

# *McCutcheon v. FEC* and the Supreme Court's Return to *Buckley*

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Widely hailed (and derided) as the “next *Citizens United*,” the Supreme Court’s most recent campaign finance ruling has ignited predictable heat and little light. What should have been a relatively modest as-applied challenge to a single restriction, the case instead spawned an impassioned fight over the form and extent of corruption in American government. Ultimately, the controlling opinion marked a decisive step toward straightforward and predictable constitutional analysis.<sup>1</sup> It restored, in important part, the jurisprudence of the seminal *per curiam* decision of *Buckley v. Valeo*, decided in 1976 at a low point in American political history.<sup>2</sup> In doing so, the Court made campaign finance law a simpler, if no less controversial, discipline.

American elections are largely private affairs, with the appeals of candidates and political parties paid for by contributions from individuals. The amount of such contributions has long been limited: individual Americans may contribute a set maximum to each candidate, political party, or political action committee (PAC), on the theory that large contributions from individuals directly to officeholders will create opportunities for corrupt exchanges. In addition, Congress limited the *total* amount that an individual may contribute to all candidates, parties, and PACs in the aggregate. It is this last aggregate limit that was the subject of *McCutcheon v. Federal Election Commission*.

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<sup>1</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434 (2012). Authored by Chief Justice John Roberts and joined by Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito. Justice Clarence Thomas’s concurring opinion would have gone further, imposing strict scrutiny and overruling contrary precedent, but he nevertheless voted with the majority and patently prefers the plurality’s reasoning to that of the dissent.

<sup>2</sup> *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976).

The Court began with the largely uncontroversial position that the spending of money—while not itself speech—is necessary for effective advocacy in the United States. As the Court has long recognized, “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”<sup>3</sup> Money is not speech, nor is oxygen fire, but in both cases the connection is apparent. Just as a restriction on the use of printing presses or blogging software would be evaluated through a First Amendment freedom-of-speech lens, so too must money that facilitates political expression.<sup>4</sup>

The Court went on to apply the now-familiar, two-part test regarding government infringements on fundamental rights: (1) has the state articulated an important-enough interest to justify infringing upon constitutional liberties, and (2) is its chosen policy appropriately tailored to that interest? This analysis ought to be straightforward and familiar after 40 years of regular Supreme Court rulings on the constitutionality of various campaign finance regulations. But Justice Antonin Scalia spoke for many when he stated at oral argument that “campaign finance law is so intricate that I can’t figure it out.”<sup>5</sup>

Given this muddled state of affairs, *McCutcheon* made two important doctrinal contributions, one with respect to each of the two prongs of this First Amendment analysis.

First, it clarified that contribution limits must be justified by the government interests in preventing the corruption of officeholders or the appearance of such corruption. It further clarified that when the Court says “corruption,” it means “quid pro quo arrangements,” and not an amorphous concept of influence or access (much less a generalized understanding of speaker equality). Second, it found that while the base limits on contributions to particular political entities may be justified, aggregate limits paint with too broad a brush. If “it is perfectly fine to contribute \$5,200 to nine candidates, [how is it] somehow corrupt to give the same amount to a tenth[?]”<sup>6</sup>

<sup>3</sup> *Id.* at 19.

<sup>4</sup> See, e.g., Ilya Shapiro, Wisconsin’s Progressive Police State Betrays Campaign Finance Folly, *Forbes*, July 7, 2014, <http://www.forbes.com/sites/ilyashapiro/2014/05/28/wisconsins-progressive-police-state-betrays-campaign-finance-folly>.

<sup>5</sup> Transcript of Oral Argument at 17, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (No. 12-536).

<sup>6</sup> *McCutcheon*, 134 S. Ct. at 1451.

Thus, in *McCutcheon* the Court provided some much-needed clarity by returning to its roots in *Buckley*, thereby resurrecting a narrower—and hopefully both predictable and familiar—approach to campaign finance regulation.

### **I. A Brief History of Campaign Finance Regulation**

Critics have frequently lumped *McCutcheon* together with the Court's 2010 ruling in *Citizens United*, but it has little in common with that much-discussed (and largely misunderstood) case.<sup>7</sup> That case asked whether the government could ban corporations from running advertisements that advocate—even implicitly—the election or defeat of candidates. *Citizens United* is a nonprofit advocacy corporation that wished to air a film critical of then-candidate Hillary Clinton. Shaun McCutcheon, by contrast, was an individual (not a corporation) wishing to contribute directly to candidates, parties, and PACs. He hoped to give \$1,776 to each of 28 candidates and \$25,000 to each of the three Republican national party committees, but the aggregate limits applicable to individual contributors prevented this.<sup>8</sup>

*McCutcheon* and *Citizens United* thus sit on opposite sides of two important factual divides. First, *McCutcheon* involved individual political activity, not the collective activity of corporations and unions. Second, *McCutcheon* involved direct contribution of money to political actors, not independent spending to comment upon politicians.

These distinctions are important and longstanding. *McCutcheon* is the latest in a line of cases, more or less regularly decided, stretching back to the Supreme Court's 1976 *Buckley v. Valeo* decision.<sup>9</sup> *Buckley* was an omnibus challenge to the Federal Election Campaign Act (FECA). Though there have been subsequent changes to federal campaign finance law, *Buckley* has remained the preeminent articulation of the First Amendment interests that such regulation implicates, and has provided the analytical underpinning for every campaign finance case decided in the past 40 years.

<sup>7</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>8</sup> *McCutcheon*, 134 S. Ct. at 1443.

<sup>9</sup> As they must be; Congress has required the Court to review certain challenges to federal campaign finance statutes. *McCutcheon*, 134 S. Ct. at 1444 (“we ha[ve] no discretion to refuse adjudication of the case on its merits”) (citation and internal quotation marks omitted).

A. *Buckley v. Valeo*

In 1974, in the wake of the Watergate scandal, Congress amended FECA to limit “individual political contributions . . . to \$1,000 to any single candidate per election, with an overall annual limitation of \$25,000 by any contributor.”<sup>10</sup> The amendments also capped “independent expenditures by individuals and groups ‘relative to a clearly identified’ candidate” at \$1,000.<sup>11</sup> The *Buckley* Court recognized differences between expenditures and contributions, and treated the limits on each differently for purposes of constitutional analysis.

Observing that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money,” the Court pointed out the obvious consequence: limitations on the amount a candidate or group could expend would necessarily “reduce[] the quantity of expression.”<sup>12</sup> Considering voters’ “increasing dependence on television, radio, and other mass media for news and information,” the Court recognized that “effective political speech” might often be expensive.<sup>13</sup>

Given this reality, the Court was particularly troubled by the “\$1,000 ceiling on spending ‘relative to a clearly identified candidate.’”<sup>14</sup> Such a low expenditure limit “would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication.”<sup>15</sup> This reduced quantity of speech—and smaller pool of speakers—undermined fundamental democratic principles. To illustrate this concern, the Court noted that it would be “a federal criminal offense for a person or association to place a single one-quarter page advertisement ‘relative to a clearly identified candidate’ in a major metropolitan newspaper.”<sup>16</sup> (Indeed, this same concern about excluding a broad range of potential speakers would be echoed decades later, when *Citizens United* scaled back

<sup>10</sup> *Buckley*, 424 U.S. at 7.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 19.

<sup>13</sup> *Id.*

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

<sup>15</sup> *Id.* at 19–20.

<sup>16</sup> *Id.* at 40 (citations omitted).

disparate treatment of corporate speakers wishing to make independent expenditures.)<sup>17</sup>

The Court attempted to prevent this result by narrowing the statute's reach. Because it would be unconstitutionally vague and overbroad to regulate all speech "relative to a clearly identified candidate," the Court limited the definition of "expenditure" to speech "expressly advocat[ing] the election or defeat of a clearly identified candidate."<sup>18</sup> But even so limited, the Court struck down FECA's expenditure limits. Congress could not eliminate political speech by essentially all speakers except the conventional media, the institutional political parties, and the candidates themselves.

"By contrast with a limitation upon expenditures for political expression," the Court explained, "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication."<sup>19</sup> The Court's rationale is worth quoting in its entirety and further illustrates the foundational distinction between contributions and expenditures:

A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication,

<sup>17</sup> *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) ("With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred."). See also Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 *Yale L. J.* 412, 435 (2013) ("[T]he publication of criticism of a public official is protected whether published by a for-profit media corporation or by persons who are 'not members of the press' in the form of a paid advertisement. That covers both bases of the *Citizens United* problem: the freedom to publish criticisms of public officials and candidates is not lost by virtue of either corporate status or non-membership in the institutional news media.").

