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The Next Battle in the Fight for Free Speech

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No doubt you've heard of Oprah—one doesn't even need to say her last name. She is so influential that a study by University of Maryland Profs. Craig Garthwaite and Tim Moore found that her endorsement of Barack Obama was worth more than a million votes in the 2008 Democratic presidential primaries—more than the difference between then-Sen. Obama and his main rival, Hillary Clinton.

Chances are you've never heard of Shaun McCutcheon, who hopes to have a fraction of Oprah's influence on elections. Mr. McCutcheon faces one problem: The federal government could jail him for five years if he implements his plan. So he has taken his case to court, and on Oct. 8 the Supreme Court will hear oral argument in *McCutcheon v. FEC*. This case could be as important to campaign-finance law as *Citizens United v. FEC*, which in 2010 restored the rights of corporations and unions to engage in political speech.

Mr. McCutcheon owns a company that designs and builds electrical systems for projects such as clean coal-liquefaction. His financial success has allowed the longtime Republican activist to use his money to support GOP candidates.

Under federal law, however, Mr. McCutcheon is limited to a maximum contribution of $2,600 to a candidate in any election. The ostensible reason for this limit is to prevent candidates from being "corrupted" by large campaign contributions. The law also limits him to contributing a total of $48,600 to candidates in any two-year election cycle, meaning that he can only contribute the $2,600 maximum in 18 races. With at least 60 U.S. House races and 15 Senate races expected to be competitive in 2014, Mr. McCutcheon can give the maximum contribution in fewer than one-quarter of those races.

Mr. McCutcheon is willing to live with the $2,600 limit on contributions to any one candidate. But his case presents the Supreme Court with a simple question: If his $2,600 contribution would not "corrupt" the first 18 candidates he supports, why would it "corrupt" the 19th and 20th?

The aggregate limit on contributions to candidates was enacted in 2002, as part of the McCain-Feingold campaign-finance law, but Congress left no record as to why the aggregate limit was necessary. The government now argues that without the aggregate

cap donors could circumvent the law by giving money to one candidate with the understanding that the candidate would pass it to another to whom the donor has already contributed the $2,600 maximum.

That theory makes little sense. The law already treats a contribution made to one candidate or political-action committee, but earmarked to be passed on to another, as a contribution to the candidate for whom it is earmarked.

A donor might try to make unearmarked contributions, in the hope that they will be passed on to the candidate he really wants to support. But as the U.S. District Court for the District of Columbia noted in September, it is "unlikely that so many separate entities would willingly serve as conduits for a single contributor's interests." There is no evidence, before or since imposition of the aggregate limit, that donors have used such schemes to circumvent the $2,600 candidate limit. Despite the lack of evidence, the lower court upheld the law on those grounds.

The Supreme Court has long held that campaign contributions and spending are constitutionally protected speech. Despite the First Amendment's prohibition on any law "abridging the freedom of speech," the court has upheld measures limiting political speech, provided that the government "demonstrates a sufficiently important interest" and that restrictions are "closely drawn to avoid unnecessary abridgment of associational freedoms" *(Buckley v. Valeo,* 1976).

In Mr. McCutcheon's case, the government has not addressed either criterion. If the Supreme Court is serious in its past pronouncements that laws limiting political speech must receive "heightened scrutiny" from the judiciary, it is hard to see how the government wins.

Mr. McCutcheon's co-plaintiff is the Republican National Committee, which asks essentially the same question. Under McCain-Feingold, an individual can contribute up to $32,400 to a national-party committee, subject to an aggregate limit of $74,600 to all party committees and PACs combined.

Thus an individual who wants to support Republicans in both the House and Senate, through a maximum contribution to both the Republican National Congressional Committee and the Republican National Senatorial Committee, cannot also make a full contribution to the Republican National Committee, let alone contribute to state and local party committees or trade association and ideological PACs. The result is that political parties, historically among the most important American political institutions, are fading in importance.

It is often forgotten that until 1974 there were no federal limits on contributions to candidates or political parties, let alone aggregate limits on total contributions. Starting with the Federal Election Campaign Act Amendments of 1974, however, American political discourse has been blanketed with ever-increasing government regulation. By

the summer of 2007, political speech was more heavily regulated than at any time in U.S. history. All this was done in the name of preventing "corruption" and fostering "confidence in government." Yet confidence in government today is lower than it was in 1974, not coincidentally the year President Nixon resigned.

In 2007, in *Wisconsin Right to Life v. FEC*, the Supreme Court declared "enough is enough." Chief Justice John Roberts and a majority have since been slowly hacking away at this maze of speech regulations.

Campaign-finance "reformers" overlook that the First Amendment—protecting the right to unfettered political speech—is the constitutional solution to the problem of government corruption. It is the means by which confidence in government is maintained. People speak. Citizens listen. Corruption and ineptitude are exposed. Voters vote.

Shaun McCutcheon wants to join with others to speak about candidates and elections. The First Amendment means little if it does not protect that right.

Mr. Smith is chairman of the Center for Competitive Politics, which filed an amicus brief in support of Mr. McCutcheon. He served as commissioner of the Federal Election Commission from 2000-05.