Freedom of Speech in the United States from *The Federalist* to *McCutcheon v. Federal Election Commission*: Where and Why the Supreme Court Lost Its Way

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50th Annual Meeting, June 2014
Inter-American Bar Association
San Juan, Puerto Rico

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> The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments, and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.
>
> – James Madison's Proposal of the Bill of Rights to the House of Representatives, June 8, 1789

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> – First Amendment to the United States Constitution, 1791

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
>
> – Universal Declaration of Human Rights, 1948

The right protected by the phrase, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . " is also protected from action of state governments by the Fourteenth Amendment. However, it is an accepted principle that generally, and in particular, in United States

Constitutional law that few, if any, rights – no matter how fundamental – are absolute.[1] We note here that the meaning of "speech" in the context of U.S. Constitutional doctrine means expression of ideas, including written words and non-verbal forms of expression, e.g., "symbolic speech,"[2] campaign expenditures, or campaign contributions.[3]

Writers have become increasingly strident in their criticism of the Supreme Court, to wit, "The Supreme Court's Citizens United decision – baby brother to the Dred Scott and Bush v. Gore atrocities – touched off a tsunami of unlimited, unaccountable, deniable political money that has just washed over South Carolina and Florida and will crest in the autumn."[4] The opinion also touched off a tsunami of criticism too voluminous to even attempt to catalog here.

In Citizens United v FEC[5] and the subsequent case of McCutcheon v FEC[6] the Court seems to have engaged in some tortured reasoning, cloaked in legal scholarship, to justify its decision. Displaying a lack of candor that is stunning for a Supreme Court Justice as otherwise respected as Justice Kennedy is, he writes in *Citizens United*, "And the appearance of access or influence will not cause the electorate to lose faith in this democracy."[7] In effect, the U.S. Supreme Court has tried but failed to give credence to the idea that political contributions only influence voters because those voters are better-informed, where clearly, the better-financed candidates almost always get more votes, no matter what the issue is, absent some scandal or egregious incompetence.

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1 *See* McCutcheon v. FEC, 572 U.S. ___ (2014), Slip Op. No. 12-536, at 1, "The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute."

2 Texas v. Johnson, 491 U.S. 397 (1989).

3 *See* Buckley v. Valeo, 424 U.S. 1 (1976), cited in McCutcheon v. Federal Election Commission, 572 U.S. __ (2014) (Slip Op. No. 12-536), at 2, where the Court upholds a distinction between limits on campaign expenditures, requiring "the exacting scrutiny applicable to limits on core First Amendment rights of political expression," and contribution limits which impose a lesser restraint (but still a "rigorous standard of review") on political speech.

4 Hendrik Hertzberg, *The Debate Debate*, THE NEW YORKER, Feb. 13/20, 2012, pp 31-32.

5 130 S. Ct. 876 (2010).

6 See note 1, *supra.*

7 See note 5, *supra*, at 884.

The result of the current environment of essentially unrestricted campaign financing is obvious to many, but apparently not to the U.S. Supreme Court: Members of Congress spend more and more of their time raising money for their next election, and less and less time actually doing what they were elected to do, i.e. pass legislation.

Access to elected officials has always been easier for those who contribute. Access by those who cannot afford to contribute is becoming more and more difficult. Therein lies a threat to democracy far greater than limiting the "right to participate in democracy through political contributions."[8] Yet the same Supreme Court majority that gave us *Citizens United*, *Arizona Free Enterprise* [see note 31], and *McCutcheon* would limit the right to participate in democracy by making it difficult for less privileged voters to vote.

While not usually acknowledged as such, the right to vote can be thought of as a form of speech that ought to be protected by the First Amendment. "The most basic right of all [is] the right to choose your own leaders."[9] While that right is protected by the anonymity of the secret ballot, it is, even today, under assault by forces that wish to make the exercise of that right more difficult for some than for others, and it is not clear why today's Supreme Court does not seem to regard it as deserving of as much protection as campaign financing.[10]

Chief Justice Roberts, writing for the same majority that decided *Citizens United*, opened his opinion in *McCutcheon* with the statement that

8 See note 1, *supra*, at 1.
9 President Lyndon Baines Johnson, before Congress, March 15, 1965.
10 Derfner A, and Hebert JG, *Why Doesn't the Law Give Full Free Speech Protection to Voters?* http://www.huffingtonpost.com/armand-derfner/full-free-speech-protection_b_1929620.html (access 4/23/14).