<sup>18</sup> *Buckley*, 424 U.S. at 42.

<sup>19</sup> *Id.* at 20–21.

for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.<sup>20</sup>

In short, while limiting the expenditure of money for political advocacy will, mathematically, limit the quantity of such expression, the same is not precisely true for contribution limits.

From *Buckley*, then, stems the Court's long-standing distinction between laws that restrict expenditures—like the ban on collective independent expenditures invalidated in *Citizens United*—and those that restrict contributions—like the aggregate limit challenged in *McCutcheon*. Though often conflated in popular discussion, these two categories were set apart more than 40 years ago, and the Court continues to distinguish between them today.

### *B. Political Spending after Buckley*

Post-*Buckley* challenges to the constitutionality of campaign finance laws have generally been as-applied cases, limited to particular factual scenarios. Perhaps because of this, the Court's expenditure jurisprudence has been less than uniform. While the Court has purported to apply strict scrutiny to laws that burden independent expenditures, the applicable standard of review—and its application across various contexts—has remained in flux.<sup>21</sup>

<sup>20</sup> *Id.* at 21.

<sup>21</sup> See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 669 (1990) (upholding state law forbidding corporations from making independent expenditures out of general treasury funds); *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007) (“*WRTL II*”) (striking down federal prohibition on corporate independent expenditures for electioneering communications introduced by the Bipartisan Campaign Reform Act of 2002, but not adopting a uniform rationale for doing so. See *id.* at 483–504 (Scalia, J., dissenting)); *McConnell v. FEC*, 540 U.S. 93 (2003) (upholding BCRA—including its electioneering communications provisions—on its face); *Citizens United*, 558 U.S. at 341 (purporting to apply the same scrutiny, but overruling *Austin* and going further than *WRTL II* by concluding that, insofar as BCRA banned corporate independent expenditures, it was unconstitutional).

Fortunately, unlike expenditure cases,<sup>22</sup> the Court's resolution of cases about contribution limits, up to and including *McCutcheon*, has been largely consistent with *Buckley*. In particular, the Court has been clear on three points. First, contribution limits are permitted because they help protect against corruption and its appearance. Second, such limits nonetheless implicate associational (and to a lesser extent speech) liberties.<sup>23</sup> And third, while contribution limits must be reasonable, legislatures will be accorded substantial deference in setting them.

Decisions applying these principles have also been comparatively clear. *Nixon v. Shrink Missouri Government PAC*, for example, upheld Missouri's contribution limits. Reiterating that the government's anti-corruption interest could indeed justify such limits,<sup>24</sup> the Court nonetheless considered their impact on First Amendment rights,<sup>25</sup> while noting that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."<sup>26</sup> The Court applied the same analysis when it later *invalidated* state contribution limits in *Randall v. Sorrell*, recognizing that, "contribution limits might sometimes work more harm to protected First Amendment interests than their anti-corruption objectives

<sup>22</sup> And cases turning on whether a particular payment is an expenditure or a contribution, see, e.g., *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996).

<sup>23</sup> Although these two liberties are related: "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Buckley*, 424 U.S. at 15 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1976)) (alterations omitted).

<sup>24</sup> 528 U.S. 377, 388–89 (2000) ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent'") (quoting *Buckley*, 424 U.S. at 27; in turn quoting *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 565 (1973); collecting cases).

<sup>25</sup> *Id.* at 388 ("While we did not attempt to parse distinctions between the speech and association standards of scrutiny for contribution limits, we did make it clear that those restrictions bore more heavily on the associational right than on freedom to speak.") (citing *Buckley*, 424 U.S. at 24–25).

<sup>26</sup> *Id.* at 391.

[can] justify.”<sup>27</sup> Noting that “ordinarily we have deferred to the legislature’s determination of such matters,” the Court concluded that, in that particular case, the legislature had gone too far and the limits were too low.<sup>28</sup> “[W]e must recognize the existence of some lower bound. At some point the constitutional risks to the democratic electoral process become too great.”<sup>29</sup>

Thus the law stood when Shaun McCutcheon’s challenge to the individual aggregate contribution limits reached the Supreme Court. Contribution limits had been recognized as a generally permissible tool. But the government was still required to show that any particular limit did not do more harm to First Amendment interests than could be justified by its utility as an anti-corruption measure.

## II. *McCutcheon* and Aggregate Contribution Limits

Federal campaign finance statutes impose two types of contribution limits. The first, known as base limits, “restrict[] how much money a donor may contribute to a particular candidate or committee.”<sup>30</sup> The second “restrict[] how much money a donor may contribute in total to all candidates or committees.”<sup>31</sup> Only the latter type—aggregate limits—were at issue in *McCutcheon*.

The limits challenged in *McCutcheon* in fact contained three distinct aggregate limits. The first of these capped a donor’s total contributions to all candidates for federal office at \$48,600.<sup>32</sup> In addition, the same donor could contribute up to \$74,600 to a combination of political parties and PACs.<sup>33</sup> Of this \$74,600, a total of \$26,000 was set

<sup>27</sup> 548 U.S. 230, 247–48 (2006) (citing *Shrink Mo.*, 528 U.S. at 395–397; *Buckley*, 424 U.S. at 21).

<sup>28</sup> *Id.* at 248.

<sup>29</sup> *Id.*

<sup>30</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014) (citing 2 U.S.C. § 441a(a)(1)).

<sup>31</sup> *Id.* at 1442 (citing 2 U.S.C. § 441a(a)(3)).

<sup>32</sup> *Id.* at 1442–43 (citing 2 U.S.C. § 441a(a)(3); 78 Fed. Reg. 8532.).

<sup>33</sup> PACs bundle funds from individual donors to support a common mission through election-related spending, including contributions to candidates. They aren’t exactly a creature of federal campaign finance law, but they do illustrate the important principle that banning one avenue of political spending will ultimately result in the same dollars being spent via other channels. Indeed, the first “political action committee” was formed by the Congress of Industrial Organizations in response to the newly enacted ban on campaign contributions by labor organizations. For a more complete history of



aside exclusively for the national political parties.<sup>34</sup> (In other words, only \$48,600 of the \$74,600 could be given to PACs and state/local parties.) Taken together, the result was an overall aggregate limit of \$123,200—though that amount was further subdivided among candidates, parties, and PACs, as just described.<sup>35</sup>

The *McCutcheon* holding is simply stated: because they “do little, if anything” to combat corruption, aggregate limits are unconstitutional.<sup>36</sup> The plurality’s reasoning is also straightforward: Congress determined that a particular amount of money will not corrupt a given candidate. How, then, could that same amount of money become corrupting if also contributed to another candidate? Or if given to nine? Or a tenth?

In defending the aggregate limits, the government argued that the danger wasn’t so much the corruption of the tenth versus ninth candidate, but the risk that those contributing large amounts in the aggregate would devise circumvention schemes, allowing them to funnel an amount of money that *is* corrupting to a chosen candidate.

*Buckley* could indeed be read to lend support to the proposition that aggregate limits help prevent circumvention of base limits. Though it noted that the question had not been briefed, the *Buckley* Court ruled that FECA’s \$25,000 aggregate limit on all contributions to candidates, parties, and PACs was “no more than a corollary” of base limits.<sup>37</sup> In particular, there was a danger that the base limits would be circumvented when “massive amounts of money [were given] to a particular candidate through the use of unearmarked contributions’ to entities that are themselves likely to contribute to” a particular candidate.<sup>38</sup>

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the development of PACs, see Allison R. Hayward, Revisiting the Fable of Reform, 45 *Harv. J. on Legis.* 421, 448–456 (2008).

<sup>34</sup> *McCutcheon*, 134 S. Ct. at 1442–43 (citing 2 U.S.C. § 441a(a)(3); 78 Fed. Reg. 8532.).

<sup>35</sup> In a related case filed shortly after *McCutcheon*, an individual contributor brought suit under the theory that, even if the overall aggregate limit were a constitutional exercise of congressional power, these discriminatory sub-limits—which forced a contributor to funnel a portion of the \$123,200 maximum through parties and PACs—furthered no constitutionally sufficient government interest. *James v. FEC*, 134 S. Ct. 1806 (2014). The author represented the plaintiff in the *James* litigation.

