

What is *McCutcheon v. FEC*?

M*cCutcheon v. FEC* is a Supreme Court case in which a narrow 5-4 majority struck down the limit on the total amount that one wealthy donor is permitted to contribute to all federal candidates, parties, and political action committees (PACs) combined.

This “aggregate contribution limit” was already \$123,200 over a two-year election cycle¹—more than twice the average income for an American household.² This was not enough for Alabama coal executive Shaun McCutcheon, who joined with Senator Mitch McConnell and the Republican National Committee to urge the Court to allow him and other wealthy donors to contribute a potentially unlimited amount.

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Will This Mean More Big Money In Politics?

Yes. With the Court’s decision in *McCutcheon*, wealthy donors may now contribute more than \$3.5 million to a single party’s candidates and party committees (plus a virtually unlimited amount to supportive PACs).³ Dēmos projects that this will result in more than \$1 billion in additional campaign contributions from only 2,800 elite donors through the 2020 election cycle.⁴

More importantly, this will shift the balance of power even further toward wealthy donors and away from ordinary citizens. Without an aggregate limit, we estimate that in 2012 just 1,219 elite donors would have contributed nearly 50 percent more to candidates and parties than President Obama and Mitt Romney raised combined from more than 4 million small donors.⁵

Still in place, at least for now, are limits on the amount an individual may contribute to a particular federal candidate and party committee. A wealthy individual may contribute up to \$2,600 per election (\$5,200 per election cycle) to a federal candidate, \$5,000 per calendar year to a political action committee (PAC) that supports federal candidates, \$10,000 per calendar year to a state or local party committee, and \$32,400 per calendar year to a national party committee.⁶ But “joint fundraising committees” will allow members of Congress and party officials to solicit much larger checks from big money donors who can contribute to many candidates or parties at once.

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What Did The Roberts Court Get Wrong In *McCutcheon*?

The Court asked the wrong question.⁷ For decades, when evaluating limits on the use of big money in politics, the Court has asked only one question: is this regulation necessary to fight corruption or its appearance? The Roberts Court has defined “corruption” very narrowly to mean only quid pro quo exchanges of money for official action (more on this below), and in *McCutcheon* Justice Roberts wrote explicitly about how other potential government interests are not

legitimate reasons for limiting the use of big money.

But addressing the role of money in politics is not just about clean governance—it’s about shifting fundamental power dynamics in American society to facilitate meaningful representation for all citizens. Even if we were able to eliminate all financial quid pro quo corruption from the electoral process, money would still exercise tremendous influence on elections and hence policy outcomes. Much more profound questions about the relationship between concentrated economic power and democracy are at stake.

The Court should be asking whether it’s fair for the wealthy to use their economic might to purchase political power and whether one person contributing millions of dollars to candidates and parties is consistent with the principle of one person, one vote. The Justices should be prepared to recognize other fundamental American values at stake, such as political equality, robust participation, and protecting the integrity of our democracy.

The Court doubled down on its *Citizens United* mistake. In *Citizens United* the Court opened the door to Super PACs and unlimited political spending from corporations and unions because it held that so-called “independent” spending could not corrupt.⁸ In *McCutcheon*, the Court’s conservative majority repeated its *Citizens United* mistake and said there is not enough of a risk of corruption or its appearance from wealthy donors pumping millions of dollars into federal campaigns to justify total contribution limits. This one-two punch has dealt a serious blow to our democracy. As Justice Breyer wrote in his *McCutcheon* dissent, “Taken together with *Citizens United*...to-

day's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve."⁹

The Court narrowed the definition of corruption so severely that it now looks like straight bribery—which is already illegal. As noted above, the Court should be concerned with much more than corruption. In the past, the Justices at least recognized that our democracy can be corrupted by “improper influence and opportunities for abuse.”¹⁰ But the Roberts Court has been steadily narrowing the definition of corruption. In *Citizens United*, Justice Kennedy wrote in the context of independent spending that “ingratiation and access...are not corruption.”¹¹ Justice Roberts has now taken this narrow definition to the extreme and applied it in the context of direct contributions, writing that “government regulation may not target the general gratitude a candidate may feel towards those who support him or his allies, or the political access such support may afford,” but rather must be laser-focused on “a direct exchange of an official act for money.”¹² It's hard to tell how this is different from bribery, which is already illegal. Such a narrow definition of corruption seems designed to make it difficult for laws that protect the integrity of our democracy to survive.

