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## ESSAY

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### JUSTICE KENNEDY'S DEMOCRATIC DYSTOPIA

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TERRY SMITH†

Most Americans have a jaundiced view of Congress. In the aftermath of the Supreme Court's decision in *Citizens United v. FEC*,<sup>1</sup> the proportion of Americans who perceive Congress as "corrupt" has risen, with 52% believing that most members of Congress are corrupt and a record 32% believing that their own member of Congress is corrupt.<sup>2</sup> According to a 2015 Bloomberg News survey, 78% of Americans believe that *Citizens United*, which helped to unleash the boundless wallets of corporations and the wealthy to fund Super PACs and anonymous conduits in elections, should be overturned.<sup>3</sup> The public's distaste for the high court's handiwork crosses partisan lines even in an era of über-partisan polarization. Republicans oppose the decision 80% to 18%, Democrats oppose it 83% to 13%, and independents 71% to 22%.<sup>4</sup>

One could not have predicted such a resounding rejection of *Citizens United* based on the self-assured, if unsupported, proclamations in Justice Anthony Kennedy's majority opinion. Among Kennedy's vatic pronouncements was this one:

*The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.* By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a

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† Distinguished Research Professor of Law, DePaul University College of Law, J.D., 1989, New York University School of Law; A.B., 1986, Brown University.

1 558 U.S. 310 (2010).

2 Andrew Dugan, *Majority of Americans See Congress as Out of Touch, Corrupt*, GALLUP (Sept. 28, 2015), [http://www.gallup.com/poll/185918/majority-americans-congress-touch-corrupt.aspx?g\\_source=Politics&g\\_medium=newsfeed&g\\_campaign=tiles](http://www.gallup.com/poll/185918/majority-americans-congress-touch-corrupt.aspx?g_source=Politics&g_medium=newsfeed&g_campaign=tiles) [https://perma.cc/638V-6KPQ].

3 Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG (Sept. 28, 2015, 5:00 AM), <http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot>.

4 *Id.*

candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.<sup>5</sup>

The quick, six-year pedigree of *Citizens United* has revealed the folly of Justice Kennedy's prediction. Moreover, at the time of its decision, there was before the Court, and in any case within grasp of its judicial notice, sufficient evidence that money in the political process was breeding mass political cynicism. In short, the vision of democracy conjectured by the Court's five conservative Justices had already been rejected by the American public and stood no chance of approbation going forward.

That vision is aptly described as dystopia, even as Justice Kennedy wrapped it in the purity of the First Amendment. Dystopia is a society characterized by unpleasantness, even misery. If the figures concerning corruption do not sufficiently convey the dystopian state of American politics, consider two closely related statistics: 79% of Americans believe that Congress is "out of touch with average Americans," and 69% believe that Congress "focuse[s] on the needs of 'special interests' rather than the needs of [its] constituents."<sup>6</sup> These figures reflect the distorting impact of big money in politics, and the resulting skew of policy outcomes in favor of the donor class.

Oddly, though, Justice Kennedy may not be moved by the latter findings even if known to him. This is due to Kennedy's narrowing of the government's interest in preventing "corruption." Citing to only his own partial dissent from a prior case, Kennedy opined for the majority in *Citizens United* that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."<sup>7</sup> Kennedy then quoted himself:

Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.<sup>8</sup>

There's a reason Justice Kennedy was forced into the terrarium of self-citation for his views on favoritism: prior to *Citizens United*, they had not commanded

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<sup>5</sup> *Citizens United*, 558 U.S. at 360 (emphasis added) (citation omitted).

<sup>6</sup> Dugan, *supra* note 2.

<sup>7</sup> *Citizens United*, 558 U.S. at 359.

<sup>8</sup> *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part), *overruled by id.*).

a majority. To accede to such views is to endorse the locus of the public's dystopian perception of politics—too much focus on special interests at the expense of everyone else.

Justice Kennedy assumes without support that representatives organically hold political views on the myriad, often esoteric issues on which they must vote, and that these views attract donors, rather than donors helping to shape the candidate's views. This naïve preconception is ironically utopian with dystopian consequences.<sup>9</sup> Furthermore, it is a non sequitur to say that favoritism and influence are unavoidable while at the same time hamstringing Congress's ability to curtail these gateways to corruption. And if the point of making a contribution is, as Kennedy puts it, to have the supported candidate “respond by producing those political outcomes the supporter favors,”<sup>10</sup> there appears to be little point in our bribery laws—in fact, they, too, may be unconstitutional.<sup>11</sup>

Consider how Justice Kennedy's unavoidability argument enables the conduct of Congressman Bill Shuster, the Chairman of the House Transportation and Infrastructure Committee. According to OpenSecrets.org, one of the top ten contributors to Shuster's campaign during the 2014 cycle was Airlines for America (A4A), a leading airlines trade association.<sup>12</sup> It also happens that the vice president of A4A is Shuster's girlfriend.<sup>13</sup> Although Shuster insists that his girlfriend does not lobby his office, it is clear that the president of A4A, Nick Calio, does. Calio testified before Shuster's committee in favor of a bill that would place air traffic control authority in the hands of a private nonprofit company instead of the Federal Aviation Administration.<sup>14</sup> After the bill cleared Shuster's committee, he, Calio and

<sup>9</sup> See *infra* notes 16–20 and accompanying text.