<sup>36</sup> *McCutcheon*, 134 S. Ct. at 1442.

<sup>37</sup> *Buckley*, 424 U.S. at 38.

<sup>38</sup> *McCutcheon*, 134 S. Ct. at 1446 (quoting *Buckley*, 424 U.S. at 38).

The *McCutcheon* Court acknowledged and rejected *Buckley's* three-sentence analysis, noting that the Bipartisan Campaign Reform Act (McCain-Feingold) “is a different statutory regime, and the aggregate limits it imposes operate against a distinct legal backdrop.”<sup>39</sup> Beyond recognizing that *Buckley's* brief mention of aggregate limits under an out-of-date statute was not controlling, the *McCutcheon* Court considered a number of laws and regulations adopted after *Buckley*, which made it unlikely that funds could in fact be funneled to defeat the base contribution limits or raise the specter of quid pro quo corruption.

#### A. Standard of Review

Expenditure limitations are generally subject to “strict scrutiny,” while other laws that burden expressive political activity—including contribution limits—are subject to less-searching review, often labeled “exacting scrutiny.”<sup>40</sup> But there is much confusion regarding what this “exacting scrutiny” standard requires.

In *Worley v. Cruz-Bustillo*, for example, the U.S. Court of Appeals for the Eleventh Circuit upheld Florida’s reporting and disclosure requirements as applied to a group of individuals that wanted to purchase \$600 worth of radio ads.<sup>41</sup> In failing to require more than the state’s assertion of an “informational interest” to justify a speech-suppressing PAC regime, the Eleventh Circuit set a precedent that “exacting scrutiny” is little (if anything) more than simple rational basis review.

By contrast, at least one Tenth Circuit judge has concluded that exacting scrutiny instead means a level of review just shy of *strict* scrutiny. In *Riddle v. Hickenlooper*, a challenge to a Colorado law imposing different contribution limits upon major party and non-major party candidates, Judge Neil Gorsuch began by “confess[ing] some uncertainty about the level of scrutiny the Supreme Court wishes us to apply to this contribution limit challenge.”<sup>42</sup> He endorsed the plaintiff’s view:

that contributing in elections implicates a fundamental liberty interest, that Colorado’s scheme favors the exercise

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 369 (2010) (“[t]he Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech”) (citing *FEC v. Mass. Citizens For Life, Inc.*, 479 U.S. 238, 262 (1986)).

<sup>41</sup> 717 F.3d 1238 (11th Cir. 2013).

<sup>42</sup> 742 F.3d 922, 930 (10th Cir. 2014).

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of that fundamental liberty interest by some at the expense of others, and for this reason warrants the most searching level of judicial scrutiny. For my part, I don't doubt this line of argument has much to recommend it. *The trouble is, we have no controlling guidance on the question from the Supreme Court. And in what guidance we do have lie some conflicting cues.*<sup>43</sup>

Judge Gorsuch's explanation of this conflicting Supreme Court precedent—and the resulting confusion—bears repeating:

No one before us disputes that the act of contributing to political campaigns implicates a “basic constitutional freedom,” one lying “at the foundation of a free society” and enjoying a significant relationship to the right to speak and associate—both expressly protected First Amendment activities. Even so, the Court has yet to apply strict scrutiny to contribution limit challenges—employing instead something pretty close but not quite the same thing. Some have questioned whether contribution limits should be subject to strict scrutiny. The Court itself now has under consideration a case in which it may (or may not) choose to address the question. But, to date at least, the Court hasn't gone so far.<sup>44</sup>

In short, even sophisticated advocates and judges have struggled to answer this important question, with weighty constitutional implications: what is “exacting scrutiny”?

Thus, *McCutcheon* was a significant clarification. While it declined to venture into the realm of strict scrutiny, *McCutcheon* returned “exacting scrutiny” to its proper place.<sup>45</sup> The chief justice was clear: “ex-

<sup>43</sup> *Id.* at 930–31 (emphasis added).

<sup>44</sup> *Id.* at 931 (citing *Buckley v. Valeo*, 424 U.S. at 25 (applying a “closely drawn” rather than strict scrutiny standard); *Davis v. FEC*, 554 U.S. 724, 740 n.7 (2008); *Republican Party of N.M. v. King*, No. 12–2015, 741 F.3d 1089, 2013 U.S. App. LEXIS 25084 at \*9 (10th Cir. Dec. 18, 2013); *Randall v. Sorrell*, 548 U.S. 230, 266–67 (2006) (Thomas, J., concurring in the judgment); *Buckley*, 424 U.S. at 241–45 (Burger, C.J., concurring in part and dissenting in part); *McCutcheon v. FEC*, 133 S. Ct. 1242 (2013) (noting probable jurisdiction in a challenge to aggregate contribution limits; oral argument was held October 8, 2013); *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)). The judge was speaking of *McCutcheon*, which indeed declined to impose strict scrutiny.

<sup>45</sup> This makes perfect sense. The term “exacting” implies something significantly more robust than mere intermediate scrutiny. Indeed the concept of “exacting scrutiny” has its origin in a line of cases from the civil rights era, wherein the Court blocked

acting scrutiny [is] applicable to limitations on core First Amendment rights of political expression.<sup>46</sup> And this test is familiar: “Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest.”<sup>47</sup>

Having resolved a significant source of confusion in the context of expenditure limits, the plurality next explored the lower standard of scrutiny applicable to contribution limits. Because such limits “impose a lesser restraint on political speech”<sup>48</sup> than do limits on expenditures, on the theory that contributions are not themselves speech but rather a “symbolic expression of support”<sup>49</sup> for a candidate or cause, they are subject to a “lesser but still rigorous standard of review.”<sup>50</sup> Specifically, “even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”<sup>51</sup> This “‘closely drawn’ test” is now the bedrock of analysis in contribution limit cases.<sup>52</sup>

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attempts by various state governments to obtain donor or membership lists from civil rights organizations operating in segregated states. In reviewing those states’ attempts to compel disclosure of the NAACP’s donor lists, for example, the Court noted a fundamental principle that rings true today: “Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460–61 (1958). *Buckley* characterized this “closest scrutiny” as “exacting,” suggesting that exacting scrutiny is indeed merely a linguistic twist on the familiar strict scrutiny standard. *Buckley*, 424 U.S. at 64 (“Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny.”).

<sup>46</sup> *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 44–45).

<sup>47</sup> *Id.* (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

<sup>48</sup> *McCutcheon*, 134 S. Ct. at 1444.

<sup>49</sup> *Id.* (quoting *Buckley*, 424 U.S. at 21).

<sup>50</sup> *Id.* (quoting *Buckley*, 424 U.S. at 29).

<sup>51</sup> *Id.* (quoting *Buckley*, 424 U.S. at 25 (quoting *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975))).

<sup>52</sup> *Id.* at 1445 (citation omitted).

*B. The Government Interest: Quid Pro Quo Corruption and Its Discontents*

The first step of the constitutional analysis is to determine whether the government has asserted a sufficiently important interest. That step ought to be reasonably simple, as the Supreme Court has recognized only one such interest as regards contribution limits: preventing corruption or its appearance. In practice, however, the definition of “corruption” is highly contested, a conflict demonstrated by the sharp conflict between the *McCutcheon* plurality and dissent on this point.

At the heart of this dispute is the concept of “quid pro quo” corruption, or, as the *McCutcheon* plurality described it, the notion of a direct exchange of an official act for money. “The hallmark of corruption is the financial quid pro quo: dollars for political favors.”<sup>53</sup> The Court further explained that “[c]ampaign finance restrictions that pursue other objectives . . . impermissibly inject the Government into the debate over who should govern. And those who govern should be the *last* people to help decide who *should* govern.”<sup>54</sup>

This understanding of corruption comes straight from *Buckley*.<sup>55</sup> But when is a campaign finance law in fact aimed at quid pro quos, and when is it seeking another end—perhaps to “level the playing field,” or “level electoral opportunities,” or “equalize the financial resources of candidates”<sup>56</sup>—while masquerading as an anti-corruption tool? This is the essence of the debate, and answering this question requires a further discussion of the legislative and judicial history.

*1. Quid pro quo corruption: A concept born of Buckley*

*Buckley* began by defining the government’s interest as “the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions

<sup>53</sup> *Id.* at 1441 (quoting *FEC v. Nat’l Conservative PAC*, 470 U.S. 480,497 (1985)).