> There is no more basic right in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign.[11]

That was less than a year after Chief Justice Roberts wrote for the same majority in Shelby v. Holder,[12] overturning portions of the Voting Rights Act of 1965, which was immediately followed by legislative proposals to restrict voting in several states.[13] In the words of Justice Stevens, "The voter is less important than the man who provides money to the candidate. It's really wrong."[14]

In the wake of *Citizens United* and *McCutcheon*, the trend toward unlimited campaign contributions and campaign spending seems to be increasing,[15] to a point that is poisoning politics in the United States. Super PACs accounted for more than 60% of outside spending reported to the Federal Election Commission (FEC), and more than 93% of the money raised by Super PACs came in contributions of at least $10,000 – from just 3,318 donors, or the equivalent of 0.0011% of the U.S. Population.[16]

For an example of just how brazen (and how effective) efforts by moneyed interests are today, see a recent editorial in the New York Times about how the National Rifle Association (NRA) has effectively

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11 See note 1, *supra.*
12 133 S. Ct. 2612 (2013).
13 Brandeisky K, and Tigas M, *Everything That's Happened Since Supreme Court Ruled on Voting Rights Act* http://www.propublica.org/article/voting-rights-by-state-map (access 4/23/14). *See also* Fredreka Schouten, Federal super PACS spend big on local elections, USA Today, 2/25/14, http://www.usatoday.com/story/news/politics/2014/02/25/super-pacs-spending-local-races/5617121/ (access 4/24/14).
14 Liptak A, New York Times, 4/22/14, p. A14.
15 Kiely K, *Gross Political Product: Outside campaign spending tops 2010 total,* http://sunlightfoundation.com/blog/2012/09/23/gross-political-product-outside-campaign-spending-tops-2010-tota/e (access 4/24/14).
16 Lioz A, and Bowie B, *Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections*, http://www.demos.org/publication/billion-dollar-democracy-unprecedented-role-money-2012-elections (access 4/24/14).

killed President Obama's nomination of a highly qualified candidate for Surgeon General of the United States.[17]

Interpretation of the Constitution by the Supreme Court should not only be legally sound, it should comport with common sense. A common sense view has been offered by a reader of the New York Times, “The notion that regulating campaign contributions impinges on free speech is preposterous.” The writer goes on to say that “The way to support free speech is to create an environment that allows those who cannot pay millions of dollars for air time to compete with those who can – not allow big business and the wealthiest citizens to buy a platform from which they can speak louder and longer than anyone else.”[18]

So where did the five-member majority on today's United States Supreme Court go wrong?[19]

Many have argued that corporations do not have the First Amendment rights that people have. Others have argued that money is not speech protected by the First Amendment.

First, the Court has seemingly put on blinders to the extent and pervasive influence of dependence corruption and its deleterious effect on our republican form of government so eloquently and convincingly enunciated by Professor Lessig.[20] Second, the Court missed an opportunity to make a legal distinction between two distinct attributes of “speech,”[21] within the meaning of the First

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17 Editorial, *The Gun Lobby's Latest Bizarre Crusade*, NEW YORK TIMES, 3/17/14 http://www.nytimes.com/2014/03/18/opinion/the-gun-lobbys-latest-bizarre-crusade.html (access 4/22/14).
18 Letter to the Editor, *Campaign Contributions: 'Speech at a Premium,'* NEW YORK TIMES, January 26, 2012.
19 Liptak A, *Justice Stevens Suggests Solution for 'Giant Step in the Wrong Direction,'* NEW YORK TIMES, 4/22/14, p. A14.
20 Lessig L, REPUBLIC, LOST, Twelve, New York-Boston (2011), p. 230; Lessig L, The USA is Lesterland, CC-BY-NC (2014).
21 Arguably, the Supreme Court need not concern itself with this issue, because it was not argued in the case.

Amendment: content and volume.[22] We ought to recognize a distinction between the right to say something, and the right to pour unlimited amounts of money into an organization that can use it to drown out and/or dilute the speech of others. Limits on "volume" in the context of political speech, whether campaign contributions or expenditures, ought not to require the degree of scrutiny that content does. But even if limits on campaign contributions or expenditures should require strict scrutiny, the Court, by failing to recognize dependence corruption as described in the first sentence of this paragraph, the Court failed to make a diligent 'strict scrutiny' analysis in reaching its decision.

