on buying elections," Lioz notes, "allied lawyers have led a well-orchestrated campaign to challenge—and ultimately eliminate—the commonsense legal protections that prevent the direct translation of economic might into political power."

McCutcheon builds on the Court's awful ruling in *Citizens United* so that now, limits on both independent expenditures and direct contributions can be justified only if they prevent actual or apparent "quid pro quo corruption" like bribery—think *American Hustle*, or bags of cash in exchange for political favors.

The Court is now denying the corrosive forms of influence from a money-dominated political system that most would call corrupt and which the Court had endorsed before Roberts. "Spending 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, does not give rise to such quid pro quo corruption," Roberts wrote in *McCutcheon*. "The government may not seek to limit the appearance of mere influence or access."

Narrowing the definition of corruption to "quid pro quo" bribery creates an exceptionally high bar for justifying campaign finance laws and could pave the way toward an end to all limits on money in politics, even caps on direct contributions to candidates. This is a big departure from decades of precedent. For years, the Court had held that campaign finance limits could be constitutional not only as a means of preventing actual or apparent quid pro quo bribery, but also as a way to protect the political process from the excessive influence of big donors.

For example, in the landmark 1976 case *Buckley v. Valeo*, the Court held that campaign finance limits could be justified as a way to prevent "the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions."

In the 2000 case *Nixon v. Shrink Missouri PAC*, the Court ruled that limits on political contributions could be justified as a way to avoid "the broader threat from politicians too compliant with the wishes of large contributors."

And in 2003, the Court ruled in *McConnell v. FEC* that limits on money in politics are constitutionally permissible as a means of "curbing undue influence on an officeholder's judgment." The Court quite reasonably held that a donor's purported First Amendment interest in political spending could be limited to avoid "the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."

Not until *Citizens United* in 2010 did the Court declare that campaign finance limits could be upheld only if they directly prevent actual or apparent quid pro quo corruption. The 5-4 majority in that case deemed that regulation on "independent" expenditures could no longer be justified by broader concerns such as donors being given undue access and influence.

In *McCutcheon*, the court's rightwing majority applied, for the first time, *Citizens United*'s cramped definition of "corruption" to direct contribution limits, which have traditionally been regarded as implicating fewer First Amendment concerns that independent spending. Limits on both independent expenditures and direct contributions can now be justified only if they prevent "quid pro quo corruption" like bribery.

In both *Citizens United* and *McCutcheon*, the "umpire" John Roberts stepped up to the plate and really knocked it out of the park.

The cynicism of Roberts's efforts to dismantle campaign finance law becomes increasingly obvious the more you compare *Citizens United* and *McCutcheon*.

In *Citizens United*, the Court justified striking down independent spending limits by PACs and corporations under the theory that "the absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate."

In other words, because independent spending is of so little value to a candidate, limits on such spending cannot be justified, since they raise almost no risk of quid pro quo corruption.

In *McCutcheon* four years later, which dealt with limits on direct donations to candidates, the Roberts-led majority appeared to take the opposite position—that independent expenditures are, indeed, of some value to a candidate.

In *McCutcheon*, Roberts rejected the claim that killing aggregate limits would result in money-laundering schemes to circumvent campaign contribution laws, because, he said, it is so easy to fund a Super PAC that makes independent expenditures, which he now acknowledges will be at least somewhat valuable to a candidate.

"A rational actor," Roberts wrote, would not bother giving to multiple PACs and party committees that would in turn transfer funds to benefit a particular candidate since "a donor could have spent unlimited funds on independent expenditures on behalf of [hypothetical candidate] Smith."

He went on: "Indeed, [a donor] could have spent his entire $500,000 advocating for Smith, without the risk that his selected PACs would choose not to give to Smith, or that he would have to share credit with other contributors to the PACs."

But doesn't the fact that independent expenditures are not "coordinated" mean they undermine the value to a candidate, as the Court held in *Citizens United*?

"Probably not by 95 percent," Roberts acknowledged in *McCutcheon*. "And at least from the donor's point of view, it strikes us as far more likely that he will want to see his full $500,000 spent on behalf of his favored candidate—even if it must be spent independently—rather than see it diluted to a small fraction so that it can be contributed directly by someone else."

That's a big concession by Roberts. He's admitting that independent expenditures are of some value to the candidate who receives them, which seems self-evident but which Roberts and four other justices had been denying just four years earlier in *Citizens United*.