<sup>54</sup> *Id.* (emphasis in original).

<sup>55</sup> *Buckley*, 424 U.S. at 26–27 (“To the extent that large contributions are given to secure political quid pro quo’s from current and potential office holders, the integrity of our system of representative democracy is undermined.”)

<sup>56</sup> *McCutcheon*, 134 S. Ct. at 1450 (quoting *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825–26 (2011); *Davis*, 128 S. Ct. at 741–742; *Buckley*, 424 U.S. at 56).

on candidates' positions and on their actions if elected to office."<sup>57</sup> Notice two things. First, the danger recognized in *Buckley* isn't generic influence. Rather, it's *coercive* influence. Second, the thing that may be coerced in a corrupt bargain is the "candidates' positions . . . and actions."<sup>58</sup>

Having articulated the government's interest, the *Buckley* Court devoted two paragraphs to exploring its contours. With respect to actual "corruption," the Court imagined "a candidate lacking immense personal or family wealth [who] must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign."<sup>59</sup> In such cases, where fundraising is an "essential ingredient of an effective candidacy," there may be a risk of coercion.<sup>60</sup> But, for purposes of regulation, such corruption exists only "to the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders."<sup>61</sup>

The Court then turned to "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."<sup>62</sup> It took pains to explicitly contrast this apparent corruption with "the danger of actual *quid pro quo* arrangements" described in the previous paragraph.<sup>63</sup>

This compels two results. First, "actual *quid pro quo* arrangements" are the "corruption" the Court was talking about when it mentioned "corruption and the appearance of corruption." Second, the "appearance of corruption" and "opportunities for abuse" included only opportunities for those same *quid pro quo* exchanges. That is, the appearance that such exchanges might have taken place, even if they cannot be proven.

Having defined the government's interest in a contribution context, the *Buckley* Court explicitly reiterated this formulation vis-à-vis expenditures. The Court "assum[ed] *arguendo*, that large independent expenditures pose the same dangers of actual or apparent *quid*

<sup>57</sup> *Buckley*, 424 U.S. at 25.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 26.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (emphasis added).

<sup>62</sup> *Id.* at 27.

<sup>63</sup> *Id.*

*pro quo* arrangements as do large contributions,"<sup>64</sup> but ultimately determined that even that assumption was insufficient to save expenditure limits. This was because "absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."<sup>65</sup>

The *McCutcheon* dissenters would disagree. Although they agree that corruption is the correct governmental interest, they define it differently. For them, corruption is not limited to *Buckley's* *quid pro quo* understanding, but is that which "breaks the constitutionally necessary 'chain of communication' between the people and their representatives."<sup>66</sup> Justice Stephen Breyer elaborated:

Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point. That is one reason why the Court has stressed the constitutional importance of Congress' concern that a few large donations not drown out the voices of the many.<sup>67</sup>

To support this statement, Justice Breyer cites pages 26–27 of *Buckley*. This is mystifying, because those pages contain the numerous references to *quid pro quo* arrangements just discussed, and say nothing about drowning out other voices.

*Buckley* did acknowledge the government's argument that "the limits serve to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections."<sup>68</sup> But the Court considered this a merely "ancillary" argument and did not rely upon it.<sup>69</sup> Thus, *Buckley's* treatment of corruption—even considering the exact pages

<sup>64</sup> *Id.* at 45.

<sup>65</sup> *Id.* at 47.

<sup>66</sup> *McCutcheon*, 134 S. Ct. at 1467.

<sup>67</sup> *Id.* at 1467–68 (citing *Buckley*, 424 U.S. at 26–27).

<sup>68</sup> *Buckley*, 424 U.S. at 25.

<sup>69</sup> *Id.* at 25–26 ("It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions.").

cited by Justice Breyer—does not seem to support the *McCutcheon* dissenters' broad pronouncement.

2. *The McCutcheon Dissent and the Court's Historical Understanding of Corruption*

In fairness to the dissenters, however, they do cite additional cases suggesting a broader understanding of corruption. But a close reading of those authorities does not get them as far as they would wish, nor does it change the fact that the plurality's understanding of corruption is well rooted in *Buckley* itself.

a. *Beaumont*

In *FEC v. Beaumont*, the Court upheld a ban on corporate contributions and expenditures "in connection with" certain federal elections.<sup>70</sup> It explicitly reiterated that "limits on contributions are more clearly justified by a link to political corruption than limits on other kinds of . . . political spending are (corruption being understood not only as quid pro quo agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence)."<sup>71</sup> Of course, the issue of whether corporations may make contributions was not at issue in *McCutcheon*, which may explain why the plurality didn't cite the case.

b. *Colorado II*

The dissenters also relied upon *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*, where "the Court upheld limits imposed upon coordinated expenditures among parties and candidates because it found they thwarted corruption and its appearance, again understood as including 'undue influence' by wealthy donors."<sup>72</sup> While this citation is correct, it is not at all clear that *Colorado II* in fact turned on the distinction between quid pro quo arrangements and other, lesser forms of "influence." *Colorado II*—a facial challenge—turned instead on the issue of base-limit *circumvention*, not the nature of the anti-corruption interest those base limits are supposed to serve in the first place.

<sup>70</sup> 539 U.S. 146 (2003).

<sup>71</sup> *Id.* at 155–56 (citing *Colorado II*, 533 U.S. at 440–41) (alterations in original).

<sup>72</sup> *McCutcheon*, 134 S. Ct. at 1469 (Breyer, J., dissenting) (citation omitted).



*Colorado II* rejected the argument that, because spending coordinated with candidates comprises a substantial portion of political party activity, limits on coordinated spending impose a special burden upon parties. The Court concluded that, just as political parties could not be subject to special restrictions upon independent expenditures, neither were they entitled to special privileges. In doing so, the Court necessarily asked whether limits on coordinated expenditures served an anti-corruption purpose. But the central question was not the scope of that corruption interest, but whether “unlimited coordinated spending by a party raises the risk of corruption (and its appearance) through circumvention of valid contribution limits.”<sup>73</sup>

There is consequently a tension in *Colorado II*. On one hand, the Court spoke in broad terms of a favored candidate’s “obligation” to contributors, and of the parties’ role as “agents for spending on behalf of those who seek to produce obligated officeholders.”<sup>74</sup> On the other, the particular relationship between donors funneling money to a given candidate’s committee, and that specific candidate, is irrelevant to the Court’s ruling. What was really at stake was that “an increased opportunity for coordinated spending would aggravate the use of a party to funnel money to a candidate from individuals and nonparty groups, who would thus bypass the contribution limits that *Buckley* upheld.”<sup>75</sup>

The touchstone, again, was *Buckley*. And since *Buckley* upheld limits on the contributions to particular candidates, preventing circumvention of those limits was, in *Colorado II*, itself a sufficient governmental interest. The Court’s *characterization* of the corruption interest is not necessary to the holding. Moreover, while the Court made only limited reference to the record (and even then, did so almost solely to demonstrate the possibility of circumvention), that record was consistent with a quid pro quo understanding of corruption.<sup>76</sup>

In sum, while *Colorado II* contains language that suggests a corruption interest broader than quid pro quo, that language is dicta from

<sup>73</sup> *Colorado II*, 533 U.S. at 456.

<sup>74</sup> *Id.* at 452.

<sup>75</sup> *Id.* at 447.

<sup>76</sup> *Colorado II*, 533 U.S. at 451, n.12 (noting Senator Paul Simon’s claim that “people contribute to party committees on both sides of the aisle . . . because they want favors. There is an expectation that giving to party committees helps you legislatively”) (citation omitted). Also consider the heavy emphasis on “tallying.”

an opinion that was really about the problem of circumvention. This distinction is particularly relevant in *McCutcheon*, another circumvention case. In any event, *Colorado II* cannot take Justice Breyer as far as he would wish.

c. Shrink Missouri

The *McCutcheon* dissent also noted that, in *Shrink Missouri*, “the Court upheld limitations imposed by the Missouri legislature upon contributions to state political candidates, not only because of the need to prevent bribery, but also because of ‘the broader threat from politicians too compliant with the wishes of large contributors.’”<sup>77</sup> The *Shrink Missouri* Court indeed interpreted *Buckley* to address “the power of money ‘to influence governmental action’ in ways less ‘blatant and specific’ than bribery.”<sup>78</sup> In part because Missouri had not preserved its legislative history, however, the Court relied to an unusual degree on the *appearance* of corruption.<sup>79</sup> Its discussion of apparent corruption evidences a concern shared by the *McCutcheon* dissent—that “the general public will not be heard.”<sup>80</sup>

The *Shrink Missouri* Court explained that concern as follows:

Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works “only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.”<sup>81</sup>

Of course, the contours of this “impropriety” are unclear from the *Shrink Missouri* opinion itself. It is possible that Missourians were concerned about actual quid pro quo arrangements—and that they might stem from “munificent” contributions—rather than a generalized theory of influence. It is difficult to know, however, because the only evidence on this point was a single affidavit from a single

<sup>77</sup> *McCutcheon*, 134 S. Ct. at 1469 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000)).

