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The Undergraduate Law Review at UC San Diego

Title

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Permalink

<https://escholarship.org/uc/item/76k2q8w1>

Journal

The Undergraduate Law Review at UC San Diego, 1(1)

ISSN

2993-5644

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Publication Date

2022-05-01

DOI

10.5070/LR3.1464

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Peer reviewed

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The Violation of Democracy: Unequal Access to the Shaping of Government

ABSTRACT. The United States government was built to protect against a tyrannical government in which the wishes of the minority elite are prioritized ahead of the wishes of the majority. The fear of such minority influence in government is now grounded in the rise of wealthy corporations. With the rise of corporations, the United States has become increasingly economically dependent on major companies. Corporations are uniquely positioned economically to bargain for political advantage, and political campaigns are especially vulnerable to this relationship due to their heavy reliance on donors. Consequently, campaign finance laws have been established with the goal of curtailing corporate political influence. Campaign finance laws have undergone several interpretations by the highest court in the United States to address evolving public concerns surrounding corruption. Most notable is the 1975 *Buckley v. Valeo* case, where the Supreme Court ruled that the wealthy minority not be given free rein to deposit funds toward their favorite candidates, citing corruption and the appearance of corruption as justification. From this, one can derive the appearance of corruption to mean any outcome by which public trust in the American democratic system is justly diminished. However, dissenters opined that despite governmental interest against corruption, the Court's remedy was overinclusive and thus violated First Amendment protections to political speech. The twenty-first century rulings of *Citizens United v. Federal Election Commission* and *McCutcheon v. Federal Election Commission* overturned precedent and opened a floodgate of money that can now participate in politics, birthing an over 3.5 billion dollar lobbying industry by which a direct line of communication between large companies and legislative leaders was granted. Such a connection between the two powers has constructed a dangerous relationship between Big Money and political mobility. The goal of this paper is to understand how the rulings in *Citizens United* and *McCutcheon* changed the extent to which ordinary persons can access and shape government. This paper understands the shaping of government to mean any means by which an individual or group of

individuals influence policymakers; unequal access to the shaping of government then refers to any circumstance under which a minority possesses a disproportionate influence over a policymaker's attention compared to ordinary persons. To accomplish its goal, this paper will study the relevant facts of the two cases, assess the arguments through which the Court's decisions were made, and gauge the possible outcomes of the Court's decisions.

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INTRODUCTION

When industries began to dominate the markets in the United States, American leaders expressed concerns regarding political corruption led by corporations who donate large funds to political campaigns. Former President Theodore Roosevelt, in 1905, expressed similar fears. Consequently, he requested that legislation be written to ban financial contributions to political leaders by corporations. The complete banning was never done, but efforts toward creating constitutional methods by which corporations could donate without the risk of corruption were made. The 1971 Federal Election Campaign Act (FECA) and later the Bipartisan Campaign Reform Act (BCRA) were meant to do just that.

The FECA sets the first aggregate limit as to how much an individual, a political action committee (PAC), or a party committee can donate to a single candidate or multiple candidates.¹ Additionally, in 1974, the FECA established the Federal Election Commission (FEC), whose primary goal was to carry out the standards set by the FECA. The FECA targeted "hard" money contributions and spending: spending that was done at the federal, state, or local level. A 1979 ruling established that the spending of "soft" money need not be regulated. This meant that any platform, company, or person could spend their own money advocating for the candidate they are in support

¹ *Legislation*, FEC, <https://www.fec.gov/legal-resources/legislation/> (last visited June 25, 2022).

THE VIOLATION OF DEMOCRACY: UNEQUAL ACCESS TO THE SHAPING OF GOVERNMENT

of without being held to any regulations. This then, of course, directly influenced how much money was being donated under the guise of soft-money donations which then were indirectly used to support elections.

This then gave footing to the Bipartisan Campaign Reform Act (BCRA) in which soft money contributions and issue advocacy were targeted.² The act made it illegal for corporations and unions to use their own funds to advertise in support of a political candidate within sixty days of a general election and thirty days of a primary election.

