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McCutcheon v. Federal Election Commission134 S. Ct. 1434 (2014)

Christian Patrick Woo

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I. INTRODUCTION

The First Amendment of the United States Constitution protects a person's right to "political association as well as political expression."[1] Recognizing that making a financial contribution to a candidate's campaign for public office is in itself a form of association,[2] the First Amendment provides the "broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[3] However, a long history of cases demonstrate that the protections afforded by the First Amendment are anything but absolute.[4]

In the 1976 landmark case *Buckley v. Valeo*, the Supreme Court of the United States held that limits on campaign expenditures posed a greater burden than limits on contributions,[5] and created a "lesser" standard of review for contributions.[6] Under this standard, "[e]ven a 'significant interference' . . . must be sustained if the State demonstrates a[n] . . . important interest and . . . means closely drawn to avoid . . . abridgment of associational freedoms."[7]

With respect to the first component, the Supreme Court held that the prevention of corruption and its appearance was a sufficiently important governmental interest.[8] More specifically, it stated that *quid pro quo* corruption or its appearance must be targeted;[9] or in simpler terms, "dollars for political favors."[10] In regards to the second component, the Court held that the $1,000.00 base limit was closely drawn because it "focused precisely on the problem of large campaign contributions . . . while leaving persons free to engage in political expression, . . . to associate actively through volunteering services, and to assist in a limited but nonetheless substantial extent . . . ."[11]

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1. Buckley v. Valeo, 424 U.S. 1, 15 (1976).
2. *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1440-41 (2014).
3. *Buckley*, 424 U.S. at 14 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
4. *McCutcheon*, 134 S. Ct. at 1441.
5. *Buckley*, 424 U.S. at 19-21.
6. *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 29).
7. *Buckley*, 424 U.S. at 25.
8. *Id*. at 26.
9. *Id*. at 26-27.
10. Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985).
11. *McCutcheon*, 134 S. Ct. at 1444-45 (quoting *Buckley*, 424 U.S. at 28).

Nearly forty years later in *McCutcheon v. Federal Election Commission*, the Supreme Court was again presented with the issue of the constitutionality of contribution limits.[12] However, this case differed from *Buckley*, as it focused exclusively on aggregate limits (the amount of money a donor can contribute to all candidates and committees) as opposed to base limits (the amount of money a donor can contribute to a single candidate or committee).[13] Relying only on a short paragraph in *Buckley* for guidance,[14] *McCutcheon* struck down aggregate limits, holding that they not only failed to prevent *quid pro quo* corruption and its appearance, but also intruded on the people's "most fundamental First Amendment activities."[15]

McCutcheon is a significant case for federal election law, as it allows a single donor to contribute within the base limits to virtually all candidates and committees,[16] as well as clarifies the definition and scope of *quid pro quo* corruption.[17] There can be no denying that the potential impact of *McCutcheon* is vast, as it will inevitably change campaign and fundraising practices in elections scheduled for 2016, and possibly the political landscape over time.[18]

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

In the 2011-2012 election cycle, Appellant Shaun McCutcheon contributed $33,088.00 to sixteen different federal candidates and $27,328.00 to several different non-candidate political committees.[19] Although his contributions of $33,088.00 and $27,328.00 were within the amounts set forth in the base limits for candidates and non-candidate political parties,[20] respectively, McCutcheon wanted to contribute more.[21] McCutcheon alleged that he not only wanted to contribute $1,776.00 each to twelve additional candidates, but also to various other political committees, which included $25,000.00 contributions to each of the three Republican national party committees.[22] Further, he alleged that he wanted to

12. *Id*. at 1442.
13. *Id*.
14. *Id*. at 1446.
15. *Id*. at 1462 (quoting *Buckley*, 424 U.S. at 14).
16. Marc E. Elias & Jonathan S. Berkon, *After McCutcheon*, 127 HARV. L. REV. 373, 377 (2014); *see also* Robert Kelner et al., *How* McCutcheon v. FEC *Will Impact Election Cycles*, LAW360 (Apr. 2, 2014), http://images.politico.com/global/2014/04/03/how_mccutcheon_v_fec_will_impact_election_cycles.pdf.
17. Michael S. Kang, *Party-Based Corruption and McCutcheon v. FEC*, 108 N.W. U. L. REV., 240, 243 (2014).
18. Kelner et. al, *supra* note 16.
19. *McCutcheon*, 134 S. Ct. at 1443.
20. *Id*.
21. McCutcheon v. Fed. Election Comm'n, 893 F.Supp.2d 133, 136 (D.D.C. 2012).
22. *Id*.

contribute at least $60,000.00 to various candidates and $75,000.00 to non-candidate political committees for the 2013-2014 election cycle.[23] However, because of the aggregate limits in place, he was not allowed to make any of these intended contributions.[24]