<sup>78</sup> *Shrink Mo.*, 528 U.S. at 389 (quoting *Buckley*, 424 U.S. at 28).

<sup>79</sup> *Id.* at 393.

<sup>80</sup> *McCutcheon*, 134 S. Ct. at 1467.

<sup>81</sup> *Shrink Mo.*, 528 U.S. at 390 (citation omitted).

state senator and some newspaper reports relied upon by the district court.<sup>82</sup>

Nevertheless, *Shrink Missouri* could be read as expanding *Buckley*'s understanding of corruption beyond quid pro quo arrangements. Certainly, Justice Clarence Thomas's spirited dissent read the majority opinion as doing precisely that:

[I]nvoicing "*Buckley*'s standard of scrutiny," the Court proceeds to significantly extend the holding in that case. The Court's substantive departure from *Buckley* begins with a revision of our compelling-interest jurisprudence. In *Buckley*, the Court indicated that the only interest that could qualify as "compelling" in this area was the government's interest in reducing actual and apparent corruption. And the Court repeatedly used the word "corruption" in the narrow quid pro quo sense, meaning "perversion or destruction of integrity in the discharge of public duties by bribery or favour."<sup>83</sup>

Of course, *Shrink Missouri* involved a challenge to base limits, the campaign finance restriction that—going back to *Buckley*—has generally enjoyed the greatest deference.<sup>84</sup> And while the *Shrink Missouri* Court did suggest a broad understanding of the corruption interest, it is far from clear that such a reading was central to its holding.

Moreover, even in *Shrink Missouri*, the Court noted that it "ha[s] never accepted mere conjecture as adequate to carry a First Amendment burden."<sup>85</sup>

#### d. McConnell

Justice Breyer's strongest argument comes from *McConnell v. FEC*.<sup>86</sup> In that sprawling challenge to McCain-Feingold, the Court reviewed limits on "soft money" contributions to political parties. Such funds were contributed directly to parties "but could be used for activities such as voter registration, get out the vote drives, and advertising that did not expressly advocate a federal candidate's

<sup>82</sup> *Id.* at 393–94.

<sup>83</sup> *Id.* at 422 (citations omitted).

<sup>84</sup> See, e.g., *id.* at 403–04; *Buckley*, 424 U.S. at 22.

<sup>85</sup> *Shrink Mo.*, 528 U.S. at 392.

<sup>86</sup> 540 U.S. 93 (2003).

election or defeat.”<sup>87</sup> A majority of the “Court found they ‘thwarted a significant risk of corruption—understood not as quid pro quo bribery, but as privileged access to and pernicious influence upon elected representatives.’”<sup>88</sup> That understanding of “access and influence” is not only clearly broader than quid pro quo arrangements, it also expresses the concept more concretely than the other cases the *McCutcheon* dissenters cite.

*McConnell* is notable for its substantial record, amassed before a special three-judge panel of the D.C. district court. “That record consisted of over 100,000 pages of material and included testimony from more than 200 witnesses.”<sup>89</sup> While not “a single discrete instance of quid pro quo corruption” was identified as a result of a soft-money contribution, the *McConnell* Court found that “[t]here was an indisputable link between generous political donations and opportunity after opportunity to make one’s case directly to a Member of Congress.”<sup>90</sup>

The plaintiffs argued that, because there was no evidence “of an instance in which a federal officeholder has actually switched a vote in exchange for soft money,”<sup>91</sup> the limit on soft money contributions was necessarily unconstitutional, as Congress had failed to demonstrate corruption or its appearance. The Court disagreed. Departing from *Buckley*, it viewed the relevant interest as “extend[ing] beyond preventing simple cash-for-votes corruption to curbing ‘undue influence on an officeholder’s judgment, and the appearance of such influence.’”<sup>92</sup> Put differently, “the danger [was] that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.”<sup>93</sup>

There is little doubt that *McConnell* helps Justice Breyer’s position in *McCutcheon*—at least insofar as it reads corruption more broadly than quid pro quo arrangements. Nevertheless, his application of *McConnell* goes too far for two reasons. First, *McConnell* dealt with both

<sup>87</sup> *McCutcheon*, 134 S. Ct. at 1469 (Breyer, J. dissenting).

<sup>88</sup> *Id.* (citation omitted).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1469–70 (Breyer, J. dissenting) (citations omitted).

<sup>91</sup> *Id.* at 1470 (quoting *McConnell*, 540 U.S. at 146, 149–50).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (quoting *McConnell*, 540 U.S. at 153).

a facial challenge and a substantial evidentiary record. The plaintiffs argued that—absent evidence that some politician had changed his or her vote in consideration of a contribution—there was no situation whatsoever in which the government could limit political party contributions. That claim is vastly broader than Mr. McCutcheon's and extends far beyond the plurality's narrow holding. Second, *McConnell* upheld the "soft money" ban, a *base* limit on a particular individual's contribution to a political party. *McCutcheon* does nothing to disturb that holding.<sup>94</sup>

*e. Austin*

Thus, we turn to the case that would provide Justice Breyer's dissent with the clearest support: the since-overruled *Austin v. Michigan Chamber of Commerce* decision, which upheld a state ban on corporate independent expenditures. That case saw corruption not only in quid pro quo arrangements, but also in "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."<sup>95</sup> Yet even the *Austin* Court was careful to note that it was not "attempt[ing] to equalize the relative influence of speakers on elections" but was instead fighting the "unfair[] influence" of corporate wealth that might not "reflect actual public support for the political ideas espoused by corporations."<sup>96</sup>

*Austin* was overruled by *Citizens United*. As Justice Kennedy (who wrote an impassioned dissent in *Austin*) reiterated in *Citizens United*:

The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that "the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," because "[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."<sup>97</sup>

<sup>94</sup> *Id.* at 1451 n. 6.

<sup>95</sup> 494 U.S. 652, 660 (1990) (overruled parenthetical).

<sup>96</sup> *Id.* (citations and quotation marks omitted).

<sup>97</sup> *Citizens United*, 558 U.S. at 345 (citations omitted) (alterations in original).

Nevertheless, *Austin*'s concern that speech would be "corrosive and distorting" if it did not "correlat[e] to the public's support for the corporation's political ideas"<sup>98</sup> finds an echo in Breyer's fear that "a few large donations [may] drown out the voices of the many," which will in turn "cut[] the link between political thought and political action."<sup>99</sup>

But certainly that was a broad—and possibly creative—theory of corruption when *Austin* was decided. In dissent, Justice Scalia dubbed it "the New Corruption."<sup>100</sup> He noted that *Austin* was about corporate speech but asked how this expansive view of corruption could find a limit. If corporations could be limited on this basis, he asked, "[w]hy is it perfectly all right if advocacy by an individual billionaire is out of proportion with 'actual public support' for his positions?"<sup>101</sup> Justice Breyer, of course, answers that question in his *McCutcheon* dissent: it is *not* perfectly all right. Allowing that billionaire (or even a millionaire) to give to a sufficiently wide number of candidates and political committees will drown out those who do not "publicly support" his views.

Justice Breyer concedes that that view was rejected in *Citizens United* and Justice Scalia's *Austin* dissent illustrates precisely why: it is so sweeping an interest as to be essentially limitless.

Consequently, *McCutcheon* clarified the law and halted the Court's movement away from *Buckley*'s understanding of corruption. The relevant governmental interest is the avoidance of quid pro quo corruption and the appearance of such arrangements. The government may not regulate to limit mere access or influence that falls short of this standard.

#### f. After *McCutcheon*

The quid pro quo standard may not, in the end, be as narrow as the *McCutcheon* dissenters lament. Previous cases have expressed concern about the chain from large contributions, to access, to influence, and, ultimately, to favors. Similarly, previous Court majorities have worried that such "access and influence" will convince individuals

<sup>98</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

<sup>99</sup> *McCutcheon*, 134 S. Ct. at 1467–68.

