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Bringing Big Money Out of the Shadows

By NATHANIEL PERSILY APRIL 2, 2014

Once again, a narrow majority of the Supreme Court has knocked down a campaign finance limit, and, once again, court watchers have gone ballistic. Yet for those who worry about the polarizing effect of money on politics, the McCutcheon decision gives us a little hope. A world in which individuals can give limited, disclosed amounts of money to an unlimited number of politicians is preferable to one in which large chunks are given only to “super PACs” and other unaccountable outside groups.

First, a little history. In 1976, in *Buckley v. Valeo*, the Supreme Court made it clear that individuals have an unfettered First Amendment right to spend as much money as they want advocating for their own election or for the election of their preferred candidate. However, the right to spend unlimited amounts of money on one’s own did not extend to a right to contribute unlimited sums to candidates and parties. Since *Buckley*, you have been able to spend as much money as you want on TV ads saying “vote for me” or “vote for Smith,” but you could only give limited amounts to the “Smith for Congress” campaign.

The court’s much-maligned opinion in *Citizens United* reinforced and expanded the logic of the long line of cases that established this basic contribution-expenditure distinction. First, overturning contrary decisions, it said corporations were just like people in that the First Amendment protects their right to spend unlimited independent amounts of money advocating for the election or defeat of candidates. Second, it asserted that corruption is a narrow concept extending only to the rare phenomenon when a politician does an official favor in exchange for the contribution (so-called “quid pro quo” corruption). The influence and access rich individuals and corporations enjoy because of their expenditures

was not enough to justify campaign finance restrictions. Rather, you now needed to show that money was buying votes or other political favors.

The bastardized campaign finance world that emerged in the wake of Citizens United was one in which the most powerful nonparty institutions — corporations, unions and rich individuals — could spend as much money as they wanted advocating for the election and defeat of candidates. Accountable political actors — the parties and the candidates themselves — continued to be constrained in their ability to raise comparable amounts. Worse still, because they are accountable to no one, outsider, nonparty groups like super PACs engage in the most polarizing campaign activities. They run television ads that make the most outrageous claims while allowing the candidates who benefit from them to say they had nothing to do with it.

Building on Citizens United, the court's decision Wednesday in *McCutcheon v. Federal Election Commission* struck down as a violation of the First Amendment the aggregate limit of \$123,200 that an individual could divide up among candidates and parties. Because such a limit would prevent Shaun McCutcheon, an Alabama businessman, from giving \$1,776 to many Congressional candidates, and a bit more to a few others, it could not be justified as preventing corruption or its appearance.

It is hard to shed a tear for the Shaun McCutcheons of the world — people who desperately want to give hundreds of thousands of dollars to politicians. We have come a long way from the time when, 70 years ago, the Supreme Court's First Amendment jurisprudence was preoccupied with “the poorly financed causes of little people.” Then again, given that in the last five years alone, the court has brought within the First Amendment's ambit the distribution of violent video games, animal torture videos, protests of military funerals and other outrageous forms of expression, it is hard to place political contributions and expenditures at the top of the list of jurisprudential offenses.

While the potential effects of the court's decision in *McCutcheon* should not be overstated, the court's ruling does hold promise to restore the balance between insiders (parties and candidates) and outsiders (corporations, unions, super PACs and other nonparty groups). It may seem crazy, considering the low esteem in which most Americans hold their politicians, but putting campaign money in the hands of parties and officeholders may be the best of all possible post-Citizens

United worlds. Because the court reaffirms the value of forcing disclosure of contributions to candidates and parties, at least with respect to contributors like Mr. McCutcheon, we will know where the money is coming from, where it is going, and how politicians behave once they receive it.

Critics of the court's decision worry that it will open the floodgates for money to flow from one contributor to one candidate's campaign treasury but then on to another and another until a donor can, in effect, contribute unlimited sums to any individual politician. That fear — despite the court's naïve proclamation to the contrary — is well founded. However, the floodgates were already thrown open by Citizens United and other decisions that allowed for unlimited expenditures by individuals, unions, corporations, super PACs and virtually every other actor in the campaign finance system.

The only question now is how to redirect the river of money flowing into politics toward the destinations most beneficial to our democracy.

The real problem in the post-Citizens United world is not the ungodly amounts of money spent on campaigns, although most Americans do find that offensive. The most pressing campaign finance challenge comes from the polarizing power exercised by those with extreme and narrow interests, who never need to stand for re-election, and nevertheless spend unlimited amounts on the electoral process. Political parties, which have historically aggregated and somewhat muted those interests by pooling resources from multiple sources, became less important players when they could not raise the same sums as outsiders. Political polarization has been fueled in part by the rise of independent, often undisclosed, money. Any court decision tackling that problem (even unintentionally) should be welcomed, if it levels the playing field between those who exercise power openly and must face the voters and those who can never be held accountable.

Acknowledging the potential upside of yesterday's decision should not be seen as a celebration of the contorted monster of a campaign finance system overlaying contemporary politics in America. The United States should provide generous public funding to its parties and candidates, like virtually every other democracy in the world. Outsourcing our politics to unaccountable groups and anonymous individuals exacerbates the polarization that has come to define our government. Given the political challenges that public financing faces, though, the best we can

hope for in the short term is a system that, by giving candidates and parties what they need to compete for voters' attention, channels money away from the shadows and into the open.

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