In June of 2012, Appellants McCutcheon and Republican National Committee (hereby referred to as "RNC") filed a complaint before the U.S. District Court for the District of Columbia, alleging that "the aggregate limits on contributions to candidates and to non-candidate political parties were unconstitutional under the First Amendment."[25] They filed for a preliminary injunction against the enforcement of the aggregate limits, and the Government moved to dismiss the case.[26] The District Court denied their motion for a preliminary injunction and granted the Government's motion to dismiss, holding that the aggregate limits "survived First Amendment scrutiny because they prevented the evasion of the base limits."[27]

In response, Appellants McCutcheon and RNC appealed directly to the Supreme Court of the United States.[28] In a lengthy 5-4 decision written by Chief Justice Roberts, the Supreme Court reversed the District Court's decision, and ruled that the aggregate limits preventing McCutcheon from making his alleged donations were unconstitutional.[29] The Court reasoned that the aggregate limits did not advance the governmental interest of preventing *quid pro quo* corruption or its appearance, and intruded upon the people's First Amendment rights.[30]

III. COURT'S DECISION AND RATIONALE

A. Plurality Opinion by Chief Justice Roberts

Chief Justice Roberts delivered the opinion of the court, joined by Justices Scalia, Kennedy, and Alito.[31] Justice Thomas, who concurred only in the judgment, wrote separately to explain his disagreement with the plurality's reasoning, arguing that *Buckley* should have been overruled all together and that the aggregate limits in the BCRA should have been subject to strict scrutiny, "which they would surely [have] fail[ed]."[32]

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23. *McCutcheon*, 134 S. Ct. at 1443 (citing Brief for Appellant, 11-12).
24. *McCutcheon*, 893 F.Supp.2d at 136.
25. *McCutcheon*, 134 S. Ct. at 1443.
26. *Id*.
27. *Id*. (citing *McCutcheon*, 893 F.Supp.2d at 140).
28. *Id*. at 1444 (citing 28 U.S.C. § 1253).
29. *Id*. at 1462.
30. *McCutcheon*, 134 S. Ct. at 1462.
31. *Id*. at 1440.
32. *Id*. at 1462-65 (Thomas, J., concurring).

In Part II of the opinion, the Court addressed the decision and the rationale behind *Buckley*, distinguishing between expenditure limits and contribution limits, and the standards of review applicable to each.[33] Following a lengthy discussion, the plurality concluded it was unnecessary to elaborate on the differences between the two, as the aggregate limits would fail even under the less rigorous "closely drawn" test for contributions.[34]

Next, the Court reiterated principles already established in *Buckley*: that FECA was enacted to "limit *quid pro quo* corruption"; that purpose was held to be a "sufficiently important" governmental interest; and that the $1,000.00 base limit in *Buckley* was "closely drawn" because it left persons "free to engage in independent political expression, to associate actively through volunteering services, and to assist to a limited but nonetheless substantial extent . . . ."[35] The Court then provided the two reasons for rejecting the overbreadth challenge to base limits that "most large donors do not seek improper influence over legislative actions."[36] First, the Court reasoned that it was too "'difficult to isolate suspect contributions' based on subjective intent."[37] Second, the Court stated that "Congress was justified in concluding that the interest in safeguarding the appearance of impropriety requires that the opportunity for abuse . . . be eliminated."[38] Later in the opinion, however, the Court noted that the overbreadth challenge needed to be separately addressed for aggregate limits, as *Buckley* focused solely on the overbreadth of base limits.[39]

Last, the Court pointed to the single paragraph in the *Buckley* opinion regarding aggregate limits.[40] In sum, the paragraph conceded that the aggregate limits did "impose an ultimate restriction upon the number of candidates and committees" one could contribute to, but justified their existence by stating that they served to "prevent evasion of the $1,000 contribution limitation" and were no more than a "corollary" of base limits.[41]

However, the Court refused to accept the paragraph in *Buckley* as controlling.[42] It reasoned that only three sentences in *Buckley* were dedicated to aggregate limits, that the limits were not directly addressed by

33. *Id*. at 1444.
34. *Id*. at 1445.
35. *McCutcheon*, 134 S. Ct. at 1444-45 (quoting *Buckley*, 424 U.S. at 28).
36. *Id*. at 1445 (citing *Buckley*, 424 U.S. at 29-30).
37. *Id*. (quoting *Buckley*, 424 U.S. at 30).
38. *Id*. (quoting *Buckley*, 424 U.S. at 30).
39. *Id*. at 1447.
40. *McCutcheon*, 134 S. Ct. at 1445.
41. *Buckley*, 424 U.S. at 38.
42. *McCutcheon*, 134 S. Ct. at 1446.