<sup>100</sup> *Austin*, 494 U.S. at 691 (Scalia, J., dissenting).

<sup>101</sup> *Id.* at 685.

that their voices don't matter, causing them to drop out of our democratic system. But vindication of that first concern is entirely consistent with Chief Justice Roberts's view. And the second is, in many ways, a self-fulfilling prophecy.

The majority's concern is clear. Justice Breyer would "separate[] corruption from its quid pro quo roots and give[] it a new, far-reaching" meaning while "casting aspersions on 'politicians too complacent with the wishes of large contributors.'"<sup>102</sup> While not explicitly stating that this theory would "equalize the voices of citizens"—a proposition "*Buckley* rejected out of hand"<sup>103</sup>—the dissenters nonetheless fail to state the boundaries of their theory of corruption or how it differs, in practice, from an equalizing interest.

The dissenters missed an opportunity to address this concern and suggest an alternative theory of corruption—one subject to *some* limiting principle. Instead, Justice Breyer posited possibly the broadest theory since *Austin*, one with little chance of being adopted by a majority concerned with governmental overreach.

In any event, the dissent misunderstands the relevant interest when it conflates quid pro quo corruption with bribery. The Court has never held that criminal penalties for actual corrupt arrangements are the outer limit of congressional power. As the chief justice stated:

It is worth keeping in mind that the base limits themselves are a prophylactic measure. As we have explained, "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements." The aggregate limits are then layered on top, ostensibly to prevent circumvention of the base limits. This "prophylaxis-upon-prophylaxis approach" requires that we be particularly diligent in scrutinizing the law's fit.<sup>104</sup>

That "fit" is *McCutcheon's* big question. And the plurality distinguished the dissenters' central concern—that base limits are

<sup>102</sup> *Shrink Mo.*, 528 U.S. at 423–24 (Thomas, J., dissenting) (internal quotation marks omitted).

<sup>103</sup> *Id.* at 424.

<sup>104</sup> *McCutcheon*, 134 S. Ct. at 1458 (citing *Citizens United*, 558 U.S. at 357; *Wisconsin Right to Life*, 551 U.S. at 479 (opinion of Roberts, C. J.); *McConnell*, 540 U.S. at 268–69 (opinion of Thomas, J.)).

necessary to prevent circumvention of the ban on soft money—because it nowhere stated that prophylactic rules are improper. The question is one of degree. Where Justice Breyer could have suggested a way to limit the risk of such circumvention, he instead went “all in”—choosing to largely reject any categorical limit on the government’s power to regulate in this area. Had he provided such an alternative, it may have garnered a majority.

### C. Tailoring

Having determined that the proper governmental interest is the prevention of corruption narrowly defined, but having allowed that prophylactic rules will be necessary to accomplish that goal, the majority asked the simple question at the heart of the *McCutcheon* dispute: were the aggregate limits “closely drawn” to help the government prevent quid pro quo corruption?

The district court believed they were, and

imagined a hypothetical scenario that might occur in a world without aggregate limits. A single donor might contribute the maximum amount under the base limits to nearly 50 separate committees, each of which might then transfer the money to the same single committee. That committee, in turn, might use all the transferred money for coordinated expenditures on behalf of a particular candidate, allowing the single donor to circumvent the base limit on the amount he may contribute to that candidate.<sup>105</sup>

The district court conceded that such a scenario “seem[s] unlikely,” since “so many separate entities [must] willingly serve as conduits.”<sup>106</sup> Nevertheless, because it found this hypothetical “not hard to imagine,” it upheld the aggregate limits.

Such hypotheticals loomed large in *McCutcheon*, as the district court correctly identified the two arguments in play. On one hand, as the dissenters found, the base and aggregate limits together acted “as a coherent system rather than merely a collection of individual limits,” and this system, the government argued, was necessary to prevent circumvention of any of its constituent parts.<sup>107</sup> On the other

<sup>105</sup> *McCutcheon*, 134 S. Ct. at 1443.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1444.



hand, as the plurality concluded, McCain-Feingold's many limits amounted to simply "stacking prophylaxis upon prophylaxis."<sup>108</sup>

At oral argument, the government made two points.

Aggregate limits combat corruption both by blocking circumvention of individual contribution limits and, equally fundamentally, by serving as a bulwark against a campaign finance system dominated by massive individual contributions in which the dangers of quid pro quo corruption would be obvious and the corrosive appearance of corruption would be overwhelming.<sup>109</sup>

Let's consider each point—the circumvention concern that informed the district court's ruling, and the danger of a system "dominated" by a few wealthy donors—in turn.

### 1. *Circumvention*

As previously noted, *Buckley* upheld FECA's aggregate limit as a "mere corollary" of that law's base limits on contributions to candidates. That aggregate limit was acceptable because it helped prevent circumvention of the base limitation by a single donor flooding a political committee with enormous contributions.

When *Buckley* was decided, this was a real danger. While the version of FECA at issue in *Buckley* "had already capped contributions from political committees to candidates . . . the 1976 version added limits on contributions to political committees."<sup>110</sup> This additional restriction was understood as intended "at least in part to prevent circumvention of the very limitation on contributions . . . upheld in *Buckley*."<sup>111</sup> Consequently, in 1974 a donor very well could "flood [a] committee with 'huge' amounts of money so that each contribution th[at] committee ma[de] [was] perceived as a contribution" from the donor.<sup>112</sup> But after the 1976 amendments imposed a \$5,000 limit on contributions from individuals to such committees, this takeover scenario ceased to present the danger of a quid pro quo understand-

<sup>108</sup> *Id.*

<sup>109</sup> Transcript of Oral Argument, *supra* note 5, at 27.

<sup>110</sup> *McCutcheon*, 134 S. Ct. at 1446.

<sup>111</sup> *Id.* (emphasis in original).

<sup>112</sup> *Id.*

ing. Instead, “[l]imits on contributions to political committees . . . create 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>113</sup>

This is not the only hurdle. “The 1976 Amendments also added an antiproliferation rule prohibiting donors from creating or controlling multiple affiliated political committees.”<sup>114</sup> This prohibition “blocks a straightforward method” of circumventing base limits by “eliminat[ing] a donor’s ability to create and use his own political committees to direct funds in excess of the individual base limits.”<sup>115</sup>

## 2. *Wild Hypotheticals*

The *McCutcheon* dissenters found these checks insufficient. Indeed, the district court originally upheld the aggregate limits on the theory that they prevented complex attempts to defeat the base limits. These included making many (relatively) small contributions to various political committees, which would then forward those contributions to a designated candidate.

Such theories were a mainstay of the government’s argument and the dissent’s rationale. As articulated by Justice Elena Kagan:

If you take off the aggregate limits, people will be allowed, if you put together the national committees and all the state committees and all the candidates in the House and the Senate, it comes to over \$3.5 million. So I can write checks totaling \$3.5 million to the Republican Party committees and all its candidates or to the Democratic Party committees and all its [candidates].<sup>116</sup>

In his eventual dissenting opinion, Justice Breyer posited two circumstances where, absent the aggregate limits, these millions of dollars could be funneled through various entities into the hands of a single candidate.

Justice Breyer imagined a single wealthy donor who first contributes the maximum of \$64,800 to all three national party committees.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1447.

<sup>116</sup> Transcript of Oral Argument, *supra* note 5, at 23.

Then he contributes the maximum of \$20,000 to each state party committee. Finally, the donor maxes out to each candidate from his party running in every House and Senate election nationwide: \$2,600 per election, or \$5,200 for both the primary and general elections. This yields a total of \$3,628,000 over two years.

But how would this money, distributed among 521 separate committees, be funneled to a particular candidate? Justice Breyer noted that each of a party's 435 House and 33 Senate candidates can write checks of up to \$4,000 to each other. And each state and national party committee may write checks of up to \$10,000 to a candidate. Taken together, "[t]his yields a potential \$1,872,000 (from candidates) plus \$530,000 (from party committees)."<sup>117</sup> Consequently, these 521 committees can collude to each redirect \$2.37 million of the hypothetical \$3.6 million check directly to a favored candidate.

Of course, this can only be done once, because there are limits on how much each committee may give another. But Justice Breyer notes that nothing prevents these committees from finding another \$3.6 million donor and making another \$2.37 million in contributions to a second candidate, and so on.

