

## IN DEFENSE OF McCUTCHEON V. FEDERAL ELECTION COMMISSION

*By Anthony J. Gaughan\**

### I. INTRODUCTION

On April 2, 2014, a sharply divided United States Supreme Court struck down the aggregate limits on campaign contributions in federal elections.<sup>1</sup> The case of *McCutcheon v. Federal Election Commission* represented the most important election law decision since *Citizens United v. Federal Election Commission* in 2010.<sup>2</sup> Prior to *McCutcheon*, the Federal Election Campaign Act (“FECA”), as amended by the Bipartisan Campaign Reform Act (“BCRA”), imposed an overall biennial limit of \$123,200 on total donations by a single contributor to federal candidates, parties, and political action committees (“PACs”) that coordinate with federal candidates or parties.<sup>3</sup> But in *McCutcheon*, a 5-4 majority held that the aggregate limits violated the First Amendment rights of freedom of expression and freedom of association.<sup>4</sup>

The *McCutcheon* decision triggered a storm of criticism and controversy. Justice Breyer warned in the dissent that “today’s decision eviscerates our Nation’s campaign finance laws.”<sup>5</sup> The *New York Times* editorial board condemned the majority for mounting a “crusade to knock down all barriers to the distorting power of money on American elections.”<sup>6</sup> A May 2014 poll found

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1. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014).

2. See, e.g., Richard Wolf & Fredreka Schouten, *Supreme Court lifts ban on aggregate campaign donations*, USA TODAY, Apr. 2, 2014, available at <http://www.usatoday.com/story/news/politics/2014/04/02/supreme-court-campaign-finance/4481675/> (“It’s the most important campaign-finance ruling since the high court’s 2010 *Citizens United v. Federal Election Commission* ruling allowed corporations and unions to spend unlimited amounts independently to influence elections.”).

3. *McCutcheon*, 134 S. Ct. at 1443.

4. *Id.* at 1442.

5. *Id.* at 1465.

6. Editorial Board, *The Court Follows the Money*, N.Y. TIMES, Apr. 2, 2014, available at <http://www.nytimes.com/2014/04/03/opinion/the-court-follows-the-money.html>.

that 51% of Americans believe the *McCutcheon* ruling will increase political corruption.<sup>7</sup>

Nevertheless, despite the widespread condemnation of the decision, the majority got the ruling right. This article's thesis is that the aggregate limits did more harm than good.

Congress enacted the aggregate limits in the 1970s to reduce the potential for corruption in the financing of federal election campaigns.<sup>8</sup> But recent elections have made clear that FECA's aggregate limits failed to decrease the influence of campaign contributors.<sup>9</sup> Worse yet, the limits had the counterproductive effect of burdening First Amendment rights while exacerbating structural problems in campaign finance law.<sup>10</sup> They curbed contributors' freedom of speech and association rights and drove donations to new campaign finance vehicles that do not coordinate their activities with candidates or parties.<sup>11</sup> In the process, the aggregate limits undermined the fundraising capabilities of candidates and parties while empowering outside groups that are not accountable to the electorate.<sup>12</sup>

Thus, as Chief Justice Roberts explained in the *McCutcheon* decision, the aggregate limits failed to prevent corruption while "seriously restricting participation in the democratic process."<sup>13</sup> Accordingly, America's election process is better off without aggregate limits on federal campaign contributions.

In defending the *McCutcheon* ruling, this article makes five main points. First, contrary to popular opinion and the claims made by the dissent, the *McCutcheon* decision does not gut the current campaign finance system.<sup>14</sup> The majority's ruling only lifted FECA's limits on the aggregate amount of contributions by a single donor to federal candidates, parties, and political action committees that coordinate with federal candidates and parties ("traditional PACs").<sup>15</sup> The total amount that an individual candidate, party committee, or traditional PAC may receive from a single donor remains capped as part of the "base" limits, which the *McCutcheon* ruling left in place.<sup>16</sup> For example, during the 2013-14 election cycle, FECA limited federal candidates to a biennial

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7. Victor Li, *Majority of poll respondents favor SCOTUS reforms, think justices' political views skew decisions*, A.B.A. J., (May 7, 2014, 11:12 PM), [http://www.abajournal.com/news/article/voters\\_surveyed\\_favor\\_supreme\\_court\\_reforms/](http://www.abajournal.com/news/article/voters_surveyed_favor_supreme_court_reforms/); Stan Greenberg et al., *Broad Bipartisan Consensus Supports Reforms to Supreme Court—Americans View Court as Too Political*, DEMOCRACY CORPS (May 7, 2014), <http://www.democracycorps.com/attachments/article/979/DCorps%20SCOTUS%20Memo%20FINAL%20050614.pdf>.

8. *See infra* Sections II(A), V(B), and V(D).

9. *See infra* Section V(B) and (D).

10. *See infra* Section V(B) and (D).

11. *See infra* Section V(B) and (D).

12. *See infra* Section V(B) and (D).

13. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1442 (2014).

14. *See infra* Section V(A).

15. *McCutcheon*, 134 S. Ct. at 1442, 1446.

16. *Id.* at 1442, 1443.

maximum of \$5,200 in donations per contributor.<sup>17</sup> Similar caps cover contributions to party committees and traditional PACs.<sup>18</sup> Moreover, as a safeguard against circumvention of the base limits, the Federal Election Commission (“FEC”) retains vigorous powers to investigate illegal earmarking of contributions.<sup>19</sup> Donations to federal candidates, parties, and traditional PACs also remain subject to automatic public disclosure of the amount of the contribution and the identity of the contributor.<sup>20</sup> *McCutcheon* thus leaves untouched the two cornerstones of federal election law—base limits on contributions and mandatory disclosure.<sup>21</sup>

Second, the *McCutcheon* ruling moderates the huge structural fundraising advantages that Super PACs and other outside groups have possessed in recent elections.<sup>22</sup> The fundraising imbalance resulted from the Supreme Court’s 2010 decision in *Citizens United v. FEC*, which exempted outside groups, such as Super PACs and other political committees that do not coordinate their activities with parties or candidates, from FECA’s contribution limits.<sup>23</sup> Federal law permits outside groups to engage in express advocacy for or against the election of federal candidates.<sup>24</sup> As long as they remain independent from candidate campaigns and party committees by only engaging in independent expenditures (“IEs”), outside groups may receive unlimited campaign contributions, a distinction that makes them potent fundraising vehicles.<sup>25</sup> The term “Super PAC” itself refers to the fundraising advantages possessed by outside

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17. *Id.* at 1462; Federal Election Commission, *McCutcheon, et al. v. FEC, Case Summary*, April 2014 [hereinafter *FEC McCutcheon Case Summary*], <http://www.fec.gov/law/litigation/McCutcheon.shtml>.

18. *McCutcheon*, 134 S. Ct. at 1462; *see also* *FEC McCutcheon Case Summary*, *supra* note 17.

19. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1447 (2014); 2 U.S.C. § 441a(a)(8) (declaring that “all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate”); 11 C.F.R. § 110.6(b)(1).

20. *See* 2 U.S.C. § 434; *McCutcheon*, 134 S. Ct. at 1459–60; *The Federal Election Campaign Act—Disclosure*, FED. ELECTION COMM’N, <http://www.fec.gov/pages/brochures/fecfec.shtml#Disclosure>.

21. *McCutcheon*, 134 S. Ct. at 1462 (2014); *FEC McCutcheon Case Summary*, *supra* note 17.

22. Marc E. Elias & Jonathan S. Berkon, Comment, *After McCutcheon*, 127 HARV. L. REV. F. 373, 378 (2014) (“The McCain-Feingold law and subsequent court decisions have created a severe imbalance in the current system.”).

23. *McCutcheon*, 134 S. Ct. at 1454 (“That same donor, meanwhile, could have spent unlimited funds on independent expenditures.”); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); Robert Kelner & Raymond La Raja, *McCain-Feingold’s Devastating Legacy*, WASH. POST, Apr. 11, 2014, available at [http://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3\\_story.html](http://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3_story.html).

24. *See* 11 C.F.R. 100.16(a); *Coordinated Communications and Independent Expenditures*, FED. ELECTION COMM’N, <http://www.fec.gov/pages/brochures/indexp.shtml>.

25. *See* Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1646–47 (May 2012); Bradley A. Smith, *Super PACs And The Role Of “Coordination” In Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 604 (Summer 2013).

groups in comparison to traditional PACs that coordinate with candidates and parties.<sup>26</sup>

Prior to the *McCutcheon* ruling, FECA's aggregate limits magnified outside groups' fundraising advantages by encouraging donors who reached the biennial cap of \$123,200 to direct additional contributions to Super PACs and other groups engaged in IEs.<sup>27</sup> The *McCutcheon* ruling partially corrects that imbalance in campaign finance law by giving parties and candidates access to substantially more funds.<sup>28</sup> Contributors may now donate the maximum amount permitted under the base limits to as many candidates and party committees as they like.<sup>29</sup> Although Super PACs retain formidable fundraising advantages, *McCutcheon* at least partially levels the playing field for parties and candidates by giving them access to a larger number of contributors.<sup>30</sup> *McCutcheon* thus represents a small but noteworthy victory for candidates and parties at a time when Super PACs are emerging as the dominant campaign vehicle in American elections.<sup>31</sup>

Third, the Court's ruling represents a modest victory for advocates of transparency in the funding of federal election campaigns. Although campaign contributions to parties, candidates, traditional PACs, and Super PACs must be publicly disclosed on a periodic basis,<sup>32</sup> mandatory disclosure laws do not apply to independent expenditure groups when they are organized under the federal tax code as Section 501(c) non-profit organizations.<sup>33</sup> Since the 2010 *Citi-*

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26. T.W. Farnam, *Super Pacs Alter The Dynamics Of Fundraising*, WASH. POST, Jan. 8, 2012, available at [http://www.washingtonpost.com/politics/super-pacs-alter-the-dynamics-of-fundraising/2012/01/05/gIQA3dzjP\\_story.html](http://www.washingtonpost.com/politics/super-pacs-alter-the-dynamics-of-fundraising/2012/01/05/gIQA3dzjP_story.html); Dave Levinthal, *How Super PACs Got Their Name*, POLITICO, Jan. 10, 2012, available at <http://www.politico.com/news/stories/0112/71285.html>.

27. Ray La Raja, *The Supreme Court might strike down overall contribution limits. And that's okay*, WASH. POST, Oct. 9, 2013, available at <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/10/09/the-supreme-court-might-strike-down-overall-contribution-limits-and-thats-okay/> (noting that contribution limits help drive money to Super PACs).

28. Ray La Raja, *The McCutcheon Decision Could Be Good News After All*, WASH. POST, Apr. 3, 2014, available at <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/04/03/the-mccutcheon-decision-could-be-good-news-after-all/>.

29. *FEC McCutcheon Case Summary*, *supra* note 17.

30. See, e.g., La Raja, *supra* note 28; Elias & Berkon, *supra* note 22, at 379.

31. See Fredereka Schouten, *Federal super PACs spend big on local elections*, USA TODAY, Feb. 25, 2014, available at <http://www.usatoday.com/story/news/politics/2014/02/25/super-pacs-spending-local-races/5617121/>; see also Dave Levinthal, *Super PACs: 2012's Campaign Godzillas*, POLITICO (Feb. 22, 2012, 12:00 AM), <http://www.politico.com/news/stories/0212/73143.html>.

32. 2 U.S.C. § 434; 2 U.S.C. § 434(a); 11 C.F.R. § 104.5(c). The threshold for public disclosure of campaign contributions to both political committees and IEs is \$200. See R. SAM GARRETT, CONG. RESEARCH SERV., R41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS, CRS-14 (2014).

33. 26 U.S.C. § 501(c)(4)(A); Rev. Rul. 81-95, 1981-1 C.B. 332 (holding that 501(c)(4) organizations "primarily engag[ed] in activities that promote social welfare" maintain their tax-exempt status); JOHN FRANCIS REILLY & BARBARA A. BRAIG ALLEN, POLITICAL CAMPAIGN AND LOBBYING ACTIVITIES OF IRC 501(C)(4)(C)(5) AND (C)(6) ORGANIZATIONS, at L-2 (2003), available at <http://www.irs.gov/pub/irs-tege/eotopic103.pdf>; Brian P. Flaherty, Note, *Election*

zens *United* ruling, many outside groups have formed as Section 501(c) organizations, such as Crossroads Grassroots Policy Studies (“Crossroads GPS”), headed by former Bush campaign manager Karl Rove.<sup>34</sup> Consequently, by opening up more avenues for money to flow to parties and candidates subject to mandatory disclosure laws, the *McCutcheon* ruling enhances the public’s knowledge of the funding sources of federal election campaigns.<sup>35</sup>

Fourth, the *McCutcheon* ruling recognizes the unpopular but undeniable reality that money facilitates political speech. In the 1976 case of *Buckley v. Valeo*, the Court described contributions as merely a donor’s “symbolic expression of support” for a candidate or party.<sup>36</sup> But the *Buckley* court was wrong. In light of the enormous cost of campaign advertisements and related expenses,<sup>37</sup> money is essential to both political speech and participation in the democratic process.<sup>38</sup> Moreover, the amount of a campaign contribution signals the intensity of a donor’s support for a candidate.<sup>39</sup> The *McCutcheon* decision thus expands the freedom of expression and political association rights of campaign contributors.

Fifth, the Court’s adoption of a narrow definition of corruption shows wise restraint.<sup>40</sup> In *McCutcheon* the Supreme Court held that Congress may only regulate *quid pro quo*—i.e. something for something—corrupt bargains between candidates and contributors.<sup>41</sup> In the ruling’s most controversial holding, *McCutcheon* bars Congress from enacting campaign finance laws for any purpose other than preventing express acts of bribery or the appearance of

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2010: *The Loophole Created by 11 C.F.R. § 104.20(c)(9) and Citizens United and the Ineffectiveness of the Campaign-Finance-Law Framework in Iowa*, 97 IOWA L. REV. 239, 253 (2011).

34. Lee Aitken, *There’s No Way to Follow the Money*, THE ATLANTIC (Dec. 16, 2013, 2:01 PM), <http://www.theatlantic.com/politics/archive/2013/12/theres-no-way-to-follow-the-money/282394/>; Richard Hasen, *A Democracy Deficit at Americans Elect*, POLITICO (Nov. 9, 2011, 9:27 PM), <http://www.politico.com/news/stories/1111/67965.html>; Richard L. Hasen, *The Biggest Danger of Super PACs*, CNN (Jan. 9, 2012, 8:13 AM), <http://www.cnn.com/2012/01/09/opinion/hasen-super-pacs/index.html>. See also <http://www.crossroadsgps.org/about/>.

35. La Raja, *supra* note 28 (observing that because of the *McCutcheon* “[t]he identity of donors will be more transparent”).

36. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

37. See, e.g., Meg James, *TV still the favored medium for political ad spending*, L.A. TIMES, Oct. 29, 2010, available at <http://articles.latimes.com/2010/oct/29/business/la-fi-ct-political-ads-20101029>; see also Julie Bykowitz, *TV Stations Charge ‘Super-Gouge’ Ad Rates for Super-PACS*, BLOOMBERG (Aug. 14, 2012, 6:47 PM), <http://www.bloomberg.com/news/2012-07-26/tv-stations-charge-super-gouge-ad-rates-for-super-pacs.html>; Anthony Crupi, *In Their Prime: Broadcast Spot Costs Soar*, ADWEEK (June 22, 2011, 1:47 PM), <http://www.adweek.com/news/television/their-prime-broadcast-spot-costs-soar-132805>; Paul Steinhauer & Robert Yoon, *Cost to win congressional election skyrockets*, CNN (July 11, 2013, 4:03 PM), <http://www.cnn.com/2013/07/11/politics/congress-election-costs/>.

38. See, e.g., BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 226 (2001).

39. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1463 (2014) (Thomas, J., concurring).

40. *Id.* at 1450 (majority opinion).

41. *Id.* at 1441.

bribery.<sup>42</sup> Thus, Congress may not enact campaign finance regulations that have broader policy goals, such as taking money out of politics or leveling the financial playing field.<sup>43</sup>

Although much maligned,<sup>44</sup> the *quid pro quo* standard wisely keeps federal courts out of the inherently subjective and politically polarizing determination of when donor access and influence crosses the line into corruption. The dissent is undoubtedly correct that contributors who donate large amounts to parties and candidates receive enhanced opportunities to interact with officeholders.<sup>45</sup> But the essence of democracy is officeholder receptivity to constituent concerns, which makes efforts to circumscribe access and influence a dangerously intrusive, subjective, and open-ended task. Partisans often view the opposing party's campaign contributors as a malign and corrupting influence on democratic government, while viewing their own supporters as exercising a benign and constructive influence on the policymaking process. Thrusting the federal courts into ferociously partisan controversies over access and influence will not make the political system any less corrupt; instead, it will spread the contagion of partisan and ideological warfare to the judiciary. *McCutcheon* thus displays laudable restraint in embracing a narrow, clear, and objective definition of corruption.

## II. THE CASE OF MCCUTCHEON V. FEDERAL ELECTION COMMISSION

### A. *The Federal Election Campaign Act*

Efforts to regulate campaign finance date as far back as Theodore Roosevelt's administration.<sup>46</sup> In his 1904 State of the Union Message, President Roosevelt called on Congress to enact a campaign finance law "directed against bribery and corruption in Federal elections."<sup>47</sup> Although he left the law's details "to the wise discretion of the Congress," Roosevelt urged the House and Senate to "go as far as under the Constitution it is possible to go."<sup>48</sup> Congress responded in 1907 by enacting a ban on corporate contributions to federal candidates and national party committees.<sup>49</sup>

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42. *Id.*

43. *Id.* at 1441, 1450.

44. *See infra* Section IV.

45. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1470 (2014) (Breyer, J., dissenting) ("[W]ealthy contributors ... gain disproportionate 'access to federal lawmakers' and the ability to 'influenc[e] legislation.'").

46. DANIEL P. TOKAJI & RENATA E. B. STRAUSE, *THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS* 8 (2014); Jack Beatty, *A Sisyphean History of Campaign Finance Reform: A look at how we ended up back where we began*, *THE ATLANTIC* (July 3, 2007, 2:51 PM), <http://www.theatlantic.com/magazine/archive/2007/07/a-sisyphean-history-of-campaign-finance-reform/306066/>.

47. President Theodore Roosevelt, *Fourth Annual Message to Congress* (Dec. 6, 1904), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29545>.

48. *Id.*

49. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 509 (2007).

