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**Administrative Law Section of the D.C. Bar
2014 Harold Leventhal Lecture**

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Oops!

Even the most careful craftsman occasionally overlooks an important step in the logical development of a legal argument. When I make that kind of mistake, I sometimes send a message to my law clerk entitled "Oops"; I then explain the obvious point that I overlooked while preparing my first draft.

In my talk today I shall describe four cases resolving issues related to the constitutionality of rules regulating the financing of political campaigns, and then make some comments about Judge Leventhal's writing about campaign finance. In three of the cases the Supreme Court virtually ignored the important distinction between the rights of persons eligible to

vote and the rights of non-voters. In the fourth - a decision of a three-judge federal district court unanimously affirmed by the Supreme Court - Judge Kavanaugh's opinion cogently explained how that distinction justifies the federal statute that prohibits foreigners from spending money to influence the outcome of American elections. Judge Kavanaugh, however, had no reason to consider its relevance to how American citizens make campaign donations in out-of-state elections. The Supreme Court's failure to discuss that distinction, together with important language in the Chief Justice's controlling opinion in *McCutcheon v. Federal Election Commission*, decided on April 2, 2014, persuades me that instead of rejecting the relevance of the distinction, the majority has simply failed to consider the point. Hence, "Oops" is the appropriate title for this talk. My ultimate submission is that Justices of the Supreme Court should be more open to rethinking rationales based in part on propositions they simply overlooked than on those in

which all relevant considerations were explicitly considered.

I

I shall begin with a comment on *McCutcheon*. In the statute at issue in that case, Congress had imposed two types of limits on campaign contributions, so-called "base limits" that restricted the amount of money that a donor could contribute to particular candidates or committees, and "aggregate limits" that restricted the total amount that a donor may contribute to all candidates or committees in an election cycle. The aggregate limits, unlike the base limits, restricted the number of candidates that a donor could support. The Court held that the aggregate limits were invalid.

In the first sentence of his controlling opinion the Chief Justice correctly states that there "is no right more basic to our democracy than the right to

participate in electing *our political leaders*." 188 L. Ed.2d 468, 482. And in his concluding paragraph he correctly describes that right as "the First Amendment right of *citizens to choose who shall govern them*." *Id.*, at 507 (Emphases added). McCutcheon's complaint, however, makes it clear that his objection to the federal statute was based entirely on its impairment of his ability to influence the election of political leaders for whom he had no right to vote. He is an Alabama citizen; in the 2012 election cycle he made equal contributions to 15 different candidates, only two of whom were from Alabama. The other thirteen were campaigning in California, Ohio, Indiana, Maryland, North Carolina, Oklahoma, Texas, and Virginia. Of primary significance is the fact that his only complaint about the federal statute was its prohibition against his making contributions in 2014 to candidates in twelve other non-Alabama elections - Colorado, Connecticut, Florida, Georgia, Hawaii, Minnesota, Utah, Washington, and Wisconsin.

To the best of my knowledge, in none of the Court's cases prior to *McCutcheon*, has the Court even mentioned a citizen's supposed right to participate in elections in which he or she has no right to vote. It surely has not characterized it as a "basic right" of unparalleled importance.

Not only did the principal opinion in the *McCutcheon* case fail to tell the reader that the petitioner was only complaining about his inability to influence elections in which he had no right to participate, but it also omitted any comment on the most significant difference between aggregate limits (that were at issue in the case) and the base limits (that were not challenged). Aggregate limits, unlike base limits, restrict the number of candidates that a particular donor may support. In the 2012 election cycle, for example, a donor could contribute \$5,000 (\$2,500 at the primary and another \$2,500 at the general election) to a candidate but was prevented under the \$46,200 aggregate limits from giving the

maximum contribution to more than nine federal candidates. The aggregate limits therefore have their principal impact on donors interested in supporting candidates seeking to govern other people - that is, candidates for whom they have no right to vote.