This scenario is further limited by the number of potential committees. There are only so many party committees, so many states, and so many seats in Congress. Fine, says Justice Breyer, but what about unaffiliated PACs? That question led to the dissent's second hypothetical:

Groups of party supporters—individuals, corporations, or trade unions—create 200 PACs. Each PAC claims it will use the funds it raises to support several candidates from the party, though it will favor those who are most endangered . . . Over a 2-year election cycle, Rich Donor One gives \$10,000 to each PAC (\$5,000 per year)—yielding \$2 million total. Rich Donor 2 does the same. So, too, do [eight other] Rich Donors. This brings their total donations to \$20 million, disbursed among the 200 PACs. Each PAC will have collected \$100,000, and each can use its money to write ten checks of \$10,000 to each of the ten most Embattled Candidates in the party (over two years). Every Embattled Candidate, receiving a \$10,000 check from 200 PACs, will have collected \$2 million.<sup>118</sup>

<sup>117</sup> *McCutcheon*, 134 S. Ct. at 1474.

<sup>118</sup> *Id.* at 1474–75.

The result is “that ten Rich Donors will have contributed \$2 million each, and ten Embattled Candidates will have collected \$2 million each.”<sup>119</sup>

### 3. *The FEC and the limits of prophylaxes*

The plurality called these hypotheticals “illegal under current campaign finance laws,” “implausible,” and “divorced from reality.” It relied heavily upon the existence of the FEC and its “intricate regulatory scheme.”<sup>120</sup> In particular, the FEC has enacted broad regulations designed to prevent other vehicles, such as PACs or joint fundraising committees (JFCs), from being used to circumvent contribution limits.<sup>121</sup>

The government, the opinion below, and the dissent all raised the troubling prospect of millions of dollars being passed through sham organizations directly to candidates. But they ignored the fact that this concern—which, of course, dates back to *Buckley* and FECA’s 1976 amendments—is already addressed by the FEC’s existing regulatory paradigm.

The FEC’s anti-proliferation rules “prohibit[] donors from creating or controlling multiple affiliated political committees.”<sup>122</sup> Commission regulations permit the FEC to weigh a number of factors in determining if a political committee is “affiliated” with another PAC or candidate.<sup>123</sup> For instance, the commission may consider “[w]hether a [non-joint fundraising] sponsoring organization, or committee, causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization or committee.”<sup>124</sup>

<sup>119</sup> *Id.* at 1475.

<sup>120</sup> *Id.* at 1447; See 11 C.F.R. § 100, et. seq.

<sup>121</sup> 11 C.F.R. 113.1(g) covers one of the most pernicious situations that confronted the *Buckley* Court. Before 1980, it was perfectly legal for campaign funds to be used for a candidate’s personal expenses, such as buying groceries, paying college tuition, or covering rent and mortgage payments.

<sup>122</sup> *McCutcheon*, 134 S. Ct. at 1446–47. Another restriction, which Justice Breyer fails to address, is the federal rule requiring PACs that give to multiple candidates to “have more than 50 contributors.” *Id.* at 1442 (referencing 11 C.F.R. § 100.5(e)(3)).

<sup>123</sup> 11 C.F.R. 100.5(4)(i)–(ii).

<sup>124</sup> 11 C.F.R. 100.5(4)(ii)(H).

The FEC's earmarking rules are similarly strict. A contribution is considered earmarked when there has been "a designation, instruction, or encumbrance, *whether direct or indirect*, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee."<sup>125</sup> Further, if any "intermediary exercises any direction or control over the choice of the recipient candidate, the earmarked contribution shall be considered a contribution by *both* the original contributor and the . . . intermediary."<sup>126</sup>

Moreover, the law prohibits "an individual who has contributed to a candidate also contribut[ing] to a political committee that has supported or anticipates supporting the same candidate, if the individual knows that 'a substantial portion [of his contribution] will be contributed to, or expended on behalf of,' that candidate."<sup>127</sup>

These regulations existed before *McCutcheon*. Notably, even in a world with aggregate limits, it would be possible for an individual conspiring with 15 PACs to funnel \$74,600 to a single candidate.<sup>128</sup> Yet, perhaps unsurprisingly, nobody appears to do this—because it would involve breaking an astounding number of federal laws.

The dissenters found this analysis insufficient, largely because they don't trust the FEC. Specifically regarding circumvention, they noted that "the regulation requires a showing that donors have *knowledge* that a substantial portion of their contributions will be used by a PAC to support a candidate to whom they have already contributed. And 'knowledge' is hard to prove."<sup>129</sup> They further noted that, of nine FEC cases referencing the anti-circumvention regulation, eight

<sup>125</sup> 11 C.F.R. 110.6(b)(1).

<sup>126</sup> 11 C.F.R. 110.6(b)(2) (emphasis added).

<sup>127</sup> *McCutcheon*, 134 S. Ct. at 1447 (citing 11 C.F.R. 110.1(h)(2)) (brackets in original). See also *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992) (upholding FEC rejection of Common Cause's complaint that the NRSC "exercised direction or control" over contributions raised by a committee that divided the money equally among four candidates). Furthermore, using a PAC to evade base limits would violate 11 C.F.R. 110.4(b)(i): "No person shall make a contribution in the name of another."

<sup>128</sup> See Zac Morgan, *McCutcheon's Wild Hypotheticals*, Center for Competitive Politics, Dec. 11, 2013, <http://www.campaignfreedom.org/2013/12/11/mccutcheons-wild-hypotheticals>.

<sup>129</sup> *McCutcheon*, 134 S. Ct. at 1477 (Breyer, J., dissenting).

failed to find the requisite knowledge.<sup>130</sup> In the one case that did, the contributors were the receiving candidates' family members who gave to a group of PACs organized by an outside consulting firm.

Justice Breyer made his point clear, quoting Oscar Wilde. "Given this record of FEC (in)activity, my reaction to the plurality's reliance upon agency enforcement of this rule (as an adequate substitute for Congress' aggregate limits) is: 'One must have a heart of stone to read [it] without laughing.'"<sup>131</sup>

The chief justice (necessarily) responded to this bon mot, noting that "[i]t might be that such guilty knowledge could not be shown because the donors were not guilty—a possibility that the dissent does not entertain."<sup>132</sup> Besides, "the donors described in those eight cases were typically alleged to have exceeded the base limits by \$5,000 or less."<sup>133</sup> Consequently, there was little in common between a scheme to exceed the base limits by a (relatively) small amount of money and one to route millions of dollars through hundreds of entities. In such cases, an official failing to identify the violation "has not a heart but a head of stone."<sup>134</sup>

This level of sarcasm belies a foundational disconnect between the supporters and opponents of increased campaign finance regulation. To some, the FEC's failure to find a large number of campaign finance violations indicates a lack of concrete evidence that campaign law scofflaws abound, as well as the agency's care in regulating activity that so closely implicates constitutional freedoms. To others, it must be the result of incompetence or unwillingness to enforce the law. As the chief justice noted, for the dissenters, "[t]he dearth of FEC prosecutions . . . proves only that people are getting away with it."<sup>135</sup> And the lack of evidence of such people just shows that "the methods of achieving circumvention are more subtle and more complex" than some appreciate.<sup>136</sup>

<sup>130</sup> *Id.* (emphasis added).

<sup>131</sup> *Id.* at 1478.

<sup>132</sup> *Id.* at 1456.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

Recall that the question is whether Congress has tailored its response to its interest. In answering, Chief Justice Roberts looked at all the ways Congress has attempted to prevent evasion of the base limits, including not only its own statutory responses (such as prohibitions on circumvention and earmarking), but also its mandate to the FEC, which exercises delegated authority to regulate in this area.

In *Wisconsin Right to Life*, the chief justice—then also writing the controlling opinion—noted that it was impermissible to pile prophylaxis upon prophylaxis,<sup>137</sup> a view he reiterated in *McCutcheon*. But he was prepared to defer to the FEC's regulations and enforcement expertise in the latter case in part *because* the agency itself is a prophylaxis.