The cases reviewed in this paper challenge the sections of the laws described above. More closely, *Citizens United v. Federal Election Commission* challenged §203 of the BCRA, which prohibits electioneering communications, and *McCutcheon v. Federal Election Commission* challenged Title 2 of the United States Code, §441(a) which sets an aggregate limit for donations toward candidates and candidate committees.

The first part of this paper will challenge the ruling in the 2010 *Citizens United v. Federal Election Commission* by arguing that it falsely extends equal protection of First Amendment rights to corporations. The second part of this paper will argue that the Court's majority argument in *McCutcheon* depended too heavily on a narrow definition of corruption which allowed them to conclude that the aggregate limit was ineffective and a violation of First Amendment rights. These two cases, which provided corporations and wealthy individuals a larger pot to donate from, coupled with such individuals' ability to hire lobbyists, create a political environment in which money prevails in government. Therefore, the last part of this paper will discuss two outcomes of these cases. The first outlines the extent to which money dictates politics. The second explores the effect of these cases on public perception of the American democratic system. Additionally, the last part of this paper will entertain the idea of remedying such effects.

I. **CITIZENS UNITED: APPLYING FIRST AMENDMENT RIGHTS TOO BROADLY**

In 2008, Citizens United created a documentary film titled *Hillary: The Movie*. *Hillary* was critical of the senator and the democratic candidate for the presidency at the time, Hillary Clinton. This film produced ads that were presented on cable television and other broadcasting networks and they hoped to make *Hillary* available through on-demand services.³ Given that the movie would be released within thirty days of a primary election, it violated §203 of the BRCA.

² *H.R.2356 - 107th Congress (2001-2002): Bipartisan Campaign Reform Act of 2002*, CONGRESS.GOV, <https://www.congress.gov/bill/107th-congress/house-bill/2356> (last visited June 26, 2022).

³ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

The Supreme Court acknowledged Citizens United's violation of the BCRA. However, they believed the case begged a different question: rather than judging the merits of Citizen United's violation of the BCRA, it merely questioned the statute's constitutionality. In order to do so, the Court sought to question the validity of a previous case that reviewed that law, *Austin v. Michigan Chamber of Commerce*.

In *Austin v. Michigan Chamber of Commerce*, the Supreme Court held that corporate independent expenditures that try to persuade state elections are not constitutional.⁴ However, the Court's revisit of this case in *Citizens United* offered a different outcome. Justice Kennedy shared that *Austin's* interference with the "marketplace of ideas" was a direct violation of the First Amendment rights of corporations—that First Amendment protections apply to corporations as well.⁵ This decision was made with the notion that corporations occupy the same realm as individuals as they are led by groups of individuals. Moreover, the Court recognizes the use of currency to advocate for your beliefs as a form of speech, and therefore a protected right under the First Amendment. Therefore, this extension of First Amendment rights to corporations invalidates the government's power to limit independent corporate expenditures through legislation, a power given by §441(b) of the BCRA.

In a 5-4 vote, the Supreme Court ruled in favor of Citizens United, claiming that §203 of the Bipartisan Campaign and Reform Act violated the First Amendment rights of corporations based on the unconstitutionality of §441(b)'s restriction on private expenditures by corporations.

The decision of the Court gave corporations the ability to communicate electioneering content at any time before an election. More broadly, it enabled the flooding of money into politics under the guise of corporate expenditures. While in the preceding case, *Buckley v. Valeo*, this outcome would have fallen under the guideline of the "appearance of corruption,"⁶ the application of a broader understanding of First Amendment rights allowed this Court to broaden those who are protected by it. As a consequence, one can expect a rise of corporate influence in political atmospheres in the form of electioneering content on media platforms.

The Court's argument takes for granted an equivalence between individuals and corporations in order to provide equal access and protection of both groups' First Amendment rights. In doing so, the argument discredits the significance of the

⁴ *Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990).

⁵ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

⁶ *Buckley v. Valeo*, 424 U.S. 1 (1976).