An Alabama citizen has no right to participate in the election of political leaders who will govern in Hawaii, Minnesota or Utah. Even those leaders who will participate in the enactment of federal laws do so as representatives of the people who voted them into office. What then is the source of McCutcheon's claimed constitutional right to make the maximum base-limit contribution to candidates in every election throughout the United States? Although there is a colorable basis for claiming that expenditures that are used to pay for one's own speech should be protected by the First Amendment, that argument does not require or justify the same treatment for campaign contributions that do not place any restriction on the candidate's use of the money. As the Court explained in its

decision in *Buckley v. Valeo* in 1976, "the transformation of contributions into political debate involves speech by someone other than the contributor." 424 U. S. at 21. There is no basis for claiming First Amendment protection for contributions that are motivated by either appreciation for past votes or for expected future votes. An unrestricted contribution by an Alabama citizen to a Hawaiian candidate can be used to finance Watergate-esque dirty tricks, expensive haircuts by the candidate, or a variety of other non-speech activities. The omission of any discussion of that threshold issue in any of the opinions in the *McCutcheon* case - like the Chief Justice's language stressing the importance of participating in the choice of "our political leaders" - surely should have prompted an "Oops" before the opinions were announced.

* * * *

There is a vast difference between (a) participating in an election either by voting or by spending money to support or defeat the election of particular candidates, on the one hand, and (b) engaging in speech about other public issues, on the other. That difference provides an acceptable justification for rules regulating elections that would not apply in other contexts - including, for example, rules prohibiting campaign speech in the vicinity of polling places. While the Court has virtually ignored the significance of that difference, it should play an important role in the analysis of rules designed to protect the integrity of the procedures that elect our political leaders.

That difference provides an acceptable explanation for the decision in the earliest of my four cases, *Austin v. Michigan Chamber of Commerce*, decided in 1990. In that case, over the eloquent dissents written by Justices Scalia and Kennedy, the Court upheld the constitutionality of a Michigan statute that prohibited

corporations from making campaign expenditures in Michigan elections. The statute imposed no restriction on corporate speech about any other issues. Because corporations have no right to vote, and because many of the corporations doing business in Michigan unquestionably have interests in other states, their standing to object to the Michigan statute was tainted by the same potential conflict of interest as McCutcheon's intended contributions to participants in non-Alabama elections.

The majority of Justices participating in the *Austin* case were satisfied that the plaintiff's status as a corporation provided a sufficient justification for prohibiting it from participating in a Michigan election by spending money to support the election of a specific candidate. Neither they nor the dissenters had any reason to comment on the fact that the Chamber had no greater right to participate in the process of electing Michigan's political leaders than did a citizen of Wisconsin or Alabama. Indeed, because the

interests of Alabama or Wisconsin residents may well conflict with the interests of Michigan's citizens, that potential conflict may well have provided an adequate justification for denying all non-voters - rather than just corporations - the right to participate in Michigan elections by making campaign expenditures.

The point did, however, come up in the opinions - and in the criticism of the majority's holding by the President of the United States - in the *Citizens United* case decided in 2010. In that case the majority overruled *Austin*, relying heavily on the argument that the First Amendment prohibits the identity of the speaker from playing any role in determining the validity of regulations of speech. In my dissent in that case, I pointed out that the majority's reasoning "would have accorded the propaganda broadcasts to our troops by 'Tokyo Rose' the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational

corporations controlled by foreigners as to individual Americans", 558 U. S., at 424. In response, the majority merely noted that it did not have to reach the question "whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process" because the challenged statute would be overbroad even if it did. That response tacitly acknowledged that the identity of the speaker may provide an acceptable justification for regulating his or her speech and that the regulation of campaign speech may be justified for reasons that would not support the regulation of speech on other issues.

A year later a three-judge District Court for the District of Columbia squarely decided that the unique importance of elections provides a justification for a statutory prohibition of campaign expenditures and contributions that would not apply to speech about other issues. In *Bluman v. Federal Election Commission*, 800 F. Supp.2d 281, that court rejected a

challenge brought by citizens of Canada and Israel to the constitutionality of the federal statute, 2 U. S. C. § 441(e), that makes it a crime for them to make campaign contributions or expenditures in state or federal elections in the United States. In his opinion Judge Kavanaugh correctly noted that the statute did not bar foreign nationals from engaging in issue advocacy and that they are protected by some, but not all, of the provisions of the Constitution. He summarized the Supreme Court cases as setting forth this straightforward principle.

"It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing

foreign influence over the U. S. political process."

Id., at 288.