<sup>10</sup> *Citizens United*, 558 U.S. at 359.

<sup>11</sup> The Supreme Court recently granted certiorari on the question of what constitutes “official action” for purposes of proving bribery in the prosecution of an elected official. *United States v. McDonnell*, 792 F.3d 478 (2015), *cert. granted in part*, 136 S. Ct. 891 (2016); Petition for a Writ of Certiorari at i, *McDonnell v. United States*, No. 15-474 (U.S. Oct. 13, 2015), 2015 WL 5996410. Indicted on corruption charges, Governor Robert McDonnell of Virginia invoked Justice Kennedy's language from *Citizens United* to argue on appeal that the trial court had erred by not instructing the jury that “mere ingratiation and access are not corruption.” 792 F.3d at 513. Even if the Court in *McDonnell* were to find that actual bribery requires more than granting a donor access, it in no way follows that in the campaign finance law context, the government's interest should be limited to actual bribery. Ingratiation and access are the gateways to actual bribery, and prior to *Citizens United*, there was no precedent holding that the government could not curtail these gateways.

<sup>12</sup> Center for Responsive Politics, *Representative Bill Shuster: Top 20 Contributors, 2013–2014*, OPENSECRETS.ORG, <https://www.opensecrets.org/politicians/contrib.php?cycle=2014&type=I&cid=N00013770&newMem=N&recs=20> [https://perma.cc/469F-82NE].

<sup>13</sup> Anna Palmer et al., *Shuster Lounges Poolside with Airline Lobbyists as He Pursues FAA Bill*, POLITICO (Feb. 23, 2016, 5:39 PM), <http://www.politico.com/story/2016/02/bill-shuster-faa-bill-airline-lobbyists-219666> [https://perma.cc/9Y9E-Z7ER].

<sup>14</sup> *Id.*

Shuster's girlfriend spent the weekend on Miami Beach attending a Republican fundraising retreat.<sup>15</sup>

What's wrong with this picture? Apparently nothing if you're Justice Kennedy. It's a tale of (unavoidable) access and favoritism. Yet it must be distasteful even for Justice Kennedy. As the Shuster imbroglio illustrates, things were already bad enough with direct contributions to candidates through corporate PACs like A4A, which are created from funds separate and apart from corporations' general treasuries. *Citizens United* holds that Congress cannot seek to curtail the inevitable public cynicism engendered by Shuster's and A4A's unseemly conduct—to say nothing of the gateways to actual bribery—by enforcing a decades-old ban on the use of corporate and union general treasuries in candidate elections.<sup>16</sup> It is one thing to believe that certain behaviors are inevitable; it is quite another for the Court to rule in a way that actually expands the spectrum of the undesirable conduct.

Justice Kennedy's answer to the charge of exacerbation rests on the fiction that Super PACs—to which corporations and wealthy individuals are now allowed to give unlimited contributions—do not demoralize the average citizen's faith in democracy because “[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”<sup>17</sup> Here, Kennedy conveys a jejune understanding of political coordination to which neither the average citizen nor the average politician would cosign. When candidates can fundraise for their very own Super PAC,<sup>18</sup> or can signal to a Super PAC which ads to run and which to stop,<sup>19</sup> it reflects a state of denial to claim the absence of coordination, and it is likewise willful blindness to claim the absence of indebtedness by the politician to her Super PAC donors.

Juxtapose the qualifications of Justice Kennedy to opine on the effects of large campaign contributions or any other *practical* aspect of campaign finance with, say, those of Donald Trump, the presumptive 2016 Republican presidential nominee who, himself, has given large campaign contributions to politicians of both parties. Trump has boasted:

I gave to many people. Before this, before two months ago, I was a businessman. I give to everybody. When they call, I give. And you know

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<sup>15</sup> *Id.*

<sup>16</sup> *Citizens United*, 558 U.S. at 319.

<sup>17</sup> *Id.* at 360.

<sup>18</sup> Paul Blumenthal, *FEC Deadlocks on Whether Candidates Can Coordinate with Their Own Super PACs*, HUFFPOST POLITICS (Nov. 10, 2015, 6:40 PM), [http://www.huffingtonpost.com/entry/fec-super-pac-coordination\\_us\\_56426ee7e4b060377346c337](http://www.huffingtonpost.com/entry/fec-super-pac-coordination_us_56426ee7e4b060377346c337) [https://perma.cc/373N-Y2Y8].