Federal regulation of campaign finance expanded dramatically in the early 1970s. In 1971 Congress adopted the Federal Election Campaign Act to require mandatory public disclosure of federal campaign contributions.<sup>50</sup> The Watergate scandal that erupted the following year prompted Congress to take an even more ambitious approach to FECA.<sup>51</sup> In 1974 Congress reshaped FECA through four sweeping amendments.<sup>52</sup> These amendments limited candidates to contributions of no more than \$1,000 per donor per election (the “base limits”); restricted each donor to an overall biennial limit of \$25,000 in total contributions to federal candidates and committees (the “aggregate limits”); imposed a ceiling on total campaign expenditures by presidential and congressional candidates; and created the Federal Election Commission to enforce FECA.<sup>53</sup>

Thus, under the 1974 amendments, FECA not only capped the amount that a single contributor could donate to a particular candidate campaign, but also imposed an overall limit on the total amount of contributions a single donor could make during each two-year election cycle. In the process, FECA established two distinct types of contribution limits: “base” limits and “aggregate” limits.<sup>54</sup> The term “base limits” refers to the caps imposed by FECA on individual campaign contributions made by a single donor to a single candidate or committee.<sup>55</sup> The term “aggregate limits” refers to the combined total amount of contributions that FECA permitted an individual donor to make during each two-year election cycle.<sup>56</sup>

In the landmark 1976 case of *Buckley v. Valeo*, the United States Supreme Court struck down FECA’s caps on candidate and party expenditures.<sup>57</sup> The Court held that the Constitution prohibited Congress from controlling “the quantity and range of debate on public issues in a political campaign.”<sup>58</sup> But,

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50. Federal Election Campaign Act of 1971, Pub. L. 92–225, 86 Stat. 3 (1972), relevant provision codified at 2 U.S.C. § 431.

51. VICTORIA A. FARRAR-MYERS & DIANA DWYRE, LIMITS AND LOOPHOLES: THE QUEST FOR MONEY, FREE SPEECH, AND FAIR ELECTIONS 11 (2008), at 11; Pamela S. Karlan, *Forty Years After Watergate: The Decades-Long Fight Against Political Money*, BOS. REV. (July 1, 2012), <https://www.bostonreview.net/karlans-court/forty-years-after-watergate-pamela-karlan>.

52. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 118 (2003); *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1443 (2014).

53. *McConnell*, 540 U.S. at 118; *McCutcheon*, 134 S. Ct. at 1443. FECA limited presidential candidates to total expenditures of no more than \$10 million during the primary campaign and \$20 million in the general election, and it also imposed expenditure ceilings on Congressional and Senate candidates. See *Buckley v. Valeo*, 424 U.S. 1, 54–55 (1976).

54. *Buckley*, 424 U.S. at 13, 58.

55. *McCutcheon*, 134 S. Ct. at 1443 (noting that the base limits “restrict how much money a donor may contribute to any particular candidate or committee” whereas the aggregate limits restrict “how many candidates or committees the donor may support, to the extent permitted by the base limits”).

56. See R. SAM GARRETT, CONG. RESEARCH SERV., R43334, CAMPAIGN CONTRIBUTION LIMITS: SELECTED QUESTIONS ABOUT MCCUTCHEON AND POLICY ISSUES FOR CONGRESS 2 (2014).

57. *Buckley*, 424 U.S. at 50 (1976).

58. *Id.* at 57.

in a crucial decision, the *Buckley* court upheld the constitutionality of FECA's base and aggregate contribution limits on donors.<sup>59</sup> The Court held that contribution limits served as the government's primary weapon against "the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions."<sup>60</sup> Accordingly, the Court concluded that although contribution limits burdened the right of political association, they were permissible so long as the government demonstrates "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."<sup>61</sup>

Surprisingly, the Supreme Court in *Buckley* gave the aggregate limits only fleeting attention. The Court devoted three cursory sentences to the Constitutional issues raised by the aggregate limits<sup>62</sup> and the parties did not even separately brief the issue.<sup>63</sup> The Court deemed the aggregate limits a "quite modest restraint upon protected political activity" that was justified by the need to prevent evasion of the base limits.<sup>64</sup> The justices feared that a donor could circumvent the base limit by making "huge contributions" to parties and PACs with the implicit understanding that the recipients would then direct the funds to the donor's intended candidate.<sup>65</sup>

In 1976 Congress further amended FECA by extending the base limits to donor contributions to non-candidate committees, such as the Republican and Democratic national party committees and PACs.<sup>66</sup> The purpose of the amendment was to prevent contributors from circumventing the base limits on candidate contributions by laundering contributions through non-candidate committees.<sup>67</sup> In 1981 the Supreme Court upheld FECA's extension of base limits to non-candidate committees, holding that "it is clear that this provision is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*."<sup>68</sup>

Congress revisited FECA in the early 2000s. The Bipartisan Campaign Reform Act of 2002 amended FECA once again, this time by raising the base and aggregate contribution limits and indexing them to inflation.<sup>69</sup> BCRA

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59. *Buckley v. Valeo*, 424 U.S. 1, 58 (1976); Elias & Berkon, *supra* note 22, at 374 ("*Buckley* has long been understood as creating a dichotomy between contribution limits (generally permissible) and expenditure limits (generally impermissible).").

60. *Buckley*, 424 U.S. at 58.

61. *Id.* at 25.

62. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1446 (2014).

63. *Buckley*, 424 U.S. at 38.

64. *Id.* at 38.

65. *Buckley v. Valeo*, 424 U.S. 1, 38 (1976).

66. *McCutcheon*, 134 S. Ct. at 1446.

67. *See Cal. Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 197-98 (1981) ("Congress enacted § 441a(a)(1)(C) in part to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*.").

68. *Id.* at 199.

69. *See* JOSEPH E. CANTOR & L. PAIGE WHITAKER, CONG. RESEARCH SERV., RL31402, BIPARTISAN CAMPAIGN REFORM ACT OF 2002: A SUMMARY AND COMPARISON WITH PREVIOUS LAW CRS-2 (2004).

raised the base contribution limits to \$2,000 per candidate per election.<sup>70</sup> BCRA's changes to the aggregate limits created a complex set of new regulations. BCRA increased the aggregate limits to a maximum of \$37,500 in contributions by a single donor to federal candidates,<sup>71</sup> and indexed all the limits to inflation.<sup>72</sup> In addition, BCRA set a biennial maximum of \$57,500 in total contributions by a single donor to non-candidate political committees, with a proviso that no more than \$37,500 of that amount could be contributed to state and local political committees.<sup>73</sup>

Thus, although BCRA raised the dollar amounts, FECA's reliance on relatively low contribution limits remained in place. Moreover, to augment the base and aggregate limits, BCRA eliminated alternative funding sources traditionally relied on by the political parties. In particular, BCRA closed a long-standing loophole by banning "soft money,"<sup>74</sup> a term used to describe contributions received by the national party committees that were used for voter registration and mobilization efforts, and not for advertisements that expressly advocated for a federal candidate's election or defeat.<sup>75</sup> By banning "soft money," BCRA effectively required that all contributions to political parties comply with FECA's contribution limits.<sup>76</sup>

BCRA also created a special procedure for adjudicating federal election law controversies. The act established a three-judge panel in the U.S. District Court for the District of Columbia with jurisdiction over all constitutional challenges seeking injunctive relief from Federal Election Commission decisions and actions.<sup>77</sup> BCRA assigned to the U.S. Supreme Court exclusive appellate jurisdiction over such cases, thus giving losing litigants the opportunity to appeal directly to the nation's high court.<sup>78</sup>

BCRA faced legal challenges almost immediately. In the 2003 case of *McConnell v. Federal Election Commission*, the Supreme Court upheld BCRA's ban on soft money.<sup>79</sup> The Court found "substantial evidence to sup-

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70. 2 U.S.C. § 441a(a)(1).

71. 2 U.S.C. § 441a(a)(3)(A).

72. See CANTOR & WHITAKER, *supra* note 69, at CRS-2, 3; *Contribution Limits 2013-14*, FED. ELECTION COMM'N, [http://www.fec.gov/ans/answers\\_general.shtml#How\\_much\\_can\\_I\\_contribute](http://www.fec.gov/ans/answers_general.shtml#How_much_can_I_contribute).

73. 2 U.S.C. § 441a(a)(3)(B).

74. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 122–26 (2003) (noting that the FEC interpreted contributions for "get-out-the-vote drives and generic party advertising" as exempt from FECA's contribution limits); TOKAJ & STRAUSE, *supra* note 46, at 13.

75. See *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1469 (2014) (Breyer, J., dissenting) ("'Soft money' referred to funds that, prior to BCRA, were freely donated to parties for activities other than directly helping elect a federal candidate—activities such as voter registration, 'get out the vote' drives, and advertising that did not expressly advocate a federal candidate's election or defeat.").

76. *McConnell*, 540 U.S. at 126.

77. See Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, § 403(a)(1), 116 Stat. 114 (codified at 2 U.S.C. § 437h (2002)); 28 U.S.C. § 2284.

78. See BCRA §403(a)(3).

79. *McConnell*, 540 U.S. at 153–54.

port Congress' determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption."<sup>80</sup> By affirming the ban on soft money, *McConnell* significantly restricted the ability of political parties to raise funds.<sup>81</sup>

However, in 2010, the Supreme Court dealt a momentous defeat to BCRA's scope and reach.<sup>82</sup> In *Citizens United v. Federal Election Commission*, a sharply divided Supreme Court struck down BCRA's prohibition on the use of corporate general treasury funds for independent campaign expenditures.<sup>83</sup> In affirming the right of corporations to engage in electioneering communications, the majority in *Citizens United* defined the battle against *quid pro quo* corruption as the *only* constitutionally valid basis for the government to impose contribution limits.<sup>84</sup>

The clear implication of the *Citizens United* ruling was that Congress could not impose contribution limits on outside groups, such as Super PACs, since by definition independent expenditure groups do not contribute to candidates or party committees.<sup>85</sup> Although Super PACs and other outside groups engage in express advocacy for the election or defeat of candidates, federal law prohibits them from contributing to—or coordinating their advertising with—candidates, parties, or traditional PACs.<sup>86</sup> Consequently, the reasoning of *Citizens United* appeared to indicate that independent campaign expenditures by outside groups cannot give rise to *quid pro quo* corruption.

The D.C. Circuit Court of Appeals interpreted *Citizens United* in precisely such terms.<sup>87</sup> In *SpeechNow.org v. Federal Election Commission*, the D.C. Circuit struck down FECA's base contribution limits as applied to outside groups engaged in independent expenditures.<sup>88</sup> As the D.C. Circuit explained in *SpeechNow*, the Supreme Court in *Citizens United* "effectively held that there is no corrupting 'quid' for which a candidate might in exchange offer a

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80. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 154 (2003).

81. Elias & Berkon, *supra* note 22, at 378; Kelner & La Raja, *supra* note 23; La Raja, *supra* note 28.

82. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

83. *Id.* at 365–66.

84. *Id.* at 359–60 “When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption” and the “appearance . . . of quid pro quo corruption”).

85. *See id.* at 357.

86. *See* 11 C.F.R. § 100.16(a) (defining independent expenditures as a communication “expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party or its agents”); *Super PACs and Other Independent Expenditure Filers*, FED. ELECTION COMM’N, [http://www.fec.gov/portal/super\\_pacs.shtml](http://www.fec.gov/portal/super_pacs.shtml).

87. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 695 (D.C. Cir. 2010) (“Given this analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as *SpeechNow*.”).

88. *Id.* at 694–95.

corrupt ‘quo’” when the donor contributes to an independent group and not a candidate, party, or traditional PAC.<sup>89</sup>

In response to *Citizens United* and *Speechnow*, the FEC formally declared that FECA’s contribution limits did not apply to outside groups that engaged exclusively in independent expenditures.<sup>90</sup> The FEC’s advisory opinion cleared the way for a surge of independent expenditures in the 2012 presidential campaign.<sup>91</sup> In all, Super PACs and other outside groups accounted for nearly \$1 billion in campaign spending that year.<sup>92</sup>

Nevertheless, despite *Citizens United*, the base and aggregate contribution limits on candidates and parties remained in place. The disconnect between the severe restriction on donor contributions to candidates and parties and the complete absence of dollar limits on donor contributions to Super PACs set the stage for a new challenge to federal campaign finance law.

### **B. Shaun McCutcheon’s Challenge to FECA**

The case of *McCutcheon v. Federal Election Commission* arose from a lawsuit brought by Shaun McCutcheon, an Alabama businessman.<sup>93</sup> In the 2011-12 election cycle, McCutcheon contributed a total of \$33,088 to sixteen different candidates for federal office.<sup>94</sup> The amounts ranged from \$1,776 to \$2,500.<sup>95</sup> He also contributed \$5,328 to three Republican Party federal committees, \$2,000 to a political action committee, and \$20,000 to the federal account of the Alabama Republican Party.<sup>96</sup>

McCutcheon sought to contribute even more. He wanted to give \$21,312 (in amounts of \$1,776 per candidate) to twelve Republican Congressional candidates and he also wanted to give a total of \$75,000 to the three Republican Party federal committees—the Republican National Committee (“RNC”), the Republican National Republican Senatorial Committee, and the National Republican Congressional Committee.<sup>97</sup> In all, McCutcheon sought to make candidate contributions in the aggregate amount of \$54,400 and party committee

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89. *Id.*

90. See Matthew S. Petersen, AO 2010-11 (F.E.C.), 2010 WL 3184269, at \*1 (July 22, 2010); Matthew S. Petersen, AO 2010-09 (F.E.C.), 2010 WL 3184267, at \*1 (July 22, 2010).

91. Smith, *supra* note 25, at 603, 604–05.

92. Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1916 (2013); see Michael Beckel, *Super Pacs And The 2012 Presidential Election: What Happened? What’s In Store?* 49 WILLAMETTE L. REV. 655 (2013).

93. Colleen McCain Nelson, *Alabama Businessman Pursued Campaign-Finance Case*, WALL ST. J., Apr. 3, 2014, available at <http://online.wsj.com/news/articles/SB10001424052702303847804579477941932485988?KEYWORDS=mccutcheon&mg=reno64-wsj>.

94. *McCutcheon v. Fed. Election Comm’n*, 893 F. Supp. 2d 133, 136 (D.D.C. 2012).

95. *Id.*

96. *Id.*

97. *Id.*

contributions in the aggregate amount of \$75,000.<sup>98</sup> He also wanted to make similar contributions in future election cycles.<sup>99</sup>

However, McCutcheon's intentions were thwarted by FECA's biennial aggregate limits, which in the 2011-12 cycle limited contributors to a maximum of \$46,200 in candidate contributions and a maximum of \$70,800 in contributions to party committees and traditional PACs.<sup>100</sup>

McCutcheon did not object to the base limits, but he did take issue with the aggregate limits.<sup>101</sup> In March of 2012 he wrote the FEC to ask whether he could make an aggregated total of \$54,400 in campaign contributions to federal candidates during the 2012 election cycle.<sup>102</sup> In April of that year, the FEC denied McCutcheon's request on the grounds that BCRA clearly capped aggregate contributions to candidates at \$46,200.<sup>103</sup>

In June 2012 McCutcheon brought suit against the FEC before a three-judge panel in the U.S. District Court for the District of Columbia.<sup>104</sup> McCutcheon asked the court to strike down FECA's aggregate limits on First Amendment grounds and he also asked the court to enjoin the FEC from enforcing the aggregate limits.<sup>105</sup> The RNC joined McCutcheon as a co-plaintiff, pointing out that the aggregate limits forced it to turn down or return contributions.<sup>106</sup>

The three-judge panel granted the FEC's motion to dismiss the case.<sup>107</sup> The district court rejected the plaintiffs' argument that the aggregate limits were both unconstitutionally low and unconstitutionally overbroad.<sup>108</sup> The court held that the aggregate limits advanced the government's anticorruption interest by preventing contributors from evading the base limits.<sup>109</sup>

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98. *Id.*

99. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1443 (2014).

100. *McCutcheon*, 893 F. Supp. 2d at 137.

101. Lyle Denniston, *Freeing more political money*, SCOTUSBLOG (April 2, 2014, 12:15 PM), <http://www.scotusblog.com/2014/04/opinion-analysis-freeing-more-political-money/>.

102. Advisory Opinion from Caroline C. Hunter, Chair of the Fed. Election Comm'n, to Stephen M. Hoersting & Jerad Najvar 1-2 (Apr. 27, 2012), available at <http://saos.fec.gov/aodocs/AO%202012-14.pdf>.

103. *See id.* at 3-4. The FEC lacks the authority to review the constitutionality of federal statutes and thus was obligated to apply BCRA's limits to McCutcheon. *See also* Fed. Election Comm'n Litigation Record, *McCutcheon et al. v. FEC*, FEDERAL ELECTION COMMISSION, <http://www.fec.gov/pages/fecrecord/2012/august/mccutcheonvfec.shtml> ("In Advisory Opinion 2012-14, the Commission noted that it lacked the authority to review the Act's constitutionality and was, in fact, obligated to enforce it.").

104. *McCutcheon v. Fed. Election Comm'n*, 893 F. Supp. 2d 133 (D.D.C. 2012); *see* Fed. Election Comm'n Litigation Record, *supra* note 103.

105. *McCutcheon*, 893 F. Supp. 2d at 136-37; *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1443 (2014).

106. *McCutcheon*, 893 F. Supp. 2d at 136; *McCutcheon*, 134 S. Ct. at 1443.

107. *McCutcheon*, 893 F. Supp. 2d at 134.

108. *Id.* at 140-41.

109. *Id.* at 140 ("[S]o, we cannot ignore the ability of aggregate limits to prevent evasion of the base limits."); *McCutcheon*, 134 S. Ct. at 1443 ("[T]he District Court concluded that the ag-

The circumvention threat posed by joint fundraising committees (“JFCs”) particularly alarmed the district court.<sup>110</sup> Under federal law, candidates, political parties, or traditional PACs may establish JFCs to raise money simultaneously, such as through a joint fundraising event.<sup>111</sup> The district court warned that without aggregate limits, large donor checks might be laundered through JFCs to support a single candidate far in excess of the base limits.<sup>112</sup> The court emphasized that the aggregate and base limits represented “a coherent system rather than merely a collection of individual limits” and thus it concluded that maintaining the aggregate limits was essential to preserving the integrity of the base limits.<sup>113</sup>

But the district court recognized the gravity of the issues involved and the potential that *Citizens United* had shifted the ground beneath it. The court expressed concern over “the troubling possibility that *Citizens United* undermined the entire contribution limits scheme,” but it concluded that “whether that case will ultimately spur a new evaluation of *Buckley* is a question for the Supreme Court, not us.”<sup>114</sup>

Following the district court’s ruling, the plaintiffs entirely bypassed the District of Columbia Circuit Court of Appeals.<sup>115</sup> As provided for by BCRA, McCutcheon and the RNC appealed directly to the United States Supreme Court.<sup>116</sup> The *McCutcheon* case arrived at the nation’s high court in October 2013.<sup>117</sup>

### III. THE RULING

#### A. *The Majority’s Holding in McCutcheon v. FEC*

By the time McCutcheon’s case reached the Supreme Court, the FEC had adjusted the contribution thresholds.<sup>118</sup> To account for inflation, the FEC slightly raised the base and aggregate limits. For the 2013-14 election cycle,

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gregate limits survived First Amendment scrutiny because they prevented evasion of the base limits.”).

110. *McCutcheon v. Fed. Election Comm’n*, 893 F. Supp. 2d 133, 140 (D.D.C. 2012).

111. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1455 (2014); Robert K. Kellner, *The Practical Consequences of McCutcheon: The Decision Leaves Our Campaign Finance System Largely Undisturbed*, 127 HARV. L. REV. F. 380, 381 (2014) (“The basic concept is that a group of candidates, political party committees, or political action committees can choose to raise money jointly, often at a single fundraising event or series of events.”). JFCs are governed by 11 C.F.R. § 102.17(c)(5).

112. *McCutcheon*, 893 F. Supp. 2d at 140.

113. *Id.*

114. *Id.* at 142.

115. 28 U.S.C. § 1253; Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114 (codified at 2 U.S.C. § 437h (2002)).

116. *McCutcheon*, 134 S. Ct. at 1443.

117. Supreme Court of the United States, *Hearing List For the Session Beginning October 7, 2013*, available at [http://www.supremecourt.gov/oral\\_arguments/hearinglists/HearingList-October2013.pdf](http://www.supremecourt.gov/oral_arguments/hearinglists/HearingList-October2013.pdf).

118. 2 U.S.C. § 441a(c) (2014) (“Increases on limits based on increases in price index”).

FECA's base limits restricted individual donors to a maximum of \$5,200 per candidate per election cycle (\$2,600 for the primary and \$2,600 for the general election); a maximum of \$32,400 in contributions to national party committees per calendar year; a maximum of \$10,000 to state, district, and local party committees per calendar year; and a maximum of \$5,000 to traditional PACs per calendar year.<sup>119</sup> FECA also imposed a per election base limit of \$5,000 on contributions by party committees and PACs to individual candidates.<sup>120</sup> In short, the contribution limits for the 2013-14 election cycle looked very similar to the 2011-12 election cycle, but with modest increases in the dollar amounts to account for inflation.

The only contribution limits at issue in the *McCutcheon* case were the aggregate limits.<sup>121</sup> For the 2013-14 election cycle, FECA established an aggregate limit of \$123,200 in total campaign contributions by a single donor.<sup>122</sup> FECA imposed even lower limits for particular types of federal contributions. FECA set a cap on each individual donor of \$48,600 in total contributions to federal candidates, and a cap of \$74,600 in total contributions by a single donor to non-candidate political committees.<sup>123</sup> In addition, FECA provided that no more than \$48,600 of the \$74,600 could be contributed to state or local party committees.<sup>124</sup>

Thus, for the 2014 midterm elections, once a donor had contributed a total of \$48,600 to candidates and \$74,600 to non-candidate committees, the donor was absolutely prohibited from making any additional contributions to candidates, parties, and traditional PACs until the next election cycle began in January 2015.

As the justices heard oral arguments in October 2013, the case attracted extensive media coverage.<sup>125</sup> Many advocates of campaign finance regulation viewed *McCutcheon*'s challenge to FECA's aggregate limits with alarm. Fred Wertheimer, the former president of the liberal public advocacy group Common Cause, declared: "The stakes in this case are enormous . . . If this court were to strike down the aggregate limits . . . it would create a new system of legalized bribery, which we haven't seen for decades."<sup>126</sup> Likewise, Solicitor

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119. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1442 (2014); 2 U.S.C. § 441a(a)(1); 78 Fed. Reg. 8532 (2013); *Contribution Limits 2013-14*, FED. ELECTION COMM'N, [http://www.fec.gov/ans/answers\\_general.shtml#How\\_much\\_can\\_I\\_contribute](http://www.fec.gov/ans/answers_general.shtml#How_much_can_I_contribute).

120. *McCutcheon*, 134 S. Ct. at 1442.

121. *Id.*

122. *Id.* at 1443.

123. *Id.*

124. *Id.*

125. See, e.g., Adam Liptak, *Justices to Weigh Key Limit on Political Donors*, N.Y. TIMES, Oct. 1, 2013, available at <http://www.nytimes.com/2013/10/02/us/politics/justices-to-weigh-key-limit-on-political-donors.html>; Fredreka Schouten, *Supreme Court weighs limits on campaign donations*, USA TODAY, Oct. 3, 2013, available at <http://www.usatoday.com/story/news/politics/2013/10/03/shaun-mccutcheon-supreme-court-campaign-finance-next-citizens-united/2914415/>.

126. Nina Totenberg, *Supreme Court Hears Another Challenge To Campaign Finance Law*,

General Donald Verilli warned that overturning the aggregate limits would cause “massive upheaval in this important area of law.”<sup>127</sup>

But the defenders of FECA’s aggregate limits failed to persuade a majority of the justices. On April 2, 2014, the Supreme Court handed down its decision.<sup>128</sup> The Court ruled 5-4 that FECA’s aggregate limits violated the First Amendment.<sup>129</sup> The Supreme Court thus reversed the district court’s ruling and awarded a historic victory to Shaun McCutcheon and the RNC.<sup>130</sup> The Court’s decision in *McCutcheon* meant that the FEC could no longer enforce aggregate limits against campaign contributors.<sup>131</sup>

The Supreme Court majority in *McCutcheon* was identical to that of the *Citizens United* decision four years before.<sup>132</sup> In *McCutcheon* Justices Roberts, Scalia, Thomas, Alito, and Kennedy voted to strike down the aggregate limits.<sup>133</sup> They were the same five justices who ruled against the FEC’s attempt to impose contribution limits on independent expenditure groups in *Citizens United*.<sup>134</sup> Justices Breyer, Ginsburg, Kagan, and Sotomayor dissented from the majority’s ruling in *McCutcheon*.<sup>135</sup> Thus, all the Republican-nominated justices voted to invalidate the campaign finance regulation at issue in *McCutcheon* and all of the Democratic-nominated justices voted to uphold it. For the second time in four years, a major and controversial campaign finance case had divided the Supreme Court along ideological lines.<sup>136</sup>

Crucially, the Court’s decision left FECA’s base limits untouched.<sup>137</sup> As Chief Justice Roberts observed, “This case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible objective of combatting corruption.”<sup>138</sup> Consequently, all of FECA’s base limits on individual campaign contributions remained in force for the 2014 Congressional elections.<sup>139</sup>

But 40 years of aggregate limits were over. While preserving the base limits on federal contributions, the Court’s ruling in *McCutcheon* freed con-

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NPR (Oct. 8, 2013, 3:02 AM), <http://www.npr.org/2013/10/08/230218039/supreme-court-hears-another-challenge-to-campaign-finance-law>.

127. Liptak, *supra* note 125.

128. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1434 (2014).

129. *Id.* at 1442.

130. *Id.* at 1462.

131. See *FEC McCutcheon Case Summary*, *supra* note 17.

132. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2014); *McCutcheon*, 134 S. Ct. at 1437.

133. *McCutcheon*, 134 S. Ct. at 1437.

134. *Citizens United*, 558 U.S. at 310.

135. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1465 (2014).

136. Adam Liptak, *Supreme Court Strikes Down Overall Political Donation Cap*, NY TIMES, Apr. 2, 2014, at 1 (“The 5-to-4 decision, with the court’s more conservative members in the majority, echoed *Citizens United*, the 2010 decision that struck down limits on independent campaign spending by corporations and unions.”).

137. *McCutcheon*, 134 S. Ct. at 1442.

138. *Id.*

139. See *FEC McCutcheon Case Summary*, *supra* note 17.

tributors to donate to as many candidates and political committees as they liked.<sup>140</sup> For the first time since the Nixon Administration, federal law no longer imposed an overall cap on the total amount of campaign contributions made by individual donors.<sup>141</sup>

### **B. *The Plurality's Reasoning in McCutcheon v. FEC***

In *McCutcheon*, five justices—Roberts, Scalia, Thomas, Alito, and Kennedy—agreed on the core holding that FECA's aggregate limits violated the First Amendment.<sup>142</sup> But like the *Buckley* court before it, the *McCutcheon* court did not adopt a definitive standard of review for contribution limits. In the 1976 *Buckley* case, the Supreme Court applied an "exacting" standard of review to expenditure limits, but applied the "lesser" standard of "rigorous" review to contribution limits.<sup>143</sup> The *Buckley* court asserted that under its "rigorous" standard of review, contribution limits should be upheld as long as they were "closely drawn" to advance the government's anticorruption interest.<sup>144</sup>

In assessing the Constitutionality of the aggregate limits, the *McCutcheon* court defined the two *Buckley* standards as "strict scrutiny" review of expenditure limits and the "closely drawn" test for contribution limits.<sup>145</sup> But the majority in *McCutcheon* saw no need to "parse the differences between the two standards" relied on by the *Buckley* court.<sup>146</sup> The five justices in the *McCutcheon* majority held that under either standard, aggregate limits failed to pass Constitutional muster.<sup>147</sup> They declared that FECA's aggregate limits "intrude without justification on a citizen's ability to exercise 'the most fundamental First Amendment activities.'"<sup>148</sup> Accordingly, the Court held that "aggregate limits are therefore invalid under the First Amendment."<sup>149</sup>

But not all the justices in the majority were pleased with the *McCutcheon* court's reasoning. In a concurring opinion, Justice Thomas argued that the Supreme Court should have gone even further than it did by applying strict scrutiny review to all contribution limits, not just aggregate limits.<sup>150</sup> Thomas thus viewed *McCutcheon* as a missed opportunity to invalidate the base limits.<sup>151</sup>

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140. *Id.*

141. On the modern history of campaign finance regulation, see RAYMOND LA RAJA, SMALL CHANGE: MONEY, POLITICAL PARTIES, AND CAMPAIGN FINANCE REFORM 144–46 (2011); see also L. PAIGE WHITAKER, CRS REPORT RL30669, THE CONSTITUTIONALITY OF CAMPAIGN FINANCE REGULATION: BUCKLEY V. VALEO AND ITS SUPREME COURT PROGENY (2008).

142. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1462 (2014).

143. *Id.* at 1444 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21, 44–45 (1976)).

144. *Buckley*, 424 U.S. at 25.

145. *McCutcheon*, 134 S. Ct. at 1446.

146. *Id.*

147. *Id.*

148. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1446 (2014) (quoting *Buckley*, 424 U.S. at 14).

149. *Id.* at 1442.

150. *Id.* at 1464 (Thomas, J., concurring) ("This case represents yet another missed opportunity to right the course of our campaign finance jurisprudence by restoring a standard that is

Consequently, Chief Justice Roberts’s opinion only represented a plurality of the justices, not a majority. Whereas Justices Scalia, Alito, Kennedy, and Thomas joined Roberts in striking down the aggregate limits, only three associate justices—Scalia, Alito, and Kennedy—agreed to the reasoning behind Chief Justice Roberts’ opinion.<sup>152</sup>

The plurality opinion consisted of four main arguments. First, it contended that statutory and regulatory changes since the 1970s rendered *Buckley v. Valeo* of limited precedential value.<sup>153</sup> Second, it asserted that FECA’s aggregate limits burdened the First Amendment rights of freedom of expression and association.<sup>154</sup> Third, the plurality argued that under the First Amendment, the government may only regulate campaign finance for the purpose of battling *quid pro quo* corruption and its appearance.<sup>155</sup> Finally, the plurality concluded that the government’s anti-circumvention rationale was a constitutionally inadequate justification for the burdens that aggregate limits impose on campaign contributors’ First Amendment rights.<sup>156</sup>

### 1. Buckley’s Limited Precedential Value

First and foremost, Chief Justice Roberts’ plurality opinion emphasized that the 1976 *Buckley v. Valeo* decision did not control the outcome in *McCutcheon*.<sup>157</sup> The 139-page *Buckley* opinion devoted only three substantive sentences to the aggregate limits, which demonstrated that the *Buckley* court never fully explored the issue.<sup>158</sup>

In addition, American campaign finance laws and regulations had changed substantially since 1976, the year of the *Buckley* decision.<sup>159</sup> According to the *McCutcheon* plurality, post-*Buckley* reforms undermined *Buckley*’s precedential value because “statutory safeguards against circumvention have been considerably strengthened since *Buckley* was decided.”<sup>160</sup> By far the most relevant

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faithful to the First Amendment.”).

151. *Id.* (Thomas, J., concurring) (observing that invalidating the aggregate limits but not applying strict scrutiny to all contributions limits places the Court in a “‘halfway house’ of our own design”).

152. *Id.* at 1440.

153. *Id.* at 1446 (“Although *Buckley* provides some guidance, we think that its ultimate conclusion about the constitutionality of the aggregate limit in place under FECA does not control here.”).

154. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1448–50 (2014).

155. *Id.* at 1441 (“Any regulation must instead target what we have called ‘quid pro quo’ corruption or its appearance.”).

156. *Id.* at 1456 (“The improbability of circumvention indicates that the aggregate limits instead further the impermissible objective of simply limiting the amount of money in political campaigns.”).

157. *Id.* at 1446 (“Although *Buckley* provides some guidance, we think that its ultimate conclusion about the constitutionality of the aggregate limit in place under FECA does not control here.”).

158. *Id.*

159. *Id.*

160. *Id.* (noting “both statutory additions and the introduction of a comprehensive regulatory scheme”).

and important change consisted of anti-circumvention measures adopted by Congress and the FEC in the years following the *Buckley* decision.<sup>161</sup> For example, the post-*Buckley* amendments to FECA extended the base contribution limits to include contributions made to parties and traditional PACs, not just contributions to candidates.<sup>162</sup>

The changes deeply impressed Chief Justice Roberts and the other justices in the plurality. The plurality observed that in 2014, unlike 1976, “a donor cannot flood the committee with ‘huge’ amounts of money so that each contribution the committee makes is perceived as a contribution from him. Rather, the donor may contribute only \$5,000 to the committee, which hardly raises the specter of abuse that concerned the Court in *Buckley*.”<sup>163</sup> This was a crucial fact in the plurality’s view, because it created “an additional hurdle for a donor who seeks both to channel a large amount of money to a particular candidate and to ensure that he gets the credit for doing so.”<sup>164</sup> Equally important, Congress had also added an “antiproliferation rule” amendment to FECA, which prohibited donors from controlling multiple PACs.<sup>165</sup>

The FEC’s significantly enhanced regulatory role also influenced the plurality’s dim view of *Buckley*’s precedential value. The plurality noted that shortly after the *Buckley* decision, the FEC promulgated extensive regulations that expanded the definition of “earmarking” to “include any designation ‘whether direct or indirect, express or implied, oral or written.’”<sup>166</sup> As one example of many, FEC regulations now prohibit donors from contributing to a single-candidate political committee if the donor has already contributed to the candidate’s campaign committee.<sup>167</sup> Moreover, in a catch-all provision, FEC regulations expressly bar donors from giving to a PAC or party committee when the donor knows that a “substantial portion” of the contribution will benefit a candidate to whom the donor has already contributed.<sup>168</sup>

Therefore, in the plurality’s view, the *McCutcheon* case confronted the Supreme Court with a fundamentally different legal and factual context than that which faced the *Buckley* court in 1976.<sup>169</sup> Accordingly, Chief Justice Roberts concluded that, “this case cannot be resolved merely by pointing to three sentences in *Buckley*.”<sup>170</sup>

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161. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1446–47 (2014).

162. *Id.* at 1446.

163. *Id.* (citing 2 U.S.C. § 441a(a)(5); 11 C.F.R. § 100.5(g)(4)).

164. *Id.*

165. *Id.*

166. *Id.* at 1447.

167. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1447 (2014).

168. *Id.* (citing 11 C.F.R. § 110.1(h)(2)).

169. *Id.* at 1447 (observing that *McCutcheon* posed the Supreme Court “with a different statute and different legal arguments, at a different point in the development of campaign finance regulation” than the issues that faced the *Buckley* court in 1976).

170. *Id.*

## 2. The Constitutional Burden Imposed by Aggregate Limits

Having established that the *Buckley* case did not bind it, the plurality moved on to the fundamental constitutional issues facing the Court in *McCutcheon*: freedom of expression and freedom of association.<sup>171</sup>

The *Buckley* court itself conceded that campaign finance regulations burden First Amendment rights because a campaign contribution “serves as a general expression of support for the candidate and his views.”<sup>172</sup> But in *Buckley* the Court viewed the burden imposed by the aggregate limits as relatively modest in terms of the overall impact on the First Amendment. It described contribution limits as “only a marginal restriction upon the contributor’s ability to engage in free communication.”<sup>173</sup> Moreover, the *Buckley* court saw no evidence that contribution limits had a “dramatic adverse effect on the funding of campaigns and political associations” since contribution limits did not “reduce the total amount of money potentially available to promote political expression.”<sup>174</sup>

The *McCutcheon* court took a completely different view. It deemed the aggregate limits a major burden because they restricted campaign contributors’ freedom to support a large number of federal candidates.<sup>175</sup> As the *McCutcheon* plurality explained, contributing money to candidates is a form of political speech because it signals the donor’s support for a candidate and his or her policies.<sup>176</sup> Limiting the number of candidates a donor may support is thus a clear and significant restriction on speech. As the *McCutcheon* plurality emphasized: “The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.”<sup>177</sup>

Yet, FECA’s aggregate limits purported to do exactly that. By limiting each donor to a maximum of \$48,600 in total contributions to federal candidates, FECA barred donors from giving the maximum individual contribution amount of \$5,200 to more than nine candidates.<sup>178</sup> Contributions of \$5,200 each to nine candidates would leave the donor with only \$1,800 left in permissible contributions to federal campaigns. The plurality pointed out that the inevitable result was that the donor “must limit the number of candidates he supports, and may have to choose which of several policy concerns he will advance—clear First Amendment harms.”<sup>179</sup>

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171. *Id.* at 1448.

172. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 21–22 (1976)).

173. *Buckley*, 424 U.S. at 20.

174. *Id.* at 21–22.

175. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1448–49 (2014) (observing that the aggregate limits required a donor to “limit the number of candidates he supports”).

176. *Id.*

177. *Id.* at 1448.

178. *Id.* at 1443, 1452.

179. *Id.* at 1448–49.

Crucially, the plurality rejected the Obama administration's argument that contribution limits did not violate the First Amendment because they permitted donors to make small, symbolic contributions to many candidates.<sup>180</sup> The administration's argument echoed the *Buckley* court's contention that the "quantity of communication by the contributor does not increase perceptibly with the size of his contribution."<sup>181</sup>

But common sense suggests just the opposite to be true. A \$1,000 contribution evinces a far higher level of support for a candidate than a \$1 contribution. To define those contributions as symbolically equivalent to one another ignores the obvious fact that donors give more to candidates for whom they feel more enthusiasm. A \$1,000 contribution thus sends a very different message than a \$1 contribution. Accordingly, the *McCutcheon* plurality sensibly declared:

"It is no answer to say that the individual can simply contribute less money to more people. To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process."<sup>182</sup>

Equally significant, the government lacked a reasonable justification for prohibiting donors from contributing the maximum base amount to more than nine candidates.<sup>183</sup> The government contended that the aggregate limits were necessary to prevent donors from exercising a corrupting influence on candidates. But why draw the line at contributions to nine candidates? Why not draw it at five candidates or fifty candidates or one hundred? The arbitrary nature of the government's line drawing raised the *McCutcheon* court's ire. The plurality simply saw no rational basis for the government's claim that maximum base limit contributions to nine candidates did not give rise to corruption, whereas maximum contributions to ten candidates did. As Chief Justice Roberts put it: "If there is no corruption concern in giving nine candidates up to \$5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given \$1,801, and all others corruptible if given a dime."<sup>184</sup>

Most importantly, the plurality emphasized the critical point that public support for contribution limits in no way changed the constitutional implications of campaign finance laws.<sup>185</sup> After all, the whole point of the First Amendment is to protect unpopular speech and defend unpopular political associations.<sup>186</sup> First Amendment protections are most important when the

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180. *Id.* at 1449.

181. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

182. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1449 (2014).

183. *Id.* at 1452.

184. *Id.*

185. *Id.* at 1441 (2014) (noting that many people "would be delighted to see fewer television commercials touting a candidate's accomplishments or disparaging an opponent's character").

186. *Id.*

speaker or the speech is unpopular. As the plurality emphasized in *McCutcheon*: “If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition.”<sup>187</sup> Moreover, wealthy contributors are as entitled to First Amendment freedoms as anyone else. The plurality made precisely that point when it observed that freedom of expression and freedom of political association apply equally to “street corner orators” and wealthy contributors.<sup>188</sup> At no time may the government punish a contributor for “robustly” exercising First Amendment rights.<sup>189</sup>

The cumulative effect of those First Amendment concerns rendered the plurality deeply skeptical of the strained logic at work in the aggregate limits. The plurality’s skepticism also reflected its concern with a separate but related Constitutional issue. The plurality warned that in defending FECA’s aggregate limits, the government defined “corruption” in terms far broader than the Constitution permits.

### 3. The Quid Pro Quo Corruption Standard

Since the *Buckley v. Valeo* decision in 1976, the Supreme Court has permitted Congress to “regulate campaign contributions to protect against corruption or the appearance of corruption.”<sup>190</sup> To that end, the Supreme Court identifies *quid pro quo* “something for something” corrupt bargains between contributors and candidates as a particular source of concern: “To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.”<sup>191</sup> In a 1985 campaign finance case, the Supreme Court elaborated further when it declared: “The hallmark of corruption is the *financial quid pro quo*: dollars for political favors.”<sup>192</sup>

*Quid pro quo* corruption involves overt acts of bribery, such as an officeholder’s promise to take official action on a contributor’s behalf in return for a contribution to the candidate’s campaign. But blatant acts of bribery are not the only way for contributors to exercise influence over officeholders. Wealthy campaign contributors who support a large number of candidates undeniably receive enhanced access to officeholders.<sup>193</sup> Many see that influence and access as a source of corruption.<sup>194</sup> Yet, is the effort to reduce the overall influence of campaign contributors a constitutionally permissible goal of campaign finance laws?

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187. *Id.*

188. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1448 (2014).

189. *Id.* at 1449 (quoting *Davis v. Federal Election Comm’n*, 554 U.S. 724, 739 (2008)).

190. *Id.* at 1441.

191. *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976).

192. *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (emphasis added).

193. *McCutcheon*, 134 S. Ct. at 1441 (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 360 (2014)); *Id.* at 1450–51.

194. *Id.* at 1469–70 (Breyer, J., dissenting).

The answer, according to the Roberts court, is no. In *McCutcheon*, the plurality emphatically rejected the notion that the Constitution permits the government to criminalize campaign contributors' general access to and influence with members of Congress.<sup>195</sup> As the plurality explained, campaign finance regulations "may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford."<sup>196</sup> Likewise, the plurality declared that "[n]o matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates.'"<sup>197</sup>

But why not? After all, the public overwhelmingly supports campaign finance restrictions on wealthy contributors.<sup>198</sup> The reason is because the Court in *McCutcheon* held that the battle against *quid pro quo* corruption—i.e. "something for something" illicit bargains<sup>199</sup>—and the appearance of corruption provide the only constitutional basis for campaign finance regulations.<sup>200</sup> As the plurality explained: "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption."<sup>201</sup> Consequently, under the *McCutcheon* ruling, even broad popular support for reducing the influence of money in American election campaigns cannot be used to justify campaign finance laws.<sup>202</sup>

The *McCutcheon* plurality's emphasis on *quid pro quo* corruption as the only constitutionally permissible basis for campaign finance restrictions was notable. Under the Court's narrow definition of corruption, the fact that a contributor gained enhanced political access to Congress by donating to large numbers of federal candidates could not be used to justify FECA's aggregate

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195. *Id.* at 1450.

196. *Id.* at 1441.

197. *Id.* at 1450.

198. See, e.g., Zachary Roth, *Fighting Corruption Polls Off The Charts*, MSNBC, Dec. 3, 2013, available at <http://www.msnbc.com/msnbc/fighting-corruption-polls-the-charts> (finding that 90% of public supports stricter campaign finance restrictions); Jordy Yager, *Poll: Majority Wants Corporate Money Out Of Politics*, THE HILL, Oct. 25, 2012, available at <http://thehill.com/blogs/ballot-box/campaign-ads/264087-poll-majority-want-corporate-money-out-of-politics> (finding that 81% of public believes current campaign finance laws are inadequately restrictive of corporate influence on election campaigns).

199. BLACK'S LAW DICTIONARY 1443 (10th ed. 2014) (the Latin phrase "*quid pro quo*" means "something for something").

200. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014).

201. *Id.* at 1450.

202. On the overwhelming popular support for campaign finance regulations, see, for example, Patricia Zengerle, *Most Americans think campaign money aids rich*, REUTERS, (May 24, 2012, 7:54 PM), <http://www.reuters.com/article/2012/05/24/us-usa-campaign-spending-idUSBRE84N1RB20120524> (finding that "Seventy-five percent of Americans feel there is too much money in politics"); see also Zachary Roth, *Fighting corruption polls off the charts*, MSNBC (Dec. 3, 2013, 11:15 AM), <http://www.msnbc.com/msnbc/fighting-corruption-polls-the-charts> (finding that "90% of respondents said they'd support a law that imposes tough new campaign finance laws").

limits on contributions.<sup>203</sup> Consequently, to prevail in the *McCutcheon* case, the government had to show that aggregate limits prevented *quid pro quo* corruption.<sup>204</sup> That would prove a difficult hill to climb.

#### 4. The Government's Anti-Circumvention Rationale

The government's entire case in *McCutcheon* ultimately rested on a single argument: FECA's aggregate limits were necessary to prevent wealthy donors from circumventing the base limits.<sup>205</sup>

The government based its circumvention argument on a series of hypotheticals.<sup>206</sup> Like the district court before it, the government's primary circumvention hypothetical consisted of one in which a wealthy contributor gave the maximum base amount to a particular candidate and then surreptitiously donated thousands more to dozens or hundreds of traditional PACs that also supported the candidate.<sup>207</sup> The government thus warned that in the absence of aggregate limits, a donor could flout the base limit of \$5,200 on individual contributions to a particular candidate by laundering "massive amounts of money" to that candidate via a huge number of PACs.<sup>208</sup>

But the government's circumvention scenarios failed to convince the *McCutcheon* court.<sup>209</sup> The fundamental flaw in the government's argument was the fact that even absent aggregate limits, existing law already prohibited the tactics described in the government's hypotheticals.<sup>210</sup> For example, federal law expressly prohibits donors from simultaneously contributing to a candidate and a traditional PAC devoted to supporting the candidate.<sup>211</sup> Similarly, in the case of multicandidate PACs, federal law bars contributors from earmarking their PAC donations for a candidate to whom they have already contributed.<sup>212</sup>

Tellingly, in their *McCutcheon* briefs, the government's lawyers themselves conceded the effectiveness of the post-*Buckley* reforms at preventing

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203. *McCutcheon*, 134 S. Ct. at 1451.

204. *Id.* at 1450.

205. *Id.* at 1446, 1452 ("[I]f there is no risk that additional candidates will be corrupted by donations of up to \$5,200, then the Government must defend the aggregate limits by demonstrating that they prevent circumvention of the base limits.").

206. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1453 (2014).

207. *Id.*

208. *Id.*

209. *Id.* at 1452 ("The problem is that they [the aggregate limits] do not serve that [anti-circumvention] function in any meaningful way.").

210. *Id.* at 1453 ("Various earmarking and antiproliferation rules disarm this example."); *Id.* at 1455 ("One problem, however, is that the District Court's speculation relies on illegal earmarking.").

211. *Id.* at 1453 (citing 11 C.F.R. § 110.1(h)(1) and § 102.14(a)).

212. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1453 (2014) ("2 U.S.C. § 441a(a)(1)(C). He cannot retain control over his contribution, 11 CFR § 110.1(h)(3), direct his money 'in any way' to Smith, 2 U.S.C. § 441a(a)(8), or even *imply* that he would like his money to be recontributed to Smith, 11 CFR § 110.6(b)(1)") (emphasis in original).

circumvention of the base limits.<sup>213</sup> This was a critical admission, for as the plurality noted, the anti-proliferation “rule eliminates a donor’s ability to create and use his own political committees to direct funds in excess of the individual base limits. It thus blocks a straightforward method of achieving the circumvention that was the underlying concern in *Buckley*.”<sup>214</sup>

Equally important was the fact that the base limits apply not only to donor contributions to *candidates*, but also to donor contributions to traditional PACs.<sup>215</sup> Consequently, since an individual donor may only contribute \$5,000 per traditional PAC,<sup>216</sup> a donor’s effort to circumvent the base limits would by necessity involve the use of a huge number of PACs, which in turn would require a vast and risky conspiracy.<sup>217</sup> As the plurality noted, all of the government’s circumvention scenarios depended on a huge number of conspirators since “only recontributed funds can conceivably give rise to circumvention of the base limits.”<sup>218</sup> In rejecting the government’s argument, the plurality concluded that the enormous scale of the hypothetical conspiracy was “sufficiently implausible that the Government has not carried its burden of demonstrating that the aggregate limits further its anticircumvention interest.”<sup>219</sup>

The rise of Super PACs made the government’s circumvention scenarios even more implausible.<sup>220</sup> If a donor desired to support a particular candidate in excess of the base limits, federal law already permits the donor to do so legally by contributing unlimited amounts to Super PACs and other outside groups.<sup>221</sup> It was simply common sense that a contributor was far more likely to make lawful, uncapped donations to Super PACs than engage in a sprawling and unwieldy conspiracy to disseminate illegally earmarked donations of \$5,000 each to hundreds of traditional PACs across the country.<sup>222</sup> Indeed, the government’s own lawyers conceded that crucial point.<sup>223</sup>

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213. *Id.* at 1447 (observing that “[t]he Government acknowledges that this antiproliferation rule ‘forecloses what would otherwise be a particularly easy and effective means of circumventing the limits on contributions to any particular political committee.’”).

214. *Id.*

215. *Id.* at 1453.

216. *Id.* (“After all, the donor cannot give more than \$5,000 to a PAC and so cannot dominate the PAC’s total receipts.”).

217. *Id.* (“[T]his circumvention scenario could not succeed without assuming that nearly 50 separate party committees would engage in a transparent violation of the earmarking rules (and that they would not be caught if they did.)”).

218. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1457 (2014).

219. *Id.* at 1453.

220. *Id.* at 1454 (“On a more basic level, it is hard to believe that a rational actor would engage in such machinations.”).

221. *Id.*

222. *Id.*

223. *Id.* at 1454 n.9 (quoting Justice Department’s Congressional testimony that “We anticipate seeing fewer cases of conduit contributions directly to campaign committees or parties, because individuals or corporations who wish to influence elections or officials will no longer need to attempt to do so through conduit contribution schemes that can be criminally prosecuted. Instead, they are likely to simply make unlimited contributions to Super PACs or 501(c)s.”).

With the government unable to point to realistic examples of circumvention scenarios, the plurality concluded that the government's argument relied on baseless "speculation" that "cannot justify the substantial intrusion on First Amendment rights at issue in this case."<sup>224</sup>

Having rejected the government's case in its entirety, the Supreme Court struck down FECA's aggregate limits.<sup>225</sup>

### C. Justice Thomas's Concurrence in *McCutcheon v. FEC*

Although Justice Thomas agreed that FECA's aggregate limits violated the First Amendment, he took issue with the modest scope of the *McCutcheon* decision. In a concurring opinion, Justice Thomas argued that the Supreme Court should have used the opportunity presented by the *McCutcheon* case to overturn *Buckley v. Valeo* completely.<sup>226</sup> He contended that campaign contributions deserved the same protection under the First Amendment as all other forms of political speech.<sup>227</sup> Thomas summed up his brief concurrence by expressing frustration with the plurality: "This case represents yet another missed opportunity to right the course of our campaign finance jurisprudence by restoring a standard that is faithful to the First Amendment."<sup>228</sup>

But the parties did not raise the issue of the base limits in their briefs,<sup>229</sup> and therefore the plurality declined to accept Justice Thomas's invitation to strike down the base limits.<sup>230</sup>

## IV. THE RULING CRITICIZED

### A. The Dissent

The four dissenting justices—Breyer, Kagan, Ginsburg, and Sotomayor—viewed the case in starkly different terms than the majority.<sup>231</sup>

Writing for the dissent, Justice Breyer insisted that it was a mistake to overrule *Buckley*'s approach to FECA's aggregate limits.<sup>232</sup> As part of his attack on the plurality's reasoning, Breyer contended that the plurality's factual determinations lacked any basis in the record.<sup>233</sup> He even declared that when combined with *Citizens United*, the *McCutcheon* ruling "eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the

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224. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1456 (2014).

225. *Id.* at 1442.

226. *Id.* at 1462 (Thomas, J., concurring) ("I adhere to the view that this Court's decision in *Buckley v. Valeo* . . . denigrates core First Amendment speech and should be overruled.")

227. *Id.* at 1462–63.

228. *Id.* at 1464.

229. *Id.* at 1442 (majority opinion).

230. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1442 (2014).

231. *Id.* at 1465 (Breyer, J., dissenting).

232. *Id.*

233. *Id.* (asserting of the majority that "[i]ts legal analysis is faulty" and "[i]ts conclusion rests upon its own, not a record-based, view of the facts").

grave problems of democratic legitimacy that those laws were intended to resolve.”<sup>234</sup>

In a highly unusual step, Justice Breyer read the dissent from the bench.<sup>235</sup> The dissent made three main points. First, the dissenting justices sharply criticized the plurality’s narrow definition of corruption.<sup>236</sup> Although Chief Justice Roberts insisted that the plurality’s *quid pro quo* definition was no different from that adopted by the *Buckley* court in the 1970s, the dissent contended that the plurality’s definition was “inconsistent with the Court’s prior case law.”<sup>237</sup> For example, Justice Breyer asserted that in the 2003 case of *McConnell v. Federal Election Commission*, the Supreme Court used an expansive definition of corruption when it upheld BCRA’s ban on soft money.<sup>238</sup> He pointed out that in *McConnell* the Court declared: “[P]laintiffs conceive of corruption too narrowly. Our cases have firmly established that Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing ‘undue influence on an officeholder’s judgment, and the appearance of such influence.’”<sup>239</sup>

The *quid pro quo* definition of corruption particularly troubled the dissent because it failed to address the special access and influence that campaign contributors received from officeholders.<sup>240</sup> By making maximum contributions to many different candidate and party committees, the dissent noted, a contributor could gain “privileged access to and pernicious influence upon elected representatives.”<sup>241</sup> Indeed, the simple fact that a donor might contribute the maximum base amount to hundreds of candidates and political committees struck Justice Breyer as an obvious source of corruption.<sup>242</sup> In light of the potential corruption risk posed by such donors, he insisted that the Constitution permitted campaign finance regulations that sought to ensure “a few large donations not drown out the voices of the many.”<sup>243</sup>

Second, the dissent maintained that FECA’s aggregate limits provided a critical safeguard against circumvention of the base limits.<sup>244</sup> Justice Breyer

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234. *Id.*

235. Adam Liptak, *Supreme Court Strikes Down Overall Political Donation Cap*, N.Y. TIMES, Apr. 2, 2014, available at <http://www.nytimes.com/2014/04/03/us/politics/supreme-court-ruling-on-campaign-contributions.html>.

236. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1465–66 (2014) (Breyer, J., dissenting) (“[T]he plurality defines ‘corruption’ too narrowly”).

237. *Id.* at 1466.

238. *Id.* at 1470.

239. *Id.* (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 150 (2003) and *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)).

240. *Id.* at 1469–70.

241. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1469 (2014) (Breyer, J., dissenting).

242. *Id.* at 1466 (explaining that the plurality’s first claim—that large aggregate contributions do not ‘give rise’ to ‘corruption’—is plausible only because the plurality defines ‘corruption’ too narrowly).

243. *Id.* at 1467–68 (citing *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976)).

244. *Id.* at 1479 (“There is no ‘substantial mismatch’ between Congress’ legitimate objec-

warned that without the aggregate limits, wealthy contributors could indirectly channel millions of dollars to candidates through the use of third parties.<sup>245</sup> He posited hypothetical scenarios in which a donor who sought to circumvent the base limits could potentially do so by using multi-candidate PACs and joint fundraising committees.<sup>246</sup> For example, he pointed out that in the 2012 federal elections, the political parties and federal candidates established over 500 joint fundraising committees, over 450 Leadership PACs, and over 3,000 multicandidate PACs.<sup>247</sup> According to Justice Breyer, if a contributor donated to every possible fundraising committee and multicandidate PAC, the possibility existed that those committees could then redirect the money to a single candidate, thus completely circumventing the base limits.<sup>248</sup> Breyer therefore concluded that the majority's ruling in *McCutcheon* "creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate's campaign."<sup>249</sup>

Finally, Breyer contended that the Court lacked a sufficient evidentiary record in *McCutcheon* to issue an opinion of any kind regarding FECA's aggregate limits.<sup>250</sup> In previous campaign finance cases, he noted, the Supreme Court "typically relied upon an evidentiary record amassed below to determine whether the law served a compelling governmental objective."<sup>251</sup> But the district court dismissed *McCutcheon*'s case prior to a full evidentiary hearing.<sup>252</sup> Breyer therefore maintained that the "legal question—whether the aggregate limits are closely drawn to further a compelling governmental interest—turns on factual questions about whether corruption, in the absence of such limits, is a realistic threat to our democracy."<sup>253</sup> Accordingly, he asserted that the Court should have followed past practice and remanded the case for an evidentiary proceeding to develop a full and adequate factual record.<sup>254</sup>

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tive and the 'means selected to achieve it.'").

245. *Id.* at 1472 ("[I]n the absence of limits on aggregate political contributions, donors can and likely will find ways to channel millions of dollars to parties and to individual candidates, producing precisely the kind of 'corruption' or 'appearance of corruption' that previously led the Court to hold aggregate limits constitutional.").

246. *Id.* ("The methods for using today's opinion to evade the law's individual contribution limits are complex, but they are well known, or will become well known, to party fundraisers. I shall describe three.").

247. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1478 (2014) (Breyer, J., dissenting).

248. *Id.* ("Using these entities, candidates, parties, and party supporters can transfer and, we are told, have transferred large sums of money to specific candidates, thereby avoiding the base contribution limits.").