The Court assumes that money is speech. Building off of past cases that have cast money as speech, Justice Roberts compares contributing millions of dollars to political candidates to flag burning or Nazi parades. But, reasonable restrictions on political money do not regulate the content of anyone's speech—candidates and outside groups are free to engage in rigorous critique of gov-

ernment officials or policies. Rather, big money acts to amplify the voices of wealthy over their fellow citizens and allow the rich to act like bullies in the public square. The Court plays fast and loose with this distinction between content and amplification to mask the fact that the five-justice majority seems concerned only with the speech of those who can afford to pump millions of dollars into campaigns.

As Justice Stevens has explained, “Money is property; it is not speech. . . . It does not follow...that the First Amendment provides the same measure of protection to the use of money to accomplish [one's] goals as it provides to the use of ideas to achieve the same results.”¹³

The Court ignores that common sense money in politics rules promote First Amendment values. Justice Roberts characterized the First Amendment as protecting only an individual's right to “speak” as much he or she can, free from government restraint.¹⁴ But the First Amendment promotes more than just self-expression—one of its primary functions is to promote the accountability and responsiveness of government officials to the public as a whole, the hallmarks of a healthy democracy.¹⁵ Justice Breyer wrote that the “First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*.”¹⁶

The Court doesn't understand how politics works in the real world, and made no attempt to find out. Justice Roberts' opinion paints a picture of a world in which large contributions to candidates and elected officials do not skew policy or cause the public to question the integrity of our democracy. This is

clearly divorced from reality and from the common sense understanding most Americans, who believe that financial supporters have an improper influence on our politics and policy and consider this a corruption of democratic government.¹⁷ Justice Breyer noted that the conclusion of the Roberts majority “rests upon its own, not a record-based, view of the facts.”¹⁸ In prior campaign finance cases, there were hundreds of thousands of pages of evidence introduced to support the various sides’ views on the actual influence of money in politics.¹⁹ Although this case lacked such detailed record, Justice Roberts still concluded confidently that abolishing the aggregate federal limits would not help motivated donors get around base contribution limits.²⁰ Historically, the Court has been somewhat deferential to Congress when it comes to making campaign rules because those who run for office have more expertise in this area; but the Roberts Court has shown no such humility.

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What Does This Mean For Our Democracy?

Elected officials will be even more responsive to the wealthy few who fund campaigns. Recent research confirms that the very wealthy have starkly different policy priorities than the general public, especially on economic issues.²¹ This research also shows that the U.S. government responds differentially to the preferences of the donor class, even when those preferences run counter to those of the general public.²² When the richest 10 percent differ from the rest of us, the 10 percent trumps the 90

percent.²³

This is largely because an elite “donor class” funds a substantial portion of campaigns, and he who pays the piper calls the tune. In the 2012 elections, for example, U.S. Senate candidates raised 64 percent of their funds in contributions of at least \$1,000—from just 0.04 percent of the population.²⁴ This means that even the best-intentioned candidates often spend most of their time contacting a narrow set of wealthy donors and hearing about their concerns and priorities.²⁵

In describing the four to six hours of fundraising calls he’s required to make per day, Connecticut Senator Chris Murphy noted that he wasn’t calling anyone “who could not drop at least \$1,000,” who he estimated make at least \$500,000 to \$1 million per year. He acknowledged that this meant he was hearing far more about the concerns of the affluent than from people who worked on the factory floor.²⁶

Americans across the political spectrum believe that money in politics is the reason their representatives are more responsive to private interests with financial resources than to the public interest²⁷ and that this will continue to undermine faith in our democracy.

A smaller network of gatekeepers and “kingmakers” will narrow the pool of candidates. To run for office successfully in our big money system, candidates need access to a network of wealthy donors. Aspiring officeholders need to win the “wealth primary” before the voters have their say at the polls. Because the donor class is more wealthy, white, and male than the population as a whole, this gives an advantage to people who run in similar circles. The *McCutcheon* ruling will mean

that an even narrower set of even wealthier donors can act as gatekeepers to more races across the country. The most effective way to control the agenda in Congress and state capitols across the country is to control who runs for office and who wins elections. Once wealthy donors have helped placed allies in positions of power, they don't need to bribe them in order to secure preferred policies that serve their interests.