Later in his opinion, stressing the importance of preventing foreign influence over the American political process, Judge Kavanaugh explained:

"Temporary resident foreign citizens by definition have primary loyalty to other national political communities, many of which have interests that compete with those of the United States." In sum, the compelling interest that justifies a limitation on financing political campaigns is the same as the interest in limiting the franchise to persons eligible to vote. The potential conflict of interest that justifies refusing to allow non-residents a right to vote in American elections justifies a prohibition against their attempted participation by campaign contributions and expenditures. The same interest that justifies the federal prohibition in §441 should be sufficient to justify the Michigan statute upheld in *Austin*. While that interest would not justify

censorship of speech about general issues, it should suffice as a justification for a rule preventing an Alabama citizen from making expenditures to support candidates seeking to represent the citizens of other States.

While the reasoning that supports the constitutionality of §441(e)'s prohibition of foreigner expenditures in American elections would also support a prohibition of an Alabama resident's expenditures in a Michigan election, the issue actually decided in the *McCutcheon* case only involved an Alabama citizen's interest in making contributions to candidates campaigning in other states - an activity that the Court has not yet held to be protected by the First Amendment. Since the plurality accepted the holding in *Buckley* that contributions of money do not qualify as speech, the holding that aggregate limits on contributions are invalid is truly bizarre.

II

Ever since Attorney General Edwin Meese suggested that the original intent of its authors should provide the primary guide to interpreting the meaning of constitutional text, history has played a major role in constitutional adjudication. There is a bit of irony, then, that the history that has governed the Supreme Court's recent decisions invalidating campaign finance rules did not begin until 1976, when the Court decided *Buckley v. Valeo* and famously announced that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . .", 424 U. S.1, 48-49. (quoted in the Chief Justice's opinion in *McCutcheon*, 188 L. Ed. 2d at 494).

Prior to 1976, it was accepted practice in legislatures, courts, and educational institutions where debates regularly occurred to limit the length of

speeches in order to allow opposing views an equal opportunity to be heard. Whenever there is an organized debate between "some elements of our society" and "others", the truth-seeking function of the debate is served by rules that restrict the time that some may speak in order to enhance the relative voice of others. That rule remains true today in many institutions but not during a campaign for elective office. Thus the glittering generality that the Court employed to resolve the question whether a rule limiting the amount of money a candidate may spend during his or her campaign actually applies only to that narrow issue. It is a ruling that protects the volume of a candidate's speech without even arguably protecting the content of his speech. No such rule had been applied before 1976.

The Court's ahistorical approach did not go unnoticed. A year after *Buckley* was decided, Harold Leventhal wrote an article in the *Columbia Law Review* that explained why he disagreed with its holding

invalidating limitations on campaign expenditures. Judge Leventhal was no stranger to campaign finance jurisprudence – he had joined the opinion of the D. C. Circuit that was reversed by the Supreme Court in *Buckley*. Judge Leventhal criticized the Court's opinion for failing to "examine the actual facts of political life" and for lacking "any sense of the history of campaign reform legislation." He noted that in 1677 the English House of Commons had entered an order treating a member's expenditure of more than ten pounds before election as a form of bribery requiring that his seat be vacated. In this country Congress first enacted a law imposing spending limits on senatorial and congressional campaigns in 1911 (37 Stat. 25). But these spending limits "were circumvented by the proliferation of committees all supporting the same candidate" and Congress sought to prevent this circumvention by enacting new spending limits in the 1925 Corrupt Practices Act and in the 1939 Hatch Act. According to Judge Leventhal,

"expenditure limits – and the circumvention of them – have long been a part of American political life."

Judge Levanthal immediately recognized that the notion that spending limits violate the First Amendment was of recent vintage. The idea first gained currency in 1976. While the argument that they limit the quantity of campaign speech - even though they may have no impact on the content of such speech - does raise a valid First Amendment issue, it would be frivolous to contend that it is an issue that would be illuminated by studying the original intent of the Framers.

Indeed, if we consider the likely response of a constitutional lawyer in the 18th or 19th century to the question whether an Alabama citizen has a constitutional right to make unlimited contributions to help elect one Yankee candidate after another, he might well have regarded the question as frivolous; perhaps he would have responded with a querulous "Oops!"