BRENNAN CENTER FOR JUSTICE *at New York University School of Law*

Supreme Court's McCutcheon Decision is a Blow Against Average Voters

April 2, 2014

Today, the U.S. Supreme Court voted in McCutcheon v. FEC, the most critical campaign finance case since Citizens United, to strike down overall contribution limits, known as aggregate limits. The Brennan Center for Justice at NYU School of Law released the following statement from President Michael Waldman:

"Today's Supreme Court decision rejects decades of precedent and strikes a sharp blow against the interests of average voters. Once again the Court has struck down a law that curbs the corrupting influence of large campaign contributions in our politics. Sadly, the Court has also achieved a new milestone by striking down a federal contribution limit for the first time.

"Our Founders feared corruption. They did not want government beholden to narrow, elite interests. Eliminating these limits will now allow a single politician to solicit, and a single donor to give, up to $3.6 million through the use of joint fundraising committees. Following the Citizens United decision, this will further inundate a political system already flush with cash, marginalize average voters, and elevate those who can afford to buy political access."

Read below how the Roberts Court has systematically dismantled American campaign finance law.

The Pro-Money Court: How the Roberts Supreme Court Dismantled Campaign Finance Law

David Earley, Avram Billig: February 26, 2014

The Supreme Court will rule soon in McCutcheon v. FEC, which could further increase the influence of big money in elections. But McCutcheon is just the latest in a long string of cases weakening campaign finance rules. Since Chief Justice John Roberts and Justice Samuel Alito joined the Court in 2005 and 2006 respectively, five decisions have significantly reshaped the legal landscape dictating how much big money can flow into political races. Here is some background on what the Court did, how it affected American elections, and what could happen next.

2007: Federal Election Commission (FEC) v. Wisconsin Right to Life, Inc.

The SCOTUS Ruling: The Court struck down a law regulating sham issue ads — television advertisements that clearly target specific candidates, but avoid regulation by posing as "issue" ads. For example, an advertisement referring to a candidate by name close to the election, but instead of explicitly advocating voting for or against the candidate, tells the viewer to "call Rep. Smith and tell him to stop corporate polluters."

The Majority Opinion: Chief Justice Roberts on the continued regulation of issue ads: "Enough is enough. Issue ads like WRTL's are by no means equivalent to contributions, and the quid-pro-quo corruption interest cannot justify regulating them."

The Dissenting Opinion: Justice Souter: "Neither Congress's decisions nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete quid pro quo; campaign finance reform has instead consistently focused on the more pervasive distortion of electoral institutions by concentrated wealth, on the special access and guaranteed favor that sap the representative integrity of American government and defy public confidence in its institutions."

The Result: By rejecting Congress's decision to regulate political spending, the Court encouraged the creation of more and more political ads that circumvent campaign finance law by leaving out "magic words" such as "vote for" or "vote against." As any voter who lives in a battleground state knows, these ads now dominate many elections, often funded by shadowy groups that do not reveal their donors.

2008: Davis v. FEC

The SCOTUS Ruling: The Court struck down the so-called "Millionaire's Amendment," which had permitted congressional candidates facing wealthy opponents who spent more than $350,000 of their own money on the race to raise larger contributions until they achieved parity with their wealthy opponents.

The Majority Opinion: Justice Alito: "While [the law] does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right."

The Dissenting Opinion: Justice Stevens: The law "does not impose any burden whatsoever on the self-funding candidate's freedom to speak, it does not violate the First Amendment, and . . . it does no more than diminish the unequal strength of the self-funding candidate."

The Result: Opponents of extremely wealthy candidates are left without an effective way to overcome their significant financial disadvantage. By striking down the "Millionaire's Amendment," the Court helped to ensure that Congress would continue to be dominated by the very wealthy, a state of affairs recently described by the Center for Responsive Politics.

2010: Citizens United v. FEC

he SCOTUS Ruling: The Court opened the door to allow unions and corporations, including for-profit corporations, to spend unlimited amounts on elections, as long as that money is not given directly to or used in coordination with a candidate.

The Majority Opinion: Justice Kennedy: "Ingratiation and access, in any event, are not corruption. . . ." "The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy."

The Dissenting Opinion: Justice Stevens: "In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races."

The Result: The Citizens United decision laid the groundwork for the creation of Super PACs, or independent political groups that can take in and spend unlimited sums. These groups, paired with newly unrestrained corporations and unions, have contributed to astronomical growth in independent political spending. Outside groups spent more than $1 billion dollars on the 2012 election, which is more than the total outside spending reported to the Federal Election Commission from 1980 to 2010. Outside spending in Senate races alone went from about $18 million in 2008 to about $260 million in 2012. Much of this money remains untraceable, as groups have taken advantage of loopholes in the election law and tax code to hide the identities of spenders.

2011: Arizona Free Enterprise Club v. Bennett

The SCOTUS Ruling: The Court struck down part of an Arizona program that provided public funds to candidates who agreed to only raise very small contributions from the public and to abide by campaign expenditure limits. Specifically, the program could no longer provide additional money to these candidates if they faced big-spending opponents.

The Majority Opinion: Chief Justice Roberts: "Laws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand."

The Dissenting Opinion: Justice Kagan: "Some people might call [it] chutzpah" that those who challenged the law claim that it "violated their First Amendment rights by disbursing funds to other speakers, even though they could have received (but chose to spurn) the same financial assistance."

The Result: Public funding programs can no longer provide candidates with additional funds if they are vastly outspent by their opponents.

2012: American Tradition Partnership v. Bullock

SCOTUS Ruling: The Court struck down a Montana ban on corporate political spending and refused to reconsider Citizens United even as outside spending skyrocketed. The Court rejected the evidence relied upon by the Montana Supreme Court that outside spending can cause corruption and the appearance of corruption.

The Majority Opinion: Per Curiam: "The question presented in this case is whether the holding of Citizens United applies to the Montana state law. There can be no serious doubt that it does."

The Dissenting Opinion: Justice Breyer: "Montana's experience, like considerable experience elsewhere since the Court's decision in Citizens United, casts grave doubt on the Court's supposition that independent expenditures do not corrupt or appear to do so."

The Result: By doubling down on its conclusion that corporate election spending may not be limited, the Court blocked future efforts to regulate outside money at the state level.

2014: McCutcheon v. FEC

What's At Stake: At issue in McCutcheon are aggregate contribution limits — the amount one contributor can give in federal elections to all candidates, political parties, and PACs, combined. Under these limits, no donor can give more than $48,600 to all candidates and $74,600 to parties and PACs in one federal election cycle (two years).

What Could Happen: McCutcheon threatens to exponentially worsen the political spending arms race — and to create risks of government corruption unlike anything the country has seen since the Gilded Age. If the Court strikes down aggregate contribution limits, one politician could use joint fundraising committees to directly solicit more than $3.5 million from a single donor in an election cycle. That's more than 70 times the median annual family income in America. For an ordinary American to raise and spend this amount would take a lifetime. Striking down aggregate limits would also effectively render individual contribution limits meaningless, since many candidates could collect money to funnel toward a single politician. As a result, far more money will flow into an American political system already flush with cash.

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