The Roberts Court has privileged the political participation of billionaires, while at the same time gutting protections for the freedom to vote. The Roberts Court's money in politics and voting rights decisions have helped the wealthy dominate politics while conversely limiting average citizens' freedom to vote. On one hand, the *McCutcheon* and *Citizens United* decisions provide unprecedented ways for wealthy individuals and corporations to use their economic might to purchase political power. On the other, the Court's 2013 decision in *Shelby County v. Holder* gutted a key provision of the Voting Rights Act²⁸ and has cleared the way for a number of state legislatures to introduce and pass new laws that make it harder for all citizens to register and vote. This dangerous combination threatens to shape a democracy of the money rather than the many.

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What Can We Do To Save Our Democracy?

Take Back our Constitution from an Errant Supreme Court. *McCutcheon v. FEC* is just the latest in a long line of cases in which the Supreme Court has misread the Constitution to strike basic protections

against concentrated wealth's dominance of public policy. It is now clearer than ever that the Supreme Court's entire approach to evaluating laws intended to curb the undue influence of big money is fatally flawed.²⁹ The People must be able to enact protections that strive not just for clean governance, but also to serve the fundamental American values of political equality, accountable government, and fair representation for all regardless of wealth. We can fix the Supreme Court's errors through two paths.

Transforming the Supreme Court's Approach to Money in Politics. First, we can work through the courts, and transform their understanding of the relationship between political speech, money in politics, and the Constitution. Over time we can harness widespread public disagreement with the Court's current approach; develop and promote robust interpretive frameworks that go beyond corruption; promote these ideas with legal and popular audiences; and help ensure that newly appointed justices share the public's common-sense understanding of the Constitution. This can lead to an interpretation of the Constitution that empowers the People to safeguard our democracy. This won't be easy, but there are examples where the Court has accepted new principles and changed its approach, for example on racial segregation, marriage equality, and the Second Amendment.

Amending the Constitution. The other way to clarify that the People have the power to rein in the influence of big money is to amend the Constitution. A strong amendment would overturn *Buckley v. Valeo*, *Citizens United*, *McCutcheon*, and the rest of the Court's misguided rulings. Sixteen states and hundreds of localities have passed resolutions calling for an amendment.³⁰

Shift the Balance of Power Towards Small Donors. Though the Supreme Court has blocked us from enforcing common-sense limits on the use of big money in politics, we remain free to tackle the problem from the other side of the equation—providing incentives to bring more small donors into the system. The best way to address the *McCutcheon* ruling immediately is to enact policies that shift the balance of power back towards average voters by providing additional incentives for non-wealthy citizens to make small contributions, and increasing the effect of these small contributions and hence the incentive for candidates to reach out to their constituents rather than spend time chasing \$2,000 checks.

The Government By the People Act (H.R. 20) and the Fair Elections Now Act (S.2023) are the best proposals in Congress. The Government By the People Act, for example, would provide a six-to-one match on contributions up to \$150 from a public fund; a \$25 refundable tax credit for small donations; enhanced matching funds in the final 60 days of a general election for candidates in high-cost races; and create small-donor political action committees that aggregate the voices and power of ordinary citizens.³¹ Similar programs have been successfully employed in Arizona, Connecticut, Maine, New York City, and many other places.

Force Big Donors to Come Out of the Shadows. First in *Citizens United* and now in *McCutcheon*, the Court has repeatedly relied upon effective disclosure of political spending to provide voters with the information they need to make informed choices. Such holistic and effective disclosure requirements, however, currently do not exist. Dark money groups such as 501(c)6 trade associations and 501(c)(4) political

nonprofits spent hundreds of millions of dollars in the last election cycle without disclosing their donors.³² Ironically, Justice Roberts actually used this lack of disclosure of outside spending in part to justify more big money contributions to candidates and parties, writing that “[t]he existing aggregate limits may in fact encourage the movement of money away from entities subject to disclosure.... Individuals can, for example, contribute unlimited amounts to 501(c) organizations, which are not required to publicly disclose their donors.”³³ Congress should force political 501(c) groups to disclose the large donors that fuel their election spending; the IRS should create clearer rules for how much political spending these groups can do; and the Securities and Exchange Commission should force publicly traded companies to disclose political spending (including contributions to dark money groups) to their shareholders. ●