either of the parties in *Buckley*, and that "statutory safeguards against circumvention" were dramatically strengthened since *Buckley*.[43] In making this last point, the Court looked to the 1976 FECA Amendments that added a $5,000.00 limit on contributions to political parties "in part to prevent circumvention of the . . . limitations . . . upheld in *Buckley*"[44] and the anti-proliferation rule that prevented donors from "creat[ing] and us[ing] [their] own political committees to direct funds in excess of the individual base limits."[45] Additionally, the Court relied on regulations broadening the definition of "earmarking" in order to limit "circumvention [of] the base limits via 'unearmarked contributions to political committees likely to contribute' to a particular candidate."[46] Such regulations defined earmarking as "any designation, 'whether direct or indirect, express or implied, oral or written."[47]

In Part III of the opinion, the Court directly addressed aggregate limits, stating that the $25,000.00 ceiling was anything but a "modest restraint" on political association because it limited the number of candidates and committees a donor could support.[48] It reasoned that aggregate limits prevented a donor from contributing a small amount to a tenth candidate—an amount far less than what was given to the prior nine candidates under the base limits.[49] In responding to the alternative to aggregate limits that a donor could contribute less money to more candidates or committees, the Court stated that it would "penalize an individual for 'robustly exercis[ing] his First Amendment rights.'"[50]

Furthermore, the Court indicated that volunteering would not be a viable alternative either, as it would be impossible to help all of those candidates at once.[51] Finally, in response to the dissent's argument that striking aggregate limits would fail to take into account the public good of "collective speech," the Court raised three points: (1) that the whole point of the First Amendment is to speak up against society's "collective speech"; (2) that the amount of protection afforded to speech cannot be protected based on its use; and (3) that the "collective" interest is already taken into account in the "compelling governmental interest" component.[52]

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43. *Id*. at 1446.
44. *Id*. (quoting California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182, 197-98 (1981)).
45. *Id.* at 1446-47 (citing 2 U.S.C. § 441(a)(a)(5)).
46. *Id*. at 1447 (quoting *Buckley*, 424 U.S. at 38).
47. *McCutcheon*, 134 S. Ct. at 1447 (quoting 11 CFR § 110.6(b)(1)).
48. *Id*. at 1448.
49. *Id*. at 1448-49.
50. *Id*. at 1449 (quoting Davis v. Federal Election Comm'n, 554 U.S. 724, 739 (2008)).
51. *Id*. at 1449.
52. *McCutcheon*, 134 S. Ct. at 1449-50.

In Part IV, the Court rejected the "leveling the playing field" argument that restricts the speech of some "in order to enhance the relevant voice of others," recognizing the prevention of corruption or its appearance as the only legitimate governmental interest.[53] Moreover, the Court stated that Congress is only able to target *quid pro quo* corruption, which, in its opinion, is different from spending large amounts of money not in connection to a candidates duties or the possibility of gaining access or influence.[54]

Next, the Court determined that the aggregate limits did not serve the governmental interest of preventing corruption or the appearance of corruption.[55] It reached this conclusion mainly because the aggregate limits restricted contributions of any kind—even those significantly less than in the base limits.[56] In response to the hypothetical that funds can be re-routed through a chain of recipients, the Court stated that it would be unlikely, as the initial recipient becomes the owner of the funds and is free to do with them what he or she wishes.[57] Additionally, the Court pointed out that a donor would have to contribute to a massive amount of PAC's in order to create even a sizeable donation to one candidate—which, comparatively speaking, hardly seems worth it.[58]

In regards to the dissent's point on joint fundraising committees composed of a candidate, a national party committee, and state party committees, the Court stated that earmarking regulations would prevent them from being used as a vehicle for the benefit of a candidate, that coordinated expenditures are limited by statutes, and that there is no reason to believe that one candidate would fund another's campaign.[59] In concluding this point, the Court criticized the dissent's fears as "illegal under current campaign finance laws or divorced from reality."[60]

The Court then addressed the dissent's argument that knowledge is difficult to prove, citing eight cases that did not proceed "because of insufficient evidence of a donor's incriminating knowledge."[61] In doing so, the Court raised the possibility of actual innocence on the part of the donor, and that the alleged violations were relatively miniscule.[62] Additionally, the

53. *Id*. at 1450 (citing *Buckley*, 424 U.S. at 48-49).
54. *Id*.
55. *Id*. at 1452.
56. *See id*.
57. *McCutcheon*, 134 S. Ct. at 1452. (citing Brief for Appellee at 37, *McCutcheon v. Federal Election Comm'n*, 134 S.Ct 1434 (2014), (No. 12-536), 2013 WL 3773847 at *37).
58. *See id*. at 1452-53.
59. *Id*. at 1454-55.
60. *Id*. at 1456.
61. *Id*.
62. *McCutcheon*, 134 S. Ct. at 1456.