Let us assume, for the sake of argument, that the Constitutional guarantee of freedom of speech, regardless of its nature, is a fundamental right, and that any governmental restraints must withstand strict scrutiny, i.e., that for the restraint to be constitutionally valid, it must fulfill a compelling state interest, and that it must be narrowly drawn and least restrictive to achieve that state interest. "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'[23]

Let us further assume that campaign contributions and campaign expenditures, whether by individuals or by corporations, are speech as referred to in the First Amendment. Professor Lessig has made the argument that corporations *do* have the same right of free speech as individuals, because the text of the First Amendment does not explicitly limit the right to "persons"[24] (never mind that corporations did not exist as a political force at the time it was ratified).[25]

In *Citizens United*, Justice Kennedy often uses the term *quid pro quo* with the word "corruption."

22 Here, the term "volume" is used in a broad sense, as will be further detailed in the text that follows.
23 See note 2 *supra*, at 2..
24 "Individual" would have been a better word to use, since in the law, corporations may be considered to be persons.
25 Lawrence Lessig, REPUBLIC, LOST, Twelve, New York-Boston, 2011, p. 239.

Where he doesn't, it seems to be implied. In any event, he seems only concerned about *quid pro quo* corruption or its appearance, and turns a blind eye to this more insidious, even though perfectly legal, form of systemic corruption, dependence corruption. Lessig documents extensively how this dependence corruption has destroyed our republican form of government and replaced it with a plutocracy. He attributes today's dysfunction and hyper-partisanship in Congress to this dependence corruption. A by-product of this dependency corruption is that members of Congress spend most of their time raising money for the next campaign, as opposed to time spent doing the job they were elected to do.[26]

In *Citizens United* (2010), Justice Stevens wrote:

> Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that quid pro quo arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other's backs--and which amply supported Congress' determination to target a limited set of especially destructive practices.[27]

In the subsequent case of *McCutcheon*, Chief Justice Roberts gives a slight nod to the idea that there can be corruption (he doesn't refer to it as dependence corruption, however) other than *quid pro quo*, but it barely amounts to lip service. Yet, it is truly astonishing that he fails to acknowledge this

26 Lessig L, The USA is Lesterland, CC-BY-NC (2014). Also, see the TED talk, “Citizens,” at http://bit.ly/Lesterland (access 4/23/14).

27 Citizens United (Justice Stevens, dissenting), 130 S. Ct. 876, 961 (2010).

pervasive poison in American politics. "Where there is such a dependency, those responsible for the effectiveness of the institution must ask whether that dependency too severely weakens the independence of the institution. If they don't ask this question, then they betray the institution which they serve."[28] If the "institution" is government, then the Supreme Court has betrayed it.

The legal analysis of limitations on campaign contributions ought to consider the *volume* attribute of speech separately from *content*. In this way, limits on contributions or spending, can be thought of as limitations on volume, and not limitations on content, and should be easier to examine under the microscope of strict scrutiny, if indeed such a standard is appropriate. We should acknowledge, however, that there is some overlap, e.g., the production of a movie such as *Hillary*, the subject of *Citizens United* might entail significant costs, and would come under the category of content. The costs of its distribution would be those of volume. It is argued here that *reasonable* limits may be placed on contributions and expenditures for both the production of content as well as its distribution.

Limitations on campaign contributions or on campaign spending fulfill a compelling state interest: the elimination of dependency corruption. Unfortunately, the Supreme Court has heretofore turned a blind eye to any corruption other than *quid pro quo* corruption, and evidently has not even recognized that limitations on campaign contributions or spending would address the appearance of corruption, evidently referring only to the appearance of quid pro quo corruption. If the elimination of dependency corruption, and thus the restoration of a government "dependent on the people alone,"[29] (as opposed to

28 Lessig L, Republic, Lost, Twelve, New York-Boston, p. 17.
29 Madison J, THE FEDERALIST, No. 52 (February 8, 1788) THE FEDERALIST, Global Affairs Publishing, Washington, DC (1987), p. 285, http://www.constitution.org/fed/federa52.htm (access 4/19/14). Madison was here concerned with the power of States to influence the election of Members of Congress, rather than that of large corporations and the wealthiest segment of society, who today, clearly have dangerously unprecedented influence over the composition of Congress.

a government dependent on a wealthy few[30]) is not a compelling interest, it is hard to imagine what is.