THE VIOLATION OF DEMOCRACY: UNEQUAL ACCESS TO THE SHAPING OF GOVERNMENT

relationship between one's position in society and the power to influence society. This relationship is enabled by the notion referred to as credibility excess. Evidence demonstrates that individuals tend to correlate power with higher ethical ground.⁷ A correlation that then justifies the granting of an excess of credibility to those individuals in positions of power. Moreover, recipients of credibility excess, as a result, tend to be seen as worthy of greater epistemic trust.⁸ This applies to corporations, for they occupy such affluent positions in society and thus inevitably assume greater credibility. Therefore, when unified with their ability to reach a mass audience, corporations carry the power to influence: steering the conversations held in the marketplace of ideas. Ordinary persons do not assume the same privilege as they likely lack credibility or the access to communicative modes with large groups of people. Consequently, when a corporation makes a politically charged statement, that statement has the potential to influence the ideas being disputed in the marketplace. This dissimilarity permits the limiting of corporations' access to free speech as their greater ability to influence public opinion allows them to steer the marketplace of ideas creating inequity for those merely participating in it.

A corporation's ability to steer the marketplace of ideas is dangerous as the objectives of corporations are often in contrast with social objectives. Traditional corporations operate with the goal of maximizing their profits to please shareholders who invested in said corporations. In their pursuit of maximizing profits, they have historically had little regard for how the outcomes of their actions affect individual people. Issues such as income inequality, climate change, and healthcare are not considered to be driving factors of economic growth. In fact, such issues are often regarded as impeding factors on a company's ability to maximize its profits as they are additional costs that can be externalized. Whereas for a political candidate, such social issues should be the driving force for their candidacy as they are issues that affect the majority of Americans. Thus, assuming corporations advocate for candidates whose policies help advance the goals of their company, it is then safe to draw the conclusion that said candidate in some respects will be sacrificing social objectives to advance business objectives as the support of the corporation relies on this exchange.

Lastly, the outcome of this case will amplify the magnitude to which political leaders are vulnerable to corporations. The most obvious medium of vulnerability

⁷ Bradley Jones, *Most Americans want to limit campaign spending, say big donors have greater political influence*, PEW RESEARCH CENTER (May 8, 2018), <https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/> (last visited June 25, 2022).

between political leaders and corporations is the economy. This point was expressed earlier in this paper and will not be revisited. Instead, this paper will discuss a more relevant and relatively new medium of vulnerability between the two groups: corporate-funded political advertisements on social media platforms. Political advertising on online platforms now plays a fundamental role in any successful campaign as print newspapers and cable advertisements become obsolete. In fact, candidate exposure on social media is heavily correlated with their results in the polls.¹⁵ While studies are inconclusive about an exclusively linear causal relationship between the two, there is a causal biconditional relationship between the two variables.⁸ This means that performance in the polls causes more social media coverage and more social media coverage causes better performance in the polls. An estimated two hundred and fifty corporations spend tens of millions of dollars to fund their electioneering communication through Facebook-owned platforms: primarily Facebook. Facebook has become an increasingly popular platform for adults not only for entertainment but for political news as well. A reported seven out of every ten adult Americans uses Facebook at least once a day and a little over a third of Americans report receiving most of their news from Facebook.⁹ Within this relationship lies the relatively new avenue of vulnerability between political candidates and corporations who fund these advertisements. Which is to say, electioneering advertisements paid for on behalf of corporations play a key role in deciding which candidate receives greater media exposure, consequently affecting said candidate's polling outcomes.

II. ALTERNATE RULINGS TO *CITIZENS UNITED*

When the case was first presented to the highest court in the United States, it was only asked of the Court to consider whether the release of the film *Hillary: The Movie* by Citizens United was in violation of §441(b) of the BRCA. However, the Court saw fit to reconsider the validity of preceding cases that would influence their ruling in *Citizens United*. This is not an unusual course of action for the Court to take if they believe that the constitutional validity of a preceding case is in question. Thus, we must

⁸ *How much influence does the media really have over elections? digging into the data*, NIEMAN LAB (Jan. 11, 2016), <https://www.niemanlab.org/2016/01/how-much-influence-does-the-media-really-have-over-elections-digging-into-the-data/> (last visited June 25, 2022).