<sup>19</sup> Nick Gass, *Kasich Wants Super PAC to Pull 'Lyin' Ted' Ad*, POLITICO (Apr. 1, 2016, 12:16 PM), <http://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/04/john-kasich-no-lyin-ted-cruz-ad-221465> [https://perma.cc/TH3E-VQBT].

what? When I need something from them, two years later, three years later, I call them. They are there for me. And that's a broken system.<sup>20</sup>

Let's dismiss Trump as a braying solipsist. There remains the sweeping record from *McConnell v. FEC*, in which "lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials."<sup>21</sup> It would have been an act of judicial modesty—and prudence—for Justice Kennedy to concede that the Court in *Citizens United* knew far less about the corrupting and distorting effects of money—whether in the form of large donations or nominally independent expenditures—than the donors and members of our democratic branches of government who actually traffic in campaign money. The Court's failure to reckon with its epistemic limitations in *Citizens United* has greatly contributed to the potential for democratic dystopia.

As if *Citizens United*'s factual assumptions were not fallacious enough, the majority embraces the novel legal theory that the First Amendment precludes the government from acting to rein in "Shusterism" or to prevent its expansion into areas of Super PACs, anonymous-moneyed 501(c)(4) organizations, or whatever the next new frontier for evading contribution limits may be. Subsequent to *Citizens United*, however, the Court rejected a First Amendment challenge to a state recusal provision that disallowed an elected official from voting on or advocating in relation to legislation where his independent judgment could foreseeably be impaired by a financial conflict of interest.<sup>22</sup> Justice Scalia, writing for the majority in *Nevada Commission on Ethics v. Carrigan*, found that conflict of interest recusal statutes were too ingrained in the historical fabric of the nation to be considered an unconstitutional infringement on speech.<sup>23</sup> This holding was of a piece with the Court's earlier decision in *Caperton v. A. T. Massey Coal Co.*, in which the Court held that a \$3 million campaign contribution to a jurist who would be part of a panel hearing the contributor's case posed the risk of actual bias, and thus, under the Due Process Clause, required recusal of the judge.<sup>24</sup>

The Court's holdings in *Carrington* and *Caperton* reflect a realist view of the imperative that politicians and judges alike should not be influenced by

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<sup>20</sup> Sam Stein, *Campaign Finance Reformers Finally Get the Campaign They've Longed for in Donald Trump*, HUFFINGTON POST (Aug. 11, 2015, 12:02 PM), [http://www.huffingtonpost.com/entry/donald-trump-campaign-finance-reformers\\_us\\_55ca0f55e4b0923c12be1a13](http://www.huffingtonpost.com/entry/donald-trump-campaign-finance-reformers_us_55ca0f55e4b0923c12be1a13) [https://perma.cc/D787-L9JN].

<sup>21</sup> 540 U.S. 93, 147 (2003), *overruled by Citizens United*, 558 U.S. 310.

<sup>22</sup> Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2342, 2346-47, 2352 (2011).

<sup>23</sup> *Id.* at 2347-49.

<sup>24</sup> 556 U.S. 868, 872-73 (2009).

either personal pecuniary interests or campaign contributions.<sup>25</sup> It makes little sense, however, for the Court to treat recusal from conflicts of interest differently than the government's efforts to prevent the creation of the conflict in the first place.<sup>26</sup> The prohibition on the use of corporate and union general treasuries invalidated in *Citizens United*, like many other campaign finance restrictions, is directed to the same basic purpose as conflict of interest recusal laws: fostering a deliberative decisionmaking process undistorted by the kinds of biases that pecuniary interests tend to induce. Until the Supreme Court can connect these dots, Justice Kennedy's democratic dystopia will burden the nation for the foreseeable future.

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<sup>25</sup> These two things are really one and the same. Politicians seek campaign contributions to get elected to jobs that provide handsome personal remuneration in many instances. For instance, House members and Senators make \$174,000 annually, *Salaries*, U.S. HOUSE OF REPRESENTATIVES: PRESS GALLERY, <https://pressgallery.house.gov/member-data/salaries> [<https://perma.cc/D6XU-9JRZ>], which is well above the average household income of \$53,657, Tami Luhby, *Typical American Family Earned \$53,657 Last Year*, CNN MONEY (Sept. 16, 2015, 5:35 PM), <http://money.cnn.com/2015/09/16/news/economy/census-poverty-income> [<https://perma.cc/2B4Q-9GG2>]. Add to this disparity the *ex cathedra* perquisites of office and the opportunity to parlay public office into a position in the private sector in the future, and it becomes clear that there is overlap between conflicts of interest engendered by personal pecuniary interests and those engendered by campaign contributions. See Taylor Wofford, *Eric Cantor Lands \$3.4 Million Investment Banking Job*, NEWSWEEK (Sept. 2, 2014, 10:45 AM), <http://www.newsweek.com/eric-cantor-lands-34-million-investment-banking-job-267924> (reporting that Eric Cantor, the former Republican House Majority Leader, received a \$3.4 million investment banking job after losing reelection to the House).

<sup>26</sup> See Adam Liptak, Caperton *After* Citizens United, 52 ARIZ. L. REV. 203, 204 (2010) (arguing that the discord between Justice Kennedy's majority opinions in *Caperton* and *Citizens United* suggests that Kennedy views judges as more corruptible than politicians).