Since the Supreme Court does not seem to have recognized that legislative limitations on campaign contributions and spending fulfill a compelling state interest, it has not effectively addressed the other prong of strict scrutiny, i.e., whether such limitations are narrowly drawn and least restrictive to accomplish the state interest.

The concept that *volume* is an attribute of speech that should have legal significance separate from its *content* has not been enunciated well in the courts. To illustrate, let's imagine a scenario where I am speaking from a soapbox on Boston Common. Someone who does not like what I have to say comes along and sets a up another soapbox near me, and starts speaking about ideas that are antithetical to mine. So far, annoying, but probably no need for state intervention to protect our rights of expression. But what if my opponent brings along a very loud speaker system that effectively drowns out my speech, so that only her views are heard and mine are not. The state could say to me that I could just move to some other location to be heard, but that would be a restraint (although mild) on my speech. In any event, though, what is to stop my opponent from moving her sound equipment to my new location? My speech could be protected by a local ordinance that limits my opponent's noise level, or the state could require my opponent to move a certain distance from me so I could still be heard. It has been said that your rights end where mine begin, and vice versa. Ideally, the state has the ability to create a legal solution that would protect the rights of both of us to speak freely, but that may necessarily involve restricting someone's speech.

But wait, you say. My opponent with the loud speaker system is not the State. True, but I say, why

30 See note 16, *supra*. 0.000032 percent – or 99 Americans – gave 60 percent of the individual SuperPAC money spent on the 2012 election cycle

should the Constitution protect the "speech" of my opponent when its clear purpose and effect is primarily to suppress my speech, rather than to express her own ideas? That is a cucial point. In other words, the First Amendment was never intended, nor should it be interpreted today, to prohibit laws that limit a person's ability to overwhelm her opponents with volume, be it noise, bandwidth, air time, or the money that enables those things.

It should be easy to see how this concept of volume as an attribute of speech could be expanded and have significance in the setting of mass media, including the internet, whether written, aural, or visual. Indeed, the Supreme Court has endorsed the concept that public funding for a less-well-funded campaign constitutes a state-imposed restraint on a financially better off campaign.[31]

Another way to look at the concept of volume as an attribute of speech, is to view expression as having an "informing" quality, as well as a "noise" quality, i.e. with the ability to inform the public and disseminate ideas, along with the ability to simply create a distraction or diversion without providing useful information, so as to "drown out" the "informing" quality of the expression of others. If you think this is just a theoretical musing, consider a recent poll indicating that people whose main source of information from the media was Fox News were no better informed than those who did not use public media (MSNBC, also acknowledged to be a partisan news source, was nearly equally ineffective in adding value to the public's general fund of knowledge).[32] In this day and age of the internet, more speech can be distributed to more people at nominal cost than anyone could have imagined fifty years ago, let alone in 1779. Or, as a letter-writer to the New York Times has articulated, "The campaigns are covered 24/7 by national media. Even in battleground states, the appearances of the candidates are

31 Arizona Free Enterprise v. Bennett, 131 S. Ct. 2806, 2812 (2011). In this case, the majority noted that "The matching funds provision [in an Arizona statute] substantially burdens speech [of a privately financed candidate]."

32 Public Mind, *Some News Leaves People Knowing Less*, http://publicmind.fdu.edu/2011/knowless (access 4/22/14).

uninformative, as the stump speech repeats the same poll-tested lines ad nauseam."[33]

The drafters of the First Amendment were mostly concerned with protecting the right of individuals to be critical of the government without fear of punishment by the state, which might include fines, incarceration or even execution. The idea of protecting speech by limiting the volume of others' speech probably did not occur to them.[34] They certainly did not contemplate the enormous influence that large amounts of money could have on public opinion, by not only disseminating information and ideas (sometimes inaccurate or misleading[35]), but also by "drowning out" the expression of opponents who have less in the way of financial resources. In this instance, though, whether one chooses to view the Constitution from the eyes of the Framers, or as a living, flexible document that must be interpreted in light of an ever-changing society and the astonishing evolution of how we communicate, we should include the concept of "volume as an attribute of speech that is distinct from content.

