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Symposium: The First Amendment's protection of political speech extends to both donations and spending

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What kind of bizarro world do we live in where a near majority of Justices of the United States Supreme Court criticizes a First Amendment ruling for being overly concerned with "the individual's right to engage in political speech"? Where these same jurists instead elevate "the public's interest in preserving a democratic order in which collective speech matters"? Are these four reactionary horsemen who won't countenance anti-war protestors, marches against oppressive laws, and other anti-establishment speech-acts? Or perhaps they're censorious troglodytes inveighing against flag-burning, nude dancing, and other emotion-riling forms of expression?

It turns out no, that this statist-majoritarian cant is the highest explication of so-called "liberal" dissent. We've always been at war with Eurasia (at least until those in charge decree that our eternal enemy is Eastasia), etc.

Rubbish. Just as the government can't limit the number of hours that Oprah broadcasts or issues that *The New York Times* publishes – lest they "unduly" influence our political system – it can't restrict the money that someone wants to spend on campaign donations lest he "skew" the marketplace of ideas. Heck, I've been part of enough SCOTUSblog symposia that I'm sure glad there's no federal limit on how much analysis someone can provide on a website that's read by all the key opinion-making eyeballs!

Despite the alarming five-to-four split among the Justices, *McCutcheon* is an easy case if you apply well-settled law (let alone the political-speech-protective first principles upon which this nation was founded): (1) Preventing *quid pro quo* corruption (or the appearance thereof) is the only valid basis for regulating the finance of political campaigns; (2) restrictions on the total amount an individual may donate to candidates and party committees don't serve that bribery-prevention interest and thus violate the First Amendment; (3) that's it; case closed.

The only surprise here is that the ruling wasn't a unanimous rejection of the government's incredible claim that, somehow, someone who "maxes out" to nine congressional candidates "corrupts the system" by giving more than $1,800 to any others. (Or maybe it's those nine candidates who are corrupted by the jealous knowledge that they're no longer unique snowflakes, that their benefactor has Benjamins for literally *anyone* who agrees with his political positions?—I could never fully grasp the logic.)

In any event, Chief Justice Roberts provided the nut of this oh-so-easy-to-crack-case when he ~~called the contribution limits a tax~~ wrote for the majority (which is indeed a majority because Justice Thomas concurred on broader grounds): "Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition."

With Justice Thomas, however, I would go beyond that simple point and overrule *Buckley v. Valeo* altogether because "[c]ontributions and expenditures are simply 'two sides of the same First Amendment coin'" and the Court's "efforts to distinguish the two have produced mere 'word games' rather than any cognizable principle of constitutional law" (quoting Chief Justice Burger's partial dissent in *Buckley*). Justice Thomas would abandon *Buckley*'s framework and replace it with a strict scrutiny test for limits on both contributions and expenditures. Quite so.

Buckley transmogrified the speech-restrictive post-Watergate Federal Election Campaign Act into something no Congress would've passed, also inventing legal standards such that one type of political speech has greater First Amendment protection than another.

Nearly twenty years later, the Supreme Court in *McConnell v. FEC* again rewrote a congressional attempt to "reform" the rules by which people run for office – the Bipartisan Campaign Reform Act, also colloquially known as McCain-Feingold – shying away from striking down *Buckley* and producing a convoluted mish-mash. ("The Chief Justice delivered the opinion of the Court with respect to miscellaneous BCRA Title III and IV provisions. . . . Justice Breyer delivered the Court's opinion with respect to BCRA Title V–§504 . . . . Stevens and O'Connor, JJ., delivered the opinion of the Court with respect to BCRA Titles I and II, in which Souter, Ginsburg, and Breyer, JJ., joined. . . . [and on and on and on, such that this part of the syllabus explaining who agrees with what jot and tittle is longer than the average Oliver Wendell Holmes opinion].")

Enough! The drip-drip of campaign-finance rulings over the last decade has shown that existing campaign-finance law is as unworkable as it is unconstitutional, serving nobody's interest but the

election lawyers who regularly get to bill hours explaining to their clients exactly what type of speech will now get them thrown in jail and how to structure their next political move so as not to provoke Justice Breyer into attaching yet another appendix onto his next dissent.

As the Court explained in *Roth v. United States*, the First Amendment broadly protects political expression in order to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." . Campaign contributions and expenditures facilitate such interchanges and are thus vital to our democracy. Yet our current restraints unconstitutionally stifle political speech and inhibit the unfettered interchange of ideas. While someone can spend an unlimited amount on his own campaigns, what he can donate to parties, committees, and candidates is strictly limited.

The *Buckley* Court correctly held that the spending money, whether as contributions or expenditures, is a form of speech protected by the First Amendment. But it treated caps on expenditures only, and not on contributions, as restrictions on that speech, reasoning that "while contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." The Court has since abandoned the concept of "speech by proxy" generally, yet the distinction between contributions and expenditures remains. That distinction has been the target of persistent, cogent criticism – and its underlying logic has been eroded by subsequent decisions.

Buckley's contribution/expenditure distinction also causes well-noted practical issues. Striking down limits on spending while upholding limits on donations creates a system where politicians spend an inordinate amount of time fundraising instead of legislating. (Though perhaps stopping the government from inflicting more governance on us is a feature, not a bug.) Furthermore, the flow of money has been pushed away from political parties and towards advocacy groups, leaving campaigns with a relative lack of what *Buckley* called "resources necessary for effective advocacy."

Most importantly, all these campaign regulations infringe the right of U.S. citizens to engage in untempered political discourse. (Full disclosure: I'm not yet a citizen – wish me luck on the civics portion of my naturalization interview later this month – but, like most immigrants, do a job Americans won't: defending the Constitution.) Limits on how much someone can give to a party, committee, or candidate unconstitutionally restrain that freedom. Indeed, there is "practically universal agreement" that the central purpose of the Speech and Press Clauses of the First Amendment was "to protect the free discussion of governmental affairs." Since money facilitates speech – not unlike printing presses, computers, or WhatsApp – contribution limits effectively allow speech *only up to a government-approved amount*.

Nor does *stare decisis* require preserving contribution limits, including the aggregate biennial limits at issue in *McCutcheon*. The *Buckley* distinction is of relatively recent vintage and has produced an arbitrary, irrational, and increasingly unworkable system, with no reliance interests that weigh against overruling it. *Stare decisis* is an important principle but it's not a binding command by which a court never overrules precedent. It's a prudential doctrine that allows the overruling of offenses against the First Amendment.

Free speech fosters political change, holds officials accountable, and sustains all the other facets of a healthy democracy to which the *McCutcheon* dissenters feign allegiance. Limits on individual donations impede robust political speech. *Buckley*'s distinction was made in error and should be eradicated at the Court's next suitable opportunity. Not only would this energize our democracy, reduce corruption, and keep with *stare decisis*, it would also be constitutionally consistent.

As Cato argued in its *amicus brief*, in a truly free society, people should be able to give whatever they want to whomever they choose, including candidates for public office. The Supreme Court thus correctly struck down aggregate contribution limits and gave those who contribute money to candidates and parties (nearly) as much freedom as those who spend independently on campaigns and causes. But it should've gone further.

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