Cato Institute Podcast
September 22, 2014
"The Big Misunderstanding over Political Speech"

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Caleb Brown: This is the Cato daily podcast for Monday, September 22, 2014. I'm Caleb Brown. At last week's Constitution Day event at the Cato Institute, New York Law School professor and former head of the American Civil Liberties Union Nadine Strossen discussed the case of *McCutcheon v. FEC*. In particular, she discussed how the case has been misrepresented in the media and misunderstood by its opponents.

Nadine Strossen: This was the sixth decision by the Roberts Court to review campaign finance regulations and the sixth to strike down the challenge regulations on First Amendment grounds. These decisions have been incredibly maligned and misunderstood, thanks to a lot of media distortion by media outlets that all have an unacknowledged conflict of interest because their voices are amplified by every law that restricts other voices in the campaign context. The hysterical overreactions that greeted *McCutcheon* lumped it together with the court's 2010 Citizens United ruling as dooming democracy. Now, let me note two points in response, briefly. First, predictions that big money would drown out other voices have been proven wrong in both elections that have taken place since *Citizens United* was decided. And secondly, these two cases deal with very distinct issues which, too often, get lumped together. *Citizens United* struck down limits on independent expenditures by corporations and unions, where as *McCutcheon* struck down aggregate limits on contributions by individuals, and as I will explain, those are very distinct phenomenon and have been throughout the court's campaign finance jurisprudence. Now, I personally have felt a special connection to the McCutcheon case ever since two old friends and colleagues of mine wrote a book about it, *When Money Speaks* by Ronald Collins and David Skover. Cato hosted a terrific panel about the McCutcheon decision the spring at which Ron spoke. You can watch it on Cato's website, which I certainly enjoyed doing, and also, I highly recommend, for those of you who are really interested in this case, the terrific article in the Cato Supreme Court Review that Allen Dickerson wrote. Well, Ron and David, in their book, were so kind as to dedicate this terrific book to Nadine Strossen, the first lady of liberty, but I say that not because I have an inflated ego - to the contrary, my defense of letting money speak, to paraphrase their title, has, in most of my circles, caused me to be called a puppet of plutocracy, not a champion of liberty. Seriously. And this ties into some of the remarks that Ilya was making. There are very few liberal civil libertarians who oppose campaign finance regulations, even within the ACLU, and a number of you are asking me about all the media about this recently. I know Cato is completely unfamiliar with disagreements within organizations, strange as it is, even within the ACLU, we've been having debates and those of us who are First Amendment absolutists have been losing some ground, although I'm happy to say that in contrast with former ACLU leaders, the current ACLU is very strongly opposing and effectively opposing, the proposed constitutional amendment on this ground. If you want more

in the weeds detail I'd be happy to answer questions but I don't want to divert too much from the case at hand. It was the ACLU that long spearheaded the fight against all of these laws, including in the 1976 landmark case *Buckley v. Valeo* in which the ACLU was both the plaintiff and co-counsel and opposed every single aspect of the Federal Election Campaign Act. This summer I teamed up with one of the few other, what I'm now calling, liberaltarians, who oppose government regulations in this area, namely Floyd Abrams for an IQ squared debate and I'd like to note that one of the leaders of the fantastic IQ squared program is Nick Rosenkranz, who is also a Cato senior fellow and who will be speaking here today. Despite the fact that Floyd is demonstrably one of the nation's most effective advocates, the live audience at our debate voted overwhelmingly against our defense, even of the right to spend your own money on your own political expression. And polls indicate that this reaction is typical, which is really worrisome when you consider the ongoing push for a constitutional amendment to overturn Supreme Court rulings in this area which would make a gaping exception to the First Amendment for the very political expression that is at the core of the First Amendment. So even though we deregulation supporters have been winning in the Supreme Court, I would say because we have been winning in the Supreme Court, we have been losing the proverbial battle for hearts and minds. And worse yet, the contempt - and that's not an overstatement - the contempt and disdain that have been heaped upon the Supreme Court rulings in this area have spilled over into a more general disdain for the First Amendment, which Ilya alluded to, even among key institutions that one would expect and hope to be especially protective of free speech, including the media and including universities, so I really want you to keep this broader concern in mind as we directly consider *McCutcheon*. Again, it struck down aggregate limits that federal law imposes on someone's total contributions to all federal candidates and committees, in contrast with base limits on each single contribution. The aggregate limits restrict how many candidates or committees a donor may support. *McCutcheon* is the first time that the court ever struck down a federal contribution limit, and that's important in light of the distinction, as I mentioned, the court has drawn consistently between contributions to campaigns on the one hand versus expenditures in support of campaigns on the other hand. That distinction goes all the way back to *Buckley*. *Buckley* said that contributions are both less central to free expression and more likely to cause quid pro quo corruption or its appearance, so *Buckley* subjected expenditure limits to what we lawyers call strict scrutiny, presumptively unconstitutional, and struck down all such limits in that case, whereas its subjected contribution limits only to intermediate scrutiny more deferential to Congress and upheld all such limits. That dichotomy was controversial from the get-go. As I said, the ACLU and the other plaintiffs opposed the contribution limits on the same grounds that we opposed the expenditure limits. Since then that dichotomy has gotten even more controversial as we live with its unintended adverse consequences, among other things, the pernicious combination of an unlimited demand for funds with the need to raise them in strictly limited increments. And that has led to the huge amount of time that candidates have to spend in fundraising and it also makes it harder for non-incumbents to mount meaningful challenges, because relatively unknown candidates depend on seed money to get started. A few large contributions from the necessarily small donor base that they have at the outset. Notably, one of the *Buckley* plaintiff's was Eugene McCarthy who repeatedly said he could not have mounted his historic