Endnotes

1. Federal Election Commission, *Contribution Limits 2013-14*, <http://www.fec.gov/pages/brochures/contriblimits.shtml> (last visited Apr. 4, 2014).
2. Carmen DeNavas-Walt, Bernadette D. Proctor, & Jessica C. Smith, *Income, Poverty, and Health Insurance Coverage in the United States: 2012*, U.S. Census Bureau (Sept. 2013), available at <http://www.census.gov/prod/2013pubs/p60-245.pdf>.
3. Adam Lioz & Blair Bowie, *McCutcheon Money: The Projected Impact of Striking Aggregate Contribution Limits*, DEMOS (OCT. 2013), available at <http://www.demos.org/sites/default/files/publications/McCutcheonMoney-2013.pdf>.
4. *Id.*
5. *Id.*
6. Federal Election Commission, *supra* note 1.
7. For much more on this point, see Adam Lioz, *More Than Just Corruption Threatens Our Democracy*, THE AMERICAN PROSPECT (Apr. 1, 2014), available at <http://prospect.org/article/more-corruption-threatens-integrity-our-democracy>.

8. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 357 (2010).
9. *McCutcheon v. Federal Election Comm'n*, No. 12-536, slip op. at 2 (U.S. Apr. 2, 2014) (Breyer, J., dissenting), available at http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf.
10. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 389–90 (2000) (internal quotations omitted).
11. *Citizens United*, 558 U.S. at 360.
12. *McCutcheon*, slip op. at 2-3 (opinion of Roberts, C.J.).
13. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).
14. See *McCutcheon*, slip op. at 14-18.
15. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 401-02 (2000) (Breyer, J., concurring); see also Robert A. Dahl, POLYARCHY: PARTICIPATION AND OPPOSITION 1 (1971) ("I assume that a key characteristic of a democracy is the continuing responsiveness of the government of its citizens, considered as political equals.").
16. *McCutcheon*, slip op. at 6 (Breyer, J., dissenting) (emphasis in original).
17. Liz Kennedy, *Stop the Next: McCutcheon v. FEC and the Crisis of Confidence in American Democracy*, DĒMOS (Sept. 2013), at <http://www.demos.org/sites/default/files/publications/McCutcheon-document.pdf>.
18. *McCutcheon*, slip op. at 2 (Breyer, J., dissenting).
19. See *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 208-09 (D.D.C. 2003).
20. See *McCutcheon*, slip op. at 30.
21. See Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51 (2013), available at <http://faculty.wcas.northwestern.edu/~jnd260/cab/CAB2012%20-%20Page1.pdf>.
22. Martin Gilens, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 1 (2012).
23. *Id.* at 83-84.
24. Blair Bowie & Adam Lioz, *Billion Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections*, at 23, DĒMOS & U.S. PIRG (Jan. 2013), available at <http://www.demos.org/publication/billion-dollar-democracy-unprecedented-role-money-2012-elections>.
25. See Paul Blumenthal, *Chris Murphy: 'Soul-Crushing' Fundraising is Bad for Congress*, HUFFINGTON POST, May 7, 2013, available at http://www.huffingtonpost.com/2013/05/07/chris-murphy-fundraising_n_3232143.html.
26. *Id.*
27. See, e.g., Memorandum from Celinda Lake et al., Lake Research Partners & Brian Nienaber & Ashlee Rich, Tarrance Group, *National Polling on Support for a Proposal to Tackle Big Money in Congressional Elections 2* (Feb. 1, 2009).
28. See *Shelby County v. Holder*, 540 U.S. ___, 133 S.Ct. 2612 (2013).
29. For a much more substantial explanation of how the Court's approach to money in politics is flawed and the real-world consequences, see Adam Lioz, *Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out*, SETON HALL LAW REVIEW: Vol. 43: Iss. 4, Article 4 (2013), available at <http://scholarship.shu.edu/shlr/vol43/iss4/4>.
30. For more information, see www.United4thePeople.org.
31. Adam Lioz, *The Government By the People Act: Legislation to Curb the Power of Wealthy Donors and Put Government Back in the Hands of Voters*, DĒMOS (Feb. 2014), available at <http://www.demos.org/sites/default/files/publications/Demos-GovByThePeopleAct.pdf>.
32. Blair Bowie & Adam Lioz, *Billion Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections*, DĒMOS & U.S. PIRG (Jan. 2013), available at <http://www.demos.org/publication/billion-dollar-democracy-unprecedented-role-money-2012-elections>.
33. *McCutcheon*, slip op. at 36.

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