This is evident not only in his discussion of FEC enforcement, but also of the government's opportunities to tailor its response to circumvention concerns. While Roberts largely concentrates on actions Congress could take that would work less harm than the overall aggregate limit—including limitations on transfers between committees—he also notes that the FEC can construct regulatory checks, such as “defining how many candidates a PAC must support in order to ensure that ‘a substantial portion’ of a donor's contribution is not rerouted to a certain candidate.”<sup>138</sup>

Thus, the plurality sees the existence of the FEC—with its regulations, enforcement powers, and rulemaking authority—as itself a step taken by Congress to prevent circumvention of statutory contribution limits. The dissenters disagree, seeing in the FEC only an empty shell. But the plurality's ruling raises the intriguing possibility that, at least in the context of First Amendment challenges, Congress's decision to delegate authority to an administrative agency may itself inform the tailoring analysis.

#### 4. *Non-circumventing corruption: The \$3.6 million check*

The district court upheld the statute under a theory of circumvention, as originally articulated by *Buckley*, and the government's briefing largely followed that reasoning. But at oral argument, the government shifted its focus to an argument that the aggregate

<sup>137</sup> *Id.* at 1458.

<sup>138</sup> *Id.* at 1459.

limits deter corruption regardless of whether they prevent circumvention.<sup>139</sup> This is, in essence, because joint fundraising committees exist. Such entities allow various committees—candidate, party, and PAC—to share the costs of fundraising and split the proceeds pro rata. Thus, a single officeholder could solicit a large check from a single donor, later dividing that contribution among the various entities in the joint committee. As the solicitor general explained, the heads of such committees might solicit very large checks, which in his view raised its own concerns:

The very fact of delivering the \$3.6 million check to the whoever it is, the Speaker of the House, the Senate Majority Leader, whoever it is who solicits that check, the very fact of delivering that check creates the inherent opportunity for quid pro quo corruption, exactly the kind of risk that the Court identified in *Buckley*, wholly apart from where that money goes after it's delivered.<sup>140</sup>

The dissent's clearest articulation of this concern came in the context of a hypothetical contributor giving to a "Joint Party Committee" comprising a party's three national committees and 50 state committees. "[I]n the absence of any aggregate limit, an individual could legally give to the Republican Party or to the Democratic Party about \$1.2 million over two years . . . . The titular heads of these joint committees could be the Speaker of the House of Representatives and the Minority Leader of the House."<sup>141</sup>

The dissent then asked (presumably rhetorically) whether "elected officials [will] be particularly grateful to the large donor, feeling obliged to provide him special access and influence, and perhaps even a quid pro quo legislative favor?"<sup>142</sup> They posited that because the soliciting officeholder will "become a player [in his party] beyond his own race" by raising such large sums, "the donor's influence is multiplied."<sup>143</sup> As Justice Kagan put it, with such a large check "you get a very, very special place at the table."<sup>144</sup>

<sup>139</sup> Transcript of Oral Argument, *supra* note 4, at 29–30, 50–52.

<sup>140</sup> *Id.* at 29.

<sup>141</sup> McCutcheon, 134 S. Ct. at 1472.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1473.

<sup>144</sup> Transcript of Oral Argument, *supra* note 5, at 24.



The plurality disagreed. Obviously, monies that pass through joint fundraising committees are still subject to the base limits. More pointedly, "*Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself. *Buckley's* analysis of the aggregate limit under FECA was similarly confined. The Court noted that the aggregate limit guarded against an individual's funneling—through circumvention—'massive amounts of money to a particular candidate.'"<sup>145</sup>

Besides precedent, the plurality dismissed the dissent's view of gratitude on practical grounds, demanding "a clear, administrable line between" money given directly to a candidate and "money beyond the base limits given widely to a candidate's party."<sup>146</sup> In the latter case, gratitude is widely shared within the party, and while "the leaders of the party or cause may feel particular gratitude" to "recast such shared interest, standing alone, as an opportunity for quid pro quo corruption would dramatically expand government regulation of the political process."<sup>147</sup>

If its standard of corruption is inherently unworkable, the government did "suggest[] that it is the *solicitation* of large contributions that poses the danger of corruption."<sup>148</sup> But having tendered a startlingly broad theory of corruption, the fact remained that the aggregate limits were not limited to solicited contributions. As the majority noted, after an exhausting disagreement over the proper role of the government in preventing corruption, "it is enough that the aggregate limits at issue are not directed specifically to candidate behavior" like solicitations.<sup>149</sup>

##### 5. *Questions of fact versus questions of law?*

Having disagreed about both the appropriate understanding of corruption and the "fit" between that interest and the aggregate limits, both sides at least agreed on the legal question: whether the aggregate limits are closely drawn to further a compelling governmental

<sup>145</sup> *McCutcheon*, 134 S. Ct. at 1460.

<sup>146</sup> *Id.* at 1461.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (emphasis in original).

interest.<sup>150</sup> Both the plurality and the government, which brought the case to the Supreme Court on cross-motions for summary judgment, saw this as a question of law. The dissenters had a different view.

To Justice Breyer, that legal question “turn[ed] on factual questions about whether corruption, in the absence of such limits, is a realistic threat to our democracy.”<sup>151</sup> He favored a remand for development of a factual record to help “determine whether or the extent to which [the Court] should defer to Congress’ own judgments.”<sup>152</sup> And he suggested that disagreements “on the possibilities for circumvention of the base limits” and “how effectively the plurality’s alternatives could prevent evasion” explained the different results reached by the plurality and the dissent.<sup>153</sup>

It is unclear how—apart from the discussion *McCutcheon* already contains—such a counterfactual could be shown. (Indeed, the plurality and dissent read even the facts of the FEC’s public enforcement record quite differently.) Justice Breyer apparently had in mind a record “contain[ing] testimony from Members of Congress (or state legislatures) explaining why Congress (or the legislature) acted as it did.”<sup>154</sup>

But creating such a record is expensive, and requiring one threatens to foreclose future challenges to campaign finance laws. The *McConnell* record was, famously, over 100,000 pages long. Many attorneys would recognize that “amassing” such a record, to borrow the justice’s apt word, would render many cases impracticable.

But Justice Breyer’s preference for a record does not extend to the probability of base-limit circumvention:

Determining whether anticorruption objectives justify a particular set of contribution limits requires answering empirically based questions, and applying significant discretion and judgment. To what extent will unrestricted giving lead to corruption or its appearance? What forms will any such corruption take? To what extent will a lack of

<sup>150</sup> *Id.* at 1480.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 1479.

regulation undermine public confidence in the democratic system? To what extent can regulation restore it? These kinds of questions, while not easily answered, are questions that Congress is far better suited to resolve than are judges.<sup>155</sup>

This may be true, but the burden of demonstrating appropriate tailoring falls upon the government. If Congress had sophisticated, evidence-based reasons for adopting the aggregate limits, it could have articulated them as part of passing BCRA.<sup>156</sup> There is little evidence that it had such a purpose or such evidence. If the government was nonetheless willing to bring the case to court as a purely legal question, and Congress was willing to pass legislation with little evidence of considered analysis along the lines Justice Breyer suggests, why should the Court decline to rule?

### Conclusion

*McCutcheon* could have been a straightforward case. *Buckley*, with little analysis, upheld aggregate contribution limits as a “corollary” needed to safeguard against circumvention of base limits. The question was simple: with the benefit of briefing and argument on the topic, were the limits in fact closely drawn to prevent corruption?

The plurality saw this as inquiry rooted in *Buckley* itself. If Congress designated a certain amount as, in its judgment, non-corrupting, it could not say that amount of money becomes corrupting if given to too many candidates.

The holding, then, is narrow. *McCutcheon* clarified that exacting scrutiny requires searching review that pays close attention to the “fit” between the asserted government interest and Congress’s policy choices. It also clarified that the “corruption” of *Buckley* is

<sup>155</sup> *Id.* at 1480.

<sup>156</sup> The dissenters appear willing to accept limitations imposed without evidence, while requiring evidence from those who would challenge such restrictions. This approach finds some support in *Shrink Missouri*'s statement that “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.” 528 U.S. at 391. But as *McCutcheon* illustrates, the novelty of the government’s interest may itself be disputed. Moreover, because they take a broad view of what is “plausible” in the real world, the dissenters’ view would create a one-way ratchet favoring greater regulation. For instance, they credulously accept the government’s circumvention hypotheticals without requiring any supporting evidence, and it appears that they would have upheld the challenged statute on that basis alone.

quid pro quo corruption and not a broader understanding of political equality or the need to ensure broader political participation—though that is certainly an interest Congress may pursue through other means. Consequently, the Court rooted its jurisprudence more firmly in *Buckley* and clarified the scope of governmental power in the area of speech regulation. Such clarity, in this confusing area, can only be to the good.