⁹ John Gramlich, *10 facts about Americans and Facebook*, PEW RESEARCH CENTER (June 1, 2021), <https://www.pewresearch.org/fact-tank/2021/06/01/facts-about-americans-and-facebook/> (last visited June 4, 2022).

THE VIOLATION OF DEMOCRACY: UNEQUAL ACCESS TO THE SHAPING OF GOVERNMENT

accept that the Court was valid in questioning the legitimacy of a preceding case. However, one can still conclude that the majority opinion of this Court falls short of convincing.

The majority opinion expresses concerns in regard to the dangers of limiting First Amendment rights. Justice Kennedy states, “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens or associations of citizens for simply engaging in political speech”.¹⁰ This indicates that the case is brought forth because of the content in the film. However, this is simply not the case. The content, though politically driven and distributed by a corporation, is not the main point in question; rather, the timing of it is. The film was released within thirty days of a primary election, placing it in violation of the BCRA because of its timing, not content. To illustrate this point, given the case that Citizens United released their film after the election or prior to their thirty-day cut-off, their actions would have been construed as a completely legal demonstration of the non-profit’s right to freedom of speech.

When one understands that the case was brought forward and was to be evaluated based on its time of release, one can conclude that the precedent set by *Austin* did not eliminate the First Amendment rights of corporations altogether, it simply set a limit to their First Amendment right. This limitation on speech has been applied countless times before in an effort to protect the public. For example, yelling “fire” into a large crowd of people is illegal for it can result in chaos and injuries. In this specific case, the limitation on speech is to protect from corruption or the appearance thereof and is therefore completely valid. Nevertheless, the ruling was made in contrast to this line of reasoning.

III. **MCCUTCHEON: AN EXCESS OF MONEY IN POLITICS**

Shaun McCutcheon had donated funds toward various Republican committees and individual candidates during the 2011-2012 election cycle. His donations were in proportion to the limits set by the BCRA. However, McCutcheon desired to donate more money that would not exceed the individual limit but would exceed the aggregate limit. McCutcheon presented his case to the Supreme Court arguing that the aggregate limit presented a violation of a person’s ability to carry out their First Amendment right, noting that historically the Supreme Court has equated the spending of money with one’s expression of free speech.¹¹

¹⁰ Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010).

¹¹ McCutcheon v. Fed. Election Comm’n, 572 U.S. 185 (2014).

More specifically, in an earlier case, *Buckley v. Valeo*, the Supreme Court ruled that the First Amendment protects one's ability to contribute money to a campaign. Setting a limit to those contributions was only permissible if it was set to avoid corruption, which was defined to refer to any contributions made that are then followed by asking the receiving candidate for favors that would benefit the contributor in some way.¹² The Court used this precedent to inform their judgment.

The Court's opinion, as expressed by Justice Roberts, emphasizes the importance of the cause for fears of corruption in their decision. He also makes note that new protective agencies and laws have been enacted following the *Buckley* decision and thus *Buckley* may not be completely up to date in its interpretation of what can constitute corruption. As a result, the Court takes for granted that a base limit for contributions provides enough deterrence for corruption to make the effects of an aggregate limit insignificant. In its insignificance, the aggregate limit then simply becomes a limit on how much money can be exerted into politics.¹³ As this Court has previously understood the spending of currency to be a form of speech, this limit is unconstitutional. Consequently, the Court found the aggregate limit to be in violation of First Amendment rights and therefore in a 5-4 vote, ruled in favor of Shaun McCutcheon.