If unlimited campaign finance is all protected "speech" within the meaning of the First Amendment, it is speech that is far more dangerous and pernicious than yelling "Fire" in a crowded theater. It is "speech" that clearly enables the corrupting influence of campaign finance to intimidate members of Congress. It is undeniably acknowledged here that restrictions on speech *content* should be subject to strict scrutiny. An important inquiry, then, should be whether a given limitation on the *volume* of speech should be subject to strict scrutiny. Even if a certain limitation on the *volume* of political speech (in the form of campaign contributions or expenditures) should be subject to strict scrutiny, I submit that in failing to acknowledge any kind of corruption other than *quid pro quo*, or the appearance of

33 Michael Fishbein, Letter to the Editor, NEW YORK TIMES, p. A18, 11/24/12.
34 James Madison's Proposal of the Bill of Rights to the House of Representatives, June 8, 1789 (quoted above).
35 Orwell G, *1984*, http://archive.org/details/ost-english-1984-george-orwell-1937-dystopia (access 4/22/14). "Its [Newspeak's] vocabulary was so constructed as to give exact and often very subtle expression to every meaning that a Party member could possibly wish to express, while excluding all other meanings and also the possibility of arriving at them by indirect methods." (Appendix at 210).

quid pro quo, the Court has given short shrift to the question of whether campaign finance restrictions survive strict scrutiny.

I hope that, by now, the reader can accept that expression of thoughts, opinions and ideas can be thought of as having the distinct attributes of content and volume. I further submit that the Framers, although not having articulated or even contemplated the concept of these dual attributes, were mostly concerned about protecting the *content* of speech (or in a broader sense, expression), and arguably silent as to the whether the volume of such speech needed protection.

Especially today, the world-wide distribution of content is possible at nominal cost. As to the *volume* attribute of speech by itself, the justification for considering it a fundamental right protected by the First Amendment is dubious.

In the wake of Citizens United, there have been calls to amend the Constitution. Critics have faulted the Supreme Court for declaring that "money is speech," or that corporations are people. There have been calls for transparency, i.e. making donor lists public – a highly controversial subject, in part because of legitimate concerns that donors will be harassed by opponents. I agree with Professor Lessig that a Constitutional amendment is probably not necessary and in any event would be hard to achieve. I also agree with him that these other issues are not the root of the problem. If campaign contributions were limited to small amounts, as he has proposed, the need for disclosure laws, along with the disadvantage of such laws, essentially goes away.

Conclusion

If unlimited, a particular kind (or two particular kinds) of speech, i.e., campaign contributions and campaign expenditures, can lead to dependency corruption resulting in a serious threat to democracy, the dissemination of misinformation (or so-called disinformation), and suppression of the speech of others by sheer dint of volume without adding information of use to the general public. We must recognize the propaganda power in financing political speech. A majority of the United States Supreme Court, with a less than thorough inquiry (due to failure to recognize the serious negative consequences of dependence corruption) into whether such legislation can withstand strict scrutiny has struck down parts of several statutes designed to limit such speech,. In doing so it reveals an astonishing lack of understanding (or lack of candor).

Professor Lessig has outlined a number of possible, but formidable, solutions to the problem of dependency corruption. I favor an appeal to reason, and therefor submit that campaign contributions and expenditures have the *volume* attribute but not the *content* attribute of political speech. Limitations on campaign money are limitations on the *volume* of speech, not the *content*. Such limitations should require a standard of review that is less rigorous than strict scrutiny. Adopting a less rigorous standard of review, and recognizing the harm that dependence corruption can do to our republican form of government would permit sensible limitations on campaign contributions and expenditures, and would be in no way harmful to the ideals of the First Amendment, either from the standpoint of what the Framers envisioned or from the standpoint of those who see the Constitution as a living, flexible instrument of government, in any way. The First Amendment was never intended, nor should it be interpreted today, to prohibit laws that limit a person's ability to overwhelm the expression of ideas by her opponents with volume, be it noise, bandwidth, air time, or the money that enables those things.

It is fair to say that the concept of campaign money as speech in 2014 was not contemplated by the Framers, and that such speech is a different animal than what they did contemplate when the First Amendment was ratified. It is time we examine that animal more closely and treat it accordingly in a way such that it does not consume the republican form of government envisioned by the Framers of the Constitution.

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