Court found the dissent's belief that there have been transfers in excess of the base limits even with the aggregate limits in place speculative at best.[63]

Subsequently, the Court criticized aggregate limits for being poorly tailored in "preventing circumvention of the base limits," and restricting "participation in the political process."[64] It stated that most recipients of contributions are far more likely to retain them as opposed to re-contribute to someone else—especially those candidates running in other states.[65]

Further, the Court went on to list multiple alternatives to aggregate limits available to Congress, such as: targeted restrictions on transfers among candidates and political committees; deposits into segregated, non-transferrable accounts; requiring funds received by joint fundraising committees to be spent by their recipients and not re-contributed; strengthening earmarking regulations; modified aggregate limits that prevent donors from contributing to political committees to a candidate after that donor has already contributed the full amount to the candidate; and perhaps most importantly, disclosure.[66] In regards to the last of these, the Court believed that this measure would be more "robust" given the recent developments of the Internet, and would actually encourage movement away from "entities subject to disclosure."[67]

In closing, the Court argued that donations to candidates themselves and their political parties would clearly cause some sense of gratefulness in the candidate (but not rise to corruption),[68] and that the aggregate limits are "not directed specifically to candidate behavior."[69]

B. Concurring Opinion by Justice Thomas

In a short concurring opinion, Justice Thomas criticized the "tenuous" foundation of the *Buckley* decision, and proposed overruling the decision in its entirety.[70] Based on the premise in *Buckley* that contributions should be reviewed by less rigorous standards because they involve speech other than the contributor's, he asserted the same could be said for expenditures as well, as many advertising agencies or television stations are the parties participating in speech.[71]

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63. *Id*.
64. *Id*. at 1457.
65. *Id*.
66. *Id*. at 1458-59.
67. *McCutcheon*, 134 S. Ct. at 1460.
68. *Id*. at 1461.
69. *Id*.
70. *Id*. at 1462 (Thomas, J., concurring) (quoting Nixon v. Shrink Missouri Gov't Political Action Comm., 528 U.S. 377, 412 (2000) (Thomas, J., dissenting)).
71. *Id*. at 1462-63.

Next, following the idea that contribution limits are a "marginal" restriction on speech because they do not require a donor to provide his reasoning for his general support, Justice Thomas stated that, "this Court has never required a speaker to explain the reasons for his position in order to obtain full First Amendment protection."[72] Furthermore, he argued that contributions, like expenditures, do increase the quantity of communication by "'amplifying the voice of the candidate' and "help[ing] to ensure the dissemination of the messages . . . ."[73]

In closing, Justice Thomas, concurred only in the judgment, stating that he "would overrule *Buckley* and subject the aggregate limits in the BCRA to strict scrutiny, which they would surely fail."[74]

C. Dissenting Opinion by Justice Breyer

Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan.[75] Initially, in Part I, he criticized the plurality's decision as conclusory because it was not based on a "record-based, view of the facts,"[76] and stated that the plurality's argument is flawed in three respects: (1) that the aggregate limits do advance a compelling government interest; (2) that the limits do serve that function; and (3) that the limits are a "'reasonable policy tool."[77]

In Part II, Justice Breyer emphasized that the First Amendment advances the public's rights just as much as an individual's rights because it holds officials accountable to their constituents.[78] He believed that this had "everything to do with corruption," as the plurality's decision now made it possible for a few large donors to "drown out the voices of the many."[79] In regards to the appearance of corruption, he believed matters would be much worse, as the public would "believe that its efforts to communicate with its representatives . . . have little purpose" and lose interest in electing their political leaders.[80] He concluded that corruption and its appearance are "rooted in the First Amendment" and laws should be strengthened as such.[81]

Next, Justice Breyer categorized the plurality's definition of corruption as far too narrow, stating that it needed to be "understood not only as *quid*

72. *McCutcheon*, 134 S. Ct. at 1463.
73. *Id*. (quoting *Shrink Missouri*, 528 U.S. at 415 (Thomas, J., dissenting)).
74. *Id*. at 1464-65 (citing Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 640-41 (1996)).
75. *Id*. at 1465 (Breyer, J., dissenting).
76. *Id*. at 1465.
77. *McCutcheon*, 134 S. Ct. at 1465-66.
78. *Id*. at 1466-67.
79. *Id*. at 1467-68 (citing *Buckley*, 424 U.S. at 26-27).
80. *Id*. at 1468 (citing *Shrink Missouri*, 528 U.S. at 390).
81. *Id*. at 1468.

pro quo corruption, but also as undue influence on an office holder's judgment." [82] Relying heavily on *McConnell v. Federal Election Commission*,[83] Justice Breyer then referred to a record "consisting of over 100,000 pages of material . . ." that categorized corruption as "'access to federal lawmakers' and the ability to 'influenc[e] legislation.'"[84] In closing, Justice Breyer criticized *Citizens United v. Federal Election Commission*[85] for contradicting both the language of *McConnell* and its holding, and insisted that the broader definition be used.[86]