Let's take Roberts's assumption that at least 5 percent of these independent expenditures are of obvious value to the candidate. Shouldn't that justify at least some level of regulation on independent expenditure groups like Super PACs, even though the Court obliterated such regulations entirely in *Citizens United*?

For example, in 2012, hedge fund manager James Simons gave $5 million to President Obama's Super PAC, Priorities USA. Assuming just 5 percent of that total was of "value" to Obama—which is surely an underestimate—it amounted to a $250,000 donation. Doesn't $250,000 in "value" raise the potential for actual or apparent corruption, however defined?

If Mitt Romney had won in 2012, the risk would have been even more severe. Sheldon Adelson and his wife gave a total of $30 million to Romney's Super PAC, Restore Our Future. Assuming just 5 percent of that total was of "value" to Romney, it amounted to a $1.5 million contribution.

Notably, in *McCutcheon*, the Court upheld the existing $2,600 cap on direct contributions to candidates, accepting Congress's finding that donations above that amount pose a sufficient risk of corruption. An effective contribution of more than 100 times the constitutional contribution limits (in the case of James Simons and Obama), or 500 times that amount (Adelson and Romney), certainly raises serious concerns about corruption under Roberts's equation, which should call for at least a partial reversal of *Citizens United*.

But this assumes that Roberts and the four other justices in the rightwing majority are acting as umpires, rather than the all-star sluggers that they've proven themselves to be.

Need more proof? Look at the ease with which Roberts dismissed evidence that striking down aggregate limits would result in money-laundering operations to sidestep what remains of campaign finance law. In the wake of *McCutcheon*, the money-laundering schemes that Roberts rejected as "divorced from reality" are, in fact, becoming reality.

Lawyers for both parties have begun developing "super committees," where various federal party committees—like the Republican National Committee, the National Republican Senatorial Committee, the National Republican Congressional Committee, and state party committees—work jointly on fundraising.

Individually, a federal party committee can accept no more than $32,400 from a single donor, and a state party $10,000; yet by working jointly, the committees can accept a single check equivalent to their combined maximum, which can amount to millions of dollars.

The funds can then be shuffled around to the most hotly contested races in the country, allowing a single donor to bypass the contribution limits and give more to a single candidate than they would have otherwise.

This outcome is entirely predictable. In fact, it is not even unprecedented.

Although Roberts dismissed a hypothetical scenario where a donor might donate to 100 different PACs that could indirectly shuffle more money to candidates than a donor could give in his or her own name—"this 100-PAC scenario is highly implausible," Roberts wrote—multimillionaire Rex Sinquefield had already done exactly that years earlier in Missouri, when the state had contribution caps but no aggregate limits. (See the cover story on Sinquefield in the May issue of *The Progressive*.)

McCutcheon also means that aggregate limits will fall on the state level. Depending on how the decision is interpreted, at least eight states and as many as twenty will no longer be permitted to enforce laws that limit the total amount of money an individual can pump into state elections.

Massachusetts and Maryland have already announced plans to stop enforcing their aggregate limits. Connecticut, Maine, New York, Rhode Island, Wyoming, and the District of Columbia are also likely to lose their aggregate caps.

In Wisconsin, a challenge to the state's $10,000 aggregate limit filed last year by Racine businessman Fred Young—a close compatriot of the billionaire Koch brothers who sits on the board of the Institute and regularly attends Koch donor summits—is expected to succeed.

"What it will surely mean is a lot more out-of-state big contributions as millionaires in other states will be able to give much more in the aggregate," says Jay Heck of Common Cause Wisconsin.

In his dissent, Justice Breyer warned that a political system dominated by moneyed interests will "lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest in political participation altogether."

Breyer is right. But thankfully, we aren't there yet.

In the days after *McCutcheon* was announced, a coalition of groups, including Public Citizen, Common Cause, People for the American Way, and others mobilized thousands of people across the country to protest the ruling and call for a constitutional amendment to restore limits on money in politics (which even former Supreme Court Justice John Paul Stevens now supports). By most accounts, there were about 150 demonstrations in forty-one states.

"The rallies were a way for us to say, this is not going to be a sad day in history but a day of hope and a call for change," says Jonah Minkoff-Zern, the co-director of Public Citizen's Democracy Is for People campaign.

The drastic disintegration of campaign finance limits began with a one-judge majority on the Supreme Court. But it could end with a constitutional amendment.