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Erwin Chemerinsky: Future of campaign finance laws

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Justice Stephen Breyer is right. The conservative majority on the Supreme Court has “eviscerated” campaign finance laws and has created an unequal political system that dramatically favors the rich. The most recent Supreme Court decision in this area, *McCutcheon v. Federal Election Commission*, on April 2, struck down provisions of the Bipartisan Campaign Finance Reform Act that limited the total amount that a person could contribute to candidates to federal offices or to political parties over a two-year period.

By itself, this decision will be undesirable in giving the wealthy the ability to spend far more in federal election campaigns. Previously, such individuals had to choose which federal candidates to support. Now, they can give to all they wish to help. Even more importantly, it will be easy to circumvent limits on the size of contributions to candidates by giving large amounts to the political parties that can then spend their money.

But the court’s decision in *McCutcheon* portends much more drastic changes in campaign finance law. Since 1976, when *Buckley v. Valeo* was decided, the Supreme Court has said that the government can limit contributions to candidates and committees for candidates, while the government cannot limit expenditures. For example, if a person had a million dollars to give to Obama or to Romney in 2012, the government could limit the amount that could be given to the candidate or a committee for a candidate, but the government could not stop the person from spending the million dollars by personally paying for ads.

In *McCutcheon*, Chief Justice John Roberts’ majority opinion expressed the view that contributions, like expenditures, are speech protected by the First Amendment. Although Roberts’ opinion did not go as far as Justice Clarence Thomas, who urged the overruling of *Buckley* and First Amendment protection for the right to contribute unlimited amounts of money to candidates for political office, that is clearly the direction the court is heading.

For example, the court likely will reconsider whether the First Amendment is violated by prohibitions on corporations contributing money directly to candidates for office, a restriction that has existed for federal elections since 1907. I have little doubt how the Supreme Court will answer this question in light of its recent decisions.

Other campaign finance laws, too, are likely vulnerable. The key provisions of the Bipartisan Campaign Finance Act limiting the large soft money contributions collected by political parties seem unlikely to survive after *McCutcheon*. There also will be a wave of challenges to federal, state, and local laws limiting the size of contributions. Indeed, anything other than disclosure laws – which the court consistently has upheld – are likely to be declared unconstitutional.

The Supreme Court wrongly has rejected the government’s interest in limiting campaign spending to ensure more equal political influence. When corporations and the wealthy can spend unlimited sums of money – as they now can – they have the ability to drown out other voices and to create a political system that is

stunningly unequal. Many elections will be decided by the ability of corporations and the rich to outspend challengers. We never will know how many people simply choose not to run because of the wealth arrayed against them.

The Supreme Court fails to recognize the corrosive effects of the spending of large sums of money in election campaigns on the political system and confidence in it. Those who spend huge sums, after *McCutcheon*, in contributions to political parties will be rightly perceived as having undue influence over the government that they helped to elect. In *McCutcheon*, the court brushed aside this concern.

In the past four years, the Supreme Court has struck down restrictions on corporate expenditures, a public finance system for elections and, now, limits on the aggregate amount that a person can give in contributions. This is why Justice Breyer correctly said that the court has "eviscerated" the system for campaign finance. The winner is the richest among us and the loser is our democratic system.

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