In Part III, Justice Breyer defended the position that eliminating the aggregate limits would undoubtedly create new opportunities to circumvent the base limits and exactly the kind of corruption or appearance of such it was to prevent.[87] In making this assertion, he provided three examples without aggregate limits.[88] First, without such limits, he hypothesized that each political party could create a "Joint Party Committee" consisting of each of its three national parties and fifty state committees, and receive 1.2 million dollars over two years—as opposed to the $74,600.00 cap over a two-year cycle.[89]

Second, given the potential 435 party candidates for the House of Representatives and potential 33 party candidates for the Senate, and assuming a candidate is running in both the primary and general election, Justice Breyer stated that a donor can now contribute a total of 3.6 million dollars at any given time—2.4 million dollars more than what the aggregate limits prevented.[90] To accept such a contribution, the parties could simply "enlarge the composition of a Joint Party Committee" or "proliferate such joint entities . . . ."[91] Further, he pointed out that it was possible to direct the money from each candidate and party committee to a particular candidate, making at least 2.37 out of the 3.6 million dollars available to a single person running for office.[92] Because the money changes hands among the constituent units, he believed it could be done "without the donor having violated the base limits or any FEC regulation."[93]

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82. *McCutcheon*, 134 S. Ct. at 1469 (quoting Federal Election Comm'n v. Beaumont, 539 U.S. 146, 155-56 (2003)).
83. 540 U.S. 93 (2003).
84. *McCutcheon* 134 S. Ct. at 1469-70 (citing McConnell v. Federal Election Comm'n, 251 F.Supp.2d 176, 481 (D.C. 2003) (opinion of Kollar-Kotelly, J.)).
85. 558 U.S. 310 (2010).
86. *McCutcheon*, 134 S. Ct. at 1471.
87. *Id*. at 1472.
88. *Id*.
89. *Id*.
90. *Id*. at 1473.
91. *McCutcheon*, 134 S. Ct. at 1473.
92. *Id*. at 1474.
93. *Id*.

Third, Justice Breyer contended that the law "does not prohibit an individual from contributing within the $5,000.00 base limit to an unlimited number of PAC's."[94] Because of this, he reasoned, it was possible for every "embattled" candidate to receive "a $10,000.00 check from 200 PAC's," totaling $2,000,000.00.[95]

In regards to the three hypotheticals discussed above, the plurality deemed the scenarios to be "either illegal under current campaign finance laws or divorced from reality."[96] In response, Justice Breyer argued that the 1976 FECA Amendment the plurality relied upon in making that statement would not matter, so long as "party supporters can create dozens or hundreds of PAC's."[97] Second, in combatting the anti-proliferation rule, he cited over 2,700 unconnected PAC's, and questioned the adequacy of the affiliation requirements.[98] Third, he claimed that earmarking provisions have not been strengthened; but rather, have had virtually the same effect since the decision in *Buckley*.[99] Fourth, he acknowledged the regulation preventing contributions to a single-candidate committee after already donating to a candidate, but brought attention to the absence of a law on donations of the same kind to multi-candidate committees that include that particular candidate.[100] Last, he argued the difficulty of proving the "knowledge" element of the anti-circumvention measures, citing nine cases that have failed to do so in the past.[101]

In Part IV, Justice Breyer responded to the plurality's conclusion that aggregate limits were "poorly tailored" because a number of potential alternatives existed.[102] In three short paragraphs, he stated that there has been no attempt to show those alternatives could effectively replace the aggregate limits, and urged that the limits be held as constitutional.[103]

Lastly, in Part V, Justice Breyer criticized the District Court's decision to dismiss the case prior to a full evidentiary hearing, and urged that the case be returned to "reach a more accurate judgment."[104] In closing, he stated that he failed to "find grounds for overturning *Buckley*," believing aggregate limits to be a viable means of combatting corruption.[105]

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94. *Id*.
95. *Id*. at 1474-75.
96. *McCutcheon*, 134 S. Ct. at 1456.
97. *Id*. at 1475.
98. *Id*. at 1475-76.
99. *Id*. at 1476.
100. *Id*.
101. *McCutcheon*, 134 S. Ct. at 1477.
102. *Id*. at 1479.
103. *Id*.
104. *Id*. 1479-80.
105. *Id*. at 1480.

IV. ANALYSIS

A. Introduction

In *Buckley*, the Supreme Court of the United States was faced with the issue of determining whether limits on both contributions and expenditures in political campaigns for public office were constitutional.[106] In that case, the Court established a standard of review for both expenditures and contributions, [107] struck down limitations on expenditures as unconstitutional, [108] and upheld aggregate limits on contributions as constitutional.[109] Since *Buckley*, federal election laws have been added or amended, [110] and the ruling in *McCutcheon* deemed aggregate limits as serving no legitimate governmental interest.[111] Thus, much of what *Buckley* once stood for has worn with time,[112] leaving only the single rule that the government has a compelling interest in preventing *quid pro quo* corruption or its appearance.[113]