The Court eliminated the aggregate limit that described how much an individual, a PAC, or a party committee can donate to a single candidate or multiple candidates. In doing so, the Court's decision diminished the extent to which ordinary individuals can participate in the election processes by enabling the creation of a separate political arena in which those lacking a certain standard of financial equity cannot participate (give any contribution that would be considered significant when compared to Big Money contributions). In other words, the importance of one person's contribution is not nearly completely eradicated by the contribution of a second person, especially where the first is a corporation and the second is an ordinary person. This form of participation is made nearly impossible with the disposal of the aggregate demand because the amount of money a campaign can receive is now more easily endless. Within an endless pool, a contribution is only as important as its percentage of the total pool. Thus, the donation of an ordinary person is now more easily overshadowed by the larger donation as the larger donor occupies a more significant percentage of the total pool. Before *McCutcheon*, this was not cause for alarm as limits were set at

¹² José Medina, *The Relevance of Credibility Excess in a Proportional View of Epistemic Injustice: Differential Epistemic Authority and the Social Imaginary*, 25 SOC. EPISTEMOLOGY 15–35 (2011).

¹³ *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014).

THE VIOLATION OF DEMOCRACY: UNEQUAL ACCESS TO THE SHAPING OF GOVERNMENT

\$46,200 for federal candidates and \$70,800 for national parties. However, when one donation is \$200 and one is \$100,000, the larger donation diminishes the political voice and in turn the political power of the smaller donor.

IV. ALTERNATE RULINGS TO *MCCUTCHEON*

To corroborate the Court's minority opinion, the Roberts Court applied too narrow a definition of what implies corruption and the appearance of corruption: only those contributions which aim to extract a favor in return give cause for a limit (*quid pro quo*). However, *quid pro quo* deals are only the most obvious form of corruption, the Court should consider that it can make its way into politics through different means as well. Corruption or the appearance thereof should be understood in broader terms to mean any outcome by which the public's confidence in government is reasonably and justly diminished. This outlook is necessary because it covers the very obvious form of corruption and leaves the door open to scrutiny from the ordinary person as they perceive the performance of elected officials. The latter part ensures "the appearance of corruption"¹⁴ is also considered when constructing judgments around cases such as the two described in this paper.

Moreover, this Court's reliance on the FEC to perform its duties in terminating corruption and the appearance of it is a naive dependency that the commission will perform its duties flawlessly. A dependency that can easily be avoided with the application of an aggregate limit. The Court claims that since *Buckley*, the FEC has added "regulations that define earmarking"¹⁵ in broader terms making it more applicable. The broader terms are:

[A]n individual who has contributed to a particular candidate may not also contribute to a single candidate committee for that candidate. Nor may an individual who has contributed to a candidate also contribute to a political committee that has supported or anticipates supporting the same candidate, if the individual knows that a substantial portion [of his contribution] will be contributed to, or expended on behalf of, that candidate"¹⁶

¹⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁵ *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014).

¹⁶ *Id.*

While this definition makes a valid case for curtailing such illegal donations, its application is in most cases imperfect, as the proof of such an instance would rely heavily on proving intent before the donation was made.

CONCLUSION

Up until the twenty-first century, the Supreme Court has held that corruption, or the appearance of, is closely related to how much money is placed into politics. More closely, the Court has placed emphasis on the notion that an excess of money in politics will inevitably lead to the diminishing of public trust in the American political system and is therefore equivalent to the appearance of corruption. In the first case discussed in this paper, it was made apparent that equating corporations to ordinary persons and using that definition to grant corporations equal access to the first amendment enabled greater corporate influence in politics. In the second case discussed, this paper explored the implications of allowing nearly endless sums of money into campaign financing. Additionally, it explored an approach to defining corruption that would encompass the most obvious forms of corruption as well as what can be construed as the appearance of corruption. This paper will close by first taking a closer look at real-life implications of the two cases. Second, by exploring if alternate revenues for remedying the outcomes of this case are available.