249. *Id.* at 1465.

250. *Id.* at 1480 ("[A] comparison of the plurality's opinion with this dissent reveals important differences of opinion on fact-related matters.").

251. *Id.* at 1479.

252. *Id.* (citing *McCutcheon v. Fed. Election Comm'n*, 893 F. Supp. 2d 133, 140–41 (D.D.C. 2012)).

253. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1480 (2014) (Breyer, J., dissenting).

254. *Id.* ("If we are to overturn an act of Congress here, we should do so on the basis of a

The dissent closed by lamenting that the *McCutcheon* ruling “undermines, perhaps devastates, what remains of campaign finance reform.”<sup>255</sup>

### B. Critics Beyond the Courtroom

The *McCutcheon* ruling provoked an equally negative response outside the courtroom. The *New York Times* editorial board declared: “The real losers in the *McCutcheon* case are the vast majority of average Americans without barrels of cash to dump on elections.”<sup>256</sup> The general public viewed the case in similar terms. Opinion surveys found that a majority of Americans believe the *McCutcheon* ruling will lead to more corruption in Congress.<sup>257</sup>

The plurality’s *quid pro quo* definition of corruption received particularly sharp criticism.<sup>258</sup> The legal commentator Dahlia Lithwick of *Slate* magazine criticized Chief Justice Roberts for presenting “such a supremely cramped notion of ‘corruption’ as to rely almost exclusively on the *quid pro quo* bribery favored in the Gilded Age, wherein robber barons casually left fat sacks of cash around in exchange for political influence.”<sup>259</sup> According to Lithwick, the reasoning employed by Roberts in *McCutcheon* was “divorced-from-reality.”<sup>260</sup> Likewise, Linda Greenhouse of the *New York Times* lamented the implications of the Court’s narrow definition of corruption.<sup>261</sup> She observed that the “*McCutcheon* decision is a powerful testament to the extent to which the free speech claim has, in the hands of the current court, become an engine of deregulation.”<sup>262</sup>

Many commentators warned that the ruling lays the groundwork for future challenges to long-standing campaign finance laws.<sup>263</sup> For example, Professor

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similar [evidentiary] record.”).

255. *Id.* at 1481.

256. Editorial Board, *The Court Follows the Money*, N.Y. TIMES, Apr. 2, 2014, available at <http://www.nytimes.com/2014/04/03/opinion/the-court-follows-the-money.html>.

257. Victor Li, *Majority of poll respondents favor SCOTUS reforms, think justices’ political views skew decisions*, A.B.A. J., May 7, 2014, available at [http://www.abajournal.com/news/article/voters\\_surveyed\\_favor\\_supreme\\_court\\_reforms/](http://www.abajournal.com/news/article/voters_surveyed_favor_supreme_court_reforms/); Stan Greenberg et al., *Broad Bipartisan Consensus Supports Reforms to Supreme Court—Americans View Court as Too Political*, DEMOCRACY CORPS (May 7, 2014), <http://www.democracycorps.com/attachments/article/979/DCorps%20SCOTUS%20Memo%20FINAL%20050614.pdf>.

258. See, e.g., Richard A. Posner, *Does Chief Justice John Roberts show a certain casualness about the truth?* SLATE, June 25, 2014, available at [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2014/scotus\\_roundup/scotus\\_end\\_of\\_term\\_is\\_roberts\\_casual\\_about\\_the\\_truth\\_in\\_the\\_campaign\\_finance.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/scotus_end_of_term_is_roberts_casual_about_the_truth_in_the_campaign_finance.html).

259. Dahlia Lithwick, *Justice Roberts Hearts Billionaires: The chief either doesn’t believe, or doesn’t care, that money corrupts politics*, SLATE, Apr. 2, 2014, available at [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/04/mccutcheon\\_v\\_fec\\_campaign\\_finance\\_decision\\_justice\\_roberts\\_doesn\\_t\\_believe.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/mccutcheon_v_fec_campaign_finance_decision_justice_roberts_doesn_t_believe.html).

260. *Id.*

261. Linda Greenhouse, *An Indecent Burial*, N.Y. TIMES, Apr. 16, 2014, available at <http://www.nytimes.com/2014/04/17/opinion/an-indecent-burial.html>.

262. *Id.*

263. See, e.g., Anthony Zurcher, *Another blow to campaign finance law*, BBC NEWS, (Apr. 2, 2014, 4:46 PM), <http://www.bbc.com/news/blogs-echochambers-26860356>; Aaron Blake, *Su-*

Richard Hasen condemned *McCutcheon* as “a subtly awful decision” that will “set the course toward even more campaign finance challenges under the First Amendment and more deregulation.”<sup>264</sup>

The notion that *McCutcheon* enhanced the influence of wealthy special interests groups lies at the heart of the criticism. Minnesota Senator Al Franken condemned the *McCutcheon* ruling as a “terrible decision.”<sup>265</sup> Franken asserted that the *McCutcheon* and *Citizens United* rulings “give wealthy, well-funded corporate interests undue influence, access, and power.”<sup>266</sup> The political scientist Norm Ornstein even claimed that the *McCutcheon* decision threatened to transform America into a “banana republic.”<sup>267</sup> Ornstein declared that the majority’s decision “returns lawmaking to the kind of favor-trading bazaar that was common in the Gilded Age” and that, as a consequence, “[o]ligarchs will rule.”<sup>268</sup>

## V. A DEFENSE OF THE MCCUTCHEON RULING

Clearly, the *McCutcheon* decision attracted intense criticism both inside and outside the courtroom. From Justice Breyer<sup>269</sup> to the editorial board of the *New York Times*,<sup>270</sup> critics bemoaned the *McCutcheon* ruling in anguished terms. The common theme of the criticism is that *McCutcheon* devastates the federal campaign finance system and undermines the integrity of the democratic process.<sup>271</sup>

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*preme Court strikes down overall campaign contribution limits*, WASH. POST, Apr. 2, 2014, available at <http://www.washingtonpost.com/blogs/post-politics/wp/2014/04/02/supreme-court-strikes-down-overall-campaign-contribution-limits/> (quoting Sen. Charles Schumer that “[t]his in itself is a small step, but another step on the road to ruination” and that *McCutcheon* “could lead to interpretations of the law that would result in the end of any fairness in the political system as we know it”).

264. Richard L. Hasen, *Die Another Day: The Supreme Court Takes a Big Step Closer to Gutting the Last Bits of Campaign Finance Reform*, SLATE, Apr. 2, 2014, available at [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/04/the\\_subtle\\_awfulness\\_of\\_the\\_mccutcheon\\_v\\_fec\\_campaign\\_finance\\_decision\\_the.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/the_subtle_awfulness_of_the_mccutcheon_v_fec_campaign_finance_decision_the.html).

265. Press Release, Office of United States Senator Al Franken, Sen. Franken Calls Supreme Court Ruling on Campaign Finance Laws a “Terrible Decision” (April 2, 2014), available at [http://www.franken.senate.gov/?p=press\\_release&id=2759](http://www.franken.senate.gov/?p=press_release&id=2759).

266. *Id.*

267. Norm Ornstein, *Could America Become a Banana Republic? The Supreme Court's recent McCutcheon ruling paves the way for a new era of political corruption in the U.S.*, NAT'L J. (April 16, 2014), <http://www.nationaljournal.com/washington-inside-out/could-america-become-a-banana-republic-20140416>.

268. *Id.*

269. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1481 (Breyer, J., dissenting) (asserting that the majority’s ruling “undermines, perhaps devastates, what remains of campaign finance reform”).

270. *The Court Follows the Money*, *supra* note 256 (describing the *McCutcheon* ruling as part of a “crusade to knock down all barriers to the distorting power of money on American elections”).

271. *See supra* Part IV.

Nevertheless, despite such harsh criticism of the majority's ruling, the Supreme Court reached the right result in *McCutcheon*. As argued below, the Court's decision protects First Amendment freedoms while preserving and modestly improving upon the main pillars of the campaign finance regulation system.

#### A. Cornerstones of Federal Election Law Remain in Place

For all of the passions the *McCutcheon* decision aroused, the most noteworthy feature of the ruling is its modest scope.<sup>272</sup> The Court's invalidation of the aggregate limits will undoubtedly increase the overall amount of contributions to parties and candidates, but it certainly does not devastate the campaign finance system. Far from a revolutionary decision, *McCutcheon* leaves in place the two cornerstones of federal campaign finance law: base limits and mandatory disclosure.<sup>273</sup>

Since the early 1970s, base limits on federal contributions have been central to campaign finance law.<sup>274</sup> As the *Buckley* court observed, contribution limits represent the government's "primary weapons against the reality or appearance of improper influence" by contributors on candidates and officeholders.<sup>275</sup> *McCutcheon* does not change that fact. In the plurality opinion in *McCutcheon*, Chief Justice Roberts emphasized the point that the Court's decision does not affect the base limits.<sup>276</sup> Indeed, Justice Thomas refused to join the plurality's opinion precisely because it only addressed the aggregate limits.<sup>277</sup> The bottom line is the base limits on contributions remain the central feature of federal campaign finance law.

*McCutcheon* also does not change FECA's base limit amounts, which remain extremely low.<sup>278</sup> For the 2013-2014 election cycle, individual contribu-

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272. See, e.g., Robert K. Kelner, *The Practical Consequences of McCutcheon: The Decision Leaves Our Campaign Finance System Largely Undisturbed*, 127 HARV. L. REV. F. 380 (2014) (observing that the *McCutcheon* ruling "probably will not have a dramatic effect on the campaign finance system"). The plurality also stressed that its ruling "does not overrule *McConnell*'s holding about 'soft money.'" See *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1451 n.6 (2014).

273. *McCutcheon*, 134 S. Ct. at 1442 (emphasizing that base limits untouched); *Id.* at 1460 (noting that FECA disclosure laws remain in effect).

274. See L. PAIGE WHITAKER, CONG. RESEARCH SERV., RL30669, THE CONSTITUTIONALITY OF CAMPAIGN FINANCE REGULATION: BUCKLEY V. VALEO AND ITS SUPREME COURT PROGENY (2008); ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM 139-50 (2014); see also ROBERT K. GOIDEL, DONALD A. GROSS & TODD G. SHIELDS, MONEY MATTERS: CONSEQUENCES OF CAMPAIGN FINANCE REFORM IN U.S. HOUSE ELECTIONS (1999).

275. *Buckley v. Valeo*, 424 U.S. 1, 59 (1976).

276. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1442 (2014).

277. *Id.* at 1464 (Thomas, J., concurring).

278. On the consequences of low base limits, see Interview by PBS Frontline with James Bopp, *What Citizens United Means for Campaign Finance* (Oct. 30, 2012), available at <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/big-sky-big-money/james-bopp-what-citizens-united-means-for-campaign-finance/> (observing that contribu-

tions to federal candidates were capped at a total of \$5,200 for the primary and general elections,<sup>279</sup> and in the 2011-12 election cycle, FECA's base limits stood at \$5,000.<sup>280</sup> The low limits ensure that an individual donor's contribution constitutes only a tiny fraction of the cost required to run for federal office. For example, in the 2012 U.S. Senate race in Massachusetts, Elizabeth Warren's campaign spent \$42 million to defeat incumbent Senator Scott Brown.<sup>281</sup> Thus, even if a donor contributed the maximum permitted amount of \$5,000 in the 2011-12 cycle, the contribution represented a negligible percentage of the overall amount raised and spent by Warren's campaign.

The highly expensive nature of the Warren campaign is not an aberration. Campaign costs have soared since the 1980s.<sup>282</sup> For instance, in the 2014 U.S. Senate race in North Carolina, the candidates, parties, and outside groups spent more than \$110 million.<sup>283</sup> When federal candidates must routinely raise tens of millions of dollars in competitive races, FECA's base limits render an individual donor's contribution a minuscule share of any federal candidate's campaign budget. *McCutcheon* does not change that fact in any way.

Likewise, *McCutcheon* does not change the federal law mandating public disclosure of contributions to candidates, parties, and PACs.<sup>284</sup> In fact, the *McCutcheon* plurality signaled its support for mandatory disclosure when it observed that "disclosure of contributions minimizes the potential for abuse of the campaign finance system."<sup>285</sup> The plurality's strong endorsement makes clear that FECA's disclosure requirements rest on solid constitutional grounds.<sup>286</sup> Moreover, FECA's disclosure provisions are more effective today

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tion limits are "too low now, and they're distorting, terribly distorting the [campaign finance] system by being so low").

279. *McCutcheon*, 134 S. Ct. at 1442; 2 U.S.C. § 441a(a)(1); 78 Fed. Reg. 8532 (2013); *Contribution Limits 2013-14*, FED. ELECTION COMM'N, available at [http://www.fec.gov/ans/answers\\_general.shtml#How\\_much\\_can\\_I\\_contribute](http://www.fec.gov/ans/answers_general.shtml#How_much_can_I_contribute).

280. *Contribution Limits 2011-12*, FED. ELECTION COMM'N, available at <http://www.fec.gov/info/contriblimits1112.pdf>.

281. See *2012 House and Senate Campaign Finance for Massachusetts—Elizabeth Warren*, FED. ELECTION COMM'N, available at <http://www.fec.gov/disclosurehs/HSCandDetail.do>; see also Michael Levenson, *After Her Record Haul, Warren Slips Into Red*, BOS. GLOBE, Dec. 5, 2012, available at <http://www.bostonglobe.com/news/politics/2012/12/05/elizabeth-warren-ended-senate-campaign-debt-despite-record-fund-raising/ShWe5K7KzUiVnFHiIkkX5H/story.html>.

282. Center for Responsive Politics, *The Rising Cost of Victory*, OPENSECRETS.ORG, <https://www.opensecrets.org/bigpicture/win.php?cycle=2012> (noting that most expensive Senate race in 2012 cost seven times as much as the most expensive Senate race in 1986).

283. Grace Wallack & John Hudak, *How Much Did Your Vote Cost? Spending Per Voter in the 2014 Senate Races*, BROOKINGS, Nov. 7, 2014, available at <http://www.brookings.edu/blogs/fixgov/posts/2014/11/07-spending-per-voter-2014-midterm-senate-wallack-hudak>.

284. See 2 U.S.C. §434; R. SAM GARRETT, CONG. RESEARCH SERV., R41541, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 14 (2014).

285. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1459 (2014).

286. 134 S. Ct. at 1460.

than ever before.<sup>287</sup> For instance, the FEC posts donor names and the amount of each donor's federal campaign contributions in an easily searchable format on its website, a technology that did not exist when *Buckley v. Valeo* was decided in 1976.<sup>288</sup> The internet age has thus made campaign finance information publicly accessible to a degree unimaginable by the *Buckley* court.<sup>289</sup>

None of this is to say that the structure of campaign finance law will be completely unaffected by the *McCutcheon* ruling. It is entirely possible that *McCutcheon* may give new prominence to old fundraising vehicles, such as joint fundraising committees. Justice Breyer is undoubtedly correct that a JFC composed of all currently existing federal candidate committees, party committees, and traditional PACs could receive as much as \$3.6 million in contributions from a single donor.<sup>290</sup> *McCutcheon* frees donors to contribute to as many candidate and political committees as they like, which means the creation of a mega-JFC is at least theoretically possible.<sup>291</sup>

But the dissent overlooks a crucial point: JFCs are subject to both base limits and the federal ban on the earmarking of campaign contributions.<sup>292</sup> FECA and federal regulations prohibit contributors from using JFCs to circumvent the base limits,<sup>293</sup> and the FEC has made it repeatedly clear that it will enforce federal contribution limits and reporting requirements on JFCs.<sup>294</sup> Moreover, the FEC expressly prohibits JFCs from funneling money to candidates when such transfers will exceed the base limits on the original donor's campaign contributions.<sup>295</sup>

In short, as the plurality opinion emphasized,<sup>296</sup> the earmarking scenarios envisioned by the dissent are already illegal under federal law. But, will circumvention happen anyway? Experience at the state level suggests the answer

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287. *Id.* at 1459–60.

288. FED. ELECTION COMM'N, *Campaign Finance Disclosure Portal* (2014), available at <http://www.fec.gov/pindex.shtml>.

289. *McCutcheon*, 134 S. Ct. at 1460 (“Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley* . . . was decided.”).

290. *Id.* at 1473 (Breyer, J., dissenting).

291. Elias & Berkon, *supra* note 22.

292. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1455 (2014).

293. *Id.* (“Under no circumstances may a contribution to a joint fundraising committee result in an allocation that exceeds the contribution limits applicable to its constituent parts”).

294. *See, e.g.*, FEC Advisory Opinion 1977-14 (Bayh, Harris, and Shriver) (JFCs are “subject to all the requirements of [FECA] and regulations including (but not limited to) the record-keeping, registration, reporting, and contribution limit provisions”).

295. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1455; 11 C.F.R. § 102.17(c)(6)(i) (“If reallocation results in a violation of a contributor's limit under 11 CFR 110.1, the fundraising representative shall return to the contributor the amount of the contribution that exceeds the limit”); 11 C.F.R. § 102.17(c)(5) (applying base limits to joint fundraising committees); 2 U.S.C. § 441a(8) (anti-earmarking); 11 C.F.R. § 110.6(b)(1) (anti-earmarking); La Raja, *supra* note 28 (observing that “[w]ith federally registered PACs the FEC can enforce anti-circumvention and anti-earmarking rules already on the books. The traceable flow of money should reveal clear patterns of PAC proliferation and earmarking.”).

296. *McCutcheon*, 134 S. Ct. at 1452–53.

is no. The campaign finance systems of thirty states currently have base limits without aggregate limits.<sup>297</sup> In its arguments and briefs before the Supreme Court in the *McCutcheon* case, the Obama administration failed to produce evidence that circumvention was a problem in any of those states.<sup>298</sup> The absence of evidence of circumvention at the state level is critically important because it demonstrates that base limits do not depend on aggregate limits to be effective.

With good reason, therefore, the plurality concluded that the dissent's scenarios "are either illegal under current campaign finance laws or divorced from reality."<sup>299</sup> The rise of Super PACs makes that point particularly convincing. Logic dictates that a donor who seeks to give more than \$5,200 to support a particular candidate is far more likely to contribute legally to outside groups rather than risk criminal punishment by circumventing the base limits on contributions to candidates and parties. As the plurality sensibly observed, "it is hard to believe that a rational actor would engage in such machinations" to circumvent the base limits when "[t]hat same donor . . . could have spent unlimited funds on independent expenditures on behalf of" the donor's preferred candidate.<sup>300</sup>

Remarkably, the government's own attorneys conceded that Super PACs reduced the threat of base limit circumvention. In a recent Congressional hearing on campaign finance law, the Justice Department acknowledged that the rise of Super PACs and other independent expenditure groups fundamentally changed the campaign finance landscape:

"We anticipate seeing fewer cases of conduit contributions directly to campaign committees or parties, because individuals or corporations who wish to influence elections or officials will no longer need to attempt to do so through conduit contribution schemes that can be criminally prosecuted. *Instead, they are likely to simply make unlimited contributions to Super PACs or 501(c)s.*"<sup>301</sup>

Although it merely stated the obvious, the Justice Department's concession exposes the illogical and untenable nature of the dissent's circumvention and earmarking arguments. In a post-*Citizens United* world, wealthy donors with a strong interest in a single candidate's campaign will make use of legal, uncapped donations to Super PACs rather than engage in convoluted, unnecessary, and highly illegal schemes to circumvent the base limits.