With this background established, this analysis focuses on a few fundamental concepts the Court considered in reaching the decision in *McCutcheon*, namely: (1) a re-visitation of the definition of *quid pro quo* corruption; (2) a new perspective on the scope of *quid pro quo* corruption; and lastly, (3) the aftermath of *McCutcheon* and its impact on federal campaign fundraising.[114]

B. Discussion

1. Revisiting the Definition of "Quid Pro Quo" Corruption

While both the plurality and the dissent in *McCutcheon* agreed that the only compelling governmental interest that could be advanced by the aggregate limits was furthering the prevention of *quid pro quo* corruption or its appearance,[115] the two sides fundamentally disagreed on what exactly constituted *quid pro quo* corruption.[116] Chief Justice Roberts, writing for the plurality, applied a narrower view of *quid pro quo* corruption that was

106. *Buckley*, 424 U.S. at 13-14.
107. *Id*. at 24-25.
108. *Id*. at 23.
109. *Id.* at 38.
110. *See McCutcheon*, 134 S. Ct. at 1446-47.
111. *Id*. at 1462.
112. *See Shrink Missouri*, 528 U.S. at 410 (Thomas, J., dissenting).
113. *McCutcheon*, 134 S. Ct. at 1464 (Thomas, J., concurring).
114. *See infra* Parts IV.B.1-3.
115. *McCutcheon*, 134 S. Ct. at 1450 (citing *Davis*, 554 U.S. at 741).
116. *See id*. at 1466 (Thomas, J., dissenting).

adhered to in *Citizens United*.[117] In that case, the Court stated that "influence over or access to elected officials" did not constitute corruption.[118] However, Justice Breyer, in expressing his dissent, disagreed and provided a much broader definition.[119] Relying principally on *McConnell*, he defined corruption to include "privileged access to and pernicious influence upon elected representatives."[120]

Turning to the landmark 1976 case that had previously governed aggregate limits, the Court in *Buckley* characterized *quid pro quo* corruption as "large contributions . . . given to secure political *quid pro quo* from current and potential office holders . . . ." and its appearance as "stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."[121] A reading of the text could reasonably lead one to believe that this language refers to bribery when applied to the definition of actual corruption, or as the plurality put it, a "direct exchange of an official act for money."[122]

However, in the next paragraph of *Buckley*, the Court defended the existence of the base limits by stating, "the giving and taking bribes deal with only the most blatant and specific attempts of those with money to influence government action."[123] Given this sentence, it would seem that the definition provided in *Buckley* could possibly extend further than the narrow version used in *Citizens United* to include access and undue influence as well.[124]

In his dissenting opinion, Justice Breyer cited several significant federal election cases that dealt with *quid pro quo* corruption, advocating for the broader approach suggested above.[125] A re-visitation of those cases provides the clarity needed to come to the conclusion that the narrow definition that was relied upon by the plurality in *McCutcheon* was undoubtedly incorrect.[126]

In 2000, the Court in *Nixon v. Shrink Missouri Government PAC*[127] stated, "[i]n speaking of 'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,' we recognized a concern not confined to bribery of public officials, but extending to the broader threat

117. *Id*. at 1450.
118. *Citizens United*, 558 U.S. 359 (citing *McConnell*, 540 U.S. at 297) (opinion of Kennedy, J.)
119. *McCutcheon*, 134 S. Ct. at 1468.
120. *Id*. at 1469.
121. *Buckley*, 424 U.S. at 26-27.
122. *McCutcheon*, 134 S. Ct. at 1441 (citing McCormick v. United States, 500 U.S. 257, 266 (1991).
123. *Buckley*, 424 U.S. at 27-28.
124. Elias & Berkon, *supra* note 16, at 375.
125. *McCutcheon*, 134 S. Ct. at 1468-69 (Breyer, J. dissenting).
126. *See id*.
127. 528 U.S. 377 (2000).

from politicians too compliant with the wishes of large contributors."[128] A year later, the Court in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*[129] explained that contributions were more closely linked to corruption, defining corruption as "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 . . . ."[130] The Court obviously found this logic to be sound, as *Federal Election Commission v. Beaumont*[131] cited to the exact language used in *Colorado Republican Federal Campaign Committee*[132] when it held that a non-profit organization could not directly contribute to a political campaign.[133]

On the other hand, Chief Justice Roberts relied principally on *Citizens United*, which cited Justice Kennedy's opinion in *McConnell*.[134] In *Citizens United*, the Court quoted Justice Kennedy's opinion that "[f]avoritism and influence are not . . . avoidable in representative politics,"[135] and accepted his plea calling for a narrower definition of *quid pro quo* corruption.[136]

Although there may be some merit behind Justice Kennedy's argument, it should be noted that his opinion in *McConnell* was merely a concurrence in the judgment in part and a dissent in part.[137] Moreover, the majority of the Court in *McConnell* characterized Justice Kennedy's position as "too narrow" before condemning large soft-money contributions as giving rise to corruption.[138] Compared to the long history of cases that have adhered to the broader definition of corruption and the ultimate holding in *McConnell* itself, the definition adopted by *Citizens United* should be given little weight.[139]