Nearly a decade has passed since these two rulings and the power of the wealthy in dictating politics is now insurmountable compared to that of the ordinary person. A study from the year 2000 to 2020 shows that on average a candidate is 92.34% likely to win their seat in the house if they are the candidate who spent more money on their campaign.¹⁷ A weaker, yet alarmingly high rate, also applies to the senate with an average 80.49% chance of victory.¹⁸ This tells us that on average, the candidate who receives the most votes is also the candidate who receives the most funding. This should not be surprising as campaigning expenditures have continued to surpass record numbers each presidential election year. Implying that it is nearly impossible to win elections without the financial support of millionaires and billionaires.

Moreover, public trust in the government to ‘do the right thing almost always or most of the time’ is on a constant downward trend; this trend dates back to the late

¹⁷ *Did Money Win?*, OPENSECRETS (Apr. 1, 2021), <https://www.opensecrets.org/elections-overview/winning-vs-spending?cycle=2020> (last visited June 25, 2022).

¹⁸ *Id.*

THE VIOLATION OF DEMOCRACY: UNEQUAL ACCESS TO THE SHAPING OF GOVERNMENT

1950s to now.¹⁹ It may be easy to assume that this trend is a result of an inherent mistrust of the government. However, a closer look at the data will show that this would be a naive assumption. If the mistrust were inherent then there would not be volatility in the data. Instead, it would be a constant trend as there would be no particular variable that can influence the level of trust individuals feel toward the government. Therefore, since there is volatility in the data, there must also exist influencing variables. Variables of volatility examined include which political party is occupying the presidency, how the economy is performing, and the frequency of political scandals. Though, there is one point of consistency. American trust in the government has not exceeded thirty percent since 2007. In an effort to properly assess the meaning of this stagnation, we must explore what has changed since that date. If we account for the fact that nearly seventy-two percent of Americans disagree with the following statement—“[P]eople who give a lot of money to elected officials *do not* have more influence than others”²⁰—it is reasonable to conclude that mistrust in government is strongly correlated with increased campaign spending/financing. When we assess this data alongside the two cases evaluated throughout this paper, it is natural to conclude that what changed was simply the amount of money allowed into politics. This excess of funds in politics, whether directly or indirectly, dramatically decreased the American public’s trust in our democratic system. While a causal relationship cannot be established, the correlation is not a naive one. Seventy-seven percent of Americans believe that campaign spending should be limited.²¹ Thus, there must exist some causal connection between decreasing trust in government and increasing money in politics.

It is important to acknowledge that this paper does not take argue that the single cause of decreased public trust in government is campaign spending. There are a multitude of complicated social factors that account for the lack of trust in the government. They take the form of increased polarization, economic instability, mishandling of the COVID-19 pandemic, and more. This paper merely conveys that there exists some causal relationship between decreased trust in government and increased money in campaign funding and politics. If this be the case, it logically

¹⁹ *How much influence does the media really have over elections? digging into the data*, NIEMAN LAB (Jan. 11, 2016), <https://www.niemanlab.org/2016/01/how-much-influence-does-the-media-really-have-over-elections-digging-into-the-data/> (last visited June 25, 2022).

²⁰ *Id.*

²¹ *Id.*

follows that distrust in government grew as a result of the cases discussed in this paper as they enabled the increase in expenditures discussed above.

Naturally, the question now becomes how do we remedy these negative effects? Such a remedy would have to explore methods by which the First Amendment rights of corporations are not challenged and yet Big Money in politics is curtailed enough so as to reallocate space for the voices, expenditures, and needs of ordinary persons. However, any restriction placed on corporate electioneering expenditures would be considered unlawful by the rulings in *McCutcheon* and *Citizens United*. On the other hand, suppose legislation was to restrict the receiving end by setting a limit on campaign spending for those campaigns funded by private donors. An excess of money in politics would remain as corporate electioneering expenditures that do not directly fund campaigns would still have no ceiling.

It would be naive to state that legislation is the correcting route for the influence of Big Money in politics and its consequential effect on the public's trust in the government. For legislation to do so, it would be necessary to reduce corporate electioneering expenditures and Big Money in politics. However, such legislation would have to challenge *McCutcheon* or *Citizens United* and thus require that the Court revisit these cases.