Common sense thus demonstrates that *McCutcheon* does not change the landscape of campaign finance regulation in a fundamental way.<sup>302</sup> The two

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297. *McCutcheon*, 134 S. Ct. at 1451 n.7. For the list of states, see *State Limits on Contributions to Candidates*, NAT'L CONFERENCE OF STATE LEGISLATURES (2013), [http://www.ncsl.org/Portals/1/documents/legismgt/Limits\\_to\\_Candidates\\_2012-2014.pdf](http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2012-2014.pdf).

298. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1451 n.7 (2014).

299. *Id.* at 1456.

300. *Id.* at 1454.

301. *Id.* at 1454 n.9 (emphasis added).

302. See Kelner, *supra* note 272, at 386 (observing that *McCutcheon* is a "ripple on the

key elements of the post-Watergate federal campaign finance system—base limits and mandatory disclosure—are still the law of the land today and will likely remain so for the foreseeable future.<sup>303</sup>

### **B. Parties and Candidates Benefit**

The *McCutcheon* ruling also modestly improves the campaign finance system as a whole. By removing the aggregate limits it provides a critical fundraising boost to federal candidates and party committees at a time when Super PACs and other outside groups have emerged as the preeminent vehicles for campaign advertising.

To understand the real world significance of the *McCutcheon* ruling, one must first consider the decade of legislation and Supreme Court decisions that preceded it. Although the dissent in *McCutcheon* insisted on the need for an evidentiary hearing to develop the factual record,<sup>304</sup> the evidence is overwhelming that Super PACs and other independent expenditure groups have disproportionately benefitted from recent campaign finance laws and rulings.<sup>305</sup> In particular, Congress's adoption of BCRA in 2002 and the Supreme Court's *Citizens United* decision in 2010 created structural imbalances in the funding of federal election campaigns that permitted outside groups to raise and spend far more money than the national political parties.<sup>306</sup> Consequently, outside groups have undermined the ability of the parties and candidates to control their own campaign messages, a deeply troubling development.<sup>307</sup>

The problem began when Congress adopted BCRA, a reform measure that banned soft money, a critical source of funds for the Democratic and Republican parties.<sup>308</sup> The Supreme Court upheld the ban on soft money in the 2003

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campaign finance pond, not a tsunami."); Elias & Berkon, *supra* note 22, at 373 (noting that "we are skeptical that the death of *Buckley*—and, hence, all campaign finance restrictions—is near.").

303. Elias & Berkon, *supra* note 22, at 373 ("Significantly, the dispute between the plurality and dissent in *McCutcheon* was not over whether *Buckley* should stand.").

304. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1479 (2014) (Breyer, J., dissenting).

305. On the impact of campaign finance law on election funding, see James Bennet, *The New Price of American Politics*, THE ATLANTIC, (Sept. 19, 2012, 8:56 PM), <http://www.theatlantic.com/magazine/archive/2012/10/the/309086/>; BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN REFORM 66–71 (2001); BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 156–57 (2002); PETER L. WALLISON AND JOEL M. GORA, BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE 43 (2009). On the history of FECA and BCRA, see DAVID C. W. PARKER, THE POWER OF MONEY IN CONGRESSIONAL CAMPAIGNS, 1880–2006, at 193–97 (2008).

306. See Center for Responsive Politics, *Outside Spending, 2014 Federal Election*, OPENSECRETS.ORG, available at [https://www.opensecrets.org/outsidespending/fes\\_summ.php](https://www.opensecrets.org/outsidespending/fes_summ.php).

307. Kelner & La Raja, *supra* note 23 (observing that as "the outside groups expanded, the parties shrank"); Derek Willis, *Outside Groups Set Spending Record in Midterms*, N.Y. TIMES, Dec. 10, 2014, available at <http://www.nytimes.com/2014/12/11/upshot/outside-groups-set-spending-record-in-midterms-.html?ref=upshot&abt=0002&abg=1>.

308. See 2 U.S.C. § 441(a); Kelner & La Raja, *supra* note 23.

case of *McConnell v. Federal Election Commission*.<sup>309</sup> The practical implications of *McConnell* were immediately felt in the 2004 presidential campaign. During that election, Section 527 groups flourished, rivaling parties and candidates as the driving force in federal elections.<sup>310</sup> Section 527 groups are issue advocacy groups that in the 2004 and 2006 elections operated as *de facto* predecessors to today's Super PACs.<sup>311</sup> The cryptic term "527" refers to the section of the Internal Revenue Code under which such groups are organized.<sup>312</sup>

Despite the mundane origins of the term, Section 527 groups helped shape the outcome of the 2004 presidential election. Vicious attacks on the patriotism and war record of Democratic nominee John Kerry by the Section 527 group "Swift Boat Veterans for Truth" overshadowed the entire campaign.<sup>313</sup> Even President George W. Bush—Kerry's opponent—condemned the negative advertising campaigns that outside groups funded and aired.<sup>314</sup>

In 2010 the *Citizens United* and *Speechnow* rulings dramatically enhanced the fundraising advantages of independent expenditure groups.<sup>315</sup> By barring Congress and the FEC from applying FECA's contribution limits to outside groups, even to those that expressly advocate for the election or defeat of federal candidates, *Citizens United* and *Speechnow* cleared the way for unlimited

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309. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

310. RODNEY SMITH, MONEY, POWER & ELECTIONS: HOW CAMPAIGN FINANCE REFORM SUBVERTS AMERICAN DEMOCRACY 85 (2006) ("The atmosphere in which these 527 groups grew and prospered was the direct result of campaign finance reform. Under this legislation, money that flowed into the political process was directed away from traditional organizations that are beholden and accountable to the candidates' campaigns."); Sara Tindall Ghazal, *Regulating Non-connected 527s: Unnecessary, Unwise, and Inconsistent with the First Amendment*, 55 EMORY L.J. 193 (2006); Frank J. Favia, Jr., *Enforcing the Goals of the Bipartisan Campaign Reform Act: Silencing Nonprofit Groups and Stealth PACs in Federal Elections*, 2006 U. ILL. L. REV. 1081 (2006); Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949 (2005).

311. L. PAIGE WHITAKER & ERIKA LUNDER, CONG. RESEARCH SERV., RS22895, 527 GROUPS AND CAMPAIGN ACTIVITY: ANALYSIS UNDER CAMPAIGN FINANCE AND TAX LAWS (June 12, 2008); Richard L. Hasen, *The Numbers Don't Lie: If You Aren't Sure Citizens United Gave Rise to the Super PACs, Just Follow the Money*, SLATE, March 9, 2012, available at [http://www.slate.com/articles/news\\_and\\_politics/politics/2012/03/the\\_supreme\\_court\\_s\\_citizens\\_united\\_decision\\_has\\_led\\_to\\_an\\_explosion\\_of\\_campaign\\_spending\\_.html](http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html).

312. See Internal Revenue Code § 527; Whitaker and Lunder, *supra* note 311.

313. Jeffrey H. Birnbaum & Thomas B. Edsall, *At the End, Pro-GOP '527s' Outspent Their Counterparts*, WASH. POST, Nov. 6, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A29189-2004Nov5.html>; Lauren Daniel, *527s in a Post-Swift Boat Era: The Current and Future Role of Issue Advocacy Groups in Presidential Elections*, 5 NW. J. L. & SOC. POL'Y 149 (2010); Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation*, 45 HARV. J. ON LEGIS. 471 (2008).

314. Rick Pearson & Frank James, *Bush calls for end to attack ads: President denounces all commercials made by independent political groups*, CHI. TRIB., Aug. 24, 2004, available at [http://articles.chicagotribune.com/2004-08-24/news/0408240194\\_1\\_swift-boat-veterans-bush-campaign-attack-ads](http://articles.chicagotribune.com/2004-08-24/news/0408240194_1_swift-boat-veterans-bush-campaign-attack-ads).

315. DAN BALZ, COLLISION 2012: OBAMA V. ROMNEY AND THE FUTURE OF ELECTIONS IN AMERICA 172 (2013); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 357 (2014); *SpeechNow.org, v. Fed. Election Comm'n*, 599 F.3d 686, 689 (D.C. Cir. 2010).

contributions to Super PACs and other independent expenditure groups.<sup>316</sup> BCRA, *McConnell*, *Citizens United*, and *Speechnow* thus created a perfect storm. They enormously expanded the financial resources of outside groups while severely curtailing the fundraising capabilities of the national political parties.<sup>317</sup>

The skyrocketing increase in Super PAC and Section 501(c) spending powerfully demonstrated the extent of the structural imbalance in campaign finance law. In the 2010, 2012, and 2014 federal elections, Super PAC spending exceeded that of both major political parties.<sup>318</sup> In an analysis of the 2012 campaign, the political scientist Michael Franz found that outside groups had eclipsed parties and candidates as the primary fundraising vehicles in American elections.<sup>319</sup> “Parties,” Franz explained, “are increasingly less relevant to the deployment of resources in competitive campaigns—and are unable to play the lead in the plotting of strategy between elections—and candidates are coming to understand that outside groups loom large in any competitive contest.”<sup>320</sup>

The fundraising importance of Super PACs was vividly demonstrated during the 2012 presidential campaign when President Barack Obama abandoned his previous criticism of Super PACs<sup>321</sup> and endorsed the creation of Priorities

316. See Matthew S. Petersen, AO 2010-11 (F.E.C.), 2010 WL 3184269, at \*2 (July 22, 2010) (“Given the holdings in *Citizens United* and *SpeechNow* . . . there is no basis to limit the amount of contributions to” independent expenditure groups.).

317. Samuel Issacharoff and Pamela S. Karlan predicted precisely that development more than a decade ago. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1714 (1999) (“There is ample evidence from states that have significantly restricted contributions that, at the very least, financially powerful actors believe that they have no choice but to channel their political contributions through independent expenditures and that such expenditures rise in direct response to the constriction of direct political contributions”).

318. Jamie Fuller, *Who needs a presidential campaign? Outside spending in 2014 could rival 2012's*, WASH. POST, (July 10, 2014), available at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/10/there-are-a-lot-of-super-pacs-spending-money-in-2014-a-lot/>; Michael Toner, *The Impact of the Federal Election Laws on the 2010 Midterm Election*, in LARRY J. SABATO, PENDULUM SWING 132 (2011) (“Taking advantage of favorable federal court rulings, and operating outside of the hard-dollar fundraising restrictions of the McCain-Feingold campaign finance law [BCRA], outside group spending in 2010 dwarfed the expenditures of the national party committees and, in many races, even exceeded the spending of the candidates themselves.”); Center for Responsive Politics, *Outside Spending, 2014 Federal Election*, OPENSECRETS.ORG, available at [https://www.opensecrets.org/outsidespending/fes\\_summ.php](https://www.opensecrets.org/outsidespending/fes_summ.php).

319. Michael M. Franz, *Interest Groups in Electoral Politics: 2012 in Context*, 10 THE FORUM: A JOURNAL OF APPLIED RESEARCH IN CONTEMPORARY POLITICS 62 (2013), available at <http://mikemfranz.files.wordpress.com/2013/04/forum-2013-0007.pdf>.

320. *Id.* at 77.

321. Devin Dwyer, *Obama ‘Signed Off’ on Super PAC Decision After Decrying Negativity*, ABC NEWS, (Feb. 7, 2012, 5:06 PM), <http://abcnews.go.com/blogs/politics/2012/02/obama-signed-off-on-super-pac-decision-after-decrying-negativity/>; Office of the White House Press Secretary, *Remarks by the President in State of the Union Address*, THE WHITE HOUSE (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (In his 2010 State of the Union Address, President Obama warned that the Court’s Citi-

USA, a pro-Obama Super PAC.<sup>322</sup> President Obama justified his reversal by explaining that he was “not going to just unilaterally disarm.”<sup>323</sup> The fact that the President of the United States needs a Super PAC to compete illustrates the profoundly difficult fundraising environment in which parties and candidates operate today.

Ironically, one of the few areas of agreement between the Romney and Obama campaigns was their shared contempt for Super PACs.<sup>324</sup> After the 2012 election, Romney campaign manager Stuart Stevens lambasted pro-Romney Super PACs for co-opting the Romney campaign’s message.<sup>325</sup> Stevens warned that “where we are with super PACs is bad for democracy.”<sup>326</sup> Senior Obama adviser Jim Margolis agreed, noting that the Romney campaign “had a harder time controlling [its] message because they were more dependent on allies, the super PACs, to help them. They couldn’t control what the super PACs did.”<sup>327</sup> Obama campaign adviser David Axelrod complained of similar problems among Democratic Super PACs. Axelrod revealed that during the 2012 presidential election pro-Obama Super PACs “hijacked” the Obama campaign’s advertising message.<sup>328</sup>

At its core, the issue comes down to a simple math problem. Contributions to candidates and parties are strictly limited by FECA and BCRA,<sup>329</sup> whereas donors may make unlimited contributions to Super PACs.<sup>330</sup> For example, during the 2012 presidential election, the pro-Romney Super PAC “Restore our Future” received \$20 million in contributions from the billionaire casino operator Sheldon Adelson and his wife Miriam.<sup>331</sup> But because of FECA’s base limit restrictions on contributions that are made directly to candi-

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zens United ruling would “open the floodgates” to unlimited campaign spending.)

322. Dan Eggen, *Obama, in a switch, endorses pro-Democratic super PAC*, WASH. POST, Feb. 7, 2012, available at [http://www.washingtonpost.com/politics/2012/02/06/gIQAVqnWvQ\\_story.html](http://www.washingtonpost.com/politics/2012/02/06/gIQAVqnWvQ_story.html); Christina Bellantoni & Terence Burlij, *Obama Plays the Super PAC Game, Endorses Priorities USA*, PBS (Feb. 7, 2012, 9:11 AM), <http://www.pbs.org/newshour/rundown/president-obama-plays-the-super-pac-game/>.

323. Jennifer Epstein, *Obama: 'Not going to just unilaterally disarm' on super PACs*, POLITICO (Feb. 14, 2012, 7:10 PM), <http://www.politico.com/news/stories/0212/72882.html>.

324. KATHLEEN HALL JAMIESON, *ELECTING THE PRESIDENT 2012: THE INSIDERS' VIEW* 146, 161–62 (2014).

325. *Id.* at 161–62.

326. *Id.* at 162.

327. *Id.* at 146.

328. See Karen Tumulty, *Super PACs' spending isn't always welcomed by candidates they support*, WASH. POST, Aug. 5, 2014, available at [http://www.washingtonpost.com/politics/super-pacs-support-2014/08/04/ecc36ed6-18ed-11e4-9349-84d4a85be981\\_story.html](http://www.washingtonpost.com/politics/super-pacs-support-2014/08/04/ecc36ed6-18ed-11e4-9349-84d4a85be981_story.html); Philip Bump, *Coming soon: A campaign run entirely by super PACs*, WASH. POST, July 28, 2014, available at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/28/coming-soon-a-campaign-run-entirely-by-super-pacs/>.

329. 2 U.S.C. § 441(a) (2014).

330. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 357 (2014); *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 689 (D.C. Cir. 2010); Petersen, *supra* note 90.

331. Jeremy Ashkenas et al., *SuperPAC: Restore Our Future*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance/pac/restore-our-future>.

dates, the Adelsons could only contribute \$2,500 each to Romney's presidential campaign in the 2012 general election.<sup>332</sup>

The inevitable result is Super PACs and other outside groups—not political parties—now set the terms of national political debate.<sup>333</sup> For example, in the 2014 Congressional elections, Super PACs spent over \$345 million and Section 501(c) groups spent over \$158 million.<sup>334</sup> In contrast, the Republican and Democratic parties spent a combined total of \$228 million,<sup>335</sup> less than half the amount spent by Super PACs and 501(c) groups in the 2014 midterms.

As the election data shows, the Republican and Democratic national committees have a diminished role in federal elections.<sup>336</sup> No one understands that development better than the parties themselves. In an extraordinary FEC forum in Washington in June 2014, state and local party officials from both the Democratic and Republican parties warned the FEC that the fundraising advantages possessed by Super PACs and other independent expenditure groups threatened the existence of traditional party committees.<sup>337</sup>

FECA's aggregate limits directly contributed to the parties' financial problems. The aggregate limits enhanced the influence of Super PACs and other outside groups by restricting the number of donors that candidates and parties could draw upon for financial support. For example, as discussed in Part II above, the aggregate limits placed a biennial cap of \$123,200 in donor contributions to candidates, parties, and traditional PACs.<sup>338</sup> Prior to *McCutcheon*, therefore, FECA prohibited a donor who reached the biennial cap from making any additional contributions to candidates and parties during the 2-year elec-

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332. Adam Smith, *Not Just Super PACs: Shel Adelson's Many 2012 Campaign Donations*, CAMPAIGN MONEY (Aug. 24, 2012), <http://campaignmoney.org/blog/2012/08/24/not-just-super-pacs-shel-adelsons-many-2012-campaign-donations>. For individual campaign contributions, see the "Individual Contributor" search feature at the FEC's "Disclosure Portal," which is available at <http://www.fec.gov/pindex.shtml>.

333. Ashley Parker, *Outside Money Drives a Deluge of Political Ads*, N.Y. TIMES, July 27, 2014, available at <http://www.nytimes.com/2014/07/28/us/politics/deluge-of-political-ads-is-driven-by-outside-money.html?module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A7%22%7D> (observing that Super PAC spending increased faster than spending by parties or candidates).

334. Center for Responsive Politics, *Outside Spending, 2014 Federal Election*, OPENSECRETS.ORG, available at [https://www.opensecrets.org/outsidespending/fes\\_summ.php](https://www.opensecrets.org/outsidespending/fes_summ.php); Nicholas Confessore, *Outside Groups With Deep Pockets Lift G.O.P.*, N.Y. TIMES, Nov. 5, 2014, available at <http://www.nytimes.com/2014/11/06/us/politics/koch-brothers-republican-super-pac-spending-pays-off.html>.

335. *Id.*

336. Kelner & La Raja, *supra* note 23 (observing that "both the Republican and Democratic national committees have atrophied to the point that they are no longer able to exercise some core functions").

337. Kenneth P. Doyle, *State, Local Parties Tell FEC They Are at Risk Due to Tough Restrictions, Outside Spending*, BLOOMBERG BNA (June 5, 2014), [http://news.bna.com/mpdm/MPDMWB/split\\_display.adp?fedfid=47516643&vname=mpebulallissues&jd=a0f1e2j2e0&split=0](http://news.bna.com/mpdm/MPDMWB/split_display.adp?fedfid=47516643&vname=mpebulallissues&jd=a0f1e2j2e0&split=0).

338. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1443 (2014).

tion cycle.<sup>339</sup> The inevitable result was that whatever additional contributions the donor intended to make had to go to Super PACs or other outside groups.<sup>340</sup> Consequently, for all practical purposes, FECA's aggregate limits had the effect of redirecting money from parties and candidates to Super PACs.

No one should welcome elections dominated by Super PACs. The quality and transparency of our elections benefit when candidates and parties set the terms of debate, not anonymous Super PACs.<sup>341</sup> Super PACs operate under non-descriptive and innocuous sounding names like "Restore our Future" and "Crossroads GPS."<sup>342</sup> Unlike candidates and parties, whose names actually appear on the ballot, Super PACs and other outside groups are not accountable to the voters on election day.<sup>343</sup> By encouraging the rise of Super PACs, FECA's aggregate limits deepened public cynicism. Opinion polling shows that Super PACs undermine public confidence in the integrity of the political process.<sup>344</sup> Public discontent runs so deep that a 2012 *Washington Post* poll found that nearly 70% of voters believe Super PACs should be illegal.<sup>345</sup>

Restoring political parties and candidates to their rightful place at the center of campaigns is thus critical to restoring democratic accountability in American elections.<sup>346</sup> That is precisely what the *McCutcheon* ruling does. It gives parties and candidates access to more donors and therefore more funds at a time when Super PACs threaten to monopolize federal elections. Even the dissenting justices in *McCutcheon* acknowledged that removing the aggregate

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339. *Id.*

340. See La Raja, *supra* note 28.

341. See, e.g., Kathleen M. Sullivan, *Two Concepts of Freedom Speech*, 124 HARV. L. REV. 143, 170 (2010); La Raja, *supra* note 28; Kelner & La Raja, *supra* note 23.

342. Jeremy W. Peters, *Conservative 'Super PACs' Synchronize Their Messages*, N.Y. TIMES, Sept. 24, 2012, available at <http://www.nytimes.com/2012/09/25/us/politics/conservative-super-pacs-sharpen-their-synchronized-message.html>; Sullivan, *supra* note 341, at 170 ("If the dirty work of negative advertising is left to corporate sponsors running independent ads because candidates do not want to be muddied by the backslash from running such ads themselves, then redirecting political money to candidates will also tend to elevate the tenor of political campaigns.").

343. Elias & Berkon, *supra* note 22, at 379 (observing that independent groups like "Americans for Prosperity" are not composed of "elected officials who must remain accountable to voters"); Issacharoff & Karlan, *supra* note 317, at 1714 (arguing that the campaign finance laws that encourage the rise of outside groups "exacerbate the already disturbing trend toward politics being divorced from the mediating influence of candidates and political parties").

344. Erik Opsal, *Poll: Super PACs Leave Americans Less Likely to Vote*, BRENNAN CTR. FOR JUSTICE (Apr. 24, 2012), <http://www.brennancenter.org/press-release/poll-super-pacs-leave-americans-less-likely-vote>.

345. Chris Cillizza & Aaron Blake, *Poll: Voters want super PACs to be illegal*, WASH. POST, Mar. 3, 2012, available at [http://www.washingtonpost.com/blogs/the-fix/post/poll-voters-want-super-pacs-to-be-illegal/2012/03/12/gIQA6skT8R\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/poll-voters-want-super-pacs-to-be-illegal/2012/03/12/gIQA6skT8R_blog.html).

346. In order to strengthen the political parties, Professor Richard Pildes has recently recommended changing "campaign-finance law to encourage more money to flow to the parties." See Richard Pildes, *How to fix our polarized politics? Strengthen political parties.*, WASH. POST, Feb. 6, 2014, available at <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/02/06/how-to-fix-our-polarized-politics-strengthen-political-parties/>.

limits will result in millions of additional dollars flowing to candidates and party committees.<sup>347</sup> Rather than bemoan that fact, we should welcome it.

*McCutcheon*'s benefits for candidates and parties should not be overstated. FECA's base limits on campaign contributions still apply to parties and candidates and not to independent expenditure groups.<sup>348</sup> Accordingly, Super PACs and other outside groups will wield fundraising supremacy in federal elections for years to come.

But the *McCutcheon* ruling is nevertheless a welcome development. By allowing donors to contribute the maximum base amounts to as many candidate and party committees as they want to, the ruling provides candidates and parties with a significant new financial lifeline.<sup>349</sup> Although it does not fix the problem of Super PAC dominance of federal election campaigns, the *McCutcheon* decision represents a step in the right direction.<sup>350</sup>

### C. Modest Victory for Disclosure

In a subtle and indirect way, *McCutcheon* also enhances public disclosure of federal campaign contributions.

It is a surprising but important fact that public disclosure laws do not apply equally to all political fundraising organizations. Under FECA, all contributions over \$200 to federal candidates and parties must be reported to the FEC and publicly disclosed.<sup>351</sup> But the same is not true of contributions made to outside groups organized under Section 501(c) of the Internal Revenue Code.<sup>352</sup> The law allows them to keep their donors' identities secret.<sup>353</sup> Accordingly, by encouraging more money to go to parties and candidates subject to FECA's public reporting requirements, *McCutcheon* increases the overall amount of contributions subject to public disclosure.

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347. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1472 (2014) (Breyer, J., dissenting).

348. See Garrett, *supra* note 32.

349. Elias & Berkon, *supra* note 22 (observing that *McCutcheon*'s "big winner is likely to be the group that suffers most under today's regime: political parties"); La Raja, *supra* note 28 (noting that "some potential good" may come out of *McCutcheon* because it allows "a party to raise more money through joint committees").

350. Elias & Berkon, *supra* note 22, at 378; La Raja, *supra* note 28 (noting that *McCutcheon* ruling gives parties access to more funds and thus reduces the Super PAC fundraising advantage).

351. 2 U.S.C. § 434; 11 C.F.R. § 104.5(c); R. SAM GARRETT, CONG. RESEARCH SERV., R42042, SUPER PACS IN FEDERAL ELECTIONS: OVERVIEW AND ISSUES FOR CONGRESS 11–12 (Apr. 4, 2014), available at <http://fas.org/sgp/crs/misc/R42042.pdf>; Federal Election Commission, *supra* note 32.

352. John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, INTERNAL REVENUE CODE EXEMPT ORGANIZATIONS—TECHNICAL INSTRUCTION PROGRAM FOR FY 2003, available at <http://www.irs.gov/pub/irs-tege/eotopic103.pdf>.

353. TOKAJI & STRAUSE, *supra* note 46, at 51 (noting that "nonprofit corporations organized under Section 501(c) of the Internal Revenue Code are not required to disclose their donors publicly").

The differential treatment stems from the fact that federal tax law exempts Section 501(c)(4) social welfare organizations, 501(c)(5) trade associations, and Section 501(c)(6) labor unions from publicly disclosing their financial supporters, even when the organizations engage in political activity.<sup>354</sup> The law thus permits Section 501(c) groups to operate in the shadows, outside the reach of public scrutiny.

The disclosure exemption for Section 501(c) organizations dates to the 1950s. In 1958 the United States Supreme Court ruled that the National Association for the Advancement of Colored People (“NAACP”), a Section 501(c)(4) social welfare organization, had a First Amendment right to conceal the identity of its donors even when it engaged in political activity.<sup>355</sup>

The case arose from the state of Alabama’s systematic harassment and intimidation of NAACP members in the 1950s. In an effort to undermine the Civil Rights Movement,<sup>356</sup> the state of Alabama subpoenaed the NAACP’s membership list.<sup>357</sup> The NAACP resisted the subpoena, pointing out that white segregationists had threatened acts of violence against the organization’s members.<sup>358</sup> The Supreme Court sided with the NAACP, reasoning that “compelled disclosure” of the identities of persons supporting unpopular or controversial social welfare organizations could have a chilling effect on the First Amendment right to freedom of political association.<sup>359</sup> As the Court explained, “Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”<sup>360</sup>

In 1995 the Supreme Court expanded the rights of those engaged in anonymous political activity.<sup>361</sup> In *McIntyre v. Ohio Elections Commission*, the Court struck down on First Amendment grounds an Ohio statute that prohibited the distribution of anonymous campaign literature.<sup>362</sup> The Supreme Court declared: “Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.”<sup>363</sup>

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354. Emma Schwartz, *The Rules That Govern 501(c)(4)s*, PBS FRONTLINE (Oct. 30, 2012), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/big-sky-big-money/the-rules-that-govern-501c4s/>; 26 U.S.C. § 501(c)(4); IRS Rev. Rul. 81-95, 1981-1 C.B. 332 (ruling that 501(c)(4) organizations that engage in independent political expenditures may maintain their tax-exempt status as long as they are “primarily engaged in activities that promote social welfare”); TOJAKI & STRAUSE, *supra* note 46, at 26.

355. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

356. *Id.* at 451–52.

357. *Id.* at 452–54.

358. GLORIA J. BROWNE-MARSHALL, RACE, LAW, AND AMERICAN SOCIETY: 1607–PRESENT 140–42 (2d ed. 2013).

359. NAACP, 357 U.S. at 462.

360. *Id.*

361. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

362. *Id.* at 357.

363. *Id.*

The political impact of the *NAACP* and *McIntyre* decisions was not felt in a major way until 2008, when federal campaign spending by Section 501(c) groups began to soar.<sup>364</sup> As recently as 2000, Section 501(c) groups accounted for only \$11.2 million in independent expenditures.<sup>365</sup> But, in 2008 independent expenditures by Section 501(c) groups grew to \$69 million; in 2012 they soared to \$310.8 million.<sup>366</sup> Critics call 501(c) groups' campaign expenditures "dark money" because the identities of 501(c) donors are exempt from public disclosure.<sup>367</sup> Professor Richard Hasen, one of the nation's leading election law experts, warns that "dark money creates an even greater danger of corruption and conflict of interest" because the public cannot "see the connections between campaign money and a candidate."<sup>368</sup>

To be sure, *McCutcheon* does not eliminate dark money or otherwise change the federal disclosure laws. However, in striking down FECA's aggregate limits, it offers a modest victory for advocates of disclosure. By artificially confining the donor pool for parties and candidates, the aggregate limits restricted the amount of campaign contributions that donors could make to political entities that are subject to mandatory disclosure laws. The redirection of those funds to outside groups undoubtedly resulted in some going to 501(c) organizations.<sup>369</sup> Ironically, therefore, the aggregate limits encouraged campaign contributors to donate to "dark money" entities that are *not* subject to disclosure laws.

The *McCutcheon* ruling at least slows that trend by increasing the amount of money available to parties and candidates.<sup>370</sup> Indeed, even the arguments underlying Justice Breyer's dissent support the conclusion that *McCutcheon* will promote greater transparency. For example, Justice Breyer bemoaned the fact that "in the absence of limits on aggregate political contributions, donors can and likely will find ways to channel millions of dollars to parties and to individual candidates."<sup>371</sup> But if Breyer is right, it means millions of dollars will flow away from IE groups, including Section 501(c) organizations, and move to candidates and parties that are subject to mandatory disclosure.<sup>372</sup>

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364. Thomas B. Edsall, *In Defense of Anonymous Political Giving*, N.Y. TIMES, Mar. 18, 2014, available at <http://www.nytimes.com/2014/03/19/opinion/edsall-in-defense-of-anonymous-political-giving.html>.

365. Center for Responsive Politics, *Outside Spending by Disclosure, Excluding Party Committees*, 2000-2014, OPENSECRETS.ORG (Nov. 2, 2014), <https://www.opensecrets.org/outsidespending/disclosure.php>.

366. *Id.*

367. LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 106 (2014); TOJAKI & STRAUSE, *supra* note 46, at 51–52.

368. Richard Hasen, *Of Super PACs and Corruption*, POLITICO (Mar. 22, 2012, 6:13 AM), available at <http://www.politico.com/news/stories/0312/74336.html>.

369. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 ("The existing aggregate limits may in fact encourage the movement of money away from entities subject to disclosure").

370. La Raja, *supra* note 28.

371. *McCutcheon*, 134 S. Ct. at 1472 (Breyer, J., dissenting).

372. La Raja, *supra* note 28 ("Donors who want to take advantage of *McCutcheon* will do so through federally regulated PACs that disclose all donations to the FEC. Regardless of how

Increased disclosure does not “take money out of politics” but it does enhance public knowledge of who is funding federal election campaigns. Voters have a right to know the identities of the campaign contributors who seek to influence their votes.<sup>373</sup> To a noteworthy degree, *McCutcheon* promotes such transparency.

#### ***D. A Major Victory for the First Amendment***

The *McCutcheon* decision’s positive and immediate impact on parties and candidates is clearly apparent. But the Court’s ruling also substantially enhances the First Amendment rights of campaign contributors themselves.

First, the *McCutcheon* ruling makes clear that the dollar value of a political contribution is itself a form of political speech.<sup>374</sup> In striking down the aggregate limits, the plurality emphasized that “[t]o require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process.”<sup>375</sup>

The Supreme Court has not always seen a strong connection between contribution amounts and freedom of speech. In *Buckley*, the Court defined campaign contributions as symbolic speech that did not deserve the full First Amendment protections afforded to other types of speech.<sup>376</sup> The *Buckley* court contended that the size of a donor’s contribution only “provides a very rough index of the intensity of the contributor’s support for the candidate.”<sup>377</sup> The Court even went so far as to assert that the size of a donor’s campaign contribution did not “perceptibly” increase the “quantity of communication by the contributor.”<sup>378</sup>

But *Buckley* was wrong. The dollar amount of a campaign contribution reflects the depth of a donor’s support for particular candidates, parties, and ideas.<sup>379</sup> As Justice Thomas observed in his *McCutcheon* concurrence, contribution limits “serve as a quantifiable metric of the intensity of a particular

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many PACs they contribute to, it is possible to connect the dots to see who is supporting whom in the political system.”).

373. On this point, see *TRIBE & MATZ*, *supra* note 367, at 112 (observing that “to the extent they are concerned with combating various kinds of corruption in our political system,” campaign reformers would be better served to “aim to ensure greater transparency in our brave new world of Super PACs and 501(c) organizations”).

374. *McCutcheon*, 134 S. Ct. at 1449, 1459 (noting that “the aggregate limits . . . impose a ceiling on speech”).

375. *Id.* at 1449.

376. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

377. *Id.*

378. *Id.*

379. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1463 (2014) (Thomas, J., concurring).

contributor's support, as demonstrated by the frequent practice of giving different amounts to different candidates."<sup>380</sup>

Indeed, the size of the contribution indicates the extent of a donor's support for a particular candidate's campaign. For instance, it is self-evidently true that a \$10 contribution to a candidate does not communicate the same message as a contribution of \$2,600, the base limit amount for general elections. The larger donation clearly suggests a higher degree of contributor support for the candidate. Accordingly, by prohibiting donors from making base limit donations of \$2,600 to ten or more general election candidates, FECA's aggregate limits restricted donor speech.<sup>381</sup> As the *McCutcheon* plurality pointedly observed, "the aggregate limits . . . impose a ceiling on speech."<sup>382</sup>

Moreover, a restriction on the number of candidates that a donor may support impinges upon the donor's freedom of political association.<sup>383</sup> Even the *Buckley* court acknowledged that FECA's aggregate limits burdened associational rights under the First Amendment.<sup>384</sup> But *Buckley* failed to appreciate the extent of the burden imposed by the aggregate limits on associational rights. It minimized the burden as a "quite modest restraint upon protected political activity."<sup>385</sup> Yet, the *Buckley* court failed to grasp the implications of its reasoning. As the *McCutcheon* plurality correctly pointed out, the First Amendment does not allow Congress to "tell a newspaper how many candidates it may endorse."<sup>386</sup> How then can Congress tell donors how many candidates they may support?

It is certainly true that the public overwhelmingly disapproves of the amount of money spent in American political campaigns.<sup>387</sup> But popular disdain for campaign contributions holds no more weight in constitutional analysis than the public's opposition to flag burning.<sup>388</sup> Under the Constitution, freedom of

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380. *Id.* at 1463 (Thomas, J., concurring).

381. *Id.* at 1459 (majority opinion).

382. *Id.*

383. *Id.* at 1448.

384. *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (observing that FECA's aggregate limits imposed "an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support").

385. *Id.*

386. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1344, 1448 (2014).

387. See, e.g., *National Survey: Super PACs, Corruption, and Democracy*, BRENNAN CTR. FOR JUSTICE (Apr. 24, 2012), <http://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy> (finding that 69% of Americans believe unlimited Super PAC campaign contributions will lead to corruption); Lydia Saad, *Half in U.S. Support Publicly Financed Federal Campaigns: Vast majority supports limiting campaign spending and contributions*, GALLUP POLITICS (June 24, 2013), <http://www.gallup.com/poll/163208/half-support-publicly-financed-federal-campaigns.aspx> (finding that 79% of Americans support spending caps for Congressional campaigns); Dan Eggen, *Poll: Large majority opposes Supreme Court's decision on campaign financing*, WASH. POST, Feb. 17, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>.

388. Joseph Carroll, *Public Support for Constitutional Amendment on Flag Burning*, GALLUP (June 29, 2006), <http://www.gallup.com/poll/23524/public-support-constitutional-amend>

speech is not limited to popular forms of political expression. As the *McCutcheon* plurality rightfully emphasized, “Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects.”<sup>389</sup> Regardless of public opinion, a campaign contributor is no less worthy of First Amendment protection than any other participant in the election process.

In addressing the First Amendment implications of FECA’s aggregate limits, the *McCutcheon* ruling implicitly acknowledges the inescapable reality that effective political communication requires financial contributions.<sup>390</sup> The *Buckley* court itself recognized that fact when it observed: “The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.”<sup>391</sup>

The *Buckley* court’s observation is even more compelling today when commercial advertising costs tens of billions of dollars annually.<sup>392</sup> A 2012 Pew Research Center study found that television advertisements reach 72% of voters, far more than any other medium of communication.<sup>393</sup> According to the Nielsen Company, the average cost of airing a single advertisement on broadcast television during primetime is \$75,000.<sup>394</sup> In light of modern advertising expenses, it should come as no surprise that the 2012 election cost a combined total of \$7 billion.<sup>395</sup> And it is not only presidential campaigns that cost enormous sums. A 2013 study found that the average Senate campaign costs over \$10 million and the average House campaign costs almost \$2 million.<sup>396</sup>

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ment-flag-burning.aspx.

389. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1441 (2014).

390. For an excellent analysis of this issue, see Bradley A. Smith, *The Siren’s Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL’Y 1, 12–19 (1997).

391. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

392. *TV Advertising Keeps Growing as Mobile Boosts Digital Video Spend*, EMARKETER (Apr. 3, 2013), <http://www.emarketer.com/Article/TV-Advertising-Keeps-Growing-Mobile-Boosts-Digital-Video-Spend/1009780>; Joe Flint, *Television Networks Load Up on Commercials*, L.A. TIMES, May 12, 2014, available at <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-nielsen-advertising-study-20140510-story.html>.

393. *Cable Leads the Pack as Campaign News Source: Twitter, Facebook Play Very Modest Roles*, PEW RESEARCH CTR. (Feb. 7, 2012), <http://www.people-press.org/2012/02/07/cable-leads-the-pack-as-campaign-news-source/>.