Furthermore, even if one refuses to accept access (and influence) under the definition of *quid pro quo* corruption, it would surely fit under the "appearance" of such.[140] This idea was explicitly stated in the *McConnell* opinion, as the court said, "access to federal candidates and officeholders [have] given rise to the appearance of undue influence" and that "the sale of

128. *Id*. at 389.
129. 533 U.S. 431 (2001).
130. *Id*. at 440-41 (citing *Shrink Missouri*, 528 U.S. at 388-89).
131. 539 U.S. 146 (2003).
132. *Id*. at 155-56 (citing *Colo. Republican*, 533 U.S. at 440-41).
133. *Id*. at 163.
134. *McCutcheon*, 134 S. Ct. at 1450-51.
135. *Citizens United*, 558 U.S. at 359 (citing *McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.)).
136. *Id*.
137. *McCutcheon*, 134 S. Ct. at 1470-71 (Breyer, J., dissenting).
138. *McConnell*, 540 U.S. at 153-54.
139. *See McCutcheon*, 134 S. Ct. at 1471.
140. *See McConnell*, 540 U.S. at 153-54.

access is the suggestion that money buys influence."[141] Thus, because this Court disregarded a long history of cases that adhered to the broader definition of *quid pro quo* corruption and ignored common sense in deeming access outside of what constitutes its appearance, their decision cannot be construed as anything other than "wrong."[142]

2. *A New Perspective on the Scope of Aggregate Limits on Contributions*

In *McCutcheon*, and arguably all of the cases involving federal election law before it, the Court looked at aggregate limits from either a "contributor-candidate" or "contributor-political committee" perspective.[143] This is evident in the definitions of base limits and aggregate limits.[144] In introducing the issue in *McCutcheon*, the Court defined base limits as, "how much money a donor may contribute to a particular *candidate or committee*" while it defined aggregate limits as, "how much money a donor may contribute in total to all *candidates and committees*."[145] Based on those two definitions, the Court reached its final conclusion that the aggregate limits did nothing to help prevent the sort of narrow *quid pro quo* corruption that was discussed at length above.[146]

Considering how the Court has viewed aggregate limits in the past and the narrow definition of *quid pro quo* corruption that excluded access or influence, the plurality's decision was sound.[147] However, there is a possibility that the Court's holding could have been completely different if it had reconsidered a vital part of their analysis: the scope of aggregate limits, and what exactly they served to prevent.[148]

Instead of looking at aggregate limits from a "contributor-candidate" or "contributor-political committee" perspective as the Court had done in the past, a very different holding could have resulted if aggregate limits were viewed from a "contributor-political party" lens.[149] Although this may seem overly expansive at first, it makes sense considering the role national parties play in politics.[150] After all, the national political parties "nominate and help elect candidates . . . who will help advance [their] shared agenda, . . .

141. *Id*.
142. *See McCutcheon*, 134 S. Ct. at 1465 (Breyer, J., dissenting).
143. Kang, *supra* note 17, at 241.
144. *See McCutcheon*, 134 S. Ct. at 1442.
145. *Id*. (emphasis added).
146. *Id*. at 1462.
147. *See id*. at 1463 (Thomas, J., concurring in the judgment) (explaining that "today's decision represents a faithful application of our precedents.").
148. *See* Kang, *supra* note 17, at 245.
149. *Id*. at 255.
150. *Id*. ("[A]t the federal level, nearly every candidate and high-level contributor operates within a campaign finance ecosystem within which the major parties matter a great deal.").

cultivate and maintain a deep infrastructure of professional fundraisers, campaign finance lawyers, and wealthy supporters, . . . and match up campaign finance contributors . . . more effectively."[151] As a result, it can safely be assumed that "the influence of major parties is so critical that judicial campaign finance is predictably associated with the preferred outcomes of contributors . . . ."[152]

This concept of the pervasiveness of corruption in national political parties can hardly be said to be new, as the Court in *McConnell* explicitly stated in its opinion, "[t]he idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible."[153] This is especially true when one considers how intertwined national parties are with their candidates.[154] After all, national parties are "composed of and led by candidates and officeholders"[155] who have significant influence in developing campaign finance plans to impact lawmaking matters.[156]

Thus, when viewed under this larger scope, the aggregate limits could be said to serve as a corollary to the base limits designed to prevent *quid pro quo* corruption of candidates by preventing the same kind of corruption from occurring at a much larger level—the national political parties.[157] While it is not certain how the Court would have ruled if they had considered a more expansive scope of aggregate limits, there can be no denying that such limits could have been reasonably been justified as advancing the governmental interests asserted in *Buckley* without intruding on people's First Amendment rights.[158]