challenge to Lyndon Johnson without very large contributions from a small handful of fat cat liberal donors and McCarthy could never understand how liberals could possibly support these limits in light of that experience. So, the ACLU argued in *Buckley* that contribution limits, as well as spending limits, violate not only free speech and association principles, but also violate the very equality principles that are said to justify those limits perversely. I continue to believe that invalidating contribution limits would boost democratic and egalitarian ideals as well as free speech, so I welcome *McCutcheon* as a small but notable step in that direction. Now, to be sure, the court in *McCutcheon* declined the request to reverse *Buckley*'s general distinction outright. That was a request that was made not only by the plaintiff, but also by some friends of the court, including the Cato Institute in a very forceful brief that was written by Ilya and Sophie Cole. The court said it had no occasion to reconsider *Buckley*'s general deference toward contribution limits because it conceded that the aggregate limits failed even deferential scrutiny. On the other hand, *McCutcheon* did reverse the portion of *Buckley* which had upheld the aggregate limits that were then in effect. To explain how the court reached that result I have to give you a little background. In *Buckley*, the court said there was little, if any, evidence that unlimited campaign contributions actually caused quid pro quo corruption, which is the exchange of money for political favors, which was already illegal under bribery laws. However, in an excess of caution, the court still upheld contribution limits as a prophylactic measure to prevent circumvention of the existing laws. Ever since then, the government has sought to justify all new regulations as attempts to avoid circumvention of existing regulations even without any evidence that existing regulations are not working. So, to quote the court, prophylaxis upon prophylaxis. *McCutcheon* has followed that pattern. The base contribution limit to candidates, $2,600, presumes that contributions at that level aren't large enough to create even a presumption of corruption. As campaign finance attorney James Bopp commented, that number is so low it can't even buy a democrat congressman. So, logically, multiple such contributions to many candidates also don't create even an appearance of corruption of any of those candidates. Therefore the government had to come up with another rationale for the aggregate limit, and here's what it was: that the aggregate limit was needed to stop the donor from colluding with multiple candidates to whom the donor gave money so that all of those candidates would collude to pass on all of those contributions to a single candidate in such a way that the single candidate would realize who the original donor was and be inappropriately beholden to that donor. The *McCutcheon* court rightly concluded that this rationale has many flaws. First, there's no evidence that any such schemes have ever been implemented, so the government and the Supreme Court dissenters had to rely on wild hypotheticals. Second, any such schemes would violate existing regulations. Third, the court suggested alternative new regulations that could further prevent this hypothetical possibility, speculative possibility, from occurring that would be less burdensome on speech. Well, the vote was five to four to strike down the aggregate limits. Chief Justice Roberts's opinion was only for a four-justice plurality. Justice Thomas refused to join that opinion because he has had a longstanding position that contribution limits should be fully unconstitutional. Although the plurality refused to join him in taking that step explicitly, Justice Thomas explained that the plurality's rationale, the plurality did not have a rationale that was consistent with constitutional - with limits on contribution on limits. And I'm running out of time so I'm not

going to explain the details of that but I do agree with Justice Thomas when he says that the ongoing rule or limits of the court's ongoing upholding of base contribution limits is now a rule that is lacking a rationale. So that's a seriously - and the dissenters, the dissent by Justice Breyer really critiqued the plurality opinion from that perspective, that it does undermine, although it didn't explicitly overturn base contribution limits. There is a second really significant way in which *McCutcheon* drills a hole into existing campaign finance regulations and that is that it explicitly sets out as a concrete and categorical rule that the only rationale that will be accepted for any campaign finance regulations is quid pro quo corruption, the exchange of political favors for money, or its appearance and, very importantly, and explicitly and categorically for the first time, the court clearly rejected a broader, more malleable concept of corruption that could just, was said to justify, in a few past decisions, to justify regulations this concept of undue access or influence. Many of us believe that that is what democracy is all about. You vote for a candidate, you give money to a candidate because you want that person to share and be responsive to your concerns. That is not corruption, that is democracy in action. And a final positive aspect, long-going, long range aspect of *McCutcheon* is that it is, could well lead to deregulation of contributions to political parties. This was something that was emphasized I thought very effectively in Cato's Supreme Court brief, which explained that one of the adverse impacts of the current regime has been to reduce the role of political parties, putting them in a straightjacket with their increased accountability and transparency. I suspect that I'm out of time, so I should come to my conclusion, which is that - let me just quote - I'm sure you'll give me time to quote Cato's brief on this point, that these regulations have pushed the flow of money away from candidates and parties toward unelected, nontransparent advocacy groups, leading to a decrease in political competition, so ironically this regulatory regime, quoting the Cato brief, undermines the main goals of most campaign finance reformers, political accountability, and open government. And *McCutcheon* is, to quote David Brooks, a small step back toward a party-centric system, and that's positive. I'll give the second last word to Justice Breyer's vitriolic dissent in *McCutcheon*, where he said the court's ruling undermines, perhaps devastates what remains of campaign finance reform, to which I say, hear, hear.

Caleb Brown: Nadine Strossen was head of the American Civil Liberties Union from 1991 to 2008. She is a professor of law at New York Law School. You can watch our full Constitution Day events at our website, CATO.org.

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