394. *Advertising and Audiences: Making Ad Dollars Make Sense*, NIELSEN (May 12, 2014), <http://www.nielsen.com/content/corporate/us/en/insights/news/2014/advertising-and-audiences-making-ad-dollars-make-sense.html>.

395. Tarini Parti, *\$7 billion spent on 2012 campaign, FEC says*, POLITICO (Jan. 31, 2013, 10:26 PM), <http://www.politico.com/story/2013/01/7-billion-spent-on-2012-campaign-fec-says-87051.html>.

396. David Knowles, *U.S. Senate seat now costs \$10.5 million to win, on average, while US House seat costs, \$1.7 million, new analysis of FEC data shows*, N.Y. DAILY NEWS, Mar. 11, 2013, available at <http://www.nydailynews.com/news/politics/cost-u-s-senate-seat-10-5-million-article-1.1285491>.

The bottom line is that candidates need money in order to communicate their campaign messages to voters.<sup>397</sup> Although one may contest the notion that money itself is speech,<sup>398</sup> it is undeniable that money is essential to political communication.<sup>399</sup> As the *Buckley* court acknowledged in 1976, contribution limits reduce “the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”<sup>400</sup> In his *McCutcheon* concurrence, Justice Thomas reiterated that point when he observed that contributions “increase the quantity of communication by ‘amplifying the voice of the candidate’ and ‘help[ing] to ensure the dissemination of the messages that the contributor wishes to convey.’”<sup>401</sup>

Consequently, by their very nature, FECA’s aggregate limits involved the government in the business of regulating and rationing political speech.<sup>402</sup> Justice Breyer admitted as much in the dissent when he claimed that the aggregate limits were necessary to ensure that “a few large donations not drown out the voices of the many.”<sup>403</sup> But the ultimate irony is the fact that the aggregate limits made the financial playing field of American election campaigns even more unbalanced. When the law permits donors to give tens of millions to Super PACs, but only \$123,200 to candidates and parties, the Super PAC’s voice is amplified at the expense of candidates and parties. Such a state of affairs is simply not defensible.

*McCutcheon* is thus a highly sensible decision. By expanding the freedom of speech and association rights of donors, parties, and candidates, it recogniz-

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397. LARRY POWELL & JOE COWART, POLITICAL CAMPAIGN COMMUNICATION: INSIDE AND OUT 216 (2003) (“[M]oney buys the means of political speech”); MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 125 (2001) (“The simple reality is that today, money is essential to communicate a candidate’s message to the electorate.”); LARRY J. SABATO, PAYING FOR ELECTIONS 25 (1989) (“Given the obvious need for more political communication and education, it hardly makes sense to spend less on the process.”).

398. For the proposition that campaign contributions are speech, see Bradley A. Smith, *Money Talks: Speech, Equality, Corruption, and Campaign Finance*, 86 GEO. L. J. 45, 52 (1997) (observing that “money is speech”). For the proposition that money is not speech, see J. Skelly Wright, *Politics and the Constitution: Is Money Speech?* 85 YALE L. J. 1001 (1976).

399. TRIBE & MATZ, *supra* note 367, at 112 (observing that “it often costs money to speak effectively to more than just a few people at once, and allowing government to control who can spend enough to get heard on a grander scale would render freedom of speech illusory”).

400. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

401. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1463 (2014) (Thomas, J., dissenting) (quoting *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 415 (2000) (Thomas, J., dissenting)).

402. On the First Amendment implications of campaign finance reform, see Lillian R. Bevier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997); and JOHN SAMPLES, THE FALLACY OF CAMPAIGN FINANCE REFORM 34 (2006).

403. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1467–68 (2014) (Breyer, J., dissenting).

es the inextricable connection between campaign contributions and the First Amendment.

### *E. Narrow Definition of Corruption is Wise*

Finally, *McCutcheon* takes an admirably restrained approach to the challenge of defining the concept of “corruption” in campaign finance law.<sup>404</sup> Critics skewered the plurality’s *quid pro quo* definition of corruption because its practical effect is to sharply limit the scope of campaign finance regulations.<sup>405</sup> But for all the controversy generated by *McCutcheon*’s narrow definition of corruption, it does not represent a radical departure from precedent. Instead, it constitutes a wise restraint on those who might be inclined to use campaign finance laws as a weapon of partisan warfare.

*McCutcheon*’s *quid pro quo* definition of corruption is identical to that adopted by the Court in recent cases such as *Citizens United*,<sup>406</sup> and it is largely consistent with the approach of *Buckley*.<sup>407</sup> Indeed, in *Buckley* the Supreme Court struck down expenditure caps on the grounds that “effective political speech” depends on “expensive modes of communication.”<sup>408</sup> Much like *McCutcheon*, the *Buckley* court concluded that the increasing cost of federal election campaigns “provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise.”<sup>409</sup>

Also like *McCutcheon*, the *Buckley* decision employed the *quid pro quo* definition of corruption. In affirming FECA’s contribution limits, *Buckley* asserted that, “[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.”<sup>410</sup> *McCutcheon*’s approach to corruption is thus well within the long-standing mainstream of Supreme Court jurisprudence.

On the other hand, as Justice Breyer’s dissent noted, it is true that in both the 2003 *McConnell* case<sup>411</sup> and the 2000 case of *Nixon v. Shrink Missouri Gov’t PAC*<sup>412</sup> the Supreme Court toyed with the idea of a broader definition of corruption. For example, in upholding BCRA’s ban on soft money, the Court

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404. *Id.* at 1450 (“while preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—‘quid pro quo’ corruption.”).

405. *See supra* Part IV.

406. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 359 (2014); *Ariz. Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825–26 (2011).

407. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

408. *Id.* at 19.

409. *Id.* at 57.

410. *Id.* at 26–27.

411. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 145 (2003).

412. *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 389 (2000).

in *McConnell* observed that “[i]mplicit . . . in the sale of access is the suggestion that money buys influence.”<sup>413</sup> Likewise, in *Shrink Missouri*, the Court affirmed a Missouri contribution limit statute because it guarded against both bribery and “the broader threat from politicians too compliant with the wishes of large contributors.”<sup>414</sup> In addition, some commentators assert that even *Buckley* implied that the Constitution permits a somewhat broader definition of corruption than just *quid pro quo* bribes.<sup>415</sup>

Moreover, critics of campaign finance regulation must acknowledge the undeniable fact that campaign contributors enjoy unusual access to federal officeholders.<sup>416</sup> Common sense would suggest as much. The very fact that federal election campaigns cost so much enhances the collective importance of campaign contributors to candidates and officeholders. It is not unreasonable at all for the public to view such access and influence as a form of corruption.

However, the challenge comes in determining where to draw the line. The great advantage of the *quid pro quo* definition of corruption is the fact that it is clear and unambiguous. In sharp contrast, clarity is completely absent from the extremely amorphous definition of “corruption” proposed by Justice Breyer. In his dissent in *McCutcheon*, Breyer proposed a definition of corruption that would include campaign contributors’ “privileged access to and pernicious influence upon elected representatives.”<sup>417</sup>

Although Justice Breyer is undoubtedly correct that some contributors exercise a pernicious influence upon elected representatives, the dissent’s ambitiously broad definition of corruption risks undermining basic constitutional rights. As Chief Justice Roberts noted, “a central feature of democracy” is “that constituents support candidates who share their beliefs and interests, and

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413. *McConnell*, 540 U.S. at 145.

414. *Shrink Missouri*, 528 U.S. at 389. See also TOKAJI & STRAUSE, *supra* note 46, at 12 (describing the Court’s “expansive” view of corruption in *Shrink Missouri* as “not limited to the quid pro quo exchange of money for political favors”).

415. See Elias & Berkon, *supra* note 22, at 374.

416. The literature on this subject is vast. See, e.g., LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); PETER L. FRANCA ET AL., *THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES, AND INTIMATES* (2003); JEFFREY H. BIRNBAUM, *THE MONEY MEN: THE REAL STORY OF FUNDRAISING’S INFLUENCE ON POLITICAL POWER IN AMERICA* (2000); Michael Cornfield, *Money Worries: Campaign Financing and Spending in the 2010 Elections*, in *PENDULUM SWING* 125 (Larry J. Sabato ed., 2011); Elias & Berkon, *supra* note 22.

417. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1466, 1469 (Breyer, J., dissenting). See also Garrett Epps, *Legalized Corruption and the Twilight of Campaign-Finance Law*, SLATE, Apr. 2, 2014, available at <http://www.theatlantic.com/politics/archive/2014/04/legalized-corruption-and-the-twilight-of-campaign-finance-law/360051/>; Editorial, *Campaign Donations and Political Corruption*, N.Y. TIMES, Feb. 19, 2013, available at <http://www.nytimes.com/2013/02/20/opinion/campaign-donations-and-political-corruption.html>; *Move to Amend’s Proposed 28th Amendment to the Constitution*, MOVE TO AMEND, <https://movetoamend.org/wethepeopleamendment>.

candidates who are elected can be expected to be responsive to those concerns.”<sup>418</sup>

Officeholder receptivity to constituent concerns is more than just a general principle of democracy. It is one of the core principles expressly identified in the Constitution. The First Amendment provides for “the right of the people . . . to petition the Government for a redress of grievances.”<sup>419</sup> The Bill of Rights thus guarantees the right of citizens to lobby their government. By definition, therefore, the right to petition the government for redress of grievances requires that American citizens have access to officeholders and influence with them. The fact that the citizen is a wealthy supporter of the officeholder does not make the First Amendment any less protective of that supporter’s right to petition the government or the officeholder.

How then does one distinguish a donor’s corrupt “access and influence” with Congress from every American’s constitutional right to petition Congress? Where should that line be drawn and who should draw it?

Disturbingly, the answers likely depend on the party to which one belongs. A recent study by the political scientists Marc Hetherington and Thomas Rudolph found that Americans’ level of trust in their government is directly contingent upon whether their preferred political party is in or out of power.<sup>420</sup> Hetherington and Rudolph conclude that rampant political polarization of the American electorate has resulted in “vanishingly low trust in government” among Americans “when their party is out of power.”<sup>421</sup>

In such a polarized era, one does not have to be a cynic to recognize that the vague and malleable nature of Breyer’s definition of corruption would open the floodgates to politically minded prosecutions. In the take-no-prisoners atmosphere of modern American politics, a broad definition of “corruption” could be used by overzealous and ambitious prosecutors to intimidate, harass, and indict campaign contributors of the opposing party.

Indeed, with corruption defined so broadly, the federal courts could easily find themselves used as a platform to promote partisan agendas. Campaign finance cases almost inevitably thrust courts into partisan controversies.<sup>422</sup> One

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418. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1441 (2014).

419. U.S. CONST. amend. I.

420. Marc Hetherington & Thomas Rudolph, *Why don’t Americans trust the government? Because the other party is in power*, WASH. POST, Jan. 30, 2014, available at <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/30/why-dont-americans-trust-the-government-be-cause-the-other-party-is-in-power/>.

421. *Id.*

422. The Don Siegelman prosecution is a case in point. See, e.g., Editorial, *Questions About a Governor’s Fall*, N.Y. TIMES, June 30, 2007, at A16, available at <http://www.nytimes.com/2007/06/30/opinion/30sat2.html>; see also Editorial, *The Siegelman Case*, N.Y. TIMES, Apr. 24, 2009, at A18, available at <http://www.nytimes.com/2009/04/25/opinion/25sat4.html>; Brief of Law Professors as Amici Curiae in Support of Petitioner at 5, *Siegelman v. United States*, 640 F.3d 1159 (11th Cir. 2011) (No. 11-955); HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT 28–31 (2009); George F. Will, *Is it*

recent example is President Obama's 2010 State of the Union Address. In his speech, the president condemned the Supreme Court's ruling in *Citizens United* as the justices sat in the audience before him.<sup>423</sup> The president declared: "With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections."<sup>424</sup>

The president correctly predicted the dramatic surge in outside group spending that subsequently ensued in the 2012 and 2014 elections. But he misstated an important part of the Court's holding in *Citizens United*, a misrepresentation that prompted Justice Alito to angrily shake his head and declare: "Not true."<sup>425</sup> The president's speech omitted the crucial fact that federal law already expressly bans foreign contributions to American election campaigns,<sup>426</sup> a ban that the *Citizens United* ruling did not affect in any regard at all.<sup>427</sup> The Supreme Court reiterated that point in a January 2012 ruling, which reaffirmed the ban on foreign campaign donations.<sup>428</sup> Federal prosecutors continue to aggressively enforce the ban on foreign contributions. For example, in February 2014 the U.S. Justice Department indicted a Mexican millionaire accused of funneling hundreds of thousands of dollars in contributions to candidates in California elections.<sup>429</sup>

The controversy over the *Citizens United* ruling and the president's 2010 State of the Union address reflects the toxic partisan environment in which every campaign finance case is heard and decided. Unfair though the accusations might be in individual cases, campaign finance indictments often give rise to damaging accusations of partisan bias on the part of judges or prosecutors. The controversy that surrounds such cases undermines public confidence

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*Bribery or Just Politics?*, WASH. POST, Feb. 10, 2012, available at [http://www.washingtonpost.com/opinions/is-it-bribery-or-just-politics/2012/02/09/gIQA4hy34Q\\_story.html](http://www.washingtonpost.com/opinions/is-it-bribery-or-just-politics/2012/02/09/gIQA4hy34Q_story.html).

423. Michael Cornfield, *Money Worries: Campaign Financing and Spending in the 2010 Elections*, in PENDULUM SWING 117 (Larry J. Sabato ed., 2011).

424. Office of the White House Press Secretary, *Remarks by the President in State of the Union Address*, THE WHITE HOUSE (Jan. 27, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

425. Cornfield, *supra* note 423, at 117.

426. 2 U.S.C. § 441(e); 11 C.F.R. § 110.20(b). See also *Foreign Nationals Contribution Brochure*, FED. ELECTION COMM'N (Apr. 2014), [http://www.fec.gov/pages/brochures/contrib.shtml#Foreign\\_Nationals](http://www.fec.gov/pages/brochures/contrib.shtml#Foreign_Nationals).

427. *Citizens United, v. Fed. Election Comm'n*, 558 U.S. 310, 362 (2014) ("We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process.")

428. John H. Cushman, Jr., *Supreme Court Retains Ban on Foreign Campaign Donations*, N.Y. TIMES, Jan. 9, 2012, available at <http://thecaucus.blogs.nytimes.com/2012/01/09/supreme-court-retains-ban-on-foreign-campaign-donations/>; *Bluman v. Fed. Election Comm'n*, 132 S. Ct. 1087 (Mem) (Jan. 9, 2012).

429. Kristina Davis, *Tycoon Charged In Campaign Scandal: Mexican Businessman Is Accused Of Illegally Funneling \$600,000 To San Diego Campaigns*, SAN DIEGO UNION-TRIB., Feb. 20, 2014, available at <http://www.utsandiego.com/news/2014/feb/20/campaign-finance-scandal-azano/>.

in the integrity of the judicial system just as much as the alleged wrongdoing undermines public confidence in the integrity of the political system.

The Bush Justice Department's decision to prosecute former Alabama Governor Don Siegelman is a case in point.<sup>430</sup> In 2005, the Republican administration of President George W. Bush brought federal charges against the former Democratic governor alleging that he corruptly solicited campaign contributions.<sup>431</sup> At trial, Siegelman was found guilty even though Justice Department prosecutors lacked proof of an express *quid pro quo* agreement between the governor and the campaign contributor.<sup>432</sup> Over 100 former state attorneys general filed an amicus brief in support of Siegelman's appeal.<sup>433</sup> The former prosecutors warned that "allowing prosecutors to cast a wide net in campaign contribution cases will stifle the legal ability of campaigns to raise needed funds for fear of politically-motivated prosecution of themselves and their donors."<sup>434</sup>

The prosecution of a Democratic politician by a Republican administration created a storm of controversy. The *New York Times* editorial board warned that Siegelman's "prosecution may have been a political hit, intended to take out the state's most prominent Democrat."<sup>435</sup> Even conservatives expressed similar concerns. The conservative columnist George Will cited the Siegelman case as an example of the fact that "prosecutors have dangerous discretion to criminalize politics."<sup>436</sup>

The Siegelman controversy demonstrates the danger posed by imprecise and unsettled corruption standards in campaign finance prosecutions. Amid the hyper-partisan environment of modern American politics, *McCutcheon's* narrow *quid pro quo* definition of corruption is prudent. It adopts a clear, bright-line rule that leaves little room for ambiguity. In the process, it keeps the federal courts out of the inherently political and subjective determination of when generalized access and influence constitute corruption. Accordingly, the *McCutcheon* ruling deserves the public's commendation, not condemnation.

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430. On the Siegelman controversy, see HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT 28-31 (2009); Adam Cohen, *The Strange Case of an Imprisoned Alabama Governor*, N.Y. TIMES, Sept. 10, 2007, at A28, available at <http://www.nytimes.com/2007/09/10/opinion/10mon4.html>.

431. *United States v. Siegelman*, 640 F.3d 1159, 1164, 1168 (11th Cir. 2011).

432. *Id.* at 1176, 1177 n.26.

433. See Brief Amici Curiae of Former Attorneys General in Support of Petitioner at 1, *Siegelman v. United States*, 640 F.3d 1159 (11th Cir. 2011).

434. *Id.* at 5.

435. Editorial, *Questions About a Governor's Fall*, N.Y. TIMES, June 30, 2007, available at <http://www.nytimes.com/2007/06/30/opinion/30sat2.html>.

436. George F. Will, *Is it bribery or just politics?*, WASH. POST, Feb. 10, 2012, available at [http://www.washingtonpost.com/opinions/is-it-bribery-or-just-politics/2012/02/09/gIQA4hy34Q\\_story.html](http://www.washingtonpost.com/opinions/is-it-bribery-or-just-politics/2012/02/09/gIQA4hy34Q_story.html).

## VI. CONCLUSION

In a nation as vast as the United States—with a population of 319 million people<sup>437</sup> and counting—the cost of campaigning for federal office is inherently expensive. The resources necessary to engage in effective political communication do not come for free. Television advertisements, travel budgets, campaign staff, and all the other indispensable elements of a modern political campaign cost millions of dollars even in small states. Fund-raising is thus an inescapable necessity of modern American election campaigns.

The *McCutcheon* ruling exhibits an admirably realistic and forthright understanding of that undeniable fact. Far from a radical departure with past precedent, *McCutcheon* modestly improves the federal campaign finance system. It gives candidates and parties a fundraising boost at a time when Super PACs and other outside groups threaten to monopolize campaign advertising. It enhances transparency by encouraging funds to flow from outside groups to parties, candidates, and PACs subject to mandatory disclosure laws. It expands the freedom of speech and association rights of campaign contributors. And, not least, it embraces a clear and manageable definition of corruption. For all of those reasons, *McCutcheon* is a wise and sensible ruling.

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437. *U.S. and World Population Clock*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/popclock/>.