3. The Aftermath of McCutcheon and its Impact on Federal Campaign Fundraising

As a result of *McCutcheon*, aggregate limits were struck down because they failed to combat *quid pro quo* corruption and its appearance, and pervasively intruded on people's First Amendment rights.[159] Although there are presumably only a few wealthy people whose rights have ever been violated for making such contributions,[160] the immediate effect of the decision is clear: donors can now make monetary contributions to as many

151. *Id*. at 246.
152. *Id*.
153. *McConnell*, 540 U.S. at 144.
154. *See* Kang, *supra* note 17, at 251.
155. *Id*.
156. *Id*. at 252.
157. *Id*. at 249-50.
158. *See id*. at 255.
159. *McCutcheon*, 134 S. Ct. at 1462.
160. *See* Kelner et al., *supra* note 16.

federal candidates, "candidate committees, political parties, and PAC's during a two-year election cycle" as they want, provided that those donations are within the appropriate base limits.[161]

In regards to the upcoming elections in 2016, the most expected change will be an increased reliance on high net worth contributors to political parties.[162] This has two obvious effects: (1) first, national party committees are going to continue to "compete with each other" for these large donations;[163] and second (2), these wealthy donors will be able to benefit a greater number of individual candidates and groups more easily by writing one check to "Joint Party Committees" or "Joint Fundraising Committees" (hereby referred to as "JFC's").[164] Obviously, from a wealthy donor's perspective, this would be preferred, as he or she would otherwise have to go through the lengthy process of making several different donations to each individual candidate and political committee.[165] Not surprisingly, people should also expect to see an increase in the influence and political power of those individual candidates who have strong relationships with these high net worth contributors, as well as the contributors themselves.[166]

Additionally, society should also expect to see a dramatic increase in the use of large JFC's,[167] which are now starting to become dubbed, "Super JFC's."[168] Although the formation of large JFC's has always been possible, and indeed has been done in the past, it is now a reality for "hundreds of campaign committees, party committees, and PAC's [to] combine [and] organize JFC's of a enormous scale."[169] The effects of these "super JFC's" are obvious, as they could raise millions of dollars that may not have been possible otherwise.[170] Admittedly, it would be difficult to create and effectively manage a "Super JFC" of that size.[171] However, it is nevertheless now a realistic possibility, especially when one considers the upcoming presidential election in 2016.[172]

Furthermore, because there is no longer a federal aggregate limit, society should expect to see the decline of aggregate limits at the state level

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161. *Id*.
162. *Id*.
163. Elias & Berkon, *supra* note 16, at 377.
164. *See McCutcheon*, 134 S. Ct. at 1472; *see also* Robert K. Kelner, *The Practical Consequences of McCutcheon*, 127 HARV. L. REV. 380, 381 (2014) [hereinafter Kelner, *Practical Consequences*].
165. *See id*.
166. Kelner et al., *supra* note 16.
167. *See* Kelner, *Practical Consequences*, *supra* note 164, at 380-82.
168. Kelner, et al., *supra* note 16.
169. Kelner, *Practical Consequences*, *supra* note 164, at 383.
170. *See McCutcheon*, 134 S. Ct. at 1473.
171. *See* Kelner, *Practical Consequences supra* note 164, at 383.
172. *Id*.

as well.[173] As of June of 2014, several states—including Maryland and Massachusetts—have declared that they would no longer enforce aggregate limits.[174] Similarly, Wisconsin has already struck down "a state contribution limit that revolved around aggregate limits."[175] With the decline of aggregate limits now occurring throughout the states, this may give political parties the ammunition that they need to regain influence within the states that have been lost over the years.[176]

V. CONCLUSION

The Supreme Court's decision in *McCutcheon* serves as a landmark case in regards to campaign financing.[177] Not only did the Court strike down aggregate limits as being unconstitutional,[178] but it also overturned several years' worth of precedent adhering to broader definition of *quid pro quo* corruption.[179] Furthermore, the Court's decision reinforced the idea that *quid pro quo* corruption is limited to the relationship between contributors and candidates or political committees and not the two major political parties existing today.[180] As a result of *McCutcheon*, the general electorate should expect to see wealthy donors playing an even larger role in federal elections,[181] and an increase in large "Joint Party Committees" by both Democrats and Republicans in the presidential election in 2016.[182]

CHRISTIAN PATRICK WOO

173. Elias & Berkon, *supra* note 16, at 377; *see also* Kelner et al., *supra* note 16.
174. *Id*.
175. *Id*. at 377-78.
176. *See id*. at 378.
177. *See* Kelner et al., *supra* note 16.
178. *McCutcheon*, 134 S. Ct. at 1462.
179. *Id*. at 1471 (Breyer, J., dissenting).
180. *See* Kang, *supra* note 17, at 241.
181. *See* Kelner et al., *supra* note 16.
182. *See* Kelner, *Practical Consequences*, *supra* note 164, at 380-83; *see also* Kelner et